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 JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Eighth Circuit should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Government aid to religious organizations has generated heated debate over the course of American history. This nation is unique in its robust protection for religious liberty, guarding religion from both

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

government compulsion and interference. Since absolute separation is neither wise nor feasible, courts have tried to flesh out the appropriate church-state relationship over decades of litigation. A fairly strict "no-aid" position prevailed in this Court after the tripart *Lemon* test was inaugurated. *Lemon v. Kurzman*, 403 U.S. 602 (1974). That approach was eventually replaced by a growing trend toward nondiscrimination, resurrecting and strengthening the weak nondiscrimination principle evident in earlier cases such as *Everson v. Board of Education*, 330 U.S. 1 (1947). Since its holding in *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), this Court has increasingly advanced nondiscrimination over the no-aid standard that prevailed in previous years. The same trend is evident in other contexts, including equal access to school facilities and equal funding for religious viewpoints.

The nondiscrimination trend developed mostly in the context of Establishment Clause challenges filed by taxpayers. A strong consensus emerged that the Constitution permitted state funds to reach religious organizations under limited conditions—most notably, as the result of private choices. But this line of authority failed to articulate exactly if or when the state *must* include religious organizations among other eligible recipients. *Locke v. Davey*, 540 U.S. 712 (2004) appears to say "no," but its narrow parameters discourage extending its conclusion to other circumstances. Missouri's Scrap Tire Program disburses funds based on neutral criteria and serves broad community purposes unrelated to religion—child safety and environmental care. To further complicate the analysis, many state constitutions, including

Missouri, rigidly deny any and all financial aid to religion. These provisions are typically rooted in nineteenth century anti-Catholic bias, a position antithetical to the federal Constitution in general and nondiscrimination principles in particular. In following its strict state constitution, Missouri discriminates against religion, denying Trinity Lutheran's application for the tire program solely because of its religious character. Missouri uses its state constitution as a sword to discriminate against religion rather than a shield to protect it. Yet the federal Religion Clauses prohibit both favoritism *and* animosity toward religion.

Nondiscrimination promotes the "benevolent neutrality" that should characterize all levels of American government. Missouri's rigid exclusion of churches is neither benevolent nor neutral. This Court should continue its direction toward nondiscrimination, apply strict scrutiny to Missouri's infringement of religious liberty, and require Missouri to grant equal treatment to both secular and religious organizations that apply and qualify for the Scrap Tire Program.

ARGUMENT

I. FEDERAL ESTABLISHMENT CLAUSE JURISPRUDENCE HAS SHIFTED FROM A RIGID "NO AID" POSITION TO PRINCIPLES OF NONDISCRIMINATION.

Over the past few decades, Establishment Clause jurisprudence has gradually progressed from a strict "no aid" stance to a point where "federal constitutional restrictions on funding religious institutions have collapsed." Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious*

Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 156 (2004). Instead of "a substantive liberty, triggered by a burden on religious practice," there emerges "a form of nondiscrimination right, triggered by a burden that is not neutral or not generally applicable." *Id*. This trend has key implications for resolving Trinity Lutheran's case.

Financial aid to religious entities has often been viewed with suspicion. In spite of affirmative First Amendment protection for religion, courts have hesitated to approve anything but remote, incidental, indirect, inconsequential benefits. *Lynch v. Donnelly,* 465 U.S. 668, 683 (1984); *Widmar v. Vincent,* 454 U.S. 263, 273-274 (1981); *Comm. for Public Educ. v. Nyquist,* 413 U.S. 756, 771 (1973). There seems to be a pervasive paranoia that somehow, somewhere, someone might inadvertently confer a slight benefit on religion. But under this Court's current approach, that anxiety is misplaced.

Providing safe playgrounds for children is an eminently neutral benefit far removed from "[t]he coercion that was a hallmark of historical establishments... coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry,* 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). That historical threat is what drove the outcome in *Locke v. Davey*—quite unlike the Scrap Tire Program. Missouri has categorically excluded churches from participation, relying on constitutionally questionable provisions in its state constitution.

