No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA,

Petitioner,

v.

SARA PARKER PAULEY,

Respondent.

On 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 PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

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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

In the distribution of entirely secular benefits (like playground safety resurfacing), the government may not discriminate against otherwise eligible private entities solely on the basis of their religious identity. That norm controls this case.

ARGUMENT

When pursuing a legitimate goal, like childhood safety, government may, and often does, employ a grant program that reimburses private entities for their actions furthering the government's goal. What the government may *not* do is discriminatorily exclude

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[1] The parties in this case have consented to the filing of this brief. A copy of the consent letter of respondent is being filed with this brief. The blanket consent of petitioner is on file with this Court. 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.

otherwise qualified, eligible entities solely because of their religious identity. This norm follows from much of this Court's jurisprudence. The state of Missouri, and the court below, nevertheless declared that petitioner Trinity Lutheran Church (TLC) could be disqualified, from a secular child safety program (resurfacing playgrounds with recycled automobile tire rubber), *solely because TLC is a church*. This Court should reverse the judgment below.

I. IT IS UNCONSTITUTIONAL INVIDIOUSLY TO DISCRIMINATE IN A SECULAR BENEFITS PROGRAM AGAINST AN OTHERWISE ELIGIBLE ENTITY SOLELY BECAUSE OF ITS RELIGIOUS IDENTITY.

There is nothing remarkable about the proposition that express governmental discrimination, in a secular benefits program, against an otherwise qualified entity, solely because of that entity's religious identity, is generally unconstitutional.

The Constitution "forbids hostility" toward "all religions," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "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). The Establishment Clause "commands that . . . [a state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16. *See also Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 16-17 (1st Cir. 1983) (Breyer, J., concurring in result) (noting, where benefit at issue "is support for

child safety rather than support for the church," that "[t]he First Amendment, after all, is impartial . . ., and that impartiality implies that it not penalize parochial school students").

This Court has therefore 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). This Court has likewise 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 also held that the Equal Protection Clause commands that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and that 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). *A fortiori*, restrictions that rest on no more than "a bare desire to harm" a particular group are impermissible, *Cleburne*, 473 U.S. at 446-47 (citing *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

It follows 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.

The consequences of a contrary ruling would be to authorize gratuitous hostility against religious entities and those they serve, including children. Use of public parks could be free except for church picnics. Tours of museums could be free for all student groups except for religious schools. A government transportation agency could allow free (and thus subsidized) use of express lanes by HOV vehicles except for church buses.

Indeed, this case already *is* the extreme hypothetical: a state could deny playground safety resurfacing grants to otherwise qualified recipients, at the expense of the children using those playgrounds, solely because of their religious identity.

Such a rule is not just a massive overreaction to establishment concerns, *see Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment) ("the First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent") (internal quotation marks omitted), but is downright constitutional anathema and, in a land settled by believers seeking religious freedom, both ahistorical and ironic. This Court should reverse the Eighth Circuit.

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[2]Petitioner TLC brings its challenge under the Free Exercise and Equal Protection Clauses. While TLC apparently does not directly maintain a Free Speech attack, the standards for reviewing discrimination against a religious message or viewpoint 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).

II. *LOCKE v. DAVEY* PROVIDES NO SOLID FOOTING FOR A CONTRARY RESULT.

The Eighth Circuit relied upon ambiguity in this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), as supplying a basis for the supposed constitutionality of a "no churches" rule. The Eighth Circuit's view of *Locke* is by no means inevitable, as a more sensible, contrary holding in the Tenth Circuit illustrates. *See 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"). Nor is the Eighth Circuit's reading of *Locke* sound.

Locke worked no revolution in constitutional jurisprudence. *Locke* did not purport to overturn any of this Court's precedents. Nor did it challenge the notion that discrimination against churches as such would violate the Constitution. *See* 540 U.S. at 724 (distinguishing government action "evincing hostility toward religion"). To the contrary, *Locke* expressly distinguished a situation like the one here, where someone or something had "to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21.

Moreover, the *Locke* decision represents an especially ill-suited candidate for the construction of a new, church-antagonistic body of law.

A. THE *LOCKE* DECISION IS ITSELF QUESTIONABLE.

At issue in *Locke* was a state's decision to deny a scholarship to an incoming college student who had announced his intention to pursue a major in devotional theology. 540 U.S. at 716-17. The majority ruled that this denial reflected a historically based refusal to use tax money to fund the training and maintenance of clergy. *Id.* at 722-23 & n.6. To be sure, that "historic and substantial" concern, *id.* at 725, was real. However, that concern addressed a *special privilege* being afforded to clergy, not a *common benefit* being denied to clergy. In other words, the state's boot in *Locke* did not match the historical footprint.

There is a huge difference *in kind*, not just in degree, between doling out a special benefit to a select profession (i.e., clergy) and singularly denying an otherwise generally available benefit (i.e., scholarships) only to the select group. The first is a privilege; the second is blatant discrimination. *See id.* at 727 (Scalia, J., dissenting) ("Davey is not asking for a special benefit to which others are not entitled. . . . He seeks only equal treatment").

