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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE BRONX HOUSEHOLD OF FAITH AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

The Bronx Household of Faith is an evangelical Christian church formed in 1971 and located in University Heights, one of the lowest-income neighborhoods in the Bronx, New York City's lowest-income borough.[1]

[1] Pursuant to Rule 37.6, Bronx Household affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than Bronx Household, its members, or its counsel made such a monetary contribution. The

The church conducts worship services each Sunday and performs significant community outreach throughout the week. Over the past forty years, Bronx Household has assisted University Heights residents with basic needs such as food, clothing, and rent, and has provided counseling on how to escape poverty and leave behind crime and drug use.

When the church began to outgrow the house where it was meeting, Bronx Household sought permission from the New York City Board of Education to use the auditorium in a nearby public school to host its Sunday services. The Board of Education has long allowed community groups to meet in city schools during non-school hours for a wide variety of purposes, yet the Board denied Bronx Household's request. It did so for only one reason: because the meetings would involve religious worship.

Bronx Household and its pastors sued the New York City Board of Education, asserting violations of the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. The dispute, which spanned two cases and nearly twenty years, resulted in five decisions from the Second Circuit. The court of appeals rejected the church's free speech and establishment claims.

In 2014, a split panel of the Second Circuit issued its final decision in the case and held that the Board of Education did not violate the Free Exercise Clause by denying Bronx Household's application. *Bronx Household of Faith* v. *Board of Education*, 750 F.3d 184, 189-190

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parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

(2014), cert. denied, 135 S. Ct. 1730 (2015). The majority reached that decision in part by reading a precedent at the center of the instant case, *Locke* v. *Davey*, 540 U.S. 712 (2004), broadly to provide that strict scrutiny does not apply to laws that facially discriminate against religion but are motivated by an asserted desire to comply with the Establishment Clause. 750 F.3d at 193-195.

Bronx Household respectfully submits that *Locke* does not stand for that proposition. Courts of appeals—including the Eighth Circuit in this case and the Second Circuit in *Bronx Household*—have misread and misused *Locke* to sanction facial discrimination against religion far beyond the careful boundaries the Court drew in that case. *Locke* does not license all religious discrimination that can be explained away as an attempt to pursue anti-establishment goals. This Court now has an opportunity to clarify *Locke*'s scope and return the decision to its limited position in the free exercise case law. Bronx Household files this brief to encourage the Court to seize that opportunity and correct the lower courts' expansive interpretation of *Locke*. Because Bronx Household continues to feel the effects of a misreading of *Locke*, the church has a significant interest in this case.

SUMMARY OF ARGUMENT

Bronx Household agrees with petitioner Trinity Lutheran Church that strict scrutiny should apply to the State of Missouri's decision to deny Trinity Lutheran's application for a Missouri Scrap Tire Grant. Under the Free Exercise Clause, strict scrutiny applies whenever a law is not neutral toward religion and burdens religious practice. Missouri has not acted neutrally toward religion: state officials denied Trinity Lutheran's application solely because of the church's religious status. And by conditioning access to the grant program on an appli-

cant's religious affiliation, the State has burdened religious freedom. Strict scrutiny should therefore apply.

This Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), does not change the result. *Locke* concerned a state-funded college scholarship program that provided funds only to pay for secular degrees. A student challenged the exclusion of religious degrees under the Free Exercise Clause, and this Court upheld the admittedly discriminatory law without applying strict scrutiny. The Court explained that the burden on religious freedom was mild; the benefit the State offered included only secular studies, and that benefit was available to religious and irreligious students alike. The State could exclude religious studies from the benefit, the Court reasoned, because of our Nation's long history of concern about using public funds to train religious leaders. The Court concluded that, if any space exists between the two Religion Clauses, it must be in that case, where the State's antiestablishment interest was "historic and substantial" and the burden imposed was "minor."

As is evident from its reasoning, *Locke* stands only for a limited proposition: strict scrutiny does not apply when the State (a) minimally burdens religion, such as by forbidding private actors from directing public funding toward religious ends, and (b) has a historical and substantial antiestablishment interest in doing so. Without grounding the State's antiestablishment interest in history, *Locke*'s burden analysis would be question begging. The Free Exercise Clause must require more justification for disparate treatment than an assertion that the religious and the secular are different. But history alone cannot lower the level of scrutiny, as this Court has applied strict scrutiny even to a law with significant historical support that discriminated on the basis of religion. That is what makes *Locke*'s focus on the nature of

the burden important. When a State allows private individuals to direct public funds toward a private end, a requirement that the recipient use the funds for secular, rather than religious, purposes burdens religion minimally. Only in that context, where a historical antiestablishment interest outweighs the minimal burden, is a lower level of scrutiny warranted.