As this Court's jurisprudence shifted from a rigid denial of government aid to a more flexible nondiscrimination approach, cases were typically Establishment Clause challenges about what the state was *permitted* to do rather than what it was *required* to do. But the result has been less than satisfactory:

> The Court struggled for decades to find a middle ground that would permit some funding for religious institutions but not too much. *Its new middle ground is to permit most funding but to require hardly any*. This position maximizes government discretion and judicial deference, but it threatens religious liberty. The Court has quite possibly come to the worst solution for religious liberty, maximizing government power over religious institutions.

Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 161 (emphasis added). This case is an opportunity to extend nondiscrimination principles so that religious entities are granted equal access to neutral, generally available benefits.

In light of this Court's developing jurisprudence, states have crafted programs to comply with existing Establishment Clause jurisprudence. The scholarship program at issue in *Colorado Christian University* reflects such efforts:

> The legislative history suggests that the legislature designed these statutes to make funds available as broadly as was thought permissible under the Supreme Court's then-existing Establishment Clause doctrine.

Colorado Christian University v. Weaver, 534 F.3d 1245, 1251 (10th Cir. 2008). In 1977, when Colorado adopted the relevant provisions, this Court had "struck down in their entirety state statutes that contained insufficient safeguards against the direct funding of pervasively sectarian institutions." *Id*. at 1245; *see, e.g*., *Roemer v. Bd. of Pub. Works,* 426 U.S. 736, 755 (1976) ("no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones," citing *Hunt v. McNair,* 413 U.S. 734 (1973)). This Court has subsequently modified its approach and discarded the absolute prohibition of funding for "pervasively sectarian" institutions. *Colorado Christian University*, 534 F.3d at 1251-52, 1258. Indeed, "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id*. at 1258, quoting *Mitchell v. Helms,* 530 U.S. 793, 828 (2000). Here, Missouri's approach collides with this Court's trend toward nondiscrimination principles in public funding cases.

Early history (pre-*Lemon*). Decades ago, this Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952). At that time, this Court began to consider state programs funding religious and secular education. Both "no aid" and nondiscrimination principles were evident in *Everson*, when this Court upheld state-funded bus rides that included a Catholic high school. *Everson v. Board of*

Education, 330 U.S. 1. The Court concluded that New Jersey could not exclude individuals of a particular faith from receiving the benefits of public welfare legislation (*id*. at 16), essentially applying a "weak form of the nondiscrimination principle" that "permitted equal funding, but did not require it." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 164. At this point, "[f]ew judges took seriously the possibility that equal funding might be constitutionally required." *Id*. But the decision was far from unanimous. Four dissenting justices advocated the rigid no aid position that later prevailed for a long stretch, insisting the Establishment Clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." *Everson*, 330 U.S. at 33 (JJ. Rutledge, Frankfurter, Jackson, Burton, dissenting).

Everson involved bus transportation, a religiously neutral benefit that hardly raised establishment concerns. A few years later, this Court approved a state program loaning textbooks to children in both public and parochial schools. Building on *Everson*, the Court found this program did not advance religion, but furthered educational opportunities for the young. *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968). But again, a strong dissent objected:

> [T]ax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny.

Id. at 253-254 (Black, J., dissenting).

Following these early decisions, this Court "has struggled to reconcile two competing intuitions"—the rigid no aid position that prevailed from *Lemon* through the mid-1980's, and the nondiscrimination approach that later won the day. Douglas Laycock, SYMPOSIUM: Educational Choice: Emerging Legal and Policy Issues: ARTICLE: *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 276 (2008).

"No Aid" Era (1971-1985). *Lemon v. Kurzman* ushered in a series of Establishment Clause challenges filed by taxpayers. *Hunt v. McNair* survived *Lemon* scrutiny because the Baptist college to be financed with state revenue bonds was not pervasively sectarian. But this era was largely dominated by a strict "no aid" policy that struck down many forms of state aid for private religious schools and their students:

- *Lemon v. Kurzman*, 403 U.S. 602
  (subsidy for private school teacher salaries)

- *Hunt v. McNair*, 413 U.S. 734
  (state revenue bonds issued for Baptist college—constitutional under *Lemon* analysis because the college was not "pervasively sectarian")

- *Meek v. Pittenger*, 421 U.S. 349 (1975)
  (instructional materials and equipment, remedial instruction, counseling, speech and hearing services to private schools; overruled in part by *Mitchell* and in part, implicitly, by *Agostini v. Felton*, 521 U.S. 203 (1997))

