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 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRIS KOSTER
Attorney General of Missouri

JAMES R. LAYTON
Solicitor General,
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1800
Fax: (573) 751-0774

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITY

OTHER AUTHORITIES

STATEMENT OF THE CASE

Missouri's Scrap Tire Program competitively awards grants for the purchase of recycled tires to resurface playgrounds. The program is funded solely by setting aside a portion of a fee collected on new tires sold. Mo. Rev. Stat. § 260.273.6(2) (Cum. Supp. 2014). The program is administered by the Missouri Department of Natural Resources; Respondent Sara Parker Pauley is the Department Director.

Forty-four applicants sought grants from the funds available in the 2012 program. But there were sufficient funds to award grants to only 14 of those.

Petitioner Trinity Lutheran Church of Columbia, Missouri, was one of the 44 applicants. Trinity Lutheran sought to place the rubber surface on a church playground used by Trinity Lutheran's Learning Center. The Learning Center, for preschoolers, has been a Trinity Lutheran Church ministry since 1985. As the District Court found, "Through the Learning Center, Trinity Lutheran teaches a Christian world view … including the Gospel." Petition Appendix ("Pet. App.") 35a.

Missouri's constitution, adopted in 1945, includes a specific limitation on the State's granting of funds to churches:

> 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 (1945).

Although on other criteria Trinity Lutheran ranked high among the 44 applicants, the Department declined to award a grant to Trinity Lutheran because the grant would have been "money … taken from the public treasury … in aid of [a] church."

Trinity Lutheran filed suit in the U.S. District Court for the Western District of Missouri, seeking injunctive and declaratory relief against the Department. The District Court granted the Department's motion to dismiss the complaint. Pet. App. 34a-75a. The U.S. Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a-31a.

REASONS FOR DENYING THE PETITION

In *Locke v. Davey*, 540 U.S. 712 (2004), this Court rebuffed a challenge to a state constitutional limitation on the movement of funds from a state treasury to religious institutions or endeavors. Ever since, there have been pleas to reverse or limit the *Locke* holding.

This case is unlike most of the cases in which lower courts and this Court have heard such pleas. Here, the question is not whether the State can tell parents or students that although they have access to public funds for tuition, they cannot use those funds for education at a church-run school or for religious study. Nor is the question whether a state can exclude churches and other religious institutions from a program that otherwise provides benefits to everyone. Rather, it is whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down non-church applicants. That is not a question as to which there is an intercircuit conflict, nor one that otherwise demands this Court's review at this time.

I. In most cases on which Trinity Lutheran relies to find a conflict or confusion, public money flows as determined by private parties.

It has not been unusual for courts—including this Court—to face questions regarding the flow of public funds to schools where the choice of school is made by a parent or student, and state laws or constitutional provisions that affect that flow.

Principal among the cases addressing such questions is *Locke v. Davey*. There, the plaintiff "chose to attend Northwest College … a private, Christian college … to pursue a double major

in pastoral studies and business management/ administration." *Id.* at 540 U.S. at 718.

Another such case is currently on the Court's certiorari docket: *Colorado State Board of Education v. Taxpayers for Public Education*, No. 15-558. There, the question is the flow of public funds, on the parents' choice, to just secular rather than to both secular and sectarian schools.

Two of the cases on which Trinity Lutheran relies also fit this mold. *Eulitt v. Maine*, 386 F.3d 344 (1st Cir. 2004), was brought by parents who "send their daughters to St. Dominic's Regional High School, a Catholic secondary school that is indisputably sectarian." *Id.* at 347. They sought to have education funds go to the particular school they chose. In *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the question was the flow of state funds to pay tuition for individual students who chose to attend a college "held [to be] pervasively sectarian by the State." *Id.* at 1250.

This is not such a case. The decision regarding who would receive the state funds here was a governmental one. And that brings into play a different consideration: the government's ability to decide what message of endorsement it wants to send. That courts may be divided in cases involving school choice does not justify the grant of certiorari in this case.

