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 THE STATE OF COLORADO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The State of Colorado has an interest in this case because the Colorado State Board of Education and Colorado Department of Education are petitioners in another case pending before this Court that raises issues similar to, yet distinct from, those raised here. *See Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.* (No. 15-558). In *Colorado State Board of Education*, a group of plaintiffs challenged a school voucher program under a state constitutional provision prohibiting the use of "public fund[s] or moneys … to help support or sustain any school … controlled by any church or sectarian denomination." Colo. Const. art. IX, § 7. Applying this provision, the Colorado Supreme Court struck down the voucher program because, in its view, "facilitation of … attendance [at private religious schools] necessarily constitutes aid to 'support or sustain' those schools." *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2015). The court rejected the argument that *Locke v. Davey*, 540 U.S. 712 (2004), prohibits categorical discrimination against religion, concluding that state constitutions can be "far more restrictive than the Establishment Clause" in excluding religious institutions from public benefits programs. 351 P.3d at 474. This Court last considered *Colorado State Board of Education* during its February 19, 2016 conference and has not yet granted or denied certiorari.[1]

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[1] Two other parties filed their own petitions for certiorari in the same case, and those petitions have also not been granted or denied. *See Doyle v. Taxpayers for Pub. Educ.* (No. 15-556); *Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ.* (No. 15-557).

Colorado joins the arguments made by the States of Nevada, *et al.*, in their amicus brief in support of Petitioner, but writes separately to describe its unique experience with Article IX, Section 7 of the Colorado Constitution and the manner in which the Colorado Supreme Court misapplied the First Amendment. *Colorado State Board of Education*, like this case, involves the use of a state "no-aid" provision to discriminate against religion. But because *Colorado State Board of Education* involves indirect payments as part of a voucher program—rather than, as here, the direct payment of state funds to churches—it sheds light on the full range of cases to which *Locke*, properly interpreted, logically must apply.

INTRODUCTION AND SUMMARY OF ARGUMENT

Beginning in the 1870s, a number of States enacted constitutional provisions barring public aid to "sectarian" institutions. *See Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion). Both Missouri's and Colorado's Constitutions contain these so-called "no-aid" provisions, and, like Missouri's, Colorado's has recently been interpreted to require the categorical exclusion of religious institutions from a public benefits program. The program challenged in *Colorado State Board of Education* and the scrap tire program challenged here, however, have a significant difference: the one at issue here involves direct payments to a church, while the Colorado program is a form of so-called "indirect" aid.

The Choice Scholarship Program in Douglas County, Colorado. In 2011, the local school board in Douglas County, Colorado, approved the "Choice

Scholarship Program," which allowed parents of schoolchildren to offset with state funds the cost of tuition at qualifying private schools.[2] Scholarships were capped so that the State would spend the same or less for each child in the Program than it would on a child attending a public school.

To be eligible under the Program, private schools were required to meet certain criteria designed to ensure student achievement and growth. The Program was explicitly neutral toward religion, allowing schools to participate regardless of religious affiliation. Families participating in the Program selected which private schools their children would attend, and scholarship checks were sent to parents, who would endorse them to their selected schools. Thus, a private school (religious or not) received funds under the Program only if it was selected by a participating family; the State and the school district did not select schools to receive scholarship funds. Most private schools ultimately chosen by families were affiliated with churches or religious institutions; some were not.

Litigation Challenging the Program. The Program was challenged as unconstitutional under Article IX, Section 7 of the Colorado Constitution ("Section 7"), which provides:

> N[o] … school district … shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian

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[2] For a full description of the Program, see Pet. Cert. 5–6, *Colo. State Bd. of Educ.* (No. 15-558).

> purpose, or to help support or sustain any school … controlled by any church or sectarian denomination whatsoever ….

Colo. Const. art. IX, § 7.