- *Wolman v. Walter*, 433 U.S. 229 (1977) (instructional materials, equipment, and services; overruled in part by *Mitchell*)

- *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (enrichment courses for private school students; overruled by *Agostini*)

- *Aguilar v. Felton*, 473 U.S. 402 (1985) (aid for salaries of public school employees providing remedial instruction and guidance services to parochial school students on parochial school premises—overruled by *Agostini*)

"The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches." Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 BYU L. Rev. at 276. At that time, the policy protected citizens from compelled support for religion and protected churches from financial dependence on the government. *Id*. The policy continued to dominate for many reasons, including lingering anti-Catholic sentiment that declined and ultimately faded in the 1950's and 1960's, and concerns about "white flight" to private schools in the face of desegregation mandates. *Id*. at 285-288. Eventually, a broad Protestant-Catholic coalition reframed the issue in terms of private choice and neutrality (*id*. at 292), but meanwhile, "the no-aid principle predominated from then [*Lemon*] until its high-water mark in *Aguilar v. Felton* in 1985." *Id*. at 277.

Aguilar and *Ball*, filed the same day, were both "ideological, strict constructionist attacks on programs that brought public-school teachers onto the premises of parochial schools." William W. Bassett, SYMPOSIUM: Educational Choice: Emerging Legal and Policy Issues: ARTICLE: *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 259 (2008). These rulings created "excessive costs to bus children from parochial schools to some 'neutral' premises to avoid the appearance of a church-state union." *Id*. The result was not only costly but chaotic. *Id*. at 263. The New York state legislature created a special school district to accommodate the needs of a religious group and its disabled children who had been denied relief from an injunction prohibiting them from receiving Title I services on their religious school premises. The creation of the new school district, carved out along religious lines, raised its own Establishment Clause concerns. *Id*. at 264, discussing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). But in *Kiryas Joel*, five of this Court's justices (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas):

> . . . called for a new case to be filed to overrule *Aguilar*. Justice O'Connor said that the Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track - government impartiality, not animosity, toward religion."

Bassett, *Changing Perceptions*, 2008 BYU L. Rev. 243 at 264 (2008), quoting *Kiryas Joel*, 512 U.S. at 717-718 (O'Connor, J., concurring).

But "[e]ven at the height of the Lemon era," this Court approved financial aid from time to time:

- Bus transportation (*Meek v. Pittenger*, 421 U.S. at 359-62)
- Standardized testing; off-premises remedial instruction (*Wolman v. Walter*, 433 U.S. at 241-244, 244-248)
- State tax deductions (*Mueller v. Allen*, 463 U.S. 388, 394-403 (1983))

Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 165-166. This Court "never squarely repudiated the nondiscrimination principle," resulting in an incoherent body of law and leaving the no-aid position "vulnerable to new Justices measuring neutrality from a different baseline." *Id*. at 166.

Around the end of the "no-aid" era, this Court decided *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). *Witters* has several parallels to *Locke v. Davey*, the cornerstone of the Eighth Circuit's ruling against Trinity Lutheran. Petitioner was a blind student, studying to become a pastor, who applied for assistance under a vocational rehabilitation program. The State of Washington—the same state where *Locke v. Davey* originated—denied the application based on the state constitution. The Washington Supreme Court upheld the denial, but based its decision on the federal Establishment Clause rather than the state constitution. This Court reversed, finding no establishment violation.

Witters is an interesting case in this Court's transition to nondiscrimination. First, while this Court expressed "no opinion" on whether the Free Exercise Clause mandated the vocational aid petitioner sought (*Witter*s, 474 U.S. at 489-490), the case was not a typical taxpayer challenge alleging an Establishment Clause violation. Instead, as in *Locke v. Davey*, it was the petition of an individual denied funding because he sought religious training. Second, this Court cited nondiscrimination principles to support its ruling: "Washington's program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited…and is in no way skewed towards religion." *Witters*, 474 U.S. at 487-488. Finally, nondiscrimination won the day in spite of the Court's simultaneous confirmation of both the "no aid" and nondiscrimination approaches:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution.... It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District v. Ball*, 473 U.S., at 394. Aid may have that effect even though it takes the form of aid to students or parents. *Ibid*.; see, *e.g., Wolman v. Walter*, 433 U.S. 229, 248-251 (1977); *Committee for Public Education and Religious Liberty* v. *Nyquist, supra; Sloan v. Lemon*, 413 U.S. 825 (1973).

