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 Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL AND LUTHERAN CHURCH—MISSOURI SYNOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Association of Christian Schools International ("ACSI") is a nonprofit organization that supports and promotes Christian schools across the United States and around the world. Based in Colorado Springs, ACSI has approximately 24,000 member schools—2,600 of which are in the United States—that serve more than 5.5 million students worldwide. In addition to providing various services for Christian schools (including teacher certification, school accreditation, and textbook publishing), ACSI advocates for their fair legal treatment.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations, which in turn have approximately 2.2 million members. Member congregations of the Synod operate elementary schools and daycare centers throughout the United States, including in the State of Missouri, and as a group they operate the largest Protestant parochial school system in America.

In the decision below, the Eighth Circuit went far beyond this Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), by holding that the Free Exer-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner is a member of the Lutheran Church—Missouri Synod but made no such monetary contribution. All parties have consented in writing to the filing of this brief.

cise and Equal Protection Clauses permitted Missouri to exclude a daycare center from a playground-resurfacing grant program solely because the daycare is affiliated with a church. *See* Pet. App. 1a-22a. That rule rests on a sweeping misapplication of *Locke* that ignores foundational principles of First Amendment and equal protection jurisprudence and, if affirmed, would require overruling decades of contrary precedent. *See infra* Part I.

The rule adopted below threatens to marginalize religious schools, churches, and other faith-based entities from public life by endorsing religious discrimination against such entities in the provision of public benefits. This threat is not theoretical: As *amici* explain, *see infra* Part II, religiously affiliated persons and groups currently qualify for hundreds of public benefit programs nationwide, all of which could be—and in some instances already have been—closed to religious groups under the Eighth Circuit's reasoning.

Amici therefore urge this Court to overturn the erroneous judgment below, which is inconsistent with the Constitution's guarantee of the free exercise of religion and with our Nation's long tradition of affirming religious participation in the public square.

STATEMENT

This case arises from a Missouri aid program granting funds to "qualifying" "public and private nonprofit day care centers" for "the purchase of recycled tires to resurface playgrounds." Pet. App. 2a-3a, 35a-36a. Trinity Lutheran Church, which operates "a licensed preschool and daycare," applied for the funds offered by this program and ranked fifth out of

more than forty applicants. *Id*. at 2a-3a. But while "fourteen projects were funded" by the State, *id*. at 3a, Trinity Lutheran's was not among them. The State claimed that it was "unable to provide this financial assistance" to Trinity Lutheran because the Missouri Constitution "provides that 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion.'" *Ibid.* (quoting Mo. Const. art. I, § 7).

A divided panel of the Eighth Circuit affirmed the dismissal of Trinity Lutheran's claims for injunctive and declaratory relief. Because the majority misconstrued Trinity Lutheran's complaint as a "facial attac[k] on Article I, § 7 of the Missouri Constitution," Pet. App. 6a, much of its opinion focused on an inapposite summary decision by this Court upholding the constitutionality of that provision in a different context.[2] But the panel majority also relied upon *Locke* to "reinforc[e] [its] decision," and held

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[2] Specifically, the bulk of the majority opinion below focused on *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974), in which this Court summarily affirmed a three-judge district court's ruling that Missouri did not violate the Free Exercise or Equal Protection Clauses by refusing to bus private-school students. *See* Pet. App. 7a-9a, 11a. *Luetkemeyer* is inapposite: In that case, all private-school students were excluded from the busing program, whereas petitioner was excluded from Missouri's recycled-tire program solely because of its religious affiliation, while secular private daycare centers were eligible to receive funds. The decision below states that *Luetkemeyer* establishes that Article I, § 7 of the Missouri Constitution is "not *facially* invalid," *id.* at 8a (emphasis altered)—making the Eighth Circuit the only court of appeals ever to cite *Luetkemeyer*'s summary decision as "controlling . . . precedent," *id.* at 7a—but as already explained, petitioner is not bringing a facial challenge.

that petitioner lacked "a valid Free Exercise claim" even if the summary decision "were not controlling." *Id*. at 10a, 12a n.3. Just as *Locke* involved "'procuring taxpayer funds to support church leaders, which [i]s one of the hallmarks of an "established" religion,'" *id*. at 10a (quoting *Locke*, 540 U.S. at 722), the majority reasoned that "the direct grant of public funds to churches" is "another of the 'hallmarks of an "established" religion'" and therefore Missouri could exclude churches from its generally available recycled-tire program, *ibid*.; *see also id*. at 12a n.3 (asserting that "the direct expenditure of public funds to aid a church is a paradigm example of" state action that is "permitted by the Establishment Clause but not required by the Free Exercise Clause" (citation and internal quotation marks omitted)).

In claiming that this case involves one of the "hallmarks of an 'established' religion," Pet. App. 10a (quotation marks omitted), the majority did not claim that providing recycled-tire grants to Trinity Lutheran would violate the Establishment Clause. To the contrary, the court acknowledged that granting recycled-tire funds to Trinity Lutheran would be "*permitted* by the Establishment Clause." *Id.* at 12a n.3 (internal quotation marks omitted) (emphasis added). Nor did the majority conclude that this specific grant to Trinity Lutheran would be contrary to some specific "historic and substantial state interest." *Locke*, 540 U.S. at 725. Rather, the majority concluded that *any* direct transfer of public funds to a religiously affiliated entity would be contrary to the State's claimed interest in maintaining a "high wall of separation between church and state," and thus could be prohibited under *Locke*. Pet. App. 12a n.3.