Over four years of litigation, the Program was alternately enjoined by a district court, upheld by a divided Colorado Court of Appeals, and enjoined once again in a fractured 3–1–3 decision by the Colorado Supreme Court. *See* Pet. App. 160c–253c, *Colo. State Bd. of Educ.* (No. 15-558) (district court decision); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 356 P.3d 833 (Colo. App. 2013), *rev'd* 351 P.3d 461 (Colo. 2015). The controlling Colorado Supreme Court opinion recognized that under the Program, religious schools received funds only indirectly, based on participating families' private choices. It nonetheless found that the Program "aided" religion because religious schools were not categorically *excluded*: "[The Program] awards public money to students who may then use that money to pay for a religious education. In so doing, the [Program] aids religious institutions." 351 P.3d at 471.

Three Justices dissented, warning that the plurality's "breathtakingly broad interpretation" of Section 7 "would invalidate not only the [Program], but numerous other state programs that provide funds to students and their parents who in turn decide to use the funds to attend religious schools." *Id.* at 479 (Eid, J., concurring in part and dissenting in part). In the dissenting Justices' view, this interpretation of Section 7 was inconsistent with the First Amendment. *Id.* at 480–83 (Eid, J., concurring in part and dissenting in part).

***The Colorado Supreme Court's Misapplication of* Locke v. Davey.** The Colorado Supreme Court struck down the Choice Scholarship Program because it permitted public funds to be spent at religious institutions. Yet the Tenth Circuit—in a case striking down another Colorado scholarship program for *excluding* certain religious schools—has recognized that "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support" would be contrary to the First Amendment. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

Given the conflict between the state and federal courts in Colorado, it appears state policymakers are caught between either choosing which precedent to violate—state or federal—or abandoning public benefits programs that allow money to flow, even indirectly, to religious institutions.

This Court has noted that "[t]he government usually acts by spending money." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843 (1995). Sometimes, as with Missouri's Scrap Tire program, this involves government directly selecting recipients of public funds. At other times, as with Colorado's Choice Scholarship Program, it involves indirect payments based on the private choices of citizens. In either case, judicial decisions requiring government to discriminate against religion in the distribution of public funds represent a departure from guiding First Amendment principles. Both the Colorado Supreme Court's decision in *Colorado State Board of Education* and the Eighth Circuit's decision in this case run contrary to the First Amendment and should be reversed.

ARGUMENT

I. Categorical discrimination against religious institutions in public benefits programs, whether direct or indirect, collides with this Court's First Amendment jurisprudence.

A. Under *Locke*, a bare desire to prohibit aid to religious entities is insufficient to justify religion-based distinctions in awarding public funds.

Federal law imposes an obligation on government, state and federal, not to discriminate against religion. A State may not "affirmatively oppos[e] or show[ ] hostility to religion," but must instead "maintain strict neutrality, neither aiding nor opposing religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963); *see also Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990) ("[G]overnment may not … impose special disabilities on the basis of religious views or religious status ….''). Even if a State has a unique interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause," that interest "is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see also Mitchell*, 530 U.S. at 835 n.19 (plurality opinion) ("[T]o require exclusion of religious schools from [a generally available, neutral government] program would raise serious questions under the Free Exercise Clause."). Applying state no-aid provisions to categorically exclude religion from public benefits programs clashes with these important constitutional principles.

Locke v. Davey did not erode the fundamental principle of neutrality toward religion. There, the Court concluded that a State may create a greater distance between religion and government than is required by the two Religion Clauses because there is some "play in the joints" between them. 540 U.S. at 719. But the Court made clear that "play in the joints" does not give license to discriminate. The desire for greater separation is limited; it must be anchored to "historic and substantial state interest[s]." *Id.* at 725.

The identified state interest in *Locke*—an aversion to "funding the religious training of clergy"—was supported with a historical pedigree that reached back to "around the time of the founding." *Id*. at 722–23 & n.5. The Court concluded that this long-held interest justified denying a public scholarship to a student who planned to train at a private Christian college "for a lifetime of ministry … as a church pastor." *Id.* at 717. Indeed, the Court could "think of few areas in which a State's antiestablishment interests come more into play" than the context of funding clergy with taxpayer dollars. *Id.* at 722.