Witters, 474 U.S. at 486. Amazingly, this Court applied nondiscrimination principles to Witter's claims even *before* cases like *Ball*, *Aguilar*, and *Wolman* were overruled (in part or whole). The Court noted in dicta that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id*. at 489. Nevertheless, *Witters* is an intriguing step toward nondiscrimination in funding cases. Trinity Lutheran's case is an opportunity for this Court to further sharpen the doctrine and consider whether "far stricter" state constitutions should override principles of equality and nondiscrimination.

Nondiscrimination (1986 and beyond). The tide eventually turned and this Court began to apply nondiscrimination principles to funding cases, facilitating greater equality between religious organizations and comparable secular entities.

In 1988, this Court rejected a taxpayer Establishment Clause challenge to a statutory scheme that allowed faith-based organizations to participate in funding for services related to adolescent sexual relations and pregnancy. *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) ("[N]othing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution.") A few years later, several landmark cases inaugurated an era where religious and secular private schools began to enjoy equal access to funding opportunities, particularly where the services funded were unrelated to religion or private choices directed the funds. In *Zobrest*, a deaf student at a Catholic high school requested a sign-language interpreter, as

required by the Individuals With Disabilities Educational Act. The school district's refusal to provide the service was based on its fear of violating the Establishment Clause. The lower courts ruled against him but this Court reversed. *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993). In 1997, this Court overruled *Aguilar* and *Ball*, and implicitly overruled *Meek v. Pittinger*, rejecting a taxpayer Establishment Clause challenge to a program allowing public school teachers to provide remedial education to low-income student in both public and private schools. The program did not define recipients with reference to religion. *Agostini*, 521 U.S. at 234. Three years later, this Court expressly endorsed nondiscrimination principles and condemned hostility to religion, upholding a federally funded program distributing equipment to public and private schools on a per-student basis without reference to religion:

> If a program offers permissible aid to the religious (including the pervasively sectarian), the a-religious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and *it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously*, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

Mitchell, 530 U.S. at 827-828 (emphasis added). As one commentator explained:

> The Establishment Clause test that emerges from *Mitchell* is articulated by the Court's derivation from *Agostini*. "Where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis ... the aid is less likely to have the effect of advancing religion," and is less likely to create a "financial incentive to undertake religious indoctrination."

Bassett, *Changing Perceptions*, 2008 BYU L. Rev. 243 at 269, citing *Mitchell*, 530 U.S. at 817; *Agostini*, 521 U.S. at 231.

Finally, in *Zelman*, this Court rejected an Establishment Clause challenge to a program that provided tuition and tutorial aid based on financial need and residence in a particular school district—not religion:

> [I]n *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge. Looking once again to the challenged program as a whole, we observed that the program distributes benefits neutrally

> to any child qualifying as disabled. Its primary beneficiaries...were disabled children, not sectarian schools.

Zelman v. Simmons-Harris, 536 U.S. 639, 651 (2002) (internal citations and quotation marks omitted). Similarly, the tire program benefits all children attending daycare in Missouri. *Zelman* and other cases "should be understood as evidence of [this] Court's shift from a focus on effects and perceptions to a focus on the principle that government decisions which do not utilize religion as a standard for action or inaction do not violate the Establishment Clause." Ryan A. Doringo, *Comment: Revival: Toward a Formal Neutrality Approach to Economic Development Transfers to Religious Institutions*, 46 Akron L. Rev. 763, 794 (2013).

Beginning with *Witters* in 1986, "[this] Court progressively elevated the nondiscrimination principle while subordinating the no-aid principle." Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 BYU L. Rev. 275 at 278. Since that time, this Court has upheld five additional programs allowing funds to reach religious institutions (*Bowen, Zobrest, Agostini, Mitchell, Zelman*), partially or wholly overruling several Lemon era rulings (*Meek*, *Wolman*, *Aguilar*, *Ball*). *Id*.

This Court's shift to nondiscrimination principles is also evident in other contexts, including speech and association: *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995) (requiring equal access to funding for religious viewpoints); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (requiring

equal access to school facilities for religious groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same). In each of these cases, this Court invalidated a policy that categorically excluded religion from a generally available public benefit.