II. Giving a particular church public money to improve its property to better serve a church ministry is a form of government speech.

The premise that a state would send a message—that it would speak—when funding one person rather than another is hardly novel. It is comparable to the message that contributors send when they make a contribution to a candidate for public office—a message recognized in *Buckley v. Valeo,* 424 U.S. 1, 21 (1976) (campaign contributions are "symbolic" speech and "general expression[s] of support"), and 244 (Burger, C.J., concurring and dissenting) (a contribution "is clearly speech by the 'contributor' himself."). *See also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 400 (2000) ("[t]hrough contributions the contributor associates himself with the candidate's cause.").

Trinity Lutheran affirms that by choosing one recipient over another, the State sends a message—*i.e.*, it speaks. Thus Trinity Lutheran complains that the Department's "religious exclusion *sends a message* that some children are less worthy of protection simply because they play on a playground owned by a church." Pet. at 24 (emphasis added). But adopting the rule that Trinity Lutheran will ask this Court to adopt, if the petition is granted, would not eliminate messages. In fact, Trinity Lutheran would still require the Department to send a message—but a message that those who join a particular

church's ministry and thus play at that church are more worthy than those who decline that invitation and play where improvements have not been made because the available State money went to that church.

Just this year, this Court addressed the authority of states to choose the messages they want to convey. The Court held, with regard to license plates, that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015). The Eighth Circuit was not asked, of course, to answer the question of whether government speech is treated differently when churches are involved. This Court can wait for a case in which a court has been asked to apply *Walker* to a situation involving the grant of funds to a church—or for a conflict to arise among cases in which the government itself decided where to direct its limited funds.

III. In *Badger Catholic*, the Seventh Circuit addressed a state-created "public forum" for free speech—and recognized distinctions pertinent to this case.

Of the handful of cases that form the basis for Trinity Lutheran's claims of intercircuit conflict and confusion, only one is based on choices made, as here, entirely by a governmental entity: *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (2010). And that case was decided on First Amendment Free Speech, not religion, grounds. There, the University of Wisconsin created a "public forum" through which it allocated funds for speech by campus groups. The University then restricted use of the forum, excluding certain religious speech. The Seventh Circuit rejected that restriction, without reaching the critical points addressed by the Eighth Circuit in this case.

But Judge Easterbrook, writing for the majority, did make some notable observations about the law as it stands post-*Locke*. He concluded that the "neutral funding" rule that Trinity Lutheran sought below is not the law:

> Arguments such as Professor (then judge, and now professor again) McConnell's that the Constitution requires a state to follow a principle of neutral funding have not carried the day at the Supreme Court.

Id. at 779. And he concluded that "the state's decision in *Locke* concerned how to use funds over which it had retained plenary control." *Id.* at 780. In doing so, he referred to government funding decisions as "government speech":

> Choosing which programs to support and which not, whether by having a department of philosophy but not a seminary, or by granting scholarships to study theology but not prepare for the ministry, is a form of government speech.

Id. In the Seventh Circuit's eyes, at least, there is a "line [between] selective funding as permissible public choice, versus selective funding as impermissible private choice in a public forum." *Id.* It is only "[o]nce it creates a public forum [that] a university must accept all comers within the forum's scope." *Id.*

This is not a "public forum" case. It is a case of the State choosing where to spend limited funds over which it "retains plenary control." It is one where the State gives its implicit imprimatur to the place or activity on which the funds are spent—here, if Trinity Lutheran is right, a particular congregation of the Lutheran Church-Missouri Synod. According to the *Badger Christian* majority, this case is distinguishable.

IV. This case does not presage the denial of "routine benefits" to churches.

To persuade the Court that this case is more significant than it really is, Trinity Lutheran hypothesizes that the State might, at some future date, "apply[] its constitution to deny routine benefits—such as sewer and water service, and police and fire protection—to religious groups." Pet. at 12; *see also* Pet. at 19.

