14-1382

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Plaintiff-Appellant,

v.

SARA PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,
Defendant-Appellee.

Appeal from the United States District Court, Western District of Missouri, The Honorable Nanette K. Laughrey

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BRIEF OF APPELLEE

CHRIS KOSTER
Attorney General

JAMES R. LAYTON
Solicitor General
Mo. Bar No. 45631
KRISTIN STOKELY
Assistant Attorney General
Mo. Bar No. 65040
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
Kristin.Stokely@ago.mo.gov

ATTORNEYS FOR APPELLEE

SUMMARY OF THE CASE

Appellant Trinity Lutheran Church, Inc. ("Trinity") applied to receive a grant under the Playground Scrap Tire Surface Material Grant Program ("Program") managed by the Department of Natural Resources' Solid Waste Management Division ("Department"). *Joint Appendix ("JA").* at 105. The Department did not award Trinity the grant because Article I, § 7 of the Missouri Constitution prohibits the use of public funds in aid of a religious institution. *Id.*

Trinity filed a complaint against the Department. *JA.* at 1-19. The district court dismissed the complaint for failure to state a claim. *JA.* at 104-138. The district court held that Trinity failed to allege any violations of the Missouri Constitution, Article I, § 7, any violation of the Free Exercise Clause, the Equal Protection Clause, the Establishment Clause, or the Free Speech Clause of the United States Constitution, and dismissed Trinity's complaint with prejudice. *Id.* The district court's dismissal should be affirmed.

The Department requests 20 minutes for oral argument due to the number of issues in the case.

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STATEMENT OF THE CASE

Plaintiff, Trinity Lutheran Church Inc., operates a "Learning Center" in Columbia, Missouri with the mission of "providing quality pre-school education and day care for families in the Boone County, Missouri and surrounding areas." *JA*. at 3. "The Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program." *Id*. at 4. "Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County and the surrounding area." *Id*. "The Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." *Id*. The Learning Center provides a playground for its students, which is currently surfaced with pea gravel and grass. *Id*.

The Missouri Department of Natural Resources Solid Waste Management Program ("Department") runs the Playground Scrap Tire Surface Material Grant Program ("Program"), which competitively awards grants to qualifying organizations to purchase recycled tires to

resurface playgrounds. *JA*. at 105. The Department grades and ranks applications and gives grants to the organizations "that best serve the program's purposes." *Id*. The Program is open to both public and private nonprofit entities. *Id*. However, the Department, in maintaining consistency with the Missouri Constitution, "has a policy that prohibits organizations from participating if the applicant is owned or controlled by a church, sect, or denomination of religions." *JA*. at 105.

The Learning Center applied to the 2012 Program to "improve the safety of the surface area of the playground." *JA*. at 5. Trinity's application ranked fifth out of forty-four applications, but was denied because of the Department's policy to not give grants to religious organizations. *Id*.

Trinity then filed its Verified Complaint for Declaratory and Injunctive Relief against the Director alleging violations of Article I, § 7 of the Missouri Constitution, and the Equal Protection Clause, Establishment Clause, Free Exercise Clause, and the Free Speech Clause of the United States Constitution. *Id*. at 1-19. The Department then filed its Motion to Dismiss, pursuant to Rule 12(b)(6), arguing that Trinity failed to state a claim for which relief can be granted "because

Missouri's constitutional prohibition against using public funds in aid of any church, sect or denomination of religion does not violate the federal Equal Protection Clause, the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, or the Missouri Constitution, Art I, § 7." *Id*. at 20.

The district court granted the Department's motion and dismissed the case with prejudice. *Id*. at 104-38.

The district court held that Trinity could not prevail on its claim that the Department violated the Missouri Constitution Article I, § 7 because Trinity failed to identify any evidence that might support its claim. *Id*. at 116. Specifically, the district court held that the Department's refusal to give a grant to Trinity cannot be discriminatory under the Missouri Constitution because the Missouri Constitution "clearly prohibits public money from, directly or indirectly, going to aid a church, sect, or denomination of religion" and Trinity's own pleadings show that the money would aid the Church and its ministry's Learning Center. *Id*. at 115.

The district court then discussed each of the claims presented under the United States Constitution. The district court held that

Trinity did not plead any facts from which the court could conclude that the decision to exclude religious institutions from the Program violated the Free Exercise Clause. *Id*. at 132. Specifically, the district court determined that the Free Exercise Clause "provides 'protection from certain forms of governmental compulsion' 'but generally does not provide a basis for [d]emands for affirmative governmental assistance.'" *Id*. at 116-17. As a result, the district court determined that the exclusion of a religious preschool from this aid program is not constitutionally suspect under the Free Exercise Clause "in light of the longstanding and substantial concerns about direct payment of public funds to sectarian schools." *Id*. at 125.

