APPEAL NO. 14-1382

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
for the Western District of Missouri
Civil Case No. 2:13-CV-04022-NKL
(Nanette K Laughrey)

Appellant's Initial Brief

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellant Trinity Lutheran Church, Inc. ("Trinity") sought to participate in the neutrally available Playground Scrap Tire Surface Material Grant Program ("Scrap Tire Program" or "Program") to help make its Learning Center playground safe. The Missouri Department of Natural Resources Solid Waste Management Program ("Department") rejected Trinity's application because the learning center is affiliated with a church.

Allowing Trinity to participate in the Program does not violate Article I, § 7 of the Missouri Constitution. This provision does not apply to transactions where there is an exchange of considerations. Because Trinity would have incurred significant obligations under the program, the scrap tires it would have received would not have been "in aid of" the church. The Department's actions and policy of excluding pervasively religious organizations violates the Establishment Clause as it excessively entangles the state with religion, discriminates amongst religious denominations and is hostile to religion. The Department's actions and policy also violates the Free Exercise Clause as they target religion for disparate treatment. Finally, they violate the Equal Protection Clause by treating some religious organizations differently than other similarly situated organizations.

Trinity requests 20 minutes for oral argument due to the complex legal issues involved.

CORPORATE DISCLOSURE STATEMENT

Trinity is a 501(c)(3) non-profit corporation, and thus does not issue stock. Trinity Lutheran Church of Columbia, Inc. does not have a parent corporation or any publicly held company that owns 10% or more of its stock.

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JURISDICTION STATEMENT

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291. The District Court dismissed this case in its entirety on September 26, 2013. Trinity timely filed a Motion for Reconsideration Requesting Leave to Amend Complaint on October 23, 2013, which was denied on January 7, 2014. Trinity timely filed the notice of appeal on February 4, 2014.

STATEMENT OF ISSUES

1. Article I, §7 of the Missouri Constitution does not prohibit transactions where there is an exchange of consideration. Under the Program, Trinity would have been obligated to store the recycled tires on their property, advertise the Program, teach the benefits of recycling and promote the program to other organizations. Did the District Court err in dismissing the case without allowing Trinity to present evidence that these obligations constituted an exchange of consideration for scrap tires?

- *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (en banc)
- *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. 1961) (en banc)

2. The Establishment Clause of the U.S. Constitution prohibits state action that excessively entangles the state with religion, prefers some religious denominations over others or is hostile to religion. Here, the Department's policy of prohibiting pervasively religious organizations from participating

in the Program excessively entangles the state with religion, prefers some religious denominations over others, and is hostile to religion. Did the Departments policy violate the Establishment Clause?

- *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2014)
- *Larson v. Valente*, 456 U.S. 228 (1982)

3. The Free Exercise Clause of the United States Constitution prohibits the state from targeting religion for disparate treatment. Here, the Department's policy targets pervasively religious organizations for disparate treatment, thus treating them differently from other religious organizations and similarly situated secular organizations. Does the Department's targeting of pervasively religious organizations violate the Free Exercise Clause?

- *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-47 (1993)
- *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2014)
- *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002)
- *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004)

4. The Equal Protection Clause of the United States Constitution requires that similarly situated persons be treated similarly. The Department has allowed

secular and religious day cares to participate in the scrap tire program. But it prohibited Trinity from participating in the program because it is controlled by a church. Did the Department violate the Equal Protection Clause by treating Trinity differently than secular and other religious day cares?

- *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).
- *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)
- *United States v. Batchelder*, 442 U.S. 114 (1979)

STATEMENT OF THE CASE

Trinity filed a Complaint seeking injunctive and declaratory relief against the Department's policy that prohibits pervasively religious organizations from participating in the Program. Trinity is a church that runs a learning center open to the entire community without discrimination. Although its application scored fifth out of forty-four applicants, it was denied the right to participate in the program solely because the Department determined that the learning center was controlled by a church. Trinity claimed that the Department's policy violated the Equal Protection, Free Exercise, Establishment, and Free Speech Clauses of the United States Constitution, as well as Article 1, Section 7 of the Missouri Constitution. The Policy, which requires the state to determine whether an organization is pervasively religious, excessively entangles state with religion, discriminates

among religious organizations, targets religion as a suspect class, and operates as a punishment for religious speech.

The Department moved to dismiss the Complaint, under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and the District Court granted the Motion and dismissed the case with prejudice.

Trinity moved for reconsideration pursuant to Rule 15(a), 59(e) and 60(b) of the Federal Rules of Civil Procedure, and asked the court to reconsider its Order dismissing the case with prejudice, to reopen the case, and to grant Trinity leave to amend its complaint. Specifically, the court erred by weighing the sufficiency of the evidence in ruling on a 12(b)(6) motion to dismiss instead of taking the well-plead facts as true. Trinity should have been allowed to conduct discovery and present its evidence that the state's interest is not sufficient in this case to prohibit Trinity from participating in the scrap tire program. Furthermore, Trinity sought leave to amend the complaint to add facts that the Department had, on at least fifteen other occasions, allowed religious organizations, including churches, to participate in the scrap tire program.

The court denied this motion for reconsideration on January 7, 2014.

On February 4, 2014, Trinity timely filed an appeal to this Court.

Factual History

The Learning Center was established as a not-for-profit organization in 1980 with the mission of providing quality pre-school education and day care for families in the Boone County, Missouri and surrounding areas. (Joint Appendix ("JA"), 3). In 1985, the Learning Center merged with Trinity Lutheran Church, and is now operated by the Church. *Id*.

The enrollment policy of the Learning Center is to provide equal opportunity for students. It admits students of any sex, race, color, religion, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center. *Id.* at 4. It provides a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively. *Id*.