Lower courts, however, have incorrectly interpreted *Locke* to do away with strict scrutiny analysis for facially discriminatory laws even absent a finding that the asserted antiestablishment interest is historically significant and the burden is minimal. By failing to enforce the limits this Court placed on the "play in the joints" between the Religion Clauses, lower courts have applied near-complete deference to asserted state antiestablishment interests and have approved burdens far greater than the denial of funding for religious purposes.

This case is a prime example. Here, the State of Missouri has neither history nor context on its side. No historical state antiestablishment interest supports the denial of the Scrap Tire Grant. Nor has the State minimally burdened religion; rather, it has conditioned access to a public program based on the applicants' religion. In these circumstances, strict scrutiny applies, and the State cannot clear that high bar.

ARGUMENT

A. *Locke* Created A Narrow Exception To The General Rule That Strict Scrutiny Applies To Laws That Facially Discriminate Against Religion

1. The First Amendment's Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two provisions together "mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992). "A proper respect for both * * * compels the State to pursue a course of 'neutrality' toward religion." *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687, 696 (1994) (internal quotation marks omitted).

On one side of the neutrality balance, the Free Exercise Clause at a minimum provides protection from any law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); see *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 877 (1990). On the other side of the neutrality balance, the Establishment Clause prevents the government from "favoring * * * one religion over others []or religious adherents collectively over nonadherents," *Grumet*, 512 U.S. at 696, while at the same time permitting governmental affiliations with religion that "w[ere] accepted by the Framers and ha[ve] withstood the critical scrutiny of time and political change," *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014).

Laws that deny access to public programs or benefits because of a person's religion primarily implicate the

Free Exercise Clause. And such laws almost always transgress its protections. See, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 628-629 (1978); *Torasco* v. *Watkins*, 367 U.S. 488, 496 (1961); cf. *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 837, 845-846 (1995). The applicable standard of review explains why: when a law (a) burdens religious practice or adherence and (b) is not neutral toward religion, the Free Exercise Clause mandates that it "undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. Laws that exclude a person "from receiving [public] benefits" "because of their faith, or lack of it," burden the exercise of religion. *Everson* v. *Board of Education of Ewing*, 330 U.S. 1, 16 (1947). "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed" for exercising one's religion in the first place. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). In addition, when the text of a law expressly conditions access to a government benefit on religious belief (or absence thereof), the law lacks neutrality, "the minimum requirement of [which] is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533.

Accordingly, to justify the denial of access to public programs or benefits based on religion, the government must demonstrate the denial is narrowly tailored to advance "interests of the highest order." *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted); see *Smith*, 494 U.S. at 886 n.3. That is a high bar to clear. Generally, therefore, "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 Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981).

2. In a smaller set of cases, laws denying access to public benefits may implicate both the Free Exercise Clause and the Establishment Clause. Those cases involve discrimination based on religion done in an effort to further antiestablishment interests. Compliance with the Establishment Clause, for example, would qualify as a compelling interest sufficient to justify narrowly tailored discrimination based on religion. See *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981).

The Establishment Clause, however, does not *require* States to deny access to a generally available public benefit because the recipient is a religious individual or organization. See *Bowen* v. *Kendrick*, 487 U.S. 589, 608 (1988). But some state laws do impose such a restriction. See, *e.g.*, Mo. Const. art. I, § 7; Wash. Const. art. I, § 11. Regarding those laws, this Court has recognized that a State may have a valid antiestablishment interest—*i.e.*, a legitimate interest in maintaining a separation between church and state—short of avoiding actions that would violate the Establishment Clause. There exists "play in the joints" between the Religion Clauses, to put it another way, such that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718-719; see *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). In that space between the two clauses, States may require extra-constitutional church-state separation without improperly burdening the free exercise of religion.

3. In *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court for the first time gave content to the space between the Religion Clauses.

