April 18, 2017

The Hon. Scott S. Harris, Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543-0001

Via Hand Delivery and Email

Re: No. 15-577, *Trinity Lutheran Church of Columbia, Inc. v. Comer*

Dear Mr. Harris:

This letter is in response to the Court's April 14, 2017, order directing the parties to submit their views on whether this case is affected by the press release relating to access to Missouri grant programs issued by Governor Greitens on April 13, 2017. For the following reasons, Petitioner believes that this case is not affected by the press release.

This Court has made clear that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "'[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)). The State must prove that "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 189 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). This Court has described that burden as "heavy," *Cnty.*

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of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), "stringent," *Friends of the Earth*, 528 U.S. at 189, and "formidable," *Already, LLC v. Nike, Inc*., 133 S. Ct. 721, 727 (2013).

To meet this heavy burden, the State must "persuad[e] the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189. A change in policy will only cause this Court to find a case moot when the State meets two demanding standards: (1) there is "'no reasonable expectation …' that the alleged violation will recur" and (2) "events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). The State cannot make either showing here.

The Governor's policy change comes late in the day, on the eve of oral argument, thus casting doubt on its permanence. *See Friends of the Earth*, 528 U.S. at 190 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (noting that "a citywide moratorium on police chokeholds. . . would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent")). A change in administration could readily lead to a resumption of the State's former policy of excluding churches from the Scrap Tire Program or the Governor could simply change his mind due to political pressure. The state briefed this case with a vigorous defense of the Department of Natural Resources' ("DNR") policy and has defended the case on that basis for over four years. *Cf. Knox*, 132 S. Ct. at 2287. The ease with which the Department's policy was changed, the fact that it occurred only after an intervening election and change in administration, and the vigorous defense of the policy at all levels for the last four years make it impossible for the State to make it "absolutely clear" that the former policy of excluding churches from the Scrap Tire Grant program will not be revived. That is particularly true given the last-minute nature of the policy change. As this Court has explained, "post certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox*, 132 S. Ct. at 2287. Nothing prevents the State from "returning to [its] old ways." *W.T. Grant Co*., 345 U.S. at 632. Thus, no possibility exists that the case is moot.

In addition, the policy change does nothing to remedy the source of the DNR's original policy—the Missouri Supreme Court's interpretation of Article 1, §7

of the Missouri Constitution. Article 1, §7 states, in relevant part, "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion." As the Eighth Circuit acknowledged in this very case, the Missouri Supreme Court has interpreted Article 1, § 7's language as significantly "more explicit" and "more restrictive" than the federal Establishment Clause. Pet. App. at 5a (quoting *Paster v. Tussey*, 512 S.W.2d 97, 101–02 (Mo. 1974)). Indeed, this is the exact same provision the Court confronted in *Widmar v. Vincent*, 454 U.S. 263 (1981), and which this Court recognized has a long history of "achieving a greater separation of church and State than is already ensured under the Establishment Clause of the United States Constitution." *Id*. at 277; see also Resp. Br. at 19 (characterizing the Missouri Constitution's separation of church and state as "absolute" and "strict").

The DNR's former policy was not designed in a vacuum. It was specifically intended to comply with Article 1, § 7. *See* Pet. App. at 153a (citing Article 1, §7 as the reason for denying Trinity Lutheran's scrap tire grant application). The Governor's announced policy change likely violates the Missouri Supreme Court's longstanding interpretation of Article 1, § 7. *See, e.g., Paster v. Tussey*, 512 S.W.2d 97, 101-04 (Mo. 1974). The Missouri Supreme Court is likely to reach that conclusion in the private lawsuit that is sure to challenge Missouri's award of a scrap tire grant to Trinity Lutheran or any other church.[1]

Finally, the State cannot show that its policy change has "completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. Governor Greitens' own statement explains that "[t]oday's action … is not expected to affect the Trinity Lutheran case before the Supreme Court because that case involves a 2012 DNR decision that became final years

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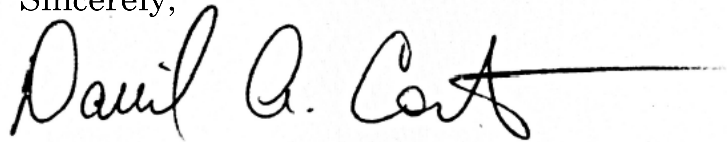
[1] See Celeste Bott, Greitens instructs DNR to consider religious organizations for grants, St. Louis Post-Dispatch (April 13, 2017), available at http://www.stltoday.com/news/local/crime-and-courts/greitens-instructs-dnr-to-consider-religious-organizations-for-grants/article_68b8bb5a-c6a8-56de-87d7-b6e31e2e2418.html

before the Greitens administration took office."[2] Not even the Governor believes that the change in policy will completely and irrevocably eradicate the effect of the DNR's discriminatory policy, which continues to deprive the children who use The Learning Center's outdoor facilities of a safer place to play.

In sum, Governor Greitens' eleventh-hour policy change does not moot this case and this Court should proceed to a decision on the merits.

Sincerely,



David A. Cortman
Counsel for Petitioner

cc: Mr. James Layton, Counsel for Respondent
Mr. D. John Sauer, Missouri Attorney General's Office

[2] Office of Mo. Governor, Governor Greitens Announces New Policy to Defend Religious Freedom (April 13, 2017), available at https://governor.mo.gov /news/archive/governor-greitens-announces-new-policy-defend-religious-freedom.