While the Learning Center is a licensed educational center and is in the process of becoming accredited as an early childhood education program, it is also a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program. *Id*. Through the Learning Center, the Church teaches a Christian world view to its students. *Id.*

The Learning Center provides a playground for its students, but the surface of the playground consisted of pea gravel and grass. *Id.* The Learning Center

sought to improve the safety of the surface area of the playground by participating in the Scrap Tire Program. The Scrap Tire Program, run by the Department, provides scrap tires to qualifying organizations for their playgrounds. This program not only allows grant recipients to provide safe surfacing for playgrounds, but encourages the use of re-cycled tires, thus reducing the landfills and benefiting the environment. *Id.*

Nonprofit day care centers and other nonprofit entities are eligible to submit applications. *Id*. at 5. But participation in the program requires accepting various obligations. For example, a participating organization must store the recycled tires on their property (that would otherwise fill Missouri's landfills). *Id.* at 49-50. The organization must also promote Missouri's Scrap Tire Program through the media, teach students about the benefits of recycling and promote the program to other organizations. *Id*. at 5.

All of the applicants for the program are graded based on how well they will accomplish these obligations, and the Department chooses the organizations who will best accomplish the Department's interests. *Id*. at 6.

The Learning Center sought to participate in the 2012 Scrap Tire Program to remove and replace the pea gravel surfacing on its playgrounds with a recycled pour-in-place rubberized product. But the Department has a policy that prohibits organizations from participating in the Scrap Tire Program if the applicant is

owned or controlled by a church, sect, or denomination of religions, if the grant would directly aid any church, sect or denomination of religion, if the applicant's mission is not secular in nature, or if the grant would not be used for secular purposes. *Id*. at 5.

Phil Glenn, a representative of the Church, contacted Kim Tschirgi, a planner for the Department, concerning this prohibition. Ms. Tschirgi informed Mr. Glenn that while the Department did not refuse applications from any organizations, if the organization scored high enough on the application to otherwise qualify for a grant, the application might have to be forwarded to the Department's legal office for review to determine eligibility. *Id.*

The Church's application received 640 total points, and ranked fifth out of 44 applications. *Id.* at 6. Although fourteen projects were funded in 2012, the Department denied the Church's application. *Id.* In a letter from Chris Nagel, the Director of the Solid Waste Management Program, the Department stated,

> Thank you for the time and effort you have taken to respond to the Missouri Department of Natural Resource's recent offering of financial assistance through the 2012 Playground Scrap Tire Surface Material Grants. The department appreciates your candor in explaining how the former "Trinity Lutheran Child Learning Center" was merged into the surviving corporation "Trinity Lutheran Church of Columbia, Missouri, Inc." back in the 1980s. However, after further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no

> money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion…"
>
> *Id*.

Article 1, Section 7 of the Missouri Constitution 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.

See V.A.M.S. Const. Art. 1, § 7.

The sole reason for the denial of the Learning Center's application is it is affiliated with a church. *Id*. at 7.

Trinity desires to participate in future grants from the Missouri Department of Natural Resources, including future Scrap Tire Programs. *Id*. at 7. The Learning Center has additional playgrounds on its facilities that are in need of safer surfacing. But due to the Department's actions and policies, including its actions in denying Trinity's application, the Learning Center cannot participate in future programs. *Id.*

Procedural History

The District Court granted the Department's Motion to Dismiss. The court rejected Trinity's argument that Article I, Section 7 of the Missouri Constitution, only prohibited "aid" to religious organizations, but did not prohibit quid pro quo

transactions with religious organizations – transactions where mutual considerations ran to both parties of the transaction. Trinity contended that this interpretation is consistent with how Missouri courts have analyzed this provision, citing *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (en banc) ("In essence, the [quid pro quo] argument presents the practical suggestion that upon the enrollment of a student the selected institution, be it public or private, must find additional funds (over and above the tuition or mandatory fee), and 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."); *see also Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. 1961) (en banc) (rejecting Missouri Establishment Clause claim that sale of public land to a religious university was unconstitutional as it was an "exchange of considerations" and thus not aid to a religious corporation).

But the District Court rejected this argument, finding that Missouri courts have never endorsed this concept, and that such an interpretation would run contrary to the long standing rule of Missouri courts to not allow aid to religious organizations. *See* Order, 7 ("the Missouri Supreme Court has, on multiple occasions, strictly interpreted Section 7 to prohibit public funding of religious institutions.")

The court noted, correctly, that the Missouri Supreme Court has adopted the

pervasively religious test to determine if state aid violates Article I, Section 7 of the Missouri Constitution. "In particular, the Missouri Supreme Court determined that '[a] key question is whether religion so pervades the atmosphere of the university that it is in essence under religious control or directed by a religious denomination.'" *See id*. at 9 (quoting *St. Louis University v. Masonic Temple Association of St. Louis*, 220 S.W.3d 721, 726 (Mo. 2007)).

Although the court stated that Missouri had a high interest in maintaining a strict separation between church and state, the court did acknowledge the deviations that Missouri has made from that interest. For instance, it noted that the Missouri Supreme Court upheld St. Louis University receiving public financing even though it was a Jesuit Catholic University. The court also recognized that "Thirty years earlier in *American United*, the Missouri Supreme Court upheld a tuition grant program to students who attended public or private colleges after finding that the institutions needed to have independent boards and policies of academic freedom. It stressed that student attendance at private colleges and universities 'does not have the same religious implications or significance' found in elementary or secondary schools.'" *Id*. at 10 (quoting *Americans United*, 538 S.W.2d at 720-21.)