The *Locke* majority sought to counter this disconnect between the state interest and the challenged restriction by asserting that "training for religious professions and training for secular professions are not fungible," and that "[t]raining someone to lead a congregation is an essentially religious endeavor." *Id.* at 721. There is some truth to

this. But there are also problems.[3] Most relevant here, however, the concern *Locke* identified is absent from this case. Like "police and fire protection, sewage facilities, and streets and sidewalks" offered equally to all entities, *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1968), playground surfacing is not "support of a religious institution," *id.*, under the Establishment Clause, and certainly not "essentially religious," *Locke*, 540 U.S. at 721. If under *Everson*, "proportionate state expenditure on school transportation is support for child safety rather than support for the church," *Members of Jamestown Sch.*, 699 F.2d at 16 (Breyer, J., concurring in result), then even more clearly

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[3]The *Locke* majority's rejoinder proves far too much. The same could be said of countless other acts: uttering a prayer to God vs. uttering a request to government; carrying a religious icon in procession vs. carrying a political banner; wearing a snow cap vs. wearing a yarmulke; growing a long beard for health or style vs. growing a beard for religious reasons. In each such case, to single out the religious act for restraint, when the comparable (and, in secular terms, indistinguishable) act is not so restrained, is antireligious discrimination.

Morever, the "essential" difference between religious and secular professions is *only visible to the theological eye*. That is, the nonbeliever considers religious acts to be meaningless rituals of no greater significance than a Zumba exercise. Only to the eyes of faith is the religious act "essentially" different. Yet the federal and state courts are not equipped or even permitted to render such inherently religious assessments. While disallowing a *special assessment* for ministers did not require courts to determine whether Ethical Culture or Veganism counts as a religion – nobody got tax money for their profession – a targeted exclusion of what is "essentially religious" from an otherwise general benefits program thrusts courts ineluctably into the theological thicket.

support for playground resurfacing is "essentially" support for child safety.

The distinction between special privileges and unique disabilities has growing importance in a time of expanding government. The more benefits and services the state undertakes to pay, deliver, control, or manage, the more important it becomes to resist discriminatory disqualifications. When the state undertakes, for example, to foot the bill for healthcare for the populace or a segment thereof, it is plainly discriminatory to disqualify otherwise eligible ministers, and only ministers, for this tax-funded benefit.

In short, the rationale of *Locke* rests upon a basic category error. Disavowing that error leaves *Locke* without its asserted historical foundation. But even if this Court were to leave *Locke entirely* intact, *Locke* would not control this case involving the wholly secular common benefit of child safety measures.

B. THE *LOCKE* DECISION WAS UNNECESSARY.

Compounding the weakness of the rationale in *Locke* is the fact that determination of the opinion's central issue was completely unnecessary to resolve the case. In actuality, the restriction at issue in *Locke* was so poorly tailored to the state's proffered rationale as to be irrational, having no real effect except to penalize those students who were guileless enough to declare a major in devotional theology before they were required to do so.

The scholarship at issue in *Locke*, the Promise Scholarship, was available to graduating high school students for use only in the first two years of college

study. Wash. Admin. Code §§ 250-80-010, 250-80-070(1), (4); *Locke*, 540 U.S. at 715-16. It could be used for any college "education-related expense, including room and board," 540 U.S. at 716. Students who did not declare any major during their first two years of college, or who declared a major other than devotional theology, could receive the Promise Scholarship. Brief for Respondent at 10 & n.4, *Locke v. Davey*, No. 02-1315 (U.S. Sept. 8, 2003) (citing record and noting that the state relied, in its answer, upon the ability of students to decline to announce a major and retain their eligibility for the scholarship). But any student who declared a major in devotional theology – i.e., theology taught from a believing perspective – was penalized with the loss of scholarship eligibility. 540 U.S. at 716.

Thus, the scholarship program at issue in *Locke*:

- Did not bar the use of tax funds for the study of devotional theology or ministerial training, even if the student fully intended to become a minister, so long as the student *did not declare a major, id.* at 725 & n.9;
- Did not bar the use of tax funds for the study of devotional theology or ministerial training as an elective or even a required course, even if the student fully intended to become a minister, so long as the student had *declared a different major, id.*;
- Did not bar the use of tax funds for the study of theology, even by an actual minister or minister in training, so long as the theology was taught from a nonbelieving perspective, *id.* at 716.

However, the restrictions at issue *did* disqualify a student with a declared major in devotional theology:

- Even if the student took no more courses in devotional theology than were required of all other students at the same school, *id.* at 725 & n.9;
- Even if the student subsequently changed his career plans and did not become clergy (like Joshua Davey himself, who attended Harvard Law School, *see* Joshua Davey, *The Real Losers of Locke v. Davey*, Harv. Icthus Online (Spring 2004), www.hcs.harvard.edu/~ichthus/issues/1.1/essay_davey.html and is now a partner at a private law firm, https://www.mcguirewoods.com/People/D/Joshua-D-Davey.aspx#overview).

Thus, the restriction at issue in *Locke*, which supposedly furthered the goal of avoiding tax funding "for vocational religious instruction," 540 U.S. at 725, was almost completely ineffectual. Scholarship recipients, including clergy in training, could use scholarship funds for devotional theology study so long as they had declared a different major or were savvy enough not to declare any major. Meanwhile, students like Joshua Davey were penalized for their voluntary declaration of a major that they were not even required subsequently to pursue. Ultimately, the haphazardly tailored restriction in *Locke* was no more than a penalty for a college freshman's forthrightness regarding his major, or a punishment for his mistaken predictions about his future study plans.

The *Locke* Court should have struck down the restrictions at issue as an irrational penalty on free speech (declaring a major) and religious exercise (declaring one's intent to pursue a religious vocation) that fails even minimal scrutiny. That case should certainly not be rewritten into the basis for a new, broad mandate to target religious entities for unique

identity-based discrimination in the context of wholly secular child safety measures.

CONCLUSION

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). May a state categorically exclude churches while otherwise allowing any entity that maintains a playground to apply for resurfacing aid, for the safety of children who play there? The answer in all such cases is a resounding "no."

This Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

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