The district court next determined that because Trinity failed to allege a violation of the Free Exercise Clause, Trinity's Equal Protection claim must also be dismissed. *Id*. at 132. The district court, relying on *Locke v. Davey*, 540 U.S. 712 (2004), determined that because there is no Free Exercise Clause violation, the court must apply rational basis scrutiny to the equal protection claim. *JA*. at 133. The district court stated that "it is clear that the decision to exclude religious organizations from participation in the [Program] withstands rational

basis review" because "Trinity's exclusion from the aid program in this case was based on the Missouri Constitution's heightened separation of church and state." *Id*.

Trinity also alleged that the Department's decision not to award it a grant evidenced hostility toward religion, in violation of the neutrality toward religion mandated by the Establishment Clause. *JA*. at 11-12. The district court held that Trinity failed to state a claim that the Department violated the Establishment Clause because Trinity cited no cases that could "be interpreted as imposing an affirmative obligation to provide direct subsidies to religious institutions." *Id*. at 136. The district court went on to say that "Trinity has not cited, and the Court's independent research has not revealed, a case construing the Establishment Clause in the manner urged by Trinity." *Id*.

Finally, the district court denied Trinity's claim that the denial of its grant application violated its right to Free Speech. *Id*. at 137. Trinity does not raise this claim on appeal.

Trinity then filed a "Motion to Reconsider [sic] Requesting Leave to Amend Complaint" alleging that the district court exceeded the scope of Rule 12(b)(6) by reaching the legal merits of the case, *JA*. at 139-144,

and requesting leave to amend its Complaint after it received discovery that it claims shows that the Department previously awarded grants to "at least fifteen religious organizations," *id*. at 140. The district court denied the Motion to Reconsider and refused to grant Trinity leave to amend its complaint. *Id*. at 226-232.

In denying Trinity's motion, the district court concluded, "Trinity could not succeed on the merits, regardless of what evidence might be adduced through discovery, because its legal theories either did not exist or were contrary to established law." *Id*. at 230. It further denied Trinity's motion for leave to amend its complaint because Trinity failed "to provide any explanation for not amending its Complaint prior to the dismissal of [the] action" and because the amendment would be "futile" because Trinity "failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest in order to justify the decision not to award a grant to Trinity." *Id*. at 232.

SUMMARY OF THE ARGUMENT

The Department of Natural Resources denied Trinity's application to be awarded a grant of public money under the Playground Scrap Tire Surface Material Grant Program to resurface its playground because the Missouri Constitution, Article I, § 7 provides "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, …; and 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."

The Department's decision to deny Trinity grant funds under the Program did not violate Article I, § 7 of the Missouri Constitution because any funds granted to Trinity would have been unconstitutional "aid" to a religion. Trinity pled that it was controlled by a church and used its Learning Center to deliver a religious message, thus any funds received would have been in "aid" of a religion. Trinity's claim that Art. I § 7 is not implicated because there would be an exchange of mutual considerations between the Department and Trinity is not supported by the constitutional language, nor by case law construing it. Because

Trinity failed to allege any facts or theories that could plausibly show a violation of Article I, § 7 the dismissal should be affirmed.

Trinity's claims under the United States Constitution fail for similar reasons. Trinity's claim that its exclusion from the Program violated the Free Exercise Clause fails as a matter of law because Trinity has not alleged or shown that the Department has prohibited or restricted the exercise of a religious practice. Neither Trinity, nor the district court, could find a single case that supports Trinity's proposition that the State is constitutionally required to include religious institutions when it offers programs granting public money to both public and private non-sectarian institutions.

As to Trinity's Equal Protection claim, Trinity has not alleged any facts or theories that could survive rational basis review. The Department's policy is rationally related to the State's heightened interest in the separation of church and state memorialized in Article I, § 7 of the Missouri Constitution.

All three of Trinity's Establishment Clause claims fail because the Establishment Clause does not give religious groups the right to secure state subsidies that are available to non-religious groups. Trinity

cannot claim that the Department violated the Establishment Clause because the Establishment Clause does not require that religious organizations receive the same state subsidies as non-religious groups. Further, Trinity's claim that the Department's policy excessively entangles it with religion, in violation of the Establishment Clause, fails because the Department does not make determinations between "sectarian" and "pervasively sectarian," as occurred in the case cited by Trinity, but instead eliminates all sectarian institutions from the Program. Lastly, Trinity claims that the Department discriminated among religions, but this Court should not consider this claim, as Trinity never pled it. Even if this Court considers the claim, Trinity has pled no facts to prevail on it.

As to Trinity's request for leave to amend its complaint, this Court has previously held that after a final judgment has been entered, leave to amend should be less freely available. *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009). Trinity had the information it wished to add to the Complaint before the final order was issued, but waited until after the final order was issued to request leave to amend. The district court did not abuse its discretion in refusing to grant

Trinity leave to belatedly amend. Further the proposed amendment would be futile, as the amended complaint would have still failed to state a claim.

