NO. _____

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Trinity Lutheran Church applied for Missouri's Scrap Tire Grant Program so that it could provide a safer playground for children who attend its daycare and for neighborhood children who use the playground after hours—a purely secular matter. But the state denied Trinity's application solely because it is a church. The Eighth Circuit affirmed that denial by equating a grant to resurface Trinity's playground using scrap tire material with funding the devotional training of clergy. The Eighth Circuit's decision was not faithful to this Court's ruling in *Locke v. Davey*, 540 U.S. 712 (2004), and deepened an existing circuit conflict. Three lower courts—two courts of appeals and one state supreme court—interpret *Locke* as justifying the exclusion of religion from a neutral aid program where no valid Establishment Clause concern exists. In contrast, two courts of appeals remain faithful to *Locke* and the unique historical concerns on which it relied.

The question presented is:

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

PARTIES TO THE PROCEEDING

Petitioner is Trinity Lutheran Church, Inc.

Respondent is Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources.

CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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INTRODUCTION

Trinity Lutheran Church applied for a state grant to fund the installation of safe rubber playground surfaces that would protect daycare and neighborhood children who use its playground. The Scrap Tire Grant Program is otherwise neutrally available to a variety of nonprofits and the state rated Trinity's grant application highly. But Trinity's attempt to participate in the program was abruptly halted when the state denied its application solely because Trinity is a church. The state based this exclusion from the program on Article I, § 7, of the Missouri Constitution, which states that "no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

The Eighth Circuit panel majority, below, held that this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), provides the state with unfettered discretion to exclude churches from generally available public benefits. And it affirmed the dismissal of Trinity's complaint despite the nascent posture of the case, holding that it failed to state a claim upon which relief could be granted. But the panel majority's decision was not uncontested. Judge Gruender dissented and the Eighth Circuit denied rehearing en banc by a 5-5 vote, with Judges Colloton, Gruender, Riley, Shepherd, and Smith voting in favor of granting Trinity's petition for en banc review.

No public benefit could be further removed from the state's antiestablishment concerns than a grant

for safe rubber playground surfaces that serve no religious function or purpose. This Court should grant review to establish that, whatever *Locke's* scope, its holding does not apply to the wholly secular benefit of providing safe play areas for kids.

DECISIONS BELOW

The Eighth Circuit's decision affirming the judgment for Respondent is reported at 788 F.3d 779 and reprinted at Petition for Writ of Certiorari Appendix ("App.") 1a. The Eighth Circuit's order denying rehearing en banc is unreported but reprinted in App. 32a.

The District Court's opinion granting Respondent's motion to dismiss is reported at 976 F. Supp. 2d 1137 and reprinted at App. 34a. The District Court's opinion denying Petitioner's motion for reconsideration and for leave to file an amended complaint is unreported but reprinted in App. 76a.

STATEMENT OF JURISDICTION

The Eighth Circuit issued an opinion on May 29, 2015, and, by an equally divided court, denied rehearing en banc on August 11, 2015. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The text of the First Amendment to the United States Constitution is set forth in App. 85a.

The text of Article I, § 7, of the Missouri Constitution is set forth in App. 85a.

Missouri Statute §260.273, the statutory authorization for the Scrap Tire Grant Program under review, is set forth in App. 86a.

Title 10 §80-9.030 of the Missouri Code of State Regulations, the administrative regulation establishing the Scrap Tire Grant Program, is set forth in App. 89a.

STATEMENT OF THE CASE

The State of Missouri instituted a program of awarding grants to nonprofit organizations to purchase playground surfacing materials made from recycled tires. The program both benefits the environment by reducing the abundance of scrap tires and makes playgrounds safer for children.

Petitioner is a church that operates a daycare with a playground used by students and the surrounding community. The church applied for a grant to replace its rock surface with a safer rubber surface. Despite meeting all neutral criteria, the state denied the Church's application solely based on Article I, § 7, of the Missouri Constitution which prohibits government aid to churches. The Church brought suit alleging this denial violated the Free Exercise Clause and the Equal Protection Clause.