In response to the argument that Missouri has deviated from its alleged interest of maintaining a high separation between church and state, the court held

that where schools are involved, the religious schools in question were not controlled by a church or religious creed. *See id.* at 10. Additionally, the schools in *American United* and *St. Louis University* were institutions of higher education. While the court admitted that the Missouri constitution makes no explicit distinction between institutions of higher education and primary or secondary schools, the Missouri courts have on several occasions considered it to be a factor in allowing aid to religious organizations. *See id*. at 11. The court explained,

> This distinction between institutions of higher education and primary or secondary schools emphasizes the Missouri Supreme Court's concern with the ***degree of control*** a church, creed, or religious domination [sic] may have over the administration, management, and curriculum development at a school. ***When that degree of control was so great that the school was, in essence, serving as a proxy or brand of the church,*** the Missouri Supreme Court has consistently held that public aid, direct or indirect, would be impermissible.
>
> *Id*. at 11 (emphasis added).

The court rejected Trinity's free exercise claim, citing the state's high interest in not funding religious organizations. The Court said: "Even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause, this Court cannot conclude that the exclusion of a religious preschool from this aid program is constitutionally suspect under the Free Exercise Clause in light of the longstanding and substantial concerns about direct payment of public funds to sectarian schools." *See id*. at 23. In response to Trinity's argument that it is entitled to conduct discovery as to whether the State's interest has waned, the court

said, "Trinity has failed to identify any evidence that might support its claim, nor has it shown that a state could ever forfeit its interest in complying with its own laws." *Id*. at 13.

The court dismissed Trinity's Equal Protection claim, finding that since there was no free exercise claim, rational basis would apply to the equal protection claim. *See id*. at 29. The court concluded, "From the allegations in the Complaint, it is clear that the decision to exclude religious organizations from participation in the Tire Scrap Program withstands rational basis review." *Id*. at 30. "Whether characterized as 'substantial' or 'compelling', the antiestablishment concerns that motivated this decision, based on Trinity's own allegations, at least bears 'a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Id*. at 30 (citing *Locke v. Davey*, 540 U.S. 712 (2004) and *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376, 386 (W.D. Mo. 1973)).

The court dismissed Trinity's Establishment Clause claim, finding there was no hostility towards religion in the State's actions, and that "neutrality" is not the sole test in Establishment Clause claims. *See id*. at 31.

The Court likewise dismissed Trinity's free speech claims, saying: "[t]here is simply no basis for concluding that the Tire Scrap Program is designed to provide an open forum encouraging diverse views from private speakers." *Id*. at 34.

Trinity moved for reconsideration, arguing that because the alleged interests of the state are relevant to these claims, Trinity should be allowed to provide evidence that Missouri has deviated from that interest in recent years. For example, the State allowed fifteen churches to participate in the recycled tire program. If the state still had a high interest in prohibiting any aid to religious organizations, then why would it have allowed fifteen churches to participate in the recycled tire program? Furthermore, how can the state even pass a rational basis review of denying Trinity participation in a scrap tire program when it has allowed fifteen other religious day cares to participate in the program?

The court denied the motion to reconsider, stating: "The Court concluded that 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."

Trinity also moved the court to reconsider on the ground that the court improperly engaged in weighing the evidence on a motion to dismiss. The court disagreed: "Regarding *St. Louis University*, the Court discussed at length the numerous factual circumstances that rendered that case distinguishable from the present one. This did not, as Trinity contends, amount to an evaluation of the evidence, but rather a legal conclusion regarding the relevance of this opinion to the allegations in Trinity's Complaint." *Id*. at 5 (citations omitted)(emphasis in

original).

In the court's view, "The issue here was not whether Trinity had actually presented evidence to support its claims, but rather the fact that Trinity had failed to identify any evidence that, even in theory, might be revealed through discovery and would give rise to an actionable claim." *Id*. at 6.

The court also denied Trinity's motion to Amend the Complaint to add facts revealed through discovery to the Complaint indicating Missouri has previously awarded tire scrap grants to churches and other religious organizations. *See id*. at 6. The court denied this motion because, according to the court, Trinity did not give a reason as to why it waited until after the case was dismissed to add these facts to the complaint, and also because any amendment, in the court's view, would be futile. According to the court, "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." *See id*. at 7.

SUMMARY OF THE ARGUMENT

Trinity sought to participate in the Playground Scrap Tire Surface Material Grant Program to improve the safety of its playground. Although its application scored fifth out of forty-four applicants, it was denied the right to participate in the

program solely because the learning center is affiliated with a church. The Department's policy is that any applicant that is controlled by a pervasively religious organization cannot participate in the Scrap Tire Program.

The Department's policy and actions violate Article I, § 7 of the Missouri constitution that, while prohibiting public money that is "in aid of" a church, also prohibits discrimination against churches. Because the Scrap Tire Program involves mutual considerations going to both parties, it does not involve public moneys "in aid of" a church as that term has been interpreted by Missouri courts. Conversely, prohibiting the Department from participating in the program solely because the Learning Center is affiliated with a church discriminates against churches. The District Court erred by dismissing the case and not allowing the Department to present evidence that the mutual considerations flowing to both sides sufficiently removed this transactions from Article I, § 7's prohibition.

The Department's policy that prohibits pervasively religious organizations from participating in the Program violates the Establishment Clause of the United States Constitution. Such a policy excessively entangles the state with religion because a key inquiry under this analysis is to what extent the institution adheres to religious doctrine or to what extent religion permeates the institution. This inquiry also inevitably leads to discrimination amongst religious organizations as some religious organizations will pass the pervasively religious test, like *St. Louis*

University, and some will fail. The District Court erred by dismissing the case and not allowing Trinity to present evidence as to how the state excessively entangles itself with religion and how such a policy has resulted in discrimination amongst religious groups. For example, fifteen other religious institutions, including churches, have been allowed to participate in the Scrap Tire Program. JA, 159.

The Department's policy violates the Equal Protection Clause as it treats churches dissimilarly from other day cares and learning centers. The Department claims it is entitled to treat Trinity differently citing Missouri's high interest of separation of church and state. But Missouri has on multiple occasions deviated from this interest indicating it is not so "high" after all. For example, it allowed public funding of a Catholic Jesuit University. It allowed scholarships to go to parochial schools. It has allowed public bonds to finance religious hospitals. Fifteen religious organizations have been allowed to participate in the Program. JA, 159. But because the court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), Trinity was not allowed to present evidence negating Missouri's alleged high interest in separating church and state. And regardless of whether a rational basis test, strict scrutiny, or another heightened scrutiny is employed, Trinity should have been permitted to present evidence it obtained through discovery regarding Missouri's true interest in this case.