If this Court consistently continues its current trend, it should reverse the Eighth Circuit decision and require Missouri to grant equal access to the state's Scrap Tire Program.

II. THIS COURT SHOULD APPLY NONDISCRIMINATION PRINCIPLES TO THE MISSOURI SCRAP TIRE PROGRAM.

Missouri uses its rigid state constitution as a sword to discriminate against religion rather than a shield to protect it. States may grant *more* protection than the federal Constitution. But Missouri's categorical exclusion does nothing to *protect* religion—the purpose of both Religion Clauses. These clauses were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely." *McCreary County v. ACLU,* 545 U.S. 844, 881 (2005).

Nondiscrimination principles promote the required government neutrality, eliminating the threat that religious entities could be denied generally available government services and benefits dispensed according to neutral criteria. Discrimination against religion stifles religious liberty rather than preserving it. As this Court once said:

> [C]utting off church schools from these services [police, fire, sewage, public highways and

> sidewalks], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. *But such is obviously not the purpose of the First Amendment*. That Amendment 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 handicap religions than it is to favor them.

Everson, 330 U.S. at 18 (emphasis added). Missouri has become the adversary of Trinity Lutheran Church.

A. Nondiscrimination Principles Favor Mandatory Inclusion Of Churches And Other Religious Organizations In Missouri's Scrap Tire Program.

The Eighth Circuit admitted that "Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). But the issue here is whether the U.S. Constitution "*compel[s]* Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri." *Id*. at 785. That would admittedly be "a logical constitutional leap in the direction the Supreme Court recently seems to be going" but "only the Supreme Court can make that leap." *Id*. at 785. In view of this Court's shift toward nondiscrimination principles, it is time to make that leap.

The shift to nondiscrimination occurred almost exclusively in Establishment Clause challenges where the question of mandatory inclusion was not in front of this Court. "*Zelman* held that a state is *entitled* to offer school vouchers that can be cashed at sectarian schools but not that it is *required* to do so." *Badger Catholic, Inc. v. Washington*, 620 F.3d 775, 779 (7th Cir. 2010). The Tenth Circuit took the next logical step in analyzing a state scholarship program. It was "undisputed that federal law [did] not *require* Colorado to discriminate" against a religious university, but the state could not constitutionally "choose to exclude pervasively sectarian institutions" from the program. *Colorado Christian University*, 534 F.3d at 1253.

In *Locke v. Davey*, this Court did allow a state to discriminate under narrow circumstances quite distinct from this case, citing "play in the joints"—"state action that is permitted by the [Establishment Clause] but not required by the [Free Exercise Clause]." *Locke*, 540 U.S. at 718. But if that phrase is read in its original context, it is apparent that Missouri's categorical exclusion is not warranted:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; *rigidity could well defeat the basic purpose of these provisions*, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those

> expressly proscribed governmental acts there is room for *play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970) (emphasis added). Nondiscrimination promotes "benevolent neutrality." Missouri's rigid exclusion of churches is neither benevolent nor neutral.

B. Missouri Has Engaged In Blatant Discrimination Against Religion.

Both Religion Clauses of the First Amendment protect religion. It frustrates this purpose to penalize a religious institution for no other reason than the fact that it *is* a religious institution. Exclusion is the antithesis of equal protection and free exercise. Missouri violates a portion of the very constitutional provision it cites for its exclusion—that "no preference shall be given to *nor any discrimination made against* any church, sect, or creed of religion, or any form of religious faith or worship." Mo. Const. Art. I, § 7. Missouri's "arbitrary denial of a general public service" renders it an "adversary of religion." *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 890 (1974) (White, J., dissenting from denial of certiorari).

Locke v. Davey does not alter this result. "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits. . . . [Missouri's] blanket prohibition is different in kind from the disfavor of religion that was present in *Locke*." *Trinity Lutheran Church*, 788 F.3d at 791-791 (Gruender, J., dissenting). *Locke*'s relatively

minor burdens and mild disfavor, even if "tolerable in service of 'historical and substantial state interest[s],'" do not justify Missouri's wholesale exclusion of churches from a neutral community benefit that has nothing to do with religion. *Colorado Christian University*, 534 F.3d at 1255-56. *Locke* expressed concern about "popular uprisings against procuring taxpayer funds to support church leaders" (*Locke*, 540 U.S. at 722). Nothing remotely similar is involved here. Unlike laws that singled out religion for benefits not available to others, Missouri withholds a generally available public benefit on the sole basis of religion—violating the Constitution as surely as if it had imposed a special tax.