ARGUMENT

I. THE DISTRICT COURT'S ORDER DISMISSING TRINITY'S COMPLAINT WITH PREJUDICE SHOULD BE UPHELD BECAUSE TRINITY FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE MISSOURI STATE CONSTITUTION.

Trinity makes two arguments as to why it believes the Department's denial of its grant application violates the Missouri Constitution. Each is detailed below.

A. Standard of review

"This court reviews de novo the grant of a motion to dismiss, taking all facts alleged in the complaint as true, and making reasonable inferences in favor of the nonmoving party." *Smithrud v. City of St. Paul*, 746 F3d. 391, 397 (8th Cir. 2014). "To withstand a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Bell Atl. Corp.*

v. Twombly, 550 U.S. 544, 547 (2007)). "A motion to dismiss should be granted if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'" *Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 896, 899 (8th Cir. 2008) (citing *Koehler v. Brody*, 483 F,3d 590, 596 (8th Cir. 2007)).

B. Trinity has not pled any facts to show that the Department violated the Missouri Constitution, Article I, § 7.

Missouri has long-standing tradition of recognizing the separation between church and state. In *Berghorn v. Reorganized Sch. Dist. No. 8*, 260 S.W.2d 573, 582-83 (Mo. 1953) the Missouri Supreme Court determined that Missouri has an "unqualified policy…that no funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religious beliefs." (Internal quotations omitted). That policy is embodied in Article I, § 7 of the Missouri Constitution, which states:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or

> denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and 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.

Trinity alleges two different violations of this provision based upon its two clauses. First, Trinity alleges that the Program involves mutual considerations and thus any money the Department gives to Trinity is not "in aid of" the institution. *Appellant Brief ("AB")* at 20. Second, Trinity alleges that barring it from participating in the Program is discriminatory toward religion. *Id*. at 24. But, as Trinity's own allegations show, any money it received would have been "in aid of" the church. And Trinity did not allege facts that would show discrimination prohibited by Art. I, § 7.

1. The facts pled by Trinity show that any money received by Trinity under the Program would have been "in aid of" the church in violation of the Missouri Constitution, Article I, § 7.

Trinity implicitly concedes that it would benefit from or, to use the constitutional language, be "aided" by a Program grant. *See generally JA*, at 4-5. But Trinity claims that the Department cannot base its

decision on that fact because, Trinity claims, "the 'no aid' provision of Article I, § 7 is not implicated if there is an 'exchange of considerations' between the state and the religious institution." *AB*. at 22. Put differently, Trinity argues that "[b]ecause participating in the [Program] involves the exchange of considerations, payments under the [P]rogram are not 'in aid of' a religious institution." *Id*. at 23. In its brief, Trinity cites two cases that it claims supports this theory; however, Trinity mischaracterizes the holding and facts in both of these cases.

Trinity first cites to *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. 1961). *AB*, at 20. Trinity claims that *Kintzele* stands for the proposition that "when state monies are given to a religious institution in exchange of mutual considerations, they are not given 'in aid of' a church." *Id*. However, Trinity oversimplifies and mischaracterizes the holding of *Kintzele*. *Kintzele* involved the sale of publicly condemned land to a private sectarian school. *Kintzele*, at 697. The plaintiffs claimed that Saint Louis University "was illegally designated to get the land involved from the inception of the project and that no one else was given an opportunity to acquire it," which they claimed "was use of

public power and public funds in aid of a private sectarian school" in violation of Art. I, § 7 of the Missouri Constitution. *Id.* at 699. Plaintiffs essentially claimed that the University's acquisition was unconstitutional aid to the University because there was no public bidding procedure, and the University acquired it for $535,800 when the City spent $1,624,617 to acquire it. *Id.*

The court held that the "plaintiffs' contention of illegal designation and subsidy from public funds cannot be sustained" for two reasons. *Id.* at 701. First, the sale was appropriate because the City was authorized to sell the property "by negotiation at fair value for uses in accordance with the redevelopment plan giving consideration to the uses and purposes required, the restrictions upon and the covenants, conditions and obligations assumed by the redeveloper." *Id.* at 700. Second, the City was given discretion to dispose of the property "under reasonable competitive bidding procedures as it may prescribe." *Id.* The City tried competitive bidding of the land at issue and was only given one bid, which it rejected, and then sold the land to the University for twice the amount of the bid. *Id.* at 700-01. The fact that the University was sectarian was irrelevant to the court's ruling. All that mattered was

that the University acquired the property appropriately under the law. *Id.* at 701.