At the same time, however, the majority opinion emphasized the narrowness of its holding: "[T]he *only* interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id*. at 722 n.5. Because the State had designed its scholarship program to "go[ ] a long way toward including religion in its benefits"—for example, "permit[ting] students to attend pervasively religious schools"—the First

Amendment's neutrality principle was satisfied. *Id.* at 724.

In contrast, the desire to categorically exclude religious institutions from playground resurfacing grants and public scholarship programs is not the kind of "historic and substantial" state interest *Locke* contemplated. The critical question is whether a "philosophical preference" for prohibiting all "aid" to religious institutions is within the "play in the joints" that *Locke* contemplated. The answer, based on other decisions of this Court, is no. *See, e.g.*, *id*. at 722 n.5; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–14 (2001) (holding that a State's interest in avoiding establishment of religion cannot justify barring a religious group from using school facilities); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947) (holding that a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation").

B. The principles of *Locke* do not depend on whether a public benefits program is direct or indirect.

In opposing certiorari in this case, the State of Missouri emphasized the difference between programs in which the government itself chooses the recipients of public funds and programs in which "the flow of public funds" depends on "parents' choice." Br. in Opp'n 3–6. This echoed the Eighth Circuit's decision below, which was based in part on the fact that Trinity Lutheran's inclusion in the scrap tire program would amount to

the "direct grant of public funds to [a] church[ ]." Pet. App. 10a. In contrast, both the Colorado Court of Appeals and the Colorado Supreme Court recognized that under the Douglas County voucher program, public funds "make their way to private schools with religious affiliation by means of personal choices of students' parents." *Taxpayers for Pub. Educ.*, 356 P.3d at 851; *see also* 351 P.3d at 470 (noting that the voucher program "does not explicitly funnel money directly to religious schools").

Certainly some direct aid to churches may implicate Establishment Clause concerns. *See Rosenberger*, 515 U.S. at 842. But the Eighth Circuit was wrong to conclude that direct funding, in the absence of any "historic and substantial" antiestablishment interest, qualifies as a "hallmark[ ] of an 'established' religion." Pet. App. 10a (quoting *Locke*, 540 U.S. at 722). Providing funds to a religious entity for *plainly nonreligious functions*—such as building a safe playground surface—bears no relation to "establishing" a state religion.

Evenhanded government support of these secular functions, in contrast to publicly funding the "essentially religious endeavor" at issue in *Locke*, 540 U.S. at 721, does not infringe any legitimate antiestablishment interest. As the dissenting justices of the Colorado Supreme Court noted, even indirect aid can be vital to the operation of religious institutions, which rely on "state-paid infrastructure" such as "roads, bridges, and sidewalks" "to operate their institutions." *Taxpayers for Pub. Educ.*, 351 P.3d at 480 (Eid, J., concurring in part and dissenting in part). In either case, direct or indirect, there is no legitimate

justification for excluding religious entities from such broad-based government programs. Under *Locke*, the distinction between direct and indirect public benefits programs cannot be determinative. A "no-aid" principle, when applied to categorically discriminate, is simply inadequate to justify a departure from the important constitutional principle of neutrality toward religion.

II. States frequently coordinate with religious entities through both direct and indirect public benefits programs.

Requiring categorical discrimination against religious organizations could disrupt many public-private partnerships and public benefits programs in many states. Dissenting judges in both the Colorado Supreme Court and the Eighth Circuit highlighted the potential breadth of a no-aid principle unbounded by the First Amendment. In Colorado, Justice Eid noted that "any program that provides an incidental benefit to certain schools—for example, programs for public infrastructure and safety—will be constitutionally suspect" if the no-aid doctrine is taken to its logical limit and left unconstrained by *Locke*. *Taxpayers for Pub. Educ.*, 351 P.3d at 483 (Eid, J., concurring in part and dissenting in part). This would "invalidate the use of public funds to build roads, bridges, and sidewalks adjacent to such schools, as the schools … 'rely on' state-paid infrastructure to operate their institutions." *Id.* at 479–80 (Eid, J., concurring in part and dissenting in part). Similarly, in the Eighth Circuit, Judge Gruender noted in dissent that "[i]f giving the Learning Center a playground-surfacing grant raises a substantial antiestablishment concern, the same can be

said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." Pet. App. 29a (Gruender, J., concurring in part and dissenting in part).