Judge Gruender dissented in part. He explained that the majority's interpretation of *Locke* would "leave states with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a (opinion of Gruender, J.). "If giving [Trinity Lutheran] a playground-surfacing grant raises a substantial antiestablishment concern," he continued, "the same can be said for *virtually all government aid* to [a religious organization], no matter how far removed from religion that aid may be." *Id.* at 29a (emphasis altered). Because *Locke* did not authorize the "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support," he would have upheld Trinity Lutheran's free exercise and equal protection claims. *Id.* at 27a.

SUMMARY OF ARGUMENT

I. Faithful application of existing precedent is more than sufficient to dispose of this case. The Free Exercise and Equal Protection Clauses prohibit the government from discriminating against religion, including in the provision of public benefits, absent the most compelling justification. *See*, *e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *McDaniel* v. *Paty*, 435 U.S. 618 (1978). Government "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." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947).

The decision below held that *Locke* v. *Davey*, 540 U.S. 712 (2004), compels the opposite conclusion. *See* Pet. App. 12a n.3. But *Locke* did not purport to cast aside the Constitution's bedrock principle of nondiscrimination; it merely recognized a narrow, historically rooted qualification of that principle, tied to the unique concerns associated with publicly funding the devotional training of clergy. *See* 540 U.S. at 721-25. Indeed, as the majority explained and the principal dissent agreed, "the only interest at issue" in *Locke* was "the State's interest in not funding the religious training of clergy." *Id*. at 722 n.5; *accord id.* at 734 (Scalia, J. dissenting). *Locke* expressly disclaimed a rule that would deny public benefits to religiously affiliated persons based on the State's mere "philosophical preference" to promote secularism by withholding funds from these groups. *Id.* at 722 n.5 (majority opinion).

There is no "historic and substantial state interest" (*Locke*, 540 U.S. at 725) in excluding religious entities from recycled-tire programs. To adopt the Eighth Circuit's interpretation of *Locke*, then, would be to constitutionalize "latent hostility to religion" by permitting States to exclude religious actors from the ever-expanding number of religiously neutral public benefit programs provided by "the modern administrative state" whenever the State *claims* a historic and substantial interest in their exclusion. *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-58 (1989) (opinion of Kennedy, J.). It would thus require reading *Locke* as implicitly upending decades of precedent forbidding religious discrimination. That is inconsistent with the Constitution and unsupported by *Locke*. This Court should reject the Eighth Circuit's

transformation of *Locke* into a license for religious discrimination, and reverse the judgment below.

II. If allowed to stand, the Eighth Circuit's rule would justify the wholesale exclusion of religiously affiliated entities from innumerable state and local aid programs across the country, based on little more than religious animus. For as the dissent below explained, "[i]f giving [Trinity Lutheran] a playground-surfacing grant raises a substantial antiestablishment concern, the same can be said for *virtually all government aid* to [a religious organization], no matter how far removed from religion that aid may be." Pet. App. 29a (opinion of Gruender, J.) (emphasis altered).

Like their secular counterparts, religious organizations are frequently eligible for direct or indirect aid from neutral government programs supporting activities that benefit the public. Beyond grants for resurfacing playgrounds with recycled tire rubber, these programs include, for example, funds ensuring that children attending private primary and secondary schools receive access to health and educational services, affordable transportation and textbooks, and even security guards and safety equipment. School vouchers, tax credits, and scholarships for families of schoolchildren are also common forms of aid, as are construction grants. Outside the education context, States administer programs that encourage tourism and other economically beneficial activities, contract with private organizations to provide services, and provide aid to entities like rehabilitation centers. Yet under the expansive rule adopted below, religious institutions could be excluded not only from these programs, but also from receiving

any form of basic public support—such as fire protection and sidewalk maintenance—solely on account of their religious affiliation. Reversal is warranted to prevent the government from engaging in active hostility to religion and leveraging the weight of the omnipresent administrative state against religious conviction.

ARGUMENT

The Free Exercise Clause and the Equal Protection Clause ensure that the government "cannot exclude" religious groups "from receiving the benefits of public welfare legislation" "because of their faith." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947) (emphasis removed). Yet the rule adopted by the Eighth Circuit below would permit precisely this type of facial religious discrimination, authorizing States to exclude religious groups from public aid programs (such as the ones identified in Part II below) notwithstanding the absence of any Establishment Clause concern or other substantial interest in preventing public funds from being used for religious purposes. Strict scrutiny is appropriate, and neither *Locke* v. *Davey*, 540 U.S. 712 (2004), nor any other precedent of this Court suggests otherwise. The judgment below should be reversed.

I. DISCRIMINATION AGAINST RELIGION VIOLATES THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES.

This Court need not fashion a new rule of law to preserve an equal role for religious persons and institutions in public life. Time and again, the Court has affirmed the "noncontroversial principle" that laws singling out religion for adverse treatment offend the

Constitution. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 559 (1993) (opinion of Souter, J.). To enforce this principle, the Court has held that claims of discrimination against religion trigger the strictest scrutiny. *See*, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978) (plurality opinion) (citing *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)). *Locke* did not implicitly overrule or reject this framework, as the Eighth Circuit's holding suggests, nor does *Locke*'s narrow, historically rooted reasoning support the Eighth Circuit's decision below.