The holding had nothing to do with mutual considerations between the University and the City. It is true that in acquiring the land the University promised to use it for certain purposes, but the mutual promise was not the reason that the sale was not unconstitutional aid. The sale was not unconstitutional aid because "the sale was made by [the City] pursuant to due observance of all applicable law […] and involved no preference or favoritism." *Id.* at 699.

Kintzele doesn't apply to the instant case at all. Trinity involves the receipt of a benefit from the State government, not the purchase of property from the state that was available to the purchaser that offered the most money. Trinity's reliance upon it to show that "mutual considerations" cause the grant funds to not be "in aid of" a church is misplaced and mischaracterizes the holding of the case.

Trinity also relies on *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976), again claiming, the case stands for the proposition that the "no aid" provision of Art. I, § 7 is not violated if there is an exchange of considerations. *AB.* at 22. *Americans United* involved a state statue

directing tuition grants to college students attending approved public or private colleges so long as the educational training received was non-religious in nature. *Americans United*, at 713-14. The program also required that the institution have an independent board and academic freedom. *Id.* at 721. The program issued checks to individual students who then endorsed the funds over to their institution. *Id.* at 715.

It is true that in *Americans United* the party defending the program *argued* that the tuition grants "were not gifts or donations by the students to the institutions, but were the quid pro quo in return for which the institutions were contractually required to make available the opportunities for the students to obtain a college education." *Id.* at 721. Trinity cites this passage when it claims that the Missouri Supreme Court has held that quid pro quo exchanges of public funding in return for obligations to utilize the funding cannot be considered "aid" under Art. I, § 7. *AB.* at 22. The court does state that "it is at least debatable whether or not encouraging the creation of such additional obligations is constitutionally proscribed for the reason it is in 'aid' of an institution," but the court does not hold that mutual obligations render the funding not "aid" to a religious institution.

Americans United, at 721. The court does hold that the program did not violate Art. I § 7 because the students received the tuition directly from the state and could only attend schools with independent boards not under the control of a religious creed or church. *Id.*

Mutual considerations did not decide *Kintzele* or *Americans United*. Neither case turned on the fact that receiving a benefit from the state required some reciprocal actions.

The instant case is much more similar to the numerous cases in which Missouri courts have found that granting state funds to private sectarian schools is a violation of the Missouri Constitution.

In *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1941), the Missouri Supreme Court struck down the use of public funds in running a private school that the state took control of. The court held that the state's action violated the "explicit interdiction of the use of public money" in Art. I, § 7 for religious instruction. *Harfst*, at 613-14. In *Harfst*, the public school took control of the parochial school, but continued to rent the building from the church, employed teachers from the church, and incorporated religious curriculum into daily instruction. *Id.* at 614.

In *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953), the Missouri Supreme Court found the use of public funds to transport students to parochial schools to be unconstitutional.

In *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) the Missouri Supreme Court found a statute that required the use of public funds to purchase textbooks for students and teachers in private non-profit elementary and secondary schools, including parochial schools, to be unconstitutional.

In its brief, Trinity implies that cases like *Harfst*, *Mcvey*, and *Paster* are not applicable to the instant case because the instant case involves an "exchange of considerations." *AB*, at 23. But there is no more "exchange" in the instant case than in those cases. In each, the State conferred a benefit on the parochial schools – funding (*Harfst*), transportation of students (*Mcvey*), and teaching materials (*Paster*). In each the State received a minimal benefit – a lower cost for public education, by reducing school districts' costs either by obtaining resources (*Harfst*), or encouraging pupils to attend parochial schools (*Mcvey* and *Paster*). This "exchange" did not make the state's actions in these cases constitutional. The state's actions were unconstitutional

because they resulted in grants of public money to sectarian institutions.

The instant case is similar. If the State were to award Trinity funds under the Program, Trinity would receive a benefit – an upgraded playground facility at a much lower cost, and the State would receive a minimal benefit – keeping scrap tires out of landfills. However, this does not negate the fact, like it didn't negate the fact in *Harfst*, *Mcvey*, and *Paster*, that it is unconstitutional under the Missouri Constitution to give public funds to sectarian institutions. The fact that the state arguably obtains some benefit from awarding Trinity funds under the Program is irrelevant.

The real difference between the cases Trinity relies on, *Kintzele* and *Americans United*, and all the cases finding a violation of Art I, § 7 is not some analysis or form of "exchange of considerations," but is the degree of control a church exercises over the school. *JA*. at 114. "When that degree of control was so great that the school was, in essence, serving as a proxy or branch of the church, the Missouri Supreme Court has consistently held that public aid, direct or indirect, would be impermissible." *Id*.