The Eighth Circuit panel majority affirmed the district court's order dismissing the Church's lawsuit over a dissent by Judge Gruender. The panel

majority, in conflict with other circuits and this Court's decision in *Locke*, held that excluding churches from an otherwise neutral and secular aid program did not violate the Free Exercise Clause or the Equal Protection Clause.

But this Court's decision in *Locke* ruled on a situation involving the historical establishment concern of funding the devotional training of clergy. *Locke* did not permit the categorical exclusion of religious groups from generally available secular benefits, like the safer playground surfaces at issue here. This Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), apply when states categorically exclude churches from neutral benefits, requiring such laws to overcome the rigors of strict scrutiny.

Yet the Court below read *Locke* as essentially abrogating this rule and allowing states to single out churches for exclusion from programs generally benefitting the public. As Justice Scalia noted in dissent, *Locke's* "holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go." *Locke*, 540 U.S. at 734 (Scalia, J., dissenting). Legal scholars, such as Professor Douglas Laycock, expressed similar concerns that *Locke* could be applied beyond its holding. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty,* 118 HARV. L. REV. 155, 161-62 (2003) (noting that *Locke*, "[a]s written, … applies only to funding the training of clergy, but it may well be extended to

all funding decisions, including discriminatory refusals to fund secular services").

Lower courts have done just that, ignoring the *Locke* opinion's context and using its holding to justify the exclusion of religious groups from secular, neutral aid programs where there is no valid antiestablishment concern. *But see* Steven K. Green, Locke v. Davey *and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 929 (2004) (recognizing that "while a prohibition against funding clergy activities is historically supportable, such justifications would not support a broader distinction against … the funding of religiously based social service agencies where the funds do not support inherently religious activities").

That application of *Locke* resulted in denying a safe rubber surface to a playground here. This Court should grant the Petition to clarify the proper application of the Free Exercise and Equal Protection Clauses to cases where a state withholds a generally available secular benefit based solely on religion where there is no historical establishment concern consistent with *Locke* and this Court's longstanding precedent.

A. Factual Background

Trinity Lutheran Church operates a pre-school education and daycare center named The Learning Center. App. 99a. The Learning Center formerly operated as a separate entity but merged into the Church in 1985 and now operates as a Church ministry. App. 99a.

Like many other preschool educational facilities, The Learning Center provides a playground for the children who attend, App. 102a, and children from the surrounding community use it as well, App. 133a. The playground surface of pea gravel and grass does not adequately protect the children who play there. App. 132a. The hard, jagged edges of the pea gravel shift away from the play equipment thereby posing a safety risk to children. App. 132a.

In 2012, the Church learned about the State of Missouri Scrap Tire Program, which provides grants for certain nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. App. 102a. The state funds the program through a fee imposed on the sale of new tires, *see* Mo. Stat. 260.273(6)(2), and the state uses the program to reduce the amount of used tires in landfills and illegal dump sites. App. 86a-88a. The Missouri Department of Natural Resources ("DNR") administers the Scrap Tire Program. App. 89a.

The Church submitted an application for a scrap tire grant to resurface its playground, which described the safety hazards it experienced:

> The pea gravel surface continually migrates away from critical play areas, especially under the swing sets and slide units and climbing units. [The Learning Center] has placed rubber mats in critical areas but the pea gravel continually erodes from under the mats and creates a trip hazard. The pea gravel is unforgiving if/when a child falls

> and thereby poses a basic safety hazard.

App. 132a.

The Church also noted that the pour-in-place rubber playground surface was ADA-compliant and would ease and increase access to the playground. *Id*. The Church also highlighted the fact that increasing the safety of the playground with rubber surface material would benefit not only the students of The Learning Center, but also children from the community who use the playground after hours. *Id*.

The DNR ranks each application for the Scrap Tire Program because it only awards a certain number of grants per year. App. 103a. The DNR received forty-four applications the year that Trinity applied. App. 154a. The DNR ranked the Church's application fifth out of the forty-four applications. App. *Id*. The DNR awarded fourteen grants that year but denied Trinity a scrap tire grant solely because it is a church. *Id*.