Missouri's policy excluding churches from the Scrap Tire Program jeopardizes the required neutrality. As the Sixth Circuit observed in upholding Detroit's downtown refurbishing program:

> That the program includes, rather than excludes, several churches among its many other recipients helps ensure neutrality, not threaten it.

Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 290 (6th Cir. 2009) (internal citations and quotation marks omitted). This Court seems to agree, noting that "[its] decisions...have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell,* 530 U.S. at 828. Missouri's discrimination against religion is comparable to the exclusion of clergy from public office this Court denounced in *McDaniel v. Paty*. There—as in this case—the state "punish[ed] a religious

profession with the privation of a civil right." *McDaniel v. Paty,* 435 U.S. 618, 626 (1978), quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904).

Moreover, Missouri discriminates against religion by imposing a burden while denying the accompanying benefits funded by that burden. The Scrap Tire Program is funded by a special tax on new tires. There is no exemption for churches, which are subject to the fee but prohibited from participation in the benefits. When the Sixth Circuit evaluated a religiously neutral program to refurbish downtown buildings and parking lots, the court noted that:

> . . .if the City may apply generally applicable public health regulations to the exterior of these buildings due to public safety concerns, the City ought to be able to help fix up their exteriors through generally applicable, neutral aid programs. What the government may regulate, as a general rule, it presumptively ought to be able to assist. It would be strange to read the Religion Clauses to say that churches may be subjected to neutral and generally applicable laws, *see Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877-82 (1990), but may not receive neutral and generally applicable benefits.

Am. Atheists, 567 F.3d at 300. The same is true here. If churches must pay the statutory fee when they purchase vehicles—as churches serving youth often do—they should be eligible for programs funded by those fees.

C. Missouri's Scrap Tire Program Serves Community Purposes Unrelated To Religion.

Missouri's constitution prohibits the use of public funds "in aid of any religious creed, church or sectarian *purpose*." Mo. Const. Art. IX, § 8 (emphasis added). This critical qualification should not be overlooked. "[S]choolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion." *Trinity Lutheran Church*, 788 F.3d at 793 (Gruender, J., dissenting). The tire program promotes child safety and environmental care. It benefits the surrounding community and not merely the children who attend the church daycare. Other cases upholding government funding reveal similarly neutral purposes. *Widmar v. Vincent,* 454 U.S. at 267 (developing social and cultural awareness; intellectual curiosity); *Am. Atheists,* 567 F.3d at 292 (downtown refurbishing program served "eminently secular objectives"); *Everson*, 330 U.S. at 6 (New Jersey legislature determined that funding bus fares for all schoolchildren would serve a public purpose); *Bd. of Educ. v. Allen*, 392 U.S. at 242 (purpose of statute requiring issuance of free preapproved textbooks, for all children in public and parochial schools, was to encourage school development—not to advance or inhibit religion). *Allen* is on the border between permissible and impermissible objectives. As the dissent pointed out, "there is nothing ideological about a bus," while "[t]he textbook goes to the very heart of education in a parochial school." *Id*. at 257 (Black, J., dissenting). Even so, this Court upheld the program. The purposes in all of these cases have value for religious schools, much like police and fire protection,

sewage facilities, streets and sidewalks. But none constitute the favoritism the Constitution prohibits.

One key to the analysis is the criteria used to select funding recipients. Trinity Lutheran's application received high ratings based on factors unrelated to its religious status. Similarly, Detroit determined eligibility for its downtown refurbishing program "in spite of, rather than because of" the religious character of applicants. *Am. Atheists*, 567 F.3d at 289. The "program allocate[d] benefits to a broad spectrum of entities on a neutral basis." *Id*. at 282. Although the First Circuit arguably erred in *Eulitt* by declining all funding for religious schools, this factor helps distinguish the result. The town of Minot, Maine opted to outsource secondary education. Its contract with a neighboring school district reserved the right to send up to 10% of its high school students to other approved secondary schools, provided they could "demonstrate that they [had] educational needs" the neighboring district could not satisfy. *Eulitt ex rel. Eulitt v. Maine Dept. of Education*, 386 F.3d 344, 346-347 (1st Cir. 2004). Several parents asserted an educational need for classes teaching Catholic doctrine, and other subjects from a Catholic viewpoint, but their requests for tuition payments were denied. Their requests were made *because of—not in spite of*—the religious character of the schools they selected for their children. The payments would have served an inherently religious purpose, and approval would not have been based on neutral criteria. Right or wrong, this ruling is readily distinguished from Trinity Lutheran's participation in the scrap tire program.