Locke involved a Washington law that granted a state-funded college scholarship to any high school senior who satisfied certain academic criteria. 540 U.S. at

715-717. Davey received the scholarship and intended to use it to pursue a degree in pastoral ministries, a course of study designed to train Christian pastors. See *id.* at 717. Washington law, however, forbade scholarship recipients from using the funds to pursue a "degree in theology" because the state constitution barred the application of public money to religious instruction. *Id.* at 716. Under the law, Davey could study pastoral ministries without losing the scholarship, but the scholarship funds would have to go toward a secular course of study at a different college than the one where he studied pastoral ministries. *Id.* at 721 n.4. Davey sued, alleging that Washington's restriction on the use of the scholarship funds violated the Free Exercise Clause. *Id.* at 718.

This Court disagreed. Davey argued that, applying strict scrutiny, the Washington law was "presumptively unconstitutional" because it was not facially neutral toward religion. *Locke*, 540 U.S. at 720 (citing *Lukumi*, *supra*). The Court did not deny that the law lacked neutrality, but it refused to apply strict scrutiny, based on its assessment of the burden prong of the free exercise analysis. The burden placed on religious exercise by the exclusion of pastoral studies from the scholarship, the Court explained, was "of a far milder kind" than the burdens seen in other free exercise cases. *Ibid.* The State had not criminally or civilly penalized any religious practice. *Ibid.* (referencing *Lukumi*, *supra*). It had not excluded theology students from participation in state politics. *Ibid.* (citing *McDaniel*, *supra*). Nor had it "require[d] students to choose between their religious beliefs and receiving a government benefit," because students pursuing a theology degree could use the scholarship for another course of study at another school. *Id.* at 720-721 & n.4 (citing *McDaniel*, *supra*; *Hobbie* v. *Un-*

employment Appeals Commission of Florida, 480 U.S. 136 (1987); *Thomas*, *supra*; and *Sherbert*, *supra*).

Instead, the Court explained, the State had "merely chosen not to fund a distinct category of instruction," *i.e.*, "training for religious professions." 540 U.S. at 721. Looking to history, the Court found that the State's distinction between funding for religious training and funding for secular education implicated a legitimate antiestablishment interest. See *id.* at 721-723. In particular, the Court explained, our Nation since the Founding had expressed a strong aversion to funding the training of ministers from the public fisc. *Id.* at 722-723. Many state constitutions prohibited the use of public funds to support the ministry, *id.* at 723, and, in others, "popular uprisings" occurred against the practice, *id.* at 722.

The Court thus concluded that the State possessed a "historic and substantial state interest" in not funding religious professions. *Locke*, 540 U.S. at 725. That interest, combined with the "relatively minor burden" that "the exclusion of such funding" placed on scholarship recipients, convinced the Court that, "[i]f any room exists between the two Religion Clauses"—such that the State was permitted to treat the religious and nonreligious differently even though the Establishment Clause did not so require—"it must be here." *Ibid.*

B. The Historical Antiestablishment Interest And Minimal Burden Were Both Necessary To *Locke*'s Holding

Locke is best understood to stand only for a relatively narrow proposition: a state law that minimally burdens religion, such as one forbidding private actors from directing public funding toward religious ends, need not face strict scrutiny if the law is rooted in a "historical and substantial" antiestablishment interest. Both the history

supporting the State's interest in not funding the training of clergy and the minimal burden at issue were central to *Locke*'s holding.

1. Absent the history substantiating the State's antiestablishment interest, the Court in *Locke* would have had little ground on which to affirm the State's facially discriminatory law. It is not enough to say that the State may treat the religious and the secular differently because it thinks the two are different. That begs the ultimate question whether the State can permissibly distinguish between the religious and nonreligious in the relevant context. Answering *that* question requires an explanation of why, in the particular context, the religious differs sufficiently from the secular that the Free Exercise Clause tolerates disparate treatment.

In *Locke*, history provided the answer. Because our Nation had a long tradition of treating funding for religious vocations as different in kind from funding for secular education, the Court was persuaded that the State had a valid antiestablishment interest in making the distinction. In other words, history demonstrated that the State could differentiate without violating the Free Exercise Clause. Accord Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, 118 Harv. L. Rev. 155, 215 & n.391 (2004); cf. *Galloway*, 134 S. Ct. at 1819.