The DNR notified the Church by letter, which explained:

> [A]fter 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…."

App. 152a-153a.

B. Procedural Background

Trinity filed a complaint in the U.S. District Court for the Western District of Missouri on January 25, 2013, alleging that the DNR's policy of denying scrap tire grants to churches violated the Free Exercise, Equal Protection, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article I, § 7. Trinity's complaint was an as-applied challenge, focusing on the DNR's policy and its application to Trinity. Trinity did not bring a facial challenge to the Missouri Constitution, Article I, § 7.

The district court dismissed Trinity's complaint in its entirety. App. 34a. It rejected Trinity's free exercise claim, reasoning that the Scrap Tire Program involved a direct payment of funds to a sectarian institution that raised "antiestablishment concerns that are at least as comparable to those relied on by the Court in *Locke*." [1] App. 54a. The

[1] Because the complaint was dismissed in its entirety, Trinity filed a motion for reconsideration and for leave to file an amended complaint. It sought to add new allegations relating to newly discovered evidence consisting of a list of past grant recipients that included churches. The District Court denied the Motion. App. 76a. Whatever the DNR's policy was in the past, the current DNR policy Trinity challenged here excludes all churches from participation in the Scrap Tire Program. *See* App. 152a-153a.

district court also cited *Locke* for the proposition that Trinity's failure "to allege a violation of the Free Exercise Clause" mean that its "Equal Protection claim must also be dismissed." App. 69a.

Trinity appealed to the Eighth Circuit which issued a divided panel opinion affirming the district court's dismissal of Trinity's Complaint. App. 1a. The panel opinion incorrectly characterized Trinity's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution. App. 6a. This was despite the fact that the Complaint brought an as-applied challenge and explicitly stated so several times. *See, e.g.* App. 106a, 111a, 112a (alleging "Defendant['s] … unconstitutional application of" Article I, § 7); App. 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing the [Article I, § 7] by denying Plaintiff's grant application").

The Complaint further requested limited relief that applied only to Trinity Lutheran. *See* App. 116a (requesting declaration that the DNR's denial of its grant application was unconstitutional); *Id.* (requesting injunctive relief only to prohibit the DNR from denying Trinity Lutheran's participation in the grant program); *Id.* (requesting the court "[d]eclare that [Article I, § 7] was unconstitutional as applied to deny Plaintiff's 2012 grant application").

Judge Gruender, in dissent, noted the panel majority's error:

> But Trinity Lutheran does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to

> bring an as-applied challenge; the complaint says so numerous times.... This claim and relief only implicate Trinity Lutheran. Consequently, Trinity Lutheran does not contend that Article I, § 7 of the Missouri Constitution is unconstitutional in all of its applications."

App. 24a.[2]

Based on *Locke*, the Eighth Circuit panel majority held that the exclusion of churches from the Scrap Tire Grant Program was justified because there was no "break in the link" between state funds and religion. App. 10a. The Eighth Circuit was concerned about "the direct grant of public funds to churches, another of the 'hallmarks of an 'established' religion,'" regardless of the secular use to which those funds are put. *Id.* Like the district court, the Eighth Circuit panel majority cited *Locke* for the proposition that "the absence of a valid [f]ree [e]xercise claim" required the dismissal of Trinity's equal protection claim as well. App. 12a.

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[2] The panel majority's mischaracterization of Trinity's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution led it to point to the three-judge district court opinion in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (without opinion), as controlling adverse precedent. App. 7a. Because Trinity never argued that Article I, § 7, was facially invalid, the panel majority's discussion of *Luetkemeyer* is irrelevant. Moreover, *Luetkemeyer* addressed a difference in treatment of public and private schools, not discrimination between private secular and private religious schools, which is an entirely different issue.

Judge Gruender dissented because this Court's reasoning in *Locke* means that "Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause." App. 23a. Judge Gruender also correctly noted: "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits." App. 26a. He explained that: "[i]f giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." App. 29a.

Trinity filed a motion for rehearing en banc that was denied by an equally divided court. App. 32a-33a. Judges Colloton, Gruender, Riley, Shepherd, and Smith voted to grant rehearing en banc. *Id.*

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Important Question of Whether *Locke* Justifies State Exclusions of Churches From Neutral Programs Raising No Establishment Clause Concerns.