When the degree of control is not so great that the school is serving as a proxy or branch of the church, the public funding is not impermissible aid. In *St. Louis Univ. v. Masonic Temple Assoc. of St. Louis*, 220 S.W.3d 721 (Mo. 2007), the City of St. Louis granted the University public aid through a tax increment financing ordinance to finance construction of a new arena. *Id*, at 724. The Missouri Supreme Court determined that the ordinance was not "in aid of" a religious institution and did not violate Art. I, § 7 because the University was not controlled by a religious creed, was managed by an independent board, its "mission [was] education, not indoctrination, and its focus [was] on development of students, not on the propagation of the Jesuits' faith." *Id*, at 728. In short, the court determined that despite the University's affiliation with the Jesuits, it was, in practice, an independent institution, thus the financing was not unconstitutional aid to a church under Art. I § 7 of the Missouri Constitution.

"The allegations in Trinity's complaint show that public funding through the [Program] would be impermissible under Section 7" because the church exercises direct control over the school. *Id*. The Learning Center merged with the church in 1985 and today remains

part of, and run by, the church. *Id. See JA.* at 3. Trinity affirmatively stated that the Learning Center is a "ministry of the Church and incorporates daily religion…into a school and optional daycare program." *JA.* at 4. Trinity pled that "[t]he Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well as to bring the Gospel message to non-members." *Id.* The district court determined that "unlike the colleges and universities in *St. Louis University* or *Americans United*, the Church controls the learning center. It utilizes religious curriculum in daily activities…by 'teaching a Christian world view.'" *JA.* at 115. It further held that "By all indications, Trinity has pled that its Learning Center is a part of the Church and is used to inculcate its religious beliefs to children in the preschool and daycare." *Id.* And that "Missouri courts have consistently held that public aid to such an organization is prohibited under the State constitution." *Id.*

To use the district court's words, "Trinity's claim based on the Missouri Constitution must fail" because "Trinity's own pleadings demonstrate that funds from [the Program] would aid the Church and its ministry Learning Center within the meaning of Missouri Law." *Id.*

2. Trinity has pled no facts that demonstrate that barring it from participating in the Program is discriminatory under Article I, § 7 of the Missouri Constitution.

Section 7 has two clauses, the first, addressed above, prohibits public aid to any church. The second states 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. Trinity claims that by prohibiting it from participating by refusing to give it aid, the Department discriminated against Trinity. *AB*. at 24.

The district court disposed of this claim fairly simply using the basic rules of statutory construction. *JA*. at 107. "It is a basic rule of statutory construction that each section of a statute must be interpreted in harmony with all sections of the statute." *Id*. (citing *Frye v. Levy*, 2013 WL 1914393, at *4 (Mo. App. S.D. May 9, 2013)). "The same principle applies to constitutional construction." *Id*. (citing *Boone Cnty. Court v. State*, 631 S.W.2d 321, 324 (Mo. 1982)).

The district court determined that "[c]onstruing both clauses in harmony, it is not possible to read Section 7 to prohibit public aid to a

church while concurrently considering denial of that aid to be discriminatory." *JA.* at 107. Thus, because the Department is prohibited from giving aid to Trinity by the first clause of Section 7, it is impossible for the Department to be simultaneously discriminating against Trinity under the second clause of Section 7. As a result, Trinity has failed to state a claim upon which relief can be granted and the dismissal was appropriate.

II. THE DISTRICT COURT'S ORDER DISMISSING TRINITY'S COMPLAINT WITH PREJUDICE SHOULD BE UPHELD BECAUSE TRINITY FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE UNITED STATES CONSTITUTION.[1]

Trinity makes three arguments as to why it believes the Department's denial of its grant application violates the United States Constitution. Each is detailed below.

[1] The same Standard of Review, de novo, applies to this section as applies in section I above.

A. Trinity's claim that its exclusion from the Program violated the Free Exercise Clause fails as a matter of law because Trinity has not alleged or shown that the Department has prohibited or restricted the exercise of a religious practice.

The Free Exercise Clause states that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. Amend. I. The Supreme Court has explained that "[t]he crucial word in the constitutional text is 'prohibit.' For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). This Court went on to explain that this clause provides "protection from certain forms of governmental compulsion." *United States v. Means*, 858 F.3d 404, 406 (8th Cir. 1988).

The Supreme Court also stated that "[t]he fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of

money, the better to exercise them." *Sherbert*, 374 U.S. at 412. This means that the Free Exercise Clause "generally does not provide a basis for '[d]emands for affirmative governmental assistance.'" *United States v. Friday*, 525 F.3d 938, 957 (10th Cir. 2008).

On appeal, Trinity makes the same claim that it did in the district court, that the Department violated the Free Exercise Clause not because it prohibited or compelled action by Trinity, but because it declined Trinity's "demand for affirmative governmental assistance." *See AB*, at 41. However, the Free Exercise Clause does not provide the basis for such a claim.