The reference to sewer and water service is a red herring. Those services, to the extent they are provided by municipalities and other political subdivisions of the State, are provided for a fee—not as a benefit from "the public treasury"—and thus would not fall within Missouri's Art. I, § 7 no matter how it is construed.

The police and fire example, because they are services funded from the "public treasury," could move closer to the mark. But that is a farfetched hypothetical. Police and fire protection policies do not differentiate between or express a preference for one possible recipient over another. If police and fire chiefs—or individual police officers or firefighters—make such a choice, it is based on the exigencies of the particular, immediate circumstances. Missouri mayors do not direct police or fire chiefs to protect churches rather than other, secular persons or property—or vice versa. And there is no reason to believe that if the Eighth Circuit

decision remains in place, they will begin to do so.

V. Article I, § 7 was not included in the 1945 Missouri Constitution because of religious bigotry.

At a key point in its efforts to distinguish this case from *Locke v. Davey*, Trinity Lutheran claims that Mo. Const. Art. I, § 7 "is born of religious bigotry." Pet. at 28. Trinity Lutheran makes that claim because, it says, the predecessor of that provision "was enacted in 1875—the same time as the federal Blaine Amendment was proposed and debated." *Id.* But Trinity Lutheran cites nothing from the 1943-44 Missouri constitutional convention, nor anything from the 1944-45 campaign, to suggest that in 1945 the people of Missouri chose to retain that provision because of any religious animus.

The Missouri constitutional debates do not suggest animus. Rather than resurrect whatever may have motivated adoption of the Blaine Amendments in the prior century, those who discussed the provision at the constitutional convention nearly 70 years later harkened back to the 18th Century need for protection from having a state church, and paying for it through public funds. DEBATES OF THE CONSTITUTIONAL CONVENTION OF MISSOURI, 1943-1944, pp. 1504-05 ("[I]n some of the New England towns, the town council levied taxes against the members of

the congregation for the 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." "[T]hat the first two and one half lines, the purpose of them was simply to prevent the establishment of the church of England or any other church as an official sacreligion [sic]."). The brief discussion at the convention confirms that the drafters wanted "to protect public monie[s] against being used for religious purposes," or to "protect[] against misuse of public funds for religious purposes. *Id.* at 1507. Such protection is not animus.

If this Court believes that animus or bigotry may have motivated the adoption of the Blaine Amendments in the 19th Century and that such motivation merits consideration in the 21st Century, it should take up that question in a case that lacks intervening 20th Century action.

VI. *Colorado Christian University* did not define a competing level of scrutiny for similar equal protection claims.

Trinity Lutheran's last claim is that there is a post-*Locke* split among the circuits with regard to the level of scrutiny to be given to the states' decisions not to channel their funds to religious institutions or pursuits. On the one side, Trinity Lutheran lists the Eighth Circuit, in this case, and the First Circuit, in *Eulitt*, as saying that rational basis review applies. Pet. at 31. On the

other side, Trinity Lutheran lists the Tenth Circuit, citing its decision in *Colorado Christian University*.

Trinity Lutheran is right that the Tenth Circuit has expressed displeasure with the rational basis approach used in *Eulitt* and mentioned, and perhaps used, by the Eighth Circuit here. But the Tenth Circuit did not, in its holding, specify a level type of scrutiny. Rather, that court said, "we need not decide precisely what level of scrutiny applies to the denominational discrimination in this case, because the State scarcely has any justification at all." 534 F.3d at 1267.

By declining to set out its own, competing standard, the panel in *Colorado Christian University* left other Tenth Circuit panels free to define the appropriate level of scrutiny in similar cases. We do not know, now, whether that definition will differ appreciably from the scrutiny given in the First and Eighth Circuits. This Court can and should wait for a case in which some court actually defines a different, competing level of scrutiny—binding in that court—that this Court can evaluate.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully Submitted,

CHRIS KOSTER
Attorney General of Missouri

JAMES R. LAYTON
Solicitor General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (facsimile)

Counsel for Petitioner