The Department's policy violates the Free Exercise Clause as it targets religion as a class for disparate treatment. This policy does not target all religious groups, but only those groups that are considered "pervasively religious." Consequently, a Catholic Jesuit University is allowed to receive state aid, but a learning center run by a church cannot. The District Court erred by dismissing this claim and not allowing Trinity to present evidence and make its case that the Department's policy violated the Free Exercise Clause.

ARGUMENT

I. TRINITY HAS STATED A CLAIM.

The Department's actions of enforcing its laws and policies to prohibit Trinity from participating in the Scrap Tire Program violates Article I, § 7 of the Missouri Constitution, as well as the Establishment, Equal Protection and Free Exercise Clauses of the United States Constitution.

A. Standard of Review

This court reviews de novo the grant of a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), and must take all facts alleged in the complaint as true. *Owen v. Gen. Motors Corp*., 533 F.3d 913, 918 (8th Cir.2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Concerning the District Court's refusal to allow Trinity to amend the complaint, the Court should apply a "different considerations" standard that includes both an abuse of discretion standard and a de novo standard. In *Parnes v. Gateway 2000, Inc*., 122 F.3d 539, 550–51 (8th Cir.1997), this Court applied the "different considerations" standard and affirmed the denial of a motion for leave to amend a complaint dismissed under Rule 9(b) (which requires heightened pleading for fraud claims) because plaintiffs "failed to provide any valid reason for failing to amend their complaint prior to the grant of summary judgment against them." *See also Zutz v. Nelson*, 601 F.3d 842, 850-51 (8th Cir. 2010) (stating that in ruling on post judgment motions to amend, courts "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits."); *Bills v. U.S. Steel LLC*, 267 F.3d 785 (8th Cir. 2001) (holding that court did not abuse its discretion to not allow amendment of pleadings when plaintiff had been warned of the flaw in his pleading and refused to amend the pleading while case was open). *Cf. United States ex rel. Hebert v. Dizney*, 2008 WL 4538308, at *4 (5th Cir. Oct.10, 2008) (unpublished) ("the considerations for a motion under Rule 59(e) are the same as those governing a motion under Rule 15(a).") (applying *Rosenzweig v. Azurix Corp*., 332 F.3d 854, 865 (5th Cir.2003)); *SNAPP, Inc*., *v.*

Ford Motor Co., 532 F.3d 496, 507 (6th Cir. 2009) (applying Rule 59 and Rule 60 principles standards, although the dismissal was reversed anyway).

As to a court's decision to not allow a post judgment motion to amend based on futility grounds, the Court should apply a de novo standard as this is a legal question. *See Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir.2008) (stating that denial of a motion for leave to amend on the basis of futility "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.")

B. The Department violated the Missouri Constitution, Article I, § 7.

The Department's actions in discriminating against Trinity because of its religious classification violated Missouri's establishment clause, found in Article I, § 7 of the Missouri Constitution. Article I, Section 7 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.

See V.A.M.S. Const. Art. 1, § 7 (emphasis added).

This Article has two prohibitions that work together. On one hand, no money can be taken from the public treasury "in aid of any church". But at the same time, this Article prohibits "any discrimination made against any church …."

The Article does not prohibit any and all public money going to a church, but only public money "in aid of" any church. In fact, public monies have gone to churches and religious organizations with the blessing of the state on different occasions. *See Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (en banc) (upholding Missouri's financial assistance program that allowed money to pay for student's tuition at religious colleges); *St. Louis University v. The Masonic Temple Association of St. Louis*, 220 S.W.3d 721 (Mo. 2007) (upholding public financing of Catholic, Jesuit university with a religious mission statement and religious by-laws). If it were true that no state money could ever be spent to aid a church, then no fire or police protection could be provided to a church. But no court has gone so far as to ban any and all state money going to a church.

1. The Recycled Tire Program involves mutual considerations and thus any money to a receiving institution is not "in aid of" the institution.

Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976) (en banc) and *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. 1961) (en banc) reason that when state monies are given to a religious institution in an exchange of mutual considerations, they are not given "in aid of" a church. *Kintzele* involved the sale of land by the St. Louis Land Clearance for Redevelopment Authority to St. Louis University. The plaintiff argued that the sale was not for "fair value" and thus was an "illegal and unconstitutional contribution of public lands to a University." *Id*. at

697. The court rejected a challenge that this sale violated the Missouri establishment clause, *see id*. at 697, viewing the sale as an "exchange of considerations" and thus not as aid to a religious corporation. *See id*.

The Court cited favorably to a New York Court of Appeals case, *64th St. Residences, Inc. v. City of New York*, 4 N.Y.2d 268 (1958). That case also dealt with the sale of land to a religious school and a challenge to such sale as being aid to a religious institution. The court rejected this argument, pointing out "since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding." *Id*. at 277.

In *Americans United*, the Missouri legislature passed a law allowing for tuition grants to students at public and private schools. Seventeen of fifty-seven universities were affiliated with a church. *See id* at 715. The plaintiffs argued that tuition grants to religious schools violated Missouri's establishment clause. *See id*. at 720-21. The court rejected this argument:

> It is argued, additionally, by those defending the program that tuition and fee payments made by a student do not represent grants "in aid of" or "help to support or sustain" an institution. It is submitted that such payments: ". . . 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 * * * No institution made a "profit" on the tuition fees received, whether paid in part by a recipient of an award from the Missouri program, from

> some Federal program, or by the student out of his own pocket. All qualified institutions are not-for-profit organizations, and the record shows that the cost to each institution of furnishing to its students their educational opportunities is always far greater than the amount of the tuition received." In essence, the argument presents the practical suggestion that upon the enrollment of a student the selected institution, be it public or private, must find additional funds (over and above the tuition or mandatory fee), ***and 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.***

Id. at 721 (emphasis added) (the Court also recognized the holding in *Kintzele* where it upheld a sale of land to a church as "'an exchange of considerations' and thus not aid to a religious corporation.")