The Eighth Circuit's decision here undermines protections for churches and other religious groups this Court has recognized under the Free Exercise Clause and the Equal Protection Clause. Generally, states may not specifically exclude religious groups from neutral programs absent a compelling state interest implemented by the least restrictive means. *See Church of the Lukumi,* 508 U.S. at 532-33; *see*

Emp't Div., 494 U.S. at 877.

The Eighth Circuit deviated from that general rule by elevating *Locke*'s ruling from its unique setting to swallow the protections for religious groups under the Free Exercise and Equal Protection Clauses. States can now justify disparate treatment and the exclusion of religious groups from generally available government programs simply by invoking the state establishment clause.

This Court should grant review to resolve an important issue of federal law among which there is a 3-2 conflict among the lower courts: whether states have unfettered discretion to withhold generally available benefits solely on the basis of religion where there is no Establishment Clause violation or historical concern.

The panel majority's decision in this case sides with the First Circuit and the Colorado Supreme Court and deepens a circuit conflict with the Seventh and Tenth Circuits. Its holding deviates from *Locke* and that decision's historical concern related to state aid for the devotional training of clergy. In the First and Eighth Circuits—and the state of Colorado—any wholly secular benefit is now an opportunity for states to single out churches, and potentially all religious groups for exclusion. And while this case involves scrap tire grants, nothing prohibits the state from applying its constitution to deny routine benefits—such as sewer and water service, and police and fire protection—to religious groups. This Court should grant review to clarify that the unique historical concerns underlying *Locke* do not insulate

all state religious exclusions from free exercise and equal protection challenges, and to restore the proper balance between the Religion Clauses.

II. The First and Eighth Circuits, as well as the Colorado Supreme Court are in Conflict with the Seventh and Tenth Circuits Regarding Whether *Locke v. Davey* Allows for the Exclusion of Religion from Otherwise Neutral Aid Programs.

The lower courts are in conflict regarding the proper interpretation and application of *Locke* to secular and otherwise neutral programs that exclude religion. As explained more fully below, this Court held in *Locke* that the State of Washington could deny scholarships to students who were pursuing a devotional theology degree. *See* 540 U.S. at 715. Critical to this Court's holding was the fact that the scholarship would go to fund the devotional training of clergy, an area where the state's antiestablishment concerns were historically high. *Id*. at 721-22. This Court noted that there was no animus toward religion in the history, text, or operation of the scholarship program, *id*. at 725, and that the scholarship program went a long way toward including religion in its benefits, *id*. at 724.

This Court upheld the State of Washington's religious exclusion because it fell within the "play in the joints" between what the Establishment Clause allowed and what the Free Exercise Clause required. *Id*. at 718-19, 725. But this Court was careful to note that the only interest at stake was the state's interest in not funding the devotional training of

clergy and that its opinion was not to be construed to justify exclusions based on any interest a state's "philosophical preference" might command. *Id*. at 722 n.5.

The lower courts have now had over ten years to apply *Locke*. They have done so inconsistently and, as in this case, in ways that are not faithful to the particular historical concern at issue in *Locke*—the religious training of ministers.

A. The First and Eighth Circuits, and the Colorado Supreme Court, Hold that *Locke* Allows for the Exclusion of Religion from Otherwise Neutral Aid Programs.

As the Tenth Circuit noted in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008): "The precise bounds of the *Locke* holding … are far from clear." This lack of clarity has led to substantial confusion in lower courts.

Three lower court decisions show this lack of clarity. In addition to the *Trinity Lutheran* decision by the Eighth Circuit, the subject of this petition, the First Circuit and the Colorado Supreme Court have misapplied *Locke* and converted it into a rule generally justifying state exclusions of churches and other religious groups from neutral state programs.