A. The Free Exercise And Equal Protection Clauses Entitle Religion To At Least Neutral Treatment By The Government.

As "confound[ing]" as this Court's religious-freedom jurisprudence has sometimes been, *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari), few constitutional rules are as settled or as foundational as the rule that, at a minimum, the government must treat religion with neutrality.[3] Almost seventy years ago, the Court recognized that the Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to

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[3] There are circumstances, moreover, in which the government is allowed or even required to afford special protection to religious exercise. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *Thomas* v. *Review Bd.*, 450 U.S. 707, 713 (1981); *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (opinion of Goldberg, J.).

handicap religions, than it is to favor them." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 18 (1947). Even after decades of doctrinal shifts in this area, the neutrality principle has remained the "touchstone" of analysis under the Religion Clauses of the First Amendment. *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 860 (2005); *see also Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (opinion of Breyer, J.); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995).

There is good reason for this neutrality rule: Neutrality makes possible "[t]he fullest realization of true religious liberty" by requiring "that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (opinion of Goldberg, J.). An "emphasis on equal treatment" is appropriate because in our constitutional tradition, "one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (opinion of O'Connor, J.). In a time of extensive government involvement in the everyday lives of the people, neutrality acknowledges that religious institutions and persons hold a valuable place in the community. Indeed, "as the modern administrative state expands to touch the lives of its citizens" in "diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-58 (1989) (opinion of Kennedy, J.).

In the free exercise context, neutrality means that, absent the most compelling justification, the government may not, on the basis of religious distinctions, treat religious people, institutions, and interests less favorably than their secular counterparts. "At a minimum," the Court has stated, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi*, 508 U.S. at 532. This neutrality principle derives from both the Free Exercise and Equal Protection Clauses. *See Kiryas Joel*, 512 U.S. at 715 (opinion of O'Connor, J.); *Church of Lukumi*, 508 U.S. at 540 (plurality opinion); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) ("Neutrality in its application requires an equal protection mode of analysis.").

The Constitution's requirement of neutrality is implicated whenever the government denies a person a right, privilege, or benefit on the basis of his or her religious affiliation, because "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981).[4] Given that the inclusion

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[4] *See also*, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 696 (2002) (Souter, J., dissenting) ("Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money."); *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 746-47 (1976) (plurality opinion) ("[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all. . . . The Court never has held that religious activities must be dis-

of religion in neutral government programs frequently conforms with the Establishment Clause, *see*, *e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 809 (2000) (plurality opinion), it is difficult, if not impossible, to reconcile government actions that "impose special disabilities" on religious applicants for government benefits with the Constitution's requirement of neutrality, *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1994).

The Court has applied this understanding of neutrality in a host of cases rebuffing attempts to partition off religion from the public square. In *McDaniel*, for example, the Court considered a Tennessee statute that barred ministers from serving as delegates to the State's constitutional convention. 435 U.S. at 620-21. Noting that Tennessee recognized a "right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention," the Court held that the statute violated the Free Exercise Clause because it prevented ministers from exercising this generally available right on the basis of their religious affiliation and without adequate justification. *Id.* at 626. Similar logic has prevailed in a series of decisions involving the efforts of religious groups to exercise

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criminated against in this way."); *Everson*, 330 U.S. at 16 ("[The States] 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."); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whateve[r] its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.").

their First Amendment speech rights on equal terms. *See*, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that a public school's exclusion of a private Christian group from its facilities violated the First Amendment); *Rosenberger*, 515 U.S. at 845 (holding that a university compromised "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment" by refusing to extend generally available printing funds to a religious student paper); *Widmar* v. *Vincent*, 454 U.S. 263, 276-77 (1981) (holding that a university had unconstitutionally discriminated against religious speech). In these cases and others, the Court has vindicated the neutrality principle by requiring the government to treat religion equally when administering public programs.

The meaning of neutrality may not be "self-revealing" in every potential application, of course. *Church of Lukumi*, 508 U.S. at 561 (opinion of Souter, J.). But any meaningful conception of neutrality would be offended by a law that singles out and discriminates against religion on its face. *See id.* at 533 (majority opinion). This Court has made clear that such laws are intolerable under the Constitution by repeatedly confirming that the Free Exercise and Equal Protection Clauses demand neutral treatment of religion by the government.

B. Violation Of The Neutrality Principle Triggers Strict Scrutiny.

To enforce this guarantee of equal treatment, claims of discrimination on the basis of religious affiliation "must undergo the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546*; accord*

Smith, 494 U.S. at 886 n.3 (classifications based on religion are analyzed like "classifications based on race, or on the content of speech" (citations omitted)); *McDaniel*, 435 U.S. at 628; *Yoder*, 406 U.S. at 215. Accordingly, laws that target "a particular religion" or "religion in general" for less favorable treatment "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of Lukumi*, 508 U.S. at 531-32; *see also id.* at 531 (a law burdening religion must be both "neutral and of general applicability" to avoid strict scrutiny).