Thus the "no aid" provision of Article 1, § 7 is not implicated if there is an "exchange of considerations" between the state and the religious institution.

Here, no state monies are going to aid Trinity as the program requires an exchange of considerations. The Learning Center must arrange to purchase the recycled tires from a vendor, and the money can only go to material and delivery costs. Meanwhile, the Learning Center must pay all other expenses, including the installation of the recycled tires. JA, 49-50. In addition, the Learning Center takes on the additional obligation of storing the recycled tires on their property (that would otherwise fill Missouri's landfills). They must also promote Missouri's Scrap Tire Program through the media, teach students about the benefits of recycling and promote the program to other organizations. *See id*. Thus, the

Learning Center must undergo obligations and expenses itself to receive this material that not only helps reduce pollution (thus aiding the state), but also provides a safer playground for children within the state (again, aiding the state).

The District Court cited many state cases where Missouri courts have struck down programs where religious institutions were funded. *See* Opinion, 7-10. But those cases are fundamentally different than this situation as those cases did not involve the exchange of considerations. *See Paster v. Tussey*, 512 S.W.2d 97 (state funds purchased textbooks); *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1941) (state took over parochial school and brought it into the public school system and funded it as such); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (use of public funds to transport students to parochial schools); *Luetkemeyer v. Kaufmann*, 364 F Supp. 376 (W.D. Mo. 1973) (bus transportation for public schools but not private schools); *Brusca v. Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971) (First Amendment does not require public assistance to secular and religious schools).

Because participating in Scrap Tire Program involves the exchange of considerations, payments under the program are not "in aid of" a religious institution. The District Court erred in dismissing this claim without allowing Trinity to offer evidence supporting its claims.

2. Barring Trinity from participating is discriminatory.

By prohibiting Trinity from participating because it is a church, the Department discriminated against churches in violation of Article I, § 7. There is no question in this case that Trinity was denied participation in the program solely because it is affiliated with a church. The Department's actions in administering the Program classified individuals and groups on the basis of religion. The Department admitted that Trinity otherwise qualified for the program, but was precluded from participating in the program solely because it was affiliated with a church. *See* JA, 6-7. The Department has given grants to other similarly situated learning centers that are not a part of a church. *See id*. 9. Religion was the sole distinguishing characteristic prohibiting Trinity from participating in the program. Thus, the Department has discriminated against churches in violation of Article I, § 7 of the Missouri Constitution.

C. The Department violated the Establishment Clause.

The Department's actions and Policy violate the Establishment Clause of the United States Constitution as they require the state to become excessively entangled with religion, discriminate amongst religious organizations, and they are hostile towards religion.

1. Excessive entanglement

As the District Court correctly found, Article I, § 7 does not prohibit all aid to religious organizations: just aid to organizations that are controlled by a church. *See* Order, 9. The Missouri Supreme Court in *St. Louis University* set out the proper test. *See* 220 S.W.3d at 726. In that case, the court determined that "[a] key question is whether religion so pervades the atmosphere of the university that it is in essence under religious control or directed by a religious denomination." *Id*. at 726.

Analyzing the pervasiveness of religiosity in an organization violates the Establishment Clause because it excessively entangles the state with religion. The Tenth Circuit confronted this exact question in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). In that case, the State of Colorado provided scholarships to eligible students who attended an accredited college in the state, but prohibited scholarships to schools the state deemed "pervasively sectarian." To determine whether a school was "pervasively sectarian," state officials examined whether the policies enacted by school trustees adhere too closely to religious doctrine, whether all students and faculty share a single "religious persuasion," and whether the contents of college theology courses tended to "indoctrinate." *See Colorado Christian Univ.*, 534 F.3d at 1250.

The court concluded that this practice violated the Establishment Clause "because … in addition to imposing a far greater burden on affected students, [the program] has two features that were not present in *Locke* and that offend longstanding constitutional principles: 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 1256.

Here, Missouri permits funding of some religious organizations, such as St. Louis University, while others are not allowed to receive any government funds. The distinguishing test is whether "religion so pervades the atmosphere of the university that it is in essence under religious control or directed by a religious denomination." *Id*. at 726.

2. Discriminates between religious denominations

As the court pointed out in *Colorado Christian University*, applying a pervasively religious test results in discrimination amongst religious denominations. *See* 534 F.3d at 1256. The same is true here where some religious organizations are allowed to receive government funding while others are not. Preferring some religious denominations over others violates the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command

of the Establishment Clause is that one religious denomination cannot be officially preferred over another"). The District Court erred by dismissing Trinity's Establishment Clause claim and not allowing Trinity to pursue its claim.

3. Hostility to religion

The federal Establishment Clause also prohibits state action that disfavors religion as a class. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) ("if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. 'The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.'")

Here, 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. This type of hostility violates the Establishment Clause. *See also Everson v. Board of Education*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them."). The singling out of

religion as a suspect class serves no governmental interest under these facts, is hostile to religion, and violates the federal Establishment Clause.

The District Court found that there was no animus towards religion involved in this case. *See* Order, 24. The same argument was raised in *Colorado Christian University* and rejected:

> Finally, the state defendants argue that they may discriminate in favor of some religions and against others so long as their discrimination is not based on "animus" against religion—by which they mean religious "bigotry." There is no support for this in any Supreme Court decision, or any of the historical materials bearing on our heritage of religious liberty.
>
> *Colorado Christian University*, 534 F.3d at 1260.