Curiously, Missouri asserts the government speech doctrine as a rationale for its categorical exclusion of churches. Opp. Pet. 5-7. Government funding decisions may send an embedded message of approval for the activities funded. "Choosing which programs to support and which not...is a form of government speech." *Badger Catholic,* 620 F.3d at 780. "[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). Some cases involve programs where one of primary purposes is to transmit a government message. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005) (federal program promoting beef consumption). In such cases, the government controls the message.

The government speech doctrine is inapplicable and offers no support for Missouri's position. The Scrap Tire Program was not established for expressive purposes. Missouri is neither transmitting its own message nor facilitating a forum to encourage a diversity of views. The state set up a program to take action – not to communicate a message, support an educational or religious program, or establish a forum for private expression. There is an implicit "message" about the value of child safety and environmental care, but the categorical exclusion of church playgrounds sends the "message" that children who play there are less worthy of protection. If the state levels the playing field and allows secular and religious applicants to participate in the program on equal terms, the message is one of neutrality—not favoritism—for religion.

D. The Missouri Constitution, Like Many Other State Constitutions, Contains Constitutionally Questionable Provisions And Cannot Withstand A Nondiscrimination Analysis.

Missouri's state constitution, examined against the backdrop of history and similar provisions adopted by other states, raises serious constitutional concerns. Many state provisions are rooted in religious bigotry, a concept that collides with the federal Religion Clauses. Concerns about the state constitution are highly relevant in view of the undisputed absence of any federal establishment concerns. Missouri has an interest in maintaining an appropriate church-state distinction so as to remain neutral toward religion. But there is hardly a compelling interest in preserving the rigid separation generated by the anti-Catholic bigotry of the nineteenth century. Missouri's categorical exclusion of churches from a neutral public benefit cannot withstand a nondiscrimination analysis.

Public schools were saturated in Protestantism during the 1800's. The unsuccessful federal Blaine Amendment was an effort to prevent public funding of "sectarian"—i.e., Catholic—private schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 551-573 (2003). Comparable state amendments "surfaced in the late nineteenth century during a period of mass anti-Catholic sentiment in response to Irish-Catholic immigration." Jonathan D. Boyer, *Article: Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine*

Amendments, 43 Colum. J.L. & Soc. Probs. 117, 118 (2009). Indeed, the 1889 Enabling Act *required* new states to include Blaine provisions in their constitutions to preclude funding for "sectarian" schools. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 573-574. And it was an "open secret that 'sectarian' was code for 'Catholic.'"*Id*. at 559, quoting *Mitchell*, 530 U.S. at 828-829. By the close of the nineteenth century, "roughly thirty states would incorporate Blaine-style amendments into their constitutions." DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 573. These provisions increase the likelihood that religious entities will be denied equal treatment and denied even the most indirect public funding. This is particularly true for schools, where strict "no aid" principles reflect "a misinterpretation of the Establishment Clause, deeply rooted in historic anti-Catholicism." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 185.

State Blaine provisions can be viewed on a continuum, from the narrow to the broad. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 577-588. Missouri is among states with the broadest restrictions. *Id*. at 587. "Missouri's constitution prohibits the state from giving anything in aid to support 'any religious creed, church or sectarian purpose....'" *Id*., quoting Mo. Const., Art. IX, § 8. Such broad-sweeping prohibitions "include any type of aid to virtually every sort of religiously-controlled institution." *Id*. at 588.