This Court's cases have faithfully applied strict scrutiny to state and local laws that discriminate on the basis of religion. In *Church of Lukumi*, for example, this Court applied strict scrutiny to invalidate city ordinances that prohibited ritualistic animal sacrifice. 508 U.S. at 524, 527-28. After finding that the challenged ordinances were neither neutral nor laws of general applicability, *see id.* at 533-46, the Court concluded with relative ease that the ordinances could not withstand strict scrutiny—they were both over- and under-inclusive in light of the neutral government interests offered in their support, betraying their discriminatory intent. *See id.* at 546-47 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

Church of Lukumi's application of strict scrutiny was neither unique nor controversial; it simply stayed the course set by other foundational free exercise cases. In *Employment Division* v. *Smith*, for in-

stance, the Court similarly noted that even though the First Amendment does not necessarily entitle religious persons to special exemptions from neutral, generally applicable laws that incidentally burden their religious exercise, strict scrutiny applies to laws that "classif[y] based on religion." 494 U.S. at 886 n.3. In *McDaniel*, the Court likewise reaffirmed that discrimination against religion with respect to generally available civil rights and public benefits can be justified by "only those interests of the highest order." 435 U.S. at 628 (quoting *Yoder*, 406 U.S. at 215); *see also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

In spite of these decisions, however, legislative bodies and government officials have continued to "devise mechanisms, overt or disguised," that single out religion for adverse treatment. *Church of Lukumi*, 508 U.S. at 547. Rigorous judicial scrutiny of such schemes is necessary to preserve "the Nation's essential commitment to religious freedom." *Id.* at 524.[5]

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[5] For that reason, numerous courts of appeals—including the Eighth Circuit, in a decision that went conspicuously unmentioned below—have followed this Court in applying strict scrutiny to reverse judgments upholding non-neutral laws discriminating against religion. *See*, *e.g.*, *Peter* v. *Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (rejecting refusal to provide a full-time aide to a disabled child who attended a private religious school, where similar services were provided to secular private schools); *Hartmann* v. *Stone*, 68 F.3d 973, 978 (6th Cir. 1995)

C. Missouri's Violation Of The Neutrality Principle In This Case Fails Strict Scrutiny And Is Not Justified By *Locke*.

The principles outlined above are directly applicable here and dispose of this case in short order. First, Missouri's denial of Trinity Lutheran's grant application was indisputably non-neutral and discriminatory, because it was based solely on petitioner's religious affiliation; if petitioner were instead Secular Daycare, it would have received the funding it applied for. *See* Pet. App. 3a.

Second, Missouri cannot satisfy strict scrutiny. The only state interest it has identified to support its discrimination against petitioner is a desire to comply with a state constitutional provision providing for "greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution"—an interest that this Court has *already held* does not justify discriminatory treatment of religion in the provision of public benefits. *Widmar*, 454 U.S. at 276; *see also* Pet. Br. 28-30.[6] Under this Court's precedents, the sort of

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(invalidating U.S. Army regulations forbidding Army-certified childcare providers to engage in any religious practices during their daycare programs).

[6] Although *Widmar* was primarily a free-speech case, it implicated the Free Exercise Clause because it involved the University of Missouri at Kansas City's refusal to allow a religious student group to meet in university buildings. *See* 454 U.S. at 265. The university justified its discrimination against the group by asserting a compelling interest in complying with the same state constitutional provision invoked by the State here. *See id.* at 275 & n.17. This Court rejected the university's justification, holding that "the state interest asserted here . . . is

"gratuitous" discrimination against religion practiced by Missouri is unambiguously unconstitutional. *Church of Lukumi*, 508 U.S. at 538 (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)).

The State suggests, however, that *Locke* calls into question the well-established rule that discrimination against religion is impermissible under the Constitution. *See* Br. in Opp. 2-3. But *Locke* cannot bear the weight the State places on it. *Locke* did not purport to rewrite this Court's First Amendment and equal protection jurisprudence; to the contrary, *Locke* expressly *disclaimed* adopting a rule that would allow States to deny public benefits to religiously affiliated persons based on the State's mere "philosophical preference" for secularism. 540 U.S. at 722 n.5. And the Court has repeatedly reiterated the nondiscrimination principle since *Locke*. *See*, *e.g.*, *McCreary Cty.*, 545 U.S. at 860. A broader understanding of *Locke* would require holding that a narrow qualification has swallowed a fundamental rule.

Locke is a self-consciously narrow decision. Both the majority and the principal dissent in *Locke* agreed that "the only interest at issue" was "the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5; *accord id.* at 734 (Scalia, J., dissenting). And the majority's reasons

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limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 276.

for upholding the program were rooted in history and heavily fact-dependent. The Court made much of the Nation's long history of resisting public funding of the clergy specifically, which justified the State's decision to decline to fund the religious training of future ministers. *See id.* at 722-23 (majority opinion) ("[R]eligious instruction is of a different ilk."); *cf. Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."). And the Court emphasized that, unlike the ordinances at issue in *Church of Lukumi*, Washington State's scholarship program went "a long way toward including religion in its benefits" because it allowed students to attend "pervasively religious" schools and take individual devotional theology courses. *Locke*, 540 U.S. at 724-25.