To prove its point, the court in Colorado cited to the cases involving race:

> Even in the context of race, where the nondiscrimination norm is most vigilantly enforced, the Court has never required proof of discriminatory animus, hatred, or bigotry. The "intent to discriminate" forbidden under the Equal Protection Clause is merely the intent to treat differently.
>
> *Id*.

The court concluded by stating that the touchstone for constitutional analysis is government neutrality:

> To be sure, where governmental bodies discriminate out of "animus" against particular religions, such decisions are plainly unconstitutional. But the constitutional requirement is of government neutrality, through the application of "generally applicable law[s],"

> not just of governmental avoidance of bigotry. If First Amendment protections were limited to "animus," the government could favor religions that are traditional, that are comfortable, or whose mores are compatible with the State, so long as it does not act out of overt hostility to the others. That is plainly not what the framers of the First Amendment had in mind.
>
> *Id*.

In sum, the Department's policy and actions here violate the federal Establishment Clause as they excessively entangle the state with religion, prefer some religious organizations over others, and are hostile to religion in general. The District Court erred by dismissing this case.

D. The Department violated the Equal Protection Clause of the United States Constitution.

Prohibiting Trinity from participating in the Scrap Tire Program, while allowing other secular daycares and learning centers to participate, violates the Equal Protection Clause of the United States Constitution. The Equal Protection Clause grants each person the right to "equal protection of the laws." U.S. Const. amend. XIV, § 1. In general, if a law distinguishes between two or more classes of individuals, the government must articulate a rational basis for doing so. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (striking down law that treated group home inhabitants on less than equal terms than others). But if a law distinguishes among individuals on the basis of a "suspect classification,"

such as race or religion, the government is held to the more exacting standard of strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Religion is a suspect classification. The U.S. Supreme Court and this Court have held that laws that distinguish on the basis of religion are subject to this higher standard. *See United States v. Batchelder*, 442 U.S. 114, 125 n. 9 (1979) ("The Equal Protection Clause prohibits selective enforcement based on an unjustifiable standard such as race, religion, or other arbitrary classification."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage …." it gets rational basis scrutiny); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 816 (8th Cir. 2008) ("Religion is a suspect classification."); *see also Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005) ("religious freedom" is a "fundamental right" and thus subjecting violations thereof to strict scrutiny); *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (stating that religion is a suspect classification); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) ("Religion is a suspect classification").

The Department's actions in this case classified individuals and groups on the basis of religion. The Department admitted that the Church otherwise qualified for the grant, but was precluded from participating in the program solely because it was a church. *Id*. at 6-7. The Department has given grants to other similarly

situated learning centers that are not a part of a church. *See id*. at 9. Religion was the sole distinguishing characteristic prohibiting Trinity from receiving a grant.

A state violates the Equal Protection Clause even if it discriminates against all religious organizations equally. This is because similarly situated persons cannot be treated dissimilarly based on a suspect classification or involving a fundamental right. For example, it is no defense to an equal protection claim that the state requires all persons of a certain race to attend separate schools. *See, e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954). Likewise, it is no defense for the Department to claim that it is discriminating against all churches equally. The Equal Protection Clause is implicated because the Learning Center is similarly situated to non-religious daycares, but is treated unequally because of its religious classification.

Consequently, the Department's actions in prohibiting the Church from participating in the Scrap Tire Program must serve a compelling governmental interest and be narrowly tailored to achieve that interest. *See id.* at 440; *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964 (8th Cir. 2003) (applying strict scrutiny analysis to a equal protection claim based on suspect classification).

1. The Department does not have a compelling governmental interest.

The Department does not have a compelling governmental interest to prohibit Trinity from participating in the Scrap Tire Program. The Scrap Tire Program provides grants so that children at daycares, learning centers, schools, and other like places throughout the state can play on safe playgrounds. This is not a program where the money from the state will buy religious textbooks, pay for religious indoctrination or provide for the training of clergy.

The Department argues that Missouri's interest in this case is to maintain a high degree of separation of church and state. This argument is not appropriate on a motion to dismiss because it involves the determination of a a factual issue that is subject to discovery. The government does not have a compelling interest when it acts contrary to that interest. *See Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993) (finding that the city did not have a compelling interest to prevent the ritual slaughter of animals when it allowed the killing of animals for various other reasons, including meat butchering); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (1999) (holding that city did not have a compelling interest to prohibit policeman to have beards when it allowed policemen to have beards for other reasons, including medical reasons).

In addition, *Luetkemeyer v. Kaufmann*, 364 F Supp. 376 (W.D. Mo. 1973) does not support such blatant hostility towards religion. In *Luetkemeyer*, the

school district provided bus transportation for students to public schools. But the Plaintiff in that case wanted to force the state to provide transportation to private schools. *See id*. at 378 ("The basic questions presented are whether the State of Missouri, once it determines to provide bus transportation only to public school students, is compelled by the Constitution of the United States to also provide like transportation to students who attend a parochial school ….") It is one thing to bring a cause of action to force the state to provide a service that it is not otherwise providing (busing for private schools). But it is wholly another matter for the state to provide a secular program, open it to public and private organizations, but then specifically exclude only religious organizations. *Luetkemeyer* only stands for the proposition that a private citizen cannot force the state to provide busing for students to religious private schools simply because it also provides busing for the public school students. *See id*.

In contrast, the State here has not limited the Scrap Tire Program to only public organizations and playgrounds, but has opened it up to private organizations as well. Plaintiffs cannot force their way into a program providing things only to state-run organizations. But when the state affirmatively opens it up to other private, non-state organizations, it cannot discriminate among them as it has done here.