Without that history, *Locke*'s analysis would devolve into deference to a State's mere say-so: the State believes it has a legitimate antiestablishment interest at stake, so strict scrutiny does not apply. But that cannot be the constitutional line. At bottom, an "antiestablishment interest" is just a philosophical desire to treat something religious in nature differently from something secular in nature to further a specific goal, namely, greater separation between church and state. As Justice

Scalia noted in his dissent in *Locke*, this philosophical desire, standing alone, "has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context." 540 U.S. at 730. One might think, for example, that a State should avoid contracting with a Muslim small business owner because the owner might donate his profits to a local mosque. Or one may think a State should withhold Medicare benefits from an evangelical Christian because, if healthy, the individual might proselytize others. Regardless of the interest, state actions based on those beliefs would result in abject discrimination. A Muslim would lose a contract bid because she follows Islam, and a Christian would be denied Medicare benefits because she espouses Christianity. Any State taking such an approach to religion would transgress the Free Exercise Clause and the Equal Protection Clause to boot. See *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Torasco*, 367 U.S. at 496. That explains why the *Locke* majority expressly disavowed that "[a] State [can] justify any interest that its 'philosophical preference' commands." 540 U.S. at 722 n.5.

This Court has already rejected extreme deference to a State's philosophy on religion in any event. That a State views the religious as different in kind than the secular does not automatically mean courts must treat them as different in kind for the purposes of constitutional analysis. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 111-112 (2001); *Rosenberger*, 515 U.S. at 830-831; *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 390-397 (1993). The holding in *Locke*, therefore, necessarily rests in part on the majority's historical analysis of the claimed anti-establishment interest. Without that interest, the rule in

Locke would have no limiting principle and thus would negate the Free Exercise Clause's protections.

2. The minimal nature of the burden at issue in *Locke* was also central to the Court's holding. The State of Washington had allowed private actors (students) to direct public funds (scholarship money) toward a private end (a student's desired course of college education). Any recipient—religious or not—could use the public funds, but not toward a religious end (a theology degree). If a recipient decided to pursue a religious end, he could still use the funds, albeit only toward a separate, secular end (a secular course of study at another institution). The State "merely chose[] not to fund" religious ends over secular ends. 540 U.S. at 721. It did not deny the benefit based on the recipient's religious choice, as even pastoral-ministry majors could use the scholarship elsewhere. Were the burden not so "mild[]," the Court suggested the result might have been different. See *id.* at 720-721. *Locke* thus extends no further than cases in which the government minimally burdens religion, such as by restricting private individuals' ability to direct the use of public funds toward privately desired religious ends over privately desired secular ends. *Id.* at 720.

The Court's focus on the minimal burden was necessary to the holding for the additional reason that the Court's historical analysis, by itself, was insufficient to justify the outcome. This Court's decision in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), illustrates the point. *McDaniel* involved a Tennessee statute barring ordained ministers from serving as delegates to the State's constitutional convention. *Id.* at 620 (plurality opinion). The practice of excluding ministers from public office had a long historical pedigree. Such exclusions began in sixteenth-century England, *id.* at 622 (citing *In re MacManaway*, [1951] A.C. 161, 164, 170-171), and seven of the

original States had continued the practice after the Revolution, *ibid.* Some States even continued to bar ministers from public office after the passage of the First Amendment. *Id.* at 623. Be that as it may, the Court in *McDaniel* applied strict scrutiny and struck down the last remaining such state law without showing any deference to the State's asserted antiestablishment interest. See *id.* at 628-629; accord *id.* at 632-634 (Brennan, J., concurring); *id.* at 642-643 (Stewart, J., concurring). A historical antiestablishment interest, therefore, cannot alone justify a significant burden on religious practice. The fact that the burden in *Locke* was the "far milder" failure to fund a specific private choice accordingly played an important role in the case's holding. 540 U.S. at 720.

3. The Court in *Locke* also noted that nothing in the history, text, or operation of the relevant laws suggested animus toward religion. 540 U.S. at 725. But the Court nowhere suggested that a finding of animus was necessary to invoke strict scrutiny; indeed, such a ruling would have sub silentio overturned precedent to the contrary.