Based on these factors, several lower courts and commentators have correctly understood *Locke* as a narrow ruling with no sweeping implications for the right of religious persons and entities to receive equal treatment from the government. In *Colorado Christian University* v. *Weaver*, for example, Judge McConnell concluded that *Locke*'s holding does not control even all cases involving public funding of religious education: "[W]e cannot accept the . . . argument that *Locke* subjects all 'state decisions about funding religious education' to no more than 'rational basis review.'" 534 F.3d 1245, 1254-55 (10th Cir. 2008).

Rather, *Locke* "suggests, even if it does not hold, that the State'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." *Colo. Christian*, 534 F.3d at 1255. Judge Gruender agreed in his dissenting opinion below. *See* Pet. App. 26a ("*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits."). And Professor Laycock, among others, has also persuasively argued that the scope of *Locke*'s holding is not as broad as some have suggested. *See* Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1184 (2007) (book review); Thomas C. Berg, *Religious Choice and Exclusions of Religion*, 157 U. Pa. L. Rev. PENNumbra 100, 108 (2008) ("[A] broad reading of *Locke v. Davey* is far from compelled.").

Locke's context-specific rationale renders it inapposite in this case. Unlike in *Locke*, the State here has not gone "a long way toward including religion" in the program at issue, 540 U.S. at 724—the recycled-tire program flatly excluded Trinity Lutheran because it is a church, *see* Pet. App. 3a, and thus "single[s] out" religion "for discriminatory treatment," *Church of Lukumi*, 508 U.S. at 538. And unlike in *Locke*, the State's discriminatory policy is not rooted in a specific, longstanding historical practice like the prohibition of public funding of clerical training. *See* 540 U.S. at 722-23. In support of its policy, Missouri points to nothing more than "a general prohibition on aid to a church that is in no way specific to the playground-surfacing grant program." Pet. App. 28a (opinion of Gruender, J.); *see* Br. in Opp. 10-11. The State has not linked its treatment of Trinity Lutheran to any "historic and substantial state interest" implicating the State's relationship

with churches, *Locke*, 540 U.S. at 725, because it cannot do so: There is no longstanding tradition of excluding religious groups from neutral public benefits that are otherwise made broadly available. Indeed, even if *Locke* had purported to upend decades of precedent by granting States broad authority to discriminate against religion in administering public programs, the substantial differences between *Locke* and this case would point to a different result here.

In any event, *Locke* plainly did no such thing—instead, it recognized a narrow, historically rooted qualification to neutrality, a caveat that does not apply to this case. Applying the neutrality principle here would both properly delineate the parameters of *Locke* and vindicate this Court's prior holdings that facial discrimination against religion cannot be squared with the Constitution's vision of equality and religious freedom.

II. THE DECISION BELOW LICENSES RELIGIOUS DISCRIMINATION IN MYRIAD EXISTING BENEFITS PROGRAMS.

The rule adopted by the Eighth Circuit below would do much more than allow States with "Blaine Amendments"—state constitutional provisions barring public aid to "sectarian" schools, *see*, *e.g.*, *Mitchell*, 530 U.S. at 828-29 (plurality opinion)—to exclude religious organizations from their playground-resurfacing grant programs.[7] The Eighth Circuit's

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[7] Nebraska, Kentucky, and Kansas operate their own recycled-tire programs. *See* Press Release, Neb. Dep't of Envtl. Quality, More Than $2 Million Awarded for Tire Collection, Recycling Projects (June 12, 2015), http://tinyurl.com/zm6m2on; *Waste Tire Program*, Ky. Dep't for Envtl. Prot., Div. of Waste

reasoning would enable the government to exclude religious organizations from any number of neutral public benefit programs that they otherwise qualify for—the State would need only to claim a desire to erect a "high wall of separation between church and state," Pet. App. 12a n.3, to engage in such discriminatory conduct. That result evinces "latent hostility," not neutrality, toward religion, as it would permit the government "in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Cty. of Allegheny*, 492 U.S. at 657 (opinion of Kennedy, J.). Imposing the Eighth Circuit's rule on the Nation would have staggering consequences for religious organizations' participation in public life.

A. School Aid Programs

1. School aid programs directly supporting students' health and education are one important area in which the Eighth Circuit's rule could justify barring children and their parents from a wide range of benefits solely because they attend religious private schools rather than secular ones. Pennsylvania, for example, provides medical services to students at all private schools (secular or religiously affiliated), granting these children access to school nurses, medical and dental examinations, diagnostic and evaluative psychological and visual services, vision and

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Mgmt. (2014), http://tinyurl.com/zdwemd5; *Waste Reduction, Public Education, & Grants*, Kan. Dep't of Health & Env't, http://tinyurl.com/jnpg79z (last visited Apr. 20, 2016) (providing lists of grant recipients). Like Missouri, each of these States could cite provisions in their constitutions to exclude religious entities from participation. *See* Neb. Const. art. VII, § 11; Ky. Const. § 184; Kan. Const. art. 6, § 6(c).

hearing tests, and tuberculosis screenings.[8] Other States have similar programs.[9] Many parents whose children attend religiously affiliated primary schools also rely on public funding to diagnose, treat, and educate students who have special gifts or educational needs.[10] And many States provide transportation to students attending private schools, or loan textbooks, lab equipment, computers, software, projection equipment, and other materials to nonpublic schools.[11]

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[8] 24 Pa. Stat. and Cons. Stat. Ann. §§ 9-923.1-A, 2-A; *id.* §§ 14-1402 to -1403.