In addition, the court in *Luetkemeyer* limited the reach of the state's interest in maintaining a high separation between church and state. The court limited its application to not include any violations of constitutional rights such as those in *Sherbert v. Verner*, 374 U.S. 398 (1963) or *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See Luetkemeyer*, 364 F.Supp. at 386. *Sherbert* and *Yoder* both dealt with laws that specifically targeted religion. In *Sherbert*, the court invalidated the application of a law that denied unemployment benefits to a claimant who had refused employment because her religious beliefs prohibited her from working on Saturdays. *See* 374 U.S. at 413. In *Yoder*, the Court struck down the application of a law that prohibited the Amish's religious practice of placing their children on the farm after they graduated the eighth grade. *See* 406 U.S. at 215. Similar to the laws struck down in *Yoder* and *Sherbert*, the application of the law here targets religion and precludes Trinity from participating in a secular program based solely on its religious classification.

In sum, *Luetkemeyer* does not give the state cart blanche approval for any and all discrimination against religious organizations in the pursuit of a high separation between church and state. For instance, should Article I, § 7 prohibit 911 from responding to any calls from a church because such service is direct aid from the state to a church? Should this law preclude police or the fire department from providing services to a religious organization? Of course not. *See, e.g.*,

Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976) (en banc) ("'The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.'") (citing *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976)). The dicta in *Luetkemeyer* concerning the state's interest in maintaining a high wall between church and state only extends to its facts – that a person cannot force the state to provide transportation services to private schools when the state has only chosen to provide transportation for public schools.

In addition, to the extent that Missouri had a compelling governmental interest to maintain a high separation between church and state in 1973 (the date of the *Luetkemeyer* decision), its recent actions favoring church and state *interaction* have diminished that interest to the point it cannot be used to justify the Department's actions here. In *Saint Louis University v. Masonic Temple Association of St. Louis*, 220 S.W.3d 721 (Mo. en banc 2007), a religious college sought to use Missouri state increment financing to construct an arena for sporting events, graduation ceremonies, and other uses by the students and community. The Masonic Temple Association of St. Louis ("Masonic") filed an action to stop the

public financing under Article I, section 7 of the Missouri Constitution, arguing that St. Louis University ("SLU") was a university controlled by a religious creed, church or sectarian denomination. *See id*. at 726.

Article I of SLU's bylaws stated:

> [SLU] has been operated and governed by [Jesuits] and enjoys a long, rich history and tradition as a Catholic university and as a Jesuit university. Its trustees acknowledge ... the University's operations will be conducted, in harmony with this history and tradition, and that:
>
> a. The University will be publicly identified as a Catholic university and as a Jesuit university.
> b. The University will be motivated by the moral, spiritual and religious inspiration and values of the Judeo–Christian tradition.
> c. The University will be guided by the spiritual and intellectual ideals of the [Jesuits].
> d. The University, through the fulfillment of its corporate purposes, by teaching, research and community service, is, and will be, dedicated to the education of men and women, to the greater glory of God, and to the temporal and eternal well being of all men and women.

Id. at 727-28.

In addition, SLU's mission statement included references to "the greater glory of God," "God's creation," "spirit of the Gospels," and a statement: "As a Catholic, Jesuit university, [SLU's mission] is motivated by the inspiration and values of the Judeo-Christian tradition and is guided by the spiritual and intellectual ideals of the [Jesuits]." *See id*. at 728.

Yet despite these facts, the court held that giving state monies to such an organization did not violate Missouri's constitution. *See id*. Missouri cannot argue on one hand that it has a compelling governmental interest to maintain a high separation between church and state such that it will not allow a learning center to participate in a government program that provides recycled tires, while on the other hand allowing public financing of a Catholic University whose mission and bylaws state a blatantly religious purpose. Missouri cannot have a compelling governmental interest when it acts in direct contradiction to that interest. *See*, *e.g*., *Fraternal Order of Police*, 170 F.3d at 366 (stating that the police department's medical exception to a no-beard rule undermined the Department's supposedly compelling interest in fostering a uniform appearance).

The Department argued below that Article I, § 7 is presumptively constitutional. But when the law in question specifically targets religion as a suspect class and subjects those in that class to discrimination, the presumption of constitutionality, if one exists, is easily overcome. *Locke v. Davey*, 540 U.S. 712 (2004), does not support presumptive constitutionality. First, *Locke* simply allowed a state to continue a practice that reflected "historic and substantial state interest[s]". *See Colorado Christian University*, 534 F.3d at 1255 ("The opinion [in *Locke*] suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and

does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.") (citing *Locke*, 540 U.S. at 725). But here, Missouri has deviated from this alleged interest and Trinity should have been given the opportunity to pursue its claim that this interest is no longer a compelling governmental interest.

But furthermore, *Locke* does not stand for the proposition that a statute targeting religion is presumptively constitutional. Instead, the facts and holding of *Locke* show why the Department does not have a compelling interest to discriminate against churches in a secular program like providing recycled tires.

In *Locke*, the Supreme Court upheld a Washington statute that prohibited state scholarships for students studying to become clergy. *See* 540 U.S. at 725. The holding was explicitly limited to the issue of funding for "the religious training of clergy." *Id*. at 722, n. 5, 722-24. The Court explained that its narrow holding reflected long-standing historical concerns over public funding of the clergy. The statute in question did not apply to general religious studies. In fact, the statute "permit[ted] students to attend pervasively religious schools, so long as they [were] accredited." *Id*. at 724. The Court recognized the limited application of the state's Establishment Clause interest:

> Justice Scalia notes that the state's "philosophical preference" to protect individual conscience is potentially without limit, see *post*, at 1318; however **the 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 (emphasis added).

Locke does not endorse blatant discrimination against religious organizations. 540 U.S. at 724.

Missouri's prohibition in this case is fundamentally different than the prohibition which was upheld in *Locke*. There is no chance that recycled tires will be used for religious instruction or for religious exercise. This is in marked contrast to Washington's prohibition in *Locke* on the funding of devotional studies for theology students.