In support of this claim, Trinity cites several cases, beginning with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993), which hold that, under the Free Exercise Clause, a court must strictly scrutinize any law that burdens religious practice and is not neutral and generally applicable. In the cases cited by Trinity, however, the ordinance or regulation at issue violated the Free Exercise Clause because it directly prohibited or restricted the exercise of a religious practice. *See, e.g., Lukumi*, 508 U.S. at 542, 547 (1993) (invalidating a series of ordinances that prohibited the ritual slaughter

of animals, which "had as their object the suppression of religion."); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167-68 (3rd Cir. 2002) (finding that the discriminatory enforcement of an ordinance, which was selectively applied to prohibit the Orthodox Jewish practice of hanging *lechis* while permitting other, comparable secular and non-secular hangings, "violate[d] the neutrality principle of *Lukumi*"); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (holding that a series of Army regulations were not neutral where the regulations "uniformly ban[ned] all religious practice"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-34 (11th Cir. 2004) (finding that a zoning ordinance that excluded religious groups from a certain district but not similarly situate secular groups "improperly targeted religious assemblies.")

Trinity's case is more similar to *Locke v. Davey*, 540 U.S. 712, 715 (2004), in which the Supreme Court upheld the state of Washington's decision to exclude students pursuing a devotional theology degree from its Promise Scholarship Program. The Supreme Court determined that this restriction did not violate the Free Exercise Clause because there was no hostility toward religion, in that it did not impose criminal or

civil sanctions, it did not deny ministers the right to participate in politics or the community, and it did not require students to choose between their religious beliefs and receiving a government benefit. *Id.* at 720-21. The Supreme Court determined that "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* Thus, because there was not the hostility toward religion that was present in *Lukumi*, the Court could not conclude that the rule was constitutionally suspect, and that "without a presumption of unconstitutionality" the "claim must fail." *Id.* at 724-25.

Trinity's claim must likewise fail. Trinity has not alleged that the Department has prohibited or restricted the exercise of a religious practice. Trinity has not alleged that the Department is discriminating between religions, or that there are criminal or civil sanctions on religious practice. The Department's refusal to award Trinity grant money under the Program did not restrict or prohibit the exercise of religion, but was simply in line with the State's constitutional ban on providing "aid" to religion. *See* Mo. Const. Art. I § 7. Like the district court found, "Trinity has not presented a single case that supports its proposition that the State, in establishing a program that offers grants

to public and private institutions engaged in early childhood care and education, is constitutionally required to include religious institutions in the program." *JA*. at 131.

B. Trinity's claim that its exclusion from the Program violated the Equal Protection Clause fails as a matter of law because Trinity has not alleged any facts or theories that would prove the absence of a "rational basis" for the Program limitation.

The Court in *Locke* disposed of the plaintiff's Equal Protection claim in a footnote, determining that "[b]ecause we hold, … that the program is not a violation of the Free Exercise Clause, … we apply rational-basis scrutiny to his equal protection claims." *Locke*, 540 U.S. at 720 n.3; *accord Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). To survive rational basis analysis, the law must bear a rational relation to some legitimate end. *Vacco v. Quill*, 521 US. 793, 799 (1997). The Court in *Locke* determined that Washington's scholarship program survived rational-basis review for the same reasons that it did not violate the Free Exercise Clause. *Locke*, 540 U.S. at 720 n. 3.

Here, the district court determined that the denial of grant money to Trinity "at least bears 'a rational relationship between the disparity of treatment and some legitimate governmental purpose'" because Trinity's denial of grant money was based upon the Missouri Constitution's heightened separation of church and state. *JA*. at 133. (*citing Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)). Trinity alleged no facts that would show that the Department's decision is not rationally related to Missouri's heightened separation of church and state, nor that would show that Missouri lacks a legitimate interest in such separation.

C. Trinity has failed to allege any theory that supports its proposition that it is entitled to relief under the Establishment Clause.

The Establishment Clause states, "Congress shall make no law respecting an establishment of religion…." U.S. Const. Amend. I. In its brief Trinity claims that the Department's refusal to allow it to participate in the Program violated the Establishment Clause as the policy is "hostile toward religion," "require[s] the state to become excessively entangled with religion," and "discriminate[s] amongst

religious organizations." *AB.* at 24. Trinity fails to allege any facts or theories that would entitle it to relief under any of these three theories.

1. The Department's refusal to allow Trinity to participate in the Program is not hostile toward religion.

Trinity alleges that the Department "is demonstrating hostility to religion by singling out religious groups for discrimination when there is no risk that allowing religious groups to participate would violate any constitutional prohibition against aiding religion." *AB.* at 27. However, as the district court held, none of the cases cited by Trinity supports its claim that the Establishment Clause entitles condemns the use of lines such as Missouri's distinction between religious and secular institutions. *JA.* at 134.