[9] New Hampshire, New Jersey, New York, and Ohio also permit or require health services to be offered to students at both religious and secular private schools. N.H. Rev. Stat. Ann. § 189:49; N.J. Stat. Ann. § 18A:40-25; N.Y. Educ. Law § 912; Ohio Rev. Code. Ann. § 3317.06.

[10] *See*, *e.g.*, Ohio Rev. Code Ann. § 3317.06 (granting private school students in Ohio access to therapeutic psychological treatment, speech and hearing diagnostic programs, and guidance and counseling services, as well as programs for disabled and gifted students); 24 Pa. Stat. and Cons. Stat. Ann. § 9-922.1-A(a)-(c) (extending guidance, counseling, and testing services, remedial learning programs, speech, hearing, and psychological services, ESL programs, and assistance for exceptional students "on an equal basis . . . to all pupils in the Commonwealth in both public and non-profit private schools").

[11] *See*, *e.g.*, *Nonpublic Schools*, N.Y. State Educ. Dep't, http://tinyurl.com/cgexeke (last visited Apr. 20, 2016) (transportation); Ohio Rev. Code Ann. § 3317.06(A), (K)-(L) (textbook, computer, and software loans); 24 Pa. Stat. and Cons. Stat. Ann. § 9-923-A(a)-(c) (lab equipment, projecting devices, and other loans). Rhode Island reportedly spent over $5 million in financial support for its textbook and transportation programs in 2014 alone. Bob Plain, *State Spends $5 Million on Private*

There is no doubt that these school aid programs are consistent with the Establishment Clause. *See*, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 616-17 (1971) (noting that providing public health services, busing, and textbooks "in common to all students" does not "offend the Establishment Clause"). But under the logic of the Eighth Circuit's decision, States can withdraw these benefits at will from students who attend parochial schools, while retaining them for secular private schools—perhaps citing Blaine Amendments or similar laws for support.[12]

2. The ruling below also threatens aid programs that ensure schoolchildren's safety. Several States provide funding for campus security as a safeguard against mass shootings and acts of terror. Michigan, for example, allows both public and nonpublic schools to partner with local law enforcement organizations and apply for competitive security grants from the Michigan State Police, with funds being used to install shatterproof glass, metal detectors, and public address systems on campus for use in an emergency.[13] Private religious schools are eligible

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School Transportation, Textbooks, RI Future (Apr. 7, 2015), http://tinyurl.com/hnn59qe.

[12] *Cf.* N.Y. Const. art. XI, § 3 (prohibiting the direct or indirect use of public money to aid "any school or institution of learning wholly or in part under the control of direction of any religious denomination"); Pa. Const. art. III, § 15 ("No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.").

[13] *School Safety Competitive Grant Program (FY 2015)*, Mich. State Police, Grants & Cmty. Servs. Div., http://tinyurl.com/jmbsfz4 (last visited Apr. 20, 2016).

for these funds on equal terms with their secular counterparts and have been awarded thousands of dollars under Michigan's program.[14] Connecticut, Ohio, and Pennsylvania offer similar safe-school programs.[15]

The Eighth Circuit's rule, however, would allow States to exclude students at religiously affiliated primary schools from these programs. The threat is not hypothetical: The Mayor of New York City recently signed an ordinance that provides nearly $20 million to all private schools (including religious schools) with 300 or more students to hire security guards.[16] The measure encountered opposition insofar as it included religious schools on the same terms as other private schools, but its sponsor—channeling this Court's First Amendment and equal protection precedents—responded that "[s]eparation of church and state doesn't mean that we treat the church worse. It means that no one gets a preference, but that certainly we treat the church the same—

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[14] *Michigan State Police Competitive School Safety Grant Awards*, Mich. State Police, Grants & Cmty. Servs. Div., http://tinyurl.com/hy3oygn (last visited Apr. 20, 2016).

[15] *See Gov. Malloy Announces Additional Funding to Make Schools Safer*, Conn. Dep't of Emerg. Servs. & Pub. Prot. (Oct. 31, 2014), http://tinyurl.com/gr9ho2m; *Round Two: School Security Grant Program*, Ohio Facilities Constr. Comm'n, http://tinyurl.com/htvcswx (last visited Apr. 20, 2016); *2015-2016 Safe Schools Targeted Grants*, Pa. Dep't of Educ., http://tinyurl.com/j9vagn9 (last visited Apr. 20, 2016).

[16] *Transcript: Mayor de Blasio Holds Public Hearing for and Signs Intros. 108-A, 603-A, 604-A, 908-A and 916-A and Signs Intros. 609-A, 65-A, 128*, Office of Mayor (Jan. 5, 2016), http://tinyurl.com/jyzzobq.

equally."[17] The rule adopted below, however, would legitimize complete exclusion of religiously affiliated elementary schools from the safety program—forcing parents to consider whether a private education at a religiously affiliated private school is worth the risk.