Missouri does not have a compelling interest in avoiding an illusory Establishment Clause violation. But Missouri does have a significant interest to prevent discrimination against religious groups. In *Oliver v. State Tax Commission of Missouri*, 37 S.W.3d 243 (Mo. 2001) (en banc), the court said,

> In *Widmar* there unquestionably was the use of state facilities by a religious organization, which might violate a literal reading of the first clause of article I, section 7, of the Missouri Constitution. But the overriding requirement of the federal constitution is that the religious organization not be discriminated against on the basis of the content of its activities, and in this case the Missouri Constitution is consistent with this principle.

Id. at 252 (upholding constitutionality of "So help me God" oath).

In sum, Missouri does not have a compelling governmental interest to prevent a church from participating in a secular recycled tire program on the same

terms and conditions as all other organizations. This case does not involve state monies for training clergy, paying for religious education, or buying religious textbooks.

2. The Department's actions are not narrowly tailored.

Additionally, prohibiting a learning center from participating in a secular governmental grant program is not narrowly tailored to achieve whatever interest the State asserts. Recycled tire scraps cannot be used for religious instruction. There is nothing inherently or implicitly religious about providing a safe playground for Missouri's children to enjoy. This case is not like *Locke* where the state aid was actually going to fund the training of clergy. *See* 540 U.S. at 722-24. This case is not even like *Mitchell* where the state lent educational materials and equipment, such as library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings to parochial schools. *See* 530 U.S. 793, 803 (2000) (plurality). While one might see how an overhead projector might be used by a parochial school for religious instruction, it is inconceivable that recycled tires could be used for religious instruction. Discriminating against churches from participating in a recycled tire program is not narrowly tailored to achieve whatever interest the State asserts.

E. The Department violated the Free Exercise Clause of the United States Constitution.

The Department's actions violated the Free Exercise Clause of the United States Constitution as they targeted Trinity solely because of religion and so were not neutral nor generally applicable. *See* U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.") (emphasis added). A state violates the Free Exercise Clause when either a regulation is not neutral or generally applicable or when a law targets religion specifically. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-47 (1993) (striking down law under the Free Exercise Clause without considering whether it imposed a substantial burden on religion); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("Under *Smith* . . . there is no substantial burden requirement when government discriminates against religious conduct"); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (because the challenged law is not neutral or generally applicable, Trinity "need not demonstrate a substantial burden on the practice of their religion."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("After *Smith*, it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny.")

The Department's actions in enforcing Article I, § 7 of the Missouri Constitution against Trinity targeted Trinity for disparate treatment solely because

of religion. JA, 6-7. There is no question that but for the Learning Center being connected to a church, it could have participated in the program. *See id*. Trinity's application received 640 total points, and ranked fifth out of 44 applications. *See id*. Fourteen projects were funded that year. *See id*. In rejecting Trinity's application, the only reason given was the fact the applicant was a church, and that Article I, § 7 of the Missouri Constitution prohibited state aid to churches. *See id*. Thus, the Department's actions must pass strict scrutiny to be constitutional, which, as explained above, they do not.

II. LEAVE SHOULD HAVE BEEN GRANTED TO AMEND THE COMPLAINT

The District Court stated that Trinity failed to present evidence that Missouri has deviated from its interest of maintaining a high separation of church and state. *See* Order, 13 ("Trinity has failed to identify any evidence that might support its claim, nor has it shown that a state could ever forfeit its interest in complying with its own laws").

Trinity did not believe it had to present evidence in its Complaint as to this issue, as its pleadings sufficiently plead that the Department did not have a valid interest to deny Trinity participation in its Programs and that it was permitting other similarly situated groups to participate. *See* JA, 9 ("Defendant has allowed other similarly-situated non-profit organizations to participate in the Scrap Tire Program.") ("Defendant does not have a compelling governmental interest to

justify such disparate treatment of Plaintiff") ("Excluding Plaintiff from the Scrap Tire Program because the Learning Center is connected to a church is not rationally related to a legitimate governmental interest.").

But in light of the court's order, Trinity sought leave to amend the Complaint to add allegations that Missouri, and the Department, have acted contrary to its alleged purpose, including the fifteen examples it learned through discovery where the Department allowed religious organizations to participate in the Program. *See* JA, 159.

The court abused its discretion in not allowing Trinity to amend its complaint to add these allegations. *See Zutz v. Nelson*, 601 F.3d 842, 850-51 (8th Cir. 2010) (stating that in ruling on post judgment motions to amend, courts "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits."). This case is different than *Parnes v. Gateway 2000, Inc*., 122 F.3d 539, 550–51 (8th Cir.1997), cited by the court. *Parnes* dealt with a Rule 9(b) fraud claim that required heightened pleading, and was dismissed after the summary judgment stage. *See also Bills v. U.S. Steel LLC*, 267 F.3d 785 (8th Cir. 2001) (holding that court did not abuse its discretion to not allow amendment of pleadings when plaintiff had been warned of the flaw in his pleading and refused to amend the pleading while case was open). Here, the case

had not progressed to the summary judgment stage, nor was Trinity given any warning that it needed to amend its pleadings as was done in the above cases.

As to the futility grounds cited by the court, because Trinity has stated a claim for relief, amending the complaint would not be futile. *See Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir.2008) (stating that denial of a motion for leave to amend on the basis of futility "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.")

CONCLUSION

The District Court erred in weighing the evidence and concluding that Trinity had not pled a claim for relief. Trinity should have been allowed to pursue its claims and have them decided based upon the evidence. The District Court's opinion should be reversed and this case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVCE

I hereby certify that on this 25th day of April, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Joel L. Oster

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7) and Eighth Circuit Rule 32.3, the undersigned counsel certifies that this brief :

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
    a. This brief contains 11,609 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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    a. This brief has been prepared in proportionately spaced typeface using Microsoft Office Word 2007, in Times New Roman font, 14 pt. for main body text, 14 pt. for footnote text.

Dated this 23rd day of April, 2014.

/s/ Joel L. Oster
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