Under this Court's case law, a law "born of animosity toward the class of persons affected" is per se unconstitutional. *Romer* v. *Evans*, 517 U.S. 620, 634 (1996); see also, *e.g.*, *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985); *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). Had the State of Washington excluded pastoral-ministry majors from the scholarship program out of animus toward religion, the restriction presumably would be invalid despite the mild burden at issue. See *Romer*, 517 U.S. at 634. The *Locke* Court addressed the hostility issue to dispense of this alternative ground for invalidating the scholarship exclusion.

The *Locke* decision, however, did not change settled law that a court need not find animus before strict scrutiny will apply to a facially discriminatory law. Cf. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144-1145 (10th Cir. 2006) (McConnell, J.). Consider once again *McDaniel*. The record in that case contained no evidence that the law barring ministers from political office grew out of hostility toward religion. The British Parliament excluded ministers to maintain its independence from the Crown. 435 U.S. at 622. And in the early States, the exclusion served "to assure the success of a new political experiment, the separation of church and state." *Ibid.* The Court in *McDaniel* nevertheless applied strict scrutiny and held that the practice violated the Free Exercise Clause. The lack of animus mattered not. So too with *Locke*: A finding of animus might have triggered strict scrutiny, but such a finding was not necessary to invoke that standard of review.

In sum, *Locke*'s focus on the history of the interest and the minimal burden at issue limits the opinion's reach. *Locke* provides only that a state law minimally burdening religion need not survive strict scrutiny if the law is rooted in a "historical and substantial" antiestablishment interest.

C. Lower Courts, Including The Eighth Circuit Here, Have Misinterpreted *Locke*

As the Eighth Circuit noted in this case, the breadth of the *Locke* decision has been a topic of "active academic and judicial debate," and a consequent source of confusion for lower courts. Pet. App. 10a; see *id.* at 30a (Gruender, J., concurring in part and dissenting in part). At least one court of appeals has read *Locke* narrowly as intended. See *Colorado Christian University* v. *Weaver*, 534 F.3d 1245, 1254-1257 (10th Cir. 2008) (McConnell,

J.). Other courts, however, have incorrectly read *Locke* to sweep much more broadly than its holding allows, dispensing with strict scrutiny analysis for facially discriminatory laws even absent a finding that the asserted antiestablishment interest is historically significant and the burden is minimal. By failing to enforce the bounds this Court placed on the "play in the joints" it recognized in *Locke*, lower courts have applied near-complete deference to asserted state antiestablishment interests and have approved burdens far greater than the denial of funding for religious purposes. The Court should take this opportunity to correct those flawed and overbroad interpretations of *Locke*.

1. The court of appeals in the instant case erroneously declined to apply strict scrutiny because it failed to recognize the limits of *Locke*'s analysis.

Strict scrutiny governs whether, as applied to Trinity Lutheran, the Missouri Constitution's prohibition on public funds being used in aid of a church violates the Free Exercise Clause. The relevant provision discriminates against religion on its face. See Mo. Const. art. I, § 7. And, as applied here, the provision forces Trinity Lutheran "to choose between [its] religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-721. The State put the church to an express choice: disaffiliate the church or its pre-school from religion or forgo the Scrap Tire Grant to which it otherwise was entitled. That is exactly the type of ultimatum that triggers strict scrutiny under the Free Exercise Clause. See *Thomas*, 450 U.S. at 716; *McDaniel*, 435 U.S. at 627-629; *Torasco*, 367 U.S. at 496.

Locke provides no basis to lower the level of scrutiny here. First, the burden on religion here exceeds the burden on religion in *Locke*. In *Locke*, scholarship recipients did not lose their scholarship based on their choice

of a religious degree; they could still use the scholarship toward another course of study at a different school. *Locke*, 540 U.S. at 721 n.4. Here, however, Missouri has conditioned access to the Scrap Tire Grant on the applicant's religious status: religious applicants do not qualify. That is a paradigmatic example of a burden on religion that triggers strict scrutiny. See, *e.g.*, *Thomas*, 450 U.S. at 716.

Second, the State has no legitimate antiestablishment interest in denying Trinity Lutheran access to the Scrap Tire Grant. In fact, the State has never attempted to explain how its asserted interest could be considered "historic and substantial." See Resp. Ct. App. Br. 25-38.

The court of appeals erred by overlooking both of these points. The court did not analyze the nature of the burden on Trinity Lutheran. And it accepted the asserted interest in preventing "direct expenditure of public funds to aid a church," Pet. App. 12a n.3, without considering whether that claimed interest was "historic and substantial." See *id.* at 10a-12a & n.3. The court of appeals essentially treated the State's asserted antiestablishment interest, and *Locke*, as a get-out-of-strict-scrutiny-free card.