3. The Eighth Circuit's ruling could also prevent lower-income students from attending religiously affiliated primary schools in the first place. Many States offer programs that make these schools affordable for parents and their children. At least thirteen States, for instance, offer tuition vouchers or scholarships that families may use at private schools of their choice.[18] Other States, like Nevada, award broader grants to parents of private-school children that can be used for tuition, textbooks, tutoring, or transportation.[19] And fourteen States grant tax credits to individuals who donate money to nonprofit organizations that, in turn, distribute those funds to

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[17] Yochonon Donn, *De Blasio Signs Parochial School Security Bill Into Law*, Hamodia (Jan. 5, 2016), http://tinyurl.com/hh7khrc.

[18] *See School Voucher Laws: State-by-State Comparison*, Nat'l Conf. of State Legislatures, http://tinyurl.com/k6hss9m (last visited Apr. 20, 2016).

[19] *See* Lindsey Burke, *Nevada Becomes Fifth State To Enact Groundbreaking Education Savings Accounts*, Daily Signal (June 2, 2015), http://tinyurl.com/zvqv6ne; *Education Savings Account*, Nev. State Treasurer, http://tinyurl.com/q7mhgu3 (last visited Apr. 20, 2016). The Nevada program has been preliminarily enjoined on the ground that it violates state law governing the diversion of funds appropriated for the operation of public schools. *Lopez* v. *Schwartz*, No. 15 OC 207 1B (Nev. Dist. Ct. Jan. 11, 2016), http://tinyurl.com/z65bpmm. A separate lawsuit claiming that the program violates Nevada's Blaine Amendment is still pending.

students as scholarships to attend the schools of their choice, including religious schools.[20]

The Establishment Clause poses no obstacle to these programs. *See*, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). But the Eighth Circuit's reading of *Locke* would allow States to bar religious private schools from any access to these funds, reserving them solely for secular private schools. *Cf. Taxpayers for Pub. Educ.* v. *Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015) (adopting reasoning similar to the Eighth Circuit's to invalidate a scholarship program), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 27-28, 2015); *Bush* v. *Holmes*, 886 So. 2d 340 (Fla. Ct. App. 2004) (en banc) (relying on *Locke* to invalidate voucher program); *Chittenden Town Sch. Dist.* v. *Dep't of Educ.*, 738 A.2d 539 (Vt.) (invalidating tuition-reimbursement program under state constitution), *cert. denied*, 528 U.S. 1066 (1999). Montana's tax-credit program, for example, excludes religiously affiliated primary schools entirely because state officials believed that the state constitution requires that result,[21] despite the state solicitor general's warning that *Locke* does not "sanc-

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[20] *See Scholarship Tax Credits*, Nat'l Conf. of State Legislatures, http://tinyurl.com/z8e2b9n (last visited Apr. 20, 2016).

[21] Heather Kays, *Montana Officials Propose Exclusion of Religious Schools from Scholarship Program*, Heartland Inst. (Nov. 26, 2015), http://tinyurl.com/jegh6a3 (citing statements by state officials).

tion the wholesale exclusion of religion from the scholarship program."[22]

4. Private schools also sometimes use public funds to build or renovate their campuses, and the decision below could be used to deny these funds to religious private schools as well. Maryland, for example, operates an Aging Schools program that awards grants to nonpublic schools regardless of their religious status to bring their aging facilities up to date.[23] And in 2013, New Jersey awarded $1.3 billion for 176 higher education construction projects to public and private universities.[24] Two recipients of these construction grants—the Princeton Theological Seminary and rabbinical school Beth Medrash Govoha—are currently defending their grants in New Jersey state court, where the plaintiffs argue that the state constitution bars these grants for building funds based on the same reading of *Locke* that the Eighth Circuit adopted.[25]

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[22] Ex. 3 to Compl., *Espinoza* v. *Mont. Dep't of Revenue*, No. DV-15-1152A (Flathead Cty. Dist. Ct. Dec. 15, 2015), http://tinyurl.com/jbbdf79.

[23] *Non-Public Aging School Program Documents*, Md. Pub. Sch. Constr. Program, http://tinyurl.com/gtqtmj8 (last visited Apr. 20, 2016).

[24] Press Release, N.J., Governor Christie Announces $1.3 Billion for Higher Education Construction, Putting Thousands to Work and Improving Facilities for 350,000 Students (Apr. 29, 2013), http://tinyurl.com/z83tq5s.

[25] Reply Br. 26 & n.11, *ACLU* v. *Hendricks*, No. A-4399-13 (N.J. Super. Ct. App. Div. July 17, 2015), http://tinyurl.com/grvhlfm.

B. Economic-Incentive And Other Programs

The Eighth Circuit's rule would also enable the exclusion of religious organizations from innumerable public aid programs outside the school context.