While the Establishment Clause forbids the making of a law respecting the establishment of any religion, there is *no* relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies. *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999). In *Strout*, the First Circuit upheld a statute that offered grants directly to private educational

institutions, provided that they were "non-sectarian," to subsidize the education of students residing in communities without public education facilities. *Id.* at 59. The decision in *Strout* centered on the Free Exercise Clause, discussed above, but the plaintiffs did argue that the statute was hostile toward religion in violation of the Establishment Clause because it did not treat religion neutrally. *Id.* at 60. The court in *Strout* held that "[t]here is no relevant precedent for using [the Establishment Clause's] negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies." *Id.* at 64. Thus, the exclusion of sectarian groups from a government program providing aid to non-sectarian public and private institutions was not hostile to religion and did not violate the Establishment Clause.

Arguing otherwise, Trinity cites to *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). In that case, the University of Virginia's Student Activities Fund paid outside contractors for the printing costs of various student groups' publications. *Rosenberger*, 515 U.S. at 819. The University refused to pay the printing charges for a student newspaper called "Wide Awake: A Christian Perspective at the University of Virginia." *Id.* The Supreme Court held that the University

violated the Free Speech Clause but that the program did not violate the Establishment Clause as it was neutral toward religion. *Id.* at 821. The program was neutral toward religion because the University had a policy not to make payments to third parties on behalf of "religious organizations." *Id.* at 840.

Trinity also cites to *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990). In *Westside*, the Supreme Court held that a public high school's refusal to recognize a Christian club violated the Equal Access Act, 20 U.S.C. §§ 4071-4074, which requires federally funded public schools to provide equal access to facilities for student groups. *Westside*, 496 U.S. at 235-47. The Court noted that the Equal Access Act does not violate the Establishment Clause as it is neutral toward religion, in that it must provide equal access to facilities to all religious groups. *Id*, at 228.

The Supreme Court, in each of these cases, only briefly considered the Establishment Clause in terms of whether it prohibited the schools from giving funding or facilities to religious groups. *See Rosenberger*, 515 U.S. at 837-38; *Westside*, 496 U.S. at 247-48. Thus, the district court here correctly concluded that "[n]either of these cases can

plausibly be read as requiring the State to provide a religious institution with a publicly funded subsidy by virtue of the neutrality toward religion generally required under the Establishment Clause. *JA.* at 135.

Trinity has cited no case, and the district court could find no case, that construes the Establishment Clause as giving religious groups the right to secure state subsidies that are available to non-religious groups. *JA.* at 136.

2. The Department's practice of refusing to allow Trinity to participate in the Program does not excessively entangle the Department with Religion.

In support of its argument that by differentiating between religious and sectarian institutions Missouri is impermissibly entangling itself with religion, Trinity relies solely on *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th. Cir. 2008). *AB.* at 25-26. In *Colorado*, a state statute provided scholarships to eligible students to be used at an accredited college in the state, including private schools, but prohibited using the funds at a school the State

deemed "pervasively sectarian." *Colorado*, at 1250. In determining whether a school was "pervasively sectarian" the statute authorized the State to consider six factors including whether "the faculty and students are not exclusively of one religious persuasion," whether attendance at religions services is required, whether there is "a strong commitment to principles of academic freedom," whether there are "required courses in religion or theology that tend to indoctrinate or proselytize", whether the governing board is limited to a certain religion, and whether funding for the school comes from sources advocating a particular religion." *Id*. at 1251. The Tenth Circuit determined that this statute violated the Establishment Clause because it had two features not present in *Locke*, "the Colorado exclusion expressly discriminates among religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions, and it does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice." *Id*. at 1265.

Missouri, unlike Colorado, does not excessively entangle itself with religion when determining whether aid would violate Art. I, § 7 of the Missouri Constitution. Missouri does not have a distinction

between "sectarian" and "pervasively sectarian" nor does it have a statute or policy laying out factors to consider about an institution to determine whether it is "pervasively sectarian." Missouri, like every state with a heightened antiestablishment clause in its constitution, must make a determination as to whether aid to an organization would violate its constitution. There must be some weighing of factors to make this determination, but Missouri does not go nearly as far as Colorado in making its decision, and thus does not excessively entangle itself with religion.

3. Trinity did not claim below that the Department discriminated between religious denominations in implementing the Program.

Trinity did not allege in its Petition that the Department discriminated between religious denominations in implementing the Program. The Eighth Circuit will ordinarily not consider an argument raised for the first time on appeal. *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002). It will consider a newly raised argument "only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result." *Id.*

Determining whether the Department discriminated between religious denominations would require extensive factual development, and it should not be considered on appeal.

Even if this Court did consider Trinity's argument that the Department discriminated among religions, the claim would fail as a matter of law because Trinity has alleged no facts or theories that are plausible.