State constitutions, as well as analogous state statutes, have generated lawsuits over the years. The Arizona Supreme Court, in dicta, "blasted the federal

Blaine Amendment bill for its anti-Catholicism and noted the problematic nature of applying Blaine Amendment provisions because of the difficulty in 'divorcing the amendment's language from the insidious discriminatory intent that prompted it.'" DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 583-584, quoting *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999). In upholding a downtown renovation program that included church buildings, the Sixth Circuit criticized Michigan constitutional provisions (Mich. Const. Art. I, § 4) that "gr[ew] out of the Blaine Amendments, the product of a mid-nineteenth century political movement with no roots in the Religion Clauses of the United States Constitution." *Am. Atheists,* 567 F.3d at 301; see also DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 556-76, 588-89. In *Widmar*, as in this case, Missouri asserted a "compelling interest" in maintaining a strict church-state separation, based on both the federal and Missouri constitutions. *Widmar v. Vincent,* 454 U.S. at 270, 275. Washington's state constitution triggered the challenges in both *Witters* and *Locke*. *Witters,* 474 U.S. at 483.[2] This Court determined in *Locke* that the relevant state provision was not a Blaine Amendment (*Locke*, 540 at 723 n. 7), and declined to analyze the state constitution in *Witters* (474 U.S. at 489-490). Here, Missouri's case rests entirely on state constitutional language adopted

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[2] Wash. Const. Art. I, § 11, provides in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," and Wash. Const. Art. IX, § 4, provides that "[all] schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

during a time when the federal Blaine Amendment was under consideration. Pet. 28. Missouri protests that the drafters were concerned to prevent the use of public money for "religious purposes" (Opp. Pet. 11)—a hollow objection in this case, where state funds may only be used to reimburse the costs of playground renovation, a purpose unrelated to religion (Section IIC).

State Blaine Amendments violate the First Amendment guarantee of religious liberty by unlawfully discriminating against religion. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 556. If used to invalidate a state program, "[this] Court could presumably reverse that judgment on the ground that the state Blaine Amendment, *as applied in that case*, violated the federal Constitution." Laycock, Comment, *Theology Scholarships,* 118 Harv. L. Rev. at 190 (2004) (emphasis added). Whether or not Missouri's constitutional provisions are "Blaine" provisions, they operate to produce unlawful religious discrimination. As applied to Trinity Lutheran's participation in the religiously neutral Scrap Tire Program, Missouri's constitution collides with fundamental constitutional principles. The church seeks equal access to a program open to secular institutions operating similar daycare programs for children. Equality is a principle deeply embedded in the nation's history and constitution. "[A] state cannot shield a Religion Clause violation from judicial scrutiny by hiding the violation behind its own state charter." DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 607. Unequal treatment—discrimination *against* religion—violates the First Amendment. If a state enacts a funding program to assist private educational institutions, "it would seem that the *principle of nondiscrimination* requires [it] to

extend that aid to organizations [that] identify themselves as religious." *Id*. at 608 (emphasis added). Exclusion of religious organizations merely because of their religious character "is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution's guarantee of religious liberty." *Id*. at 613.

E. Missouri's Categorical Exclusion Fails Strict Scrutiny.

Missouri's categorical exclusion of a church—merely because it *is* a church—demands the strict scrutiny applicable to fundamental rights. "When a law discriminates against religion as such. . .it automatically will fail strict scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun and O'Connor, JJ., concurring in judgment). Religious discrimination is subject to heightened scrutiny under the Free Exercise Clause (*id*. at 546), the Establishment Clause (*Larson v. Valente,* 456 U.S. 228, 246 (1982)), and the Equal Protection Clause (*McDaniel v. Paty,* 435 U.S. 618). *See Colorado Christian University*, 534 F.3d at 1266. Religion is an "inherently suspect distinction" for purposes of equal protection. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The Missouri Constitution does not trump the strict scrutiny required by the U.S. Constitution. Missouri has no compelling interest in preserving a rigid church-state separation that destroys the benevolent neutrality required by the Religion Clauses. The First Amendment limits a state's interest "in achieving greater separation of church and State than is already

ensured under the Establishment Clause of the Federal Constitution." *Widmar v. Vincent,* 454 U.S. at 276. *Locke* does not alter this principle and is readily distinguished. This Court described the state's interest there as "historic and substantial" (*Locke*, 540 U.S. at 725), and Washington's narrowly defined "disfavor" of religion was far milder than Missouri's categorical exclusion is in this case. *Locke*'s narrow contours do not support Missouri's categorical exclusion of churches from a neutral program promising nothing more than a safe place for children to play.

CONCLUSION

The Eighth Circuit decision should be reversed.

Respectfully submitted,

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