First Circuit

In *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 355 (1st Cir. 2004), the

First Circuit read *Locke* "broadly" to uphold a state's decision to categorically exclude the funding of sectarian schools from an otherwise neutral aid program. As the Tenth Circuit noted, the First Circuit "went well beyond the holding in *Locke*. Rather than declining to fund 'particular categories of instruction,' the state in *Eulitt* declined funding the entire program of education at the disfavored schools, based on their religious affiliation." *Colorado Christian*, 534 F.3d at 1256 n.4.

The First Circuit upheld the exclusion of sectarian schools from the funding program by looking solely at whether the program was motivated by religious animus. *Id*. at 355-56. In the First Circuit's view, the following factors taken from *Locke* "articulate a test for smoking out an anti-religious animus:"

> [A]n inquiring court must examine whether the state action in question imposes any civil or criminal sanction on religious practice, denies participation in the political affairs of the community, or requires individuals to choose between religious beliefs and government benefits.

Id. at 355. As long as no animus is present, the First Circuit conducts no further evaluation. *Id.*

Although animus is certainly sufficient to show a Free Exercise violation, it is not required. The Free Exercise Clause's protection extends "beyond those rare occasions on which the government explicitly targets religion … for disfavored treatment."

Lukumi, 508 U.S. 577-78 (Blackmun, J., and O'Connor, J., concurring).[3] But the First Circuit ignored the unique historical concerns this Court relied upon in *Locke*, such as whether state aid was going for an essentially religious endeavor or whether the aid program included religion in its benefits to some degree, and permitted categorically excluding religion altogether.[4]

Colorado Supreme Court

In a recent opinion, the Colorado Supreme Court struck down, under the state constitution, a program that provided scholarships for students to attend private schools, including religious schools.[5] *See Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015). The plurality opinion in *Taxpayers for Public Education* held that the scholarship program violated Article IX, § 7, of the Colorado Constitution. A plurality of the court ruled that the state constitution required exclusion of religious schools from the aid program, and then

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[3] *See also Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (listing cases in which this Court and others foreclosed the application of laws enacted "not out of hostility or prejudice, but for secular reasons" on free exercise grounds).

[4] The First Circuit characterized the *Locke* opinion as confirming the "legitimacy of extra-constitutional Establishment Clause concerns." *Id.* at 355. Yet this Court never relied upon "extra-constitutional" concerns. The *Locke* Court characterized its decision as falling in the "play in the joints" between the Religion Clauses based on the unique historical concerns regarding the devotional training of clergy.

[5] Respondents in *Taxpayers for Public Education* have filed petitions for writs of certiorari seeking review by this Court.

justified this exclusion under *Locke*:

> By its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid. *See Locke v. Davey,* 540 U.S. 712, 721, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) .

Taxpayers, 351 P.3d at 473-74. This is not "play in the joints" for state lawmakers, but the rejection of basic free exercise and equal protection principles in a case that involved no unique historically-based establishment concerns.

B. The Seventh and Tenth Circuits Hold that Locke Does Not Allow for the Exclusion of Religion from an Otherwise Neutral Aid Program.

In contrast to the First and Eighth Circuits, and the Colorado Supreme Court, the Tenth and Seventh Circuits hold that *Locke* did not leave states with unfettered discretion to exclude the religious from generally available secular benefits.

Tenth Circuit

The Tenth Circuit, in an opinion authored by Judge McConnell, held that *Locke* does not allow for the exclusion of students who attend "pervasively sectarian" colleges from a neutral scholarship program. *See Colo. Christian*, 534 F.3d at 1255. As

the Tenth Circuit explained:

> 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.

Id. (quoting *Locke*, 534 F.3d at 725).

Unlike the Eighth and First Circuits, and the Colorado Supreme Court, that applied *Locke* out of context, Judge McConnell's opinion in *Colorado Christian* is faithful to the unique historical concerns that underlay this Court's decision. The Tenth Circuit thus continues to faithfully apply the Free Exercise Clause to protect individuals and groups from the denial of entirely secular benefits based solely on their religious practice and beliefs.