At its extremes, this could include basic government programs, such as "police, fire, and rescue service," Br. for Pet'r 37, or public infrastructure like "roads, bridges, and sidewalks," *Taxpayers for Pub. Educ.*, 351 P.3d at 480 (Eid, J., concurring in part and dissenting in part). But even assuming no-aid provisions would not be read so expansively, decisions like the one below could implicate "subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; [and] funding for rehabilitation centers"—not to mention innovative, environmentally friendly programs like the playground resurfacing subsidy at issue in this case. Reply Br. of Pet'rs at 11 (quoting Amicus Br. of Ass'n of Christian Sch. Int'l & Lutheran Church—Missouri Synod at 16).

In Colorado, many public-private partnerships include religious institutions. The Colorado Preschool Program uses public funds to provide free preschool to children at risk of academic failure and allows school districts to contract with religious schools to provide preschool services. *See* Colo. Rev. Stat. §§ 22-28-103(2), 26-6-102(1.5). Another preschool program, administered and funded with public dollars by the City of Denver, includes dozens of religious institutions on its list of approved providers, including Catholic, Lutheran, and Hebrew schools. *See Taxpayers for Pub. Educ.*, 351 P.3d at 483 (Eid, J., concurring in part and dissenting in part) (discussing the Denver Preschool Program). Outside of the arena of education, Colorado

relies on religious institutions to provide a wide variety of public services—from youth programs,[3] to family counseling and support,[4] to refugee services,[5] to healthcare.[6]

States like Colorado choose to channel public funds to these institutions, either directly or through the private choices of its citizens, not to single out religion for special treatment but to ensure that those in need are served by competent, passionate providers and that the social safety net is robust. This Court should make clear that these longstanding private-public

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[3] *See, e.g.*, Colo. Rev. Stat. §§ 26-6.8-101 to -106 (describing the Tony Grampsas youth services program); Colo. Dep't of Human Servs., Tony Grampsas Youth Services Program 2015-15 Grantees, http://tgys.colostate.edu/2014-15%20Grantee%20Program%20Descriptions.pdf (listing grantees under the program, including "Catholic Charities of the Diocese of Pueblo" and "Colorado Seminary").

[4] *See, e.g.*, Colo. Rev. Stat. § 26-18-105 (describing family resource center grants); Press Release, Colo. Dep't of Human Servs., New Family Support Services Grants Expand Capacity in Family Resource Centers (Mar. 10, 2016), http://bit.ly/1VzowX5 (listing "Catholic Charities Archdiocese of Central Colorado" and "Catholic Charities Archdiocese of Pueblo" as grant recipients).

[5] *See* Colo. Dep't of Human Servs., *Denver's Office of Immigrant and Refugee Affairs offers mini-grants to connect communities and new arrivals* (Mar. 24, 2016), http://bit.ly/1qV832M (listing "[f]aith based organizations" as eligible applicants for refugee project funding).

[6] *See, e.g.*, *Contract Awards: Colorado Department of Human Services Awards Contract for Outpatient, Inpatient Medical Services to Catholic Health Initiatives*, US Fed News, Apr. 24, 2010.

partnerships cannot be attacked solely because public money flows to religious institutions. The First Amendment does not countenance categorical discrimination against religion in the distribution of public benefits. A bare "no-aid" preference is insufficient to override the First Amendment's principle of religious neutrality.

CONCLUSION

The decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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April 21, 2016