1. As one of many possible examples, the holding below invites States to bar religious entities from tax-incentive programs offered on a neutral basis to companies that invest in projects that spur economic growth. For instance, Kentucky offers companies a sales-tax rebate to entice them to build tourist attractions within its borders that will create jobs for local residents and boost the State's economy. *See* Ky. Rev. Stat. Ann. § 148.850 *et seq*. Approval for qualifying projects is based on statutory criteria unrelated to the religious affiliation of the applicant or the proposal. *Id*. § 148.853(2)(A) (approval based on the project's estimated costs, number of days the attraction will be open per year, and projected number of out-of-state visitors). Other States offer similar programs.[26] And as of 2014, more than thirty States offered tax rebates and other economic incentives worth millions of dollars to encourage film companies to produce movies and television shows within their borders.[27]

But the rule propounded by the Eighth Circuit clears a path for state governments to exclude reli-

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[26] Arkansas Tourism Development Act, Ark. Code Ann. § 15-11-501 *et seq*.; Georgia Tourism Development Act, Ga. Code Ann. § 48-8-270 *et seq*.

[27] *State Film Production Incentives & Programs*, Nat'l Conf. of State Legislatures (Mar. 28, 2014), http://tinyurl.com/h8wp5dh.

giously affiliated entities from these programs, even if they satisfy the same neutral criteria as any secular applicant. This is illustrated by Kentucky's recent attempt to nullify a tax rebate for a nearly $100 million tourism project proposed by a religious organization. Although the project met the statutory criteria for receiving tax incentives that applied to every other company, the State defended its withdrawal of the incentive based on the same misreading of *Locke* that the Eighth Circuit adopted below. *Ark Encounter, LLC* v. *Parkinson*, No. 3:15-CV-00013, 2016 WL 310429, at *2-5 (E.D. Ky. Jan. 25, 2016); *see* Mem. in Supp. of Mot. to Dismiss 18-21, *Ark Encounter LLC* v. *Parkinson*, No. 3:15-CV-00013 (E.D. Ky. Mar. 27, 2015) (Dkt. 18-1) (citing the district court's opinion below, Pet. App. 34a).[28]

2. Religious organizations also operate rehabilitation centers and halfway houses and are eligible to receive generally available state funds on the same terms as their secular counterparts. Florida, for example, requires its Department of Corrections to "make every effort to consider qualified faith-based service groups *on an equal basis* with other private organizations" when selecting "contract providers to administer substance abuse treatment programs" to Florida inmates. Fla. Stat. § 944.473(2)(c) (emphasis added); *see also Ctr. for Inquiry, Inc.* v. *Jones*, No.

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[28] The district court in *Ark Encounter* recently granted a preliminary injunction for the applicant based on the Free Exercise Clause and other grounds. *See* 2016 WL 310429, at *19 (reasoning that "[d]espite having a facially neutral law with secular criteria, the Commonwealth is engaging in disparate treatment by allocating benefits based on distinctions among religious and non-religious groups").

2007-CA-1358 (Fla. Cir. Ct. Jan. 20, 2016), http://tinyurl.com/zltdejb (finding that a Florida program allowing faith-based entities to bid on substance-abuse treatment contracts did not violate Florida's no-aid provision).

But state courts in Florida have relied on the Florida Constitution to deny public funds to faith-based rehabilitation groups for their substance-abuse rehabilitation centers. In a preliminary ruling addressing this issue, one Florida court read *Locke* in the same way as the decision below, asserting that "a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause." *Council for Secular Humanism, Inc.* v. *McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010), *rev. denied*, 41 So. 3d 215 (Fla. 2010).

3. Finally, the Eighth Circuit's logic has no principled stopping point, and would thus permit public officials to withdraw basic services, such as police and fire protection or sewage disposal services, from religious entities simply because they are religious—even though such a drastic result "obviously [is] not the purpose of the First Amendment." *Everson*, 330 U.S. at 18. Respondents attempt to assure this Court that these exclusions are unlikely to occur, Br. in Opp. 9-10, but they admit that no limiting principle in the ruling below would prohibit "[p]olice and fire protection policies" from "differentiat[ing] between or express[ing] a preference for one possible

recipient over another," *id.* at 9.[29] This admission is devastating, and confirms that the Eighth Circuit's rationale not only departs from this Court's precedents, but, "[t]aken to its logical extreme," would permit "a relentless extirpation of all contact between government and religion," leaving religious members of society without access to basic government services. *See Cty. of Allegheny*, 492 U.S. at 657 (opinion of Kennedy, J.).

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[29] Respondents attempt to distinguish sewage disposal and other services from fire and police protection on the ground that sewage is a fee-based service. Even assuming that were true in all jurisdictions, it misses the point: The government could still offer exemptions or discounts to secular nonprofit institutions while withholding them from religious ones. Chicago, for example, exempts nonprofit organizations from paying for water services. *See Not-for-Profit Exemption*, City of Chicago, http://tinyurl.com/h9au9u4 (last visited Apr. 20, 2016). Churches and religious groups are included under this exemption, *see* Mitch Smith & Manya A. Brachear, *Chicago Offers Compromise on Water Bill Exemptions for Nonprofits*, Chi. Trib. (Apr. 29, 2013), http://tinyurl.com/hzjhu9v, but the Eighth Circuit's rule would enable cities to deny such exemptions to religious groups while providing them to all secular groups.

CONCLUSION

The Court should reverse the judgment below and reject the Eighth Circuit's improper expansion of *Locke* v. *Davey*, 540 U.S. 712 (2004), from a narrow decision tied to the historical aversion to funding religious training for clergy, into a sweeping license to deny generally available public benefits to religious groups solely on the basis of their religious affiliation.

Respectfully submitted.

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