2. Amicus Bronx Household has seen this type of overbroad reading of *Locke* before. It is the analysis that the Second Circuit undertook when it rejected Bronx Household's free exercise claim against the New York City Board of Education. See *Bronx Household of Faith* v. *Board of Education*, 750 F.3d 184, 193-195 (2014), cert. denied, 135 S. Ct. 1730 (2015). As explained above, pp. 2-3, *supra*, the Board opens up space in public schools across New York City for use by community groups outside of school hours. Bronx Household applied under this program to use a nearby school's auditorium for its Sunday worship services. The Board denied

that request only because the meeting involved religious worship.

The Second Circuit upheld the regulation without applying strict scrutiny. *Bronx Household*, 750 F.3d at 199-200. Ignoring *Locke*'s careful inquiry into the validity of the asserted state interest, the Second Circuit held that "strict scrutiny cannot reasonably be understood to apply to rules that focus on religious practices in the interest of observing the concerns of the Establishment Clause." *Id.* at 195. In the court's view, the Board was free to discriminate on the basis of religion "if it makes a reasonable, good faith judgment that it runs a substantial risk of incurring a violation of the Establishment Clause." *Id.* at 198. The Board claimed an antiestablishment interest to justify its regulation, so the court of appeals refused to apply strict scrutiny. *Id.* at 191-195.

The Board may have claimed *an* antiestablishment interest, but it did not claim a *legitimate* one. The Board never explained how its interest in excluding church services from empty public school buildings could be considered "historic and substantial." That is unsurprising. Churches have met in public buildings for worship since the Founding. See James H. Hutson, *Religion and the Founding of the American Republic* 84-92 (1998). "Church services in the House [of Representatives] began as soon as the government moved to Washington, in the fall of 1800," *id.* at 84, and were held consistently there until after the Civil War, see Library of Congress, *Religion and the Founding of the American Republic* <http://tinyurl.com/religionandfounding>. Presidents Thomas Jefferson, James Madison, and John Quincy Adams attended those services during their terms in office. See Hutson, *supra*, at 85, 87, 96.

Nor was this type of practice abandoned in the modern era. Out of the fifty largest school districts in the

United States at the time of the Bronx Household litigation, only New York City banned religious worship services from its facilities. See *Bronx Household of Faith*, 750 F.3d at 208-209 (Walker, J., dissenting) (citing Brief of Amicus Curiae New York City Council Black, Latino, and Asian Caucus at 9-12). Without addressing this evidence, the Second Circuit deferred to the Board's asserted antiestablishment interest.

The Second and Eighth Circuits are not alone. Other courts, citing *Locke*, also have failed to scrutinize asserted state antiestablishment interests when analyzing free exercise claims. See, *e.g.*, *Eulitt ex rel. Eulitt* v. *Maine Department of Education*, 386 F.3d 344, 355 (1st Cir. 2004); *University of the Cumberlands* v. *Pennybacker*, 308 S.W.3d 668, 679-680 (Ky. 2010), *Bush* v. *Holmes*, 886 So. 2d 340, 364-365 (Fla. Ct. App. 2004).

The Court now has an opportunity to correct these flawed readings of *Locke* and provide the lower courts with much-needed guidance. The Court should clarify that courts may not simply defer to a State's assertion of an antiestablishment interest when determining whether strict scrutiny should apply. The State must provide a history of establishment concerns aligned with the specific exclusion of religion the State seeks to justify. A broader reading of *Locke* would inappropriately allow States to justify any law based on their own philosophical conception of church-state relations, regardless of how extreme. That rule would permit discrimination that the Federal Constitution without question bars today.

The court of appeals below failed to recognize the flaws in its reading of *Locke* and, as a result, applied the wrong level of scrutiny. 540 U.S. at 722-723. Had the court applied strict scrutiny as it should have, Trinity Lutheran would have prevailed. The State of Missouri has not proven, and cannot prove, that the rejection of

Trinity Lutheran's Scrap Tire Grant application is narrowly tailored to advance a governmental interest of the highest order. Under a proper reading of *Locke*, therefore, Missouri has violated the Free Exercise Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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