In *Colorado*, the State made a distinction between two groups of church institutions: "sectarian" and "pervasively sectarian" institutions. *Colorado*, at 1256. Trinity can formulate no theory under which Missouri does the same, nor has it alleged Missouri does the same. Just because Missouri must determine whether its public funds are going to a religious institution or church does not mean that Missouri is discriminating among religions or churches. In fact, the facts pled in this case show the opposite, that Missouri denies funding to all religions, treating religions neutrally. *See JA*. at 5.

III. THE DISTRICT COURT DID NOT ERR IN REFUSING TO GRANT TRINITY LEAVE TO FILE AN AMENDED COMPLAINT AFTER IT HAD ALREADY ISSUED ITS ORDER IN THE CASE.

A. Standard of Review

The district court refused to grant Trinity leave to amend its complaint because Trinity waited until after the court dismissed the action to present any new allegations, and because any amendments by Trinity would be "futile." *JA*, at 226-32. Each of the two reasons the district court refused to grant Trinity leave to file its amended complaint has a different standard of review.

A district court's refusal to allow a party to amend its complaint for failure to raise the issue before a final decision is issued is reviewed for an abuse of discretion. *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550-51 (8th Cir. 1997).

However, de novo review applies to the denial of leave to amend on the basis of futility that an amended complaint could not withstand a motion to dismiss for failure to state a claim. *Cornelia I. Corwell GST Trust v. Possis Medical, Inc.*, 519 F.3d 778, 781-82 (8th Cir. 2008). "We

ordinarily review the denial of leave to amend a complaint for abuse of discretion, but when the district court denies leave on the basis of futility we review the underlying legal conclusions de novo." *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010).

B. Trinity did not seek leave to amend its complaint until after the court had already dismissed the action.

Federal Rule of Civil Procedure Rule 15(a) states that a court should freely give leave to amend a complaint when justice so requires. However, "different considerations apply to motions filed after dismissal." *Parnes*, 122 F.3d at 550. "After a final judgment has been entered, "interests of finality dictate that leave to amend should be less freely available." *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009). Thus, leave to amend may be denied when the plaintiff fails "to provide any valid reason for failing to amend" prior to the adverse judgment. *Id*. at 823-24.

Trinity waited to request leave to amend its complaint until after the court dismissed the instant action with prejudice. At that point, Trinity stated that it had learned new information during discovery before the case was dismissed. *JA*. at 141. The district court held that,

"Trinity's failure to provide any explanation for not amending its Complaint prior to the dismissal of this action counsels against permitting the post-dismissal amendment." *JA*. at 232.

C. Refusing Trinity leave to amend its complaint after the court had already dismissed the action for failure to state a claim was within the court's discretion.

"Futility is a valid basis for denying leave to amend." *Parnes*, 122 F.3d at 822. "When the court denies leave on the basis of futility, it means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Cornelia*, 519 F.3d at 782.

The district court determined that "Trinity has failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest in order to justify the decision not to award a grant to Trinity. Accordingly, even with this additional allegation, Trinity's Complaint would be subject to dismissal for failing to state a claim." *JA*. at 232. While the district court did not go into greater detail on this issue, the rationale is understandable. The

district court determined that rational basis review applies to the policy because there is no violation of the Free Exercise Clause. *JA*. at 133. Even if Trinity were allowed to add its allegation, the Program would still survive rational basis review for the reasons discussed above, and the amendment would have been futile.

CONCLUSION

The district court did not err in dismissing Trinity's complaint with prejudice or in denying Trinity leave to amend its complaint. The district court's Order dismissing the complaint and its Order denying the motion to amend the complaint should be affirmed.

Respectfully submitted:

CHRIS KOSTER
Attorney General

/s/ *Kristin Stokely*
JAMES R. LAYTON
Solicitor General
Mo. Bar No. 45631
KRISTIN STOKELY
Assistant Attorney General
Mo. Bar No. 65040
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
Kristin.Stokely@ago.mo.gov
ATTORNEYS FOR APPELLEE

CERTIFICATE OF COMPLIANCE AND OF SERVICE

The undersigned hereby certifies that on this 17th day of June, 2014, one true and correct copy of the foregoing brief was served electronically, and an additional paper copy will be mailed, postage prepaid, to:

Joel L. Oster
Erik W. Stanley
Kevin H. Theriot
Alliance Defending Freedom
15192 Rosewood St.
Leawood, KS 66224
joster@alliancedefendingfreedom.org
estanley@alliancedefendingfreedom.org
ktheriot@alliancedefendingfreedom.org

Michael K. Whitehead
The Whitehead Law Firm, LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105
mike@thewhiteheadfirm.org

Attorneys for Plaintiffs-Appellants

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 32(a)(5) and 32(a)(6), and that the brief contains 9,006 words. The undersigned further certifies that the electronically filed brief and addendum have been scanned for viruses and are virus-free.

/s/ *Kristin Stokely*
Assistant Attorney General