Seventh Circuit

The Seventh Circuit agrees with the Tenth Circuit that *Locke* does not justify categorically excluding religious groups from generally available government aid programs. In *Badger Catholic, Inc. v. Washington*, 620 F.3d 775 (7th Cir. 2010), the Seventh Circuit, in an opinion by Chief Judge Easterbrook, struck down the University of Wisconsin's ban on student-led groups using student activity fee funds for religious activities. 620 F.3d at 777. The Seventh Circuit noted that the University,

in contrast to the state in *Locke*, did not do anything to include religion in the aid program and instead categorically excluded it. 620 F.3d at 780. Thus, the *Badger Catholic* Court adhered to this Court's admonition that *Locke* does not justify widespread exclusions of religious groups from government aid programs in which government grants are neutrally available to all.

In either the Seventh or Tenth Circuits, federal courts would hold that the DNR's exclusion of churches from the scrap tire program violates the Free Exercise Clause. But in the Eighth and First Circuits, federal courts would conclude that such religious discrimination is allowed, even though it sends a much stronger message of disfavor than the "mild" message sent in *Locke*. That conflict requires resolution by this Court.

Certainly, as this Court has explained, if government may bar "the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (quoting *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976)). But "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer*, 426 U.S. at 746; *see also Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 658, n.6 (1980) ("The Court never has held that religious activities must be discriminated against in this way."). This Court's review is warranted to resolve the conflict in the lower courts over the application of *Locke* to exclusions of religious groups from wholly secular

benefits like the rubber playground surface at issue in this case.

III. The Eighth Circuit's Ruling on Trinity's Claim under the Free Exercise Clause is Not Faithful to This Court's Decision in *Locke*.

The Eighth Circuit's opinion distorts *Locke* to justify the exclusion of religion from neutrally available public benefits even when there is no Establishment Clause violation or even a valid historical concern. None of the unique factors underlying this Court's decision in *Locke* are present here. Regardless, the Eighth Circuit rejected Trinity's free exercise claim. Its rationale allows the government to justify any exclusion of religious groups as "play in the joints" between the Religion Clauses. Such a gross deviation from free exercise precedent warrants this Court's review.

A. *Locke v. Davey*

In *Locke*, this Court held that the State of Washington did not violate the Free Exercise Clause when it denied scholarship funds solely to students pursuing a degree in devotional theology. 540 U.S. at 715. This Court held that the exclusion fell within the "play in the joints" between state actions "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19. Several factors were key to the holding in *Locke*.

1. Funding for an essentially religious endeavor

First, this Court noted that Davey was seeking funding for an "essentially religious endeavor." *Id.* at 721. It could "think of few areas in which a state's antiestablishment interests come more into play." *Id.* at 722. This Court noted that "religious instruction is of a different ilk." *Id.* at 723. Importantly, the *Locke* Court cautioned that only the state's interest in not funding the devotional training of clergy was at issue and clarified that nothing in its opinion: "suggests that the [s]tate may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5.

2. Fairly mild disfavor of religion

Second, this Court noted that the state's disfavor of religion in the scholarship program was fairly mild. *Id.* at 720-21. "It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit." *Id.* (internal marks and citations omitted).

3. Including religion in program

Third, this Court explained that the scholarship program at issue in *Locke* went "a long way toward including religion in its benefits." *Id.* at 724. Under the State of Washington's program, students could still attend pervasively religious schools and could

use their scholarship money to fund non-devotional theology classes. *Id.*

4. Lack of Blaine Amendment

The Court also noted that the Washington constitutional provision at issue was not a Blaine Amendment, nor had Davey "established a credible connection" to a state Blaine Amendment. *Id.* at 723. n.7. Accordingly, the Court did not consider the anti-Catholic bigotry that resulted in other states' constitutional provisions. *Id.*

Overall, given the relevant factors, this Court found no evidence of religious animus in the text, history, or operation of the scholarship program and thus, the program fell within the "play in the joints" between the Religion Clauses. *Id.* at 725.

B. The Eighth Circuit Did Not Faithfully Apply *Locke*.

None of the rationales underlying *Locke* apply to the Scrap Tire Program. Thus, the Eighth Circuit's decision to uphold the program against a free exercise challenge conflicts with this Court's controlling precedent, including *Widmar*, which rejected the State of Missouri's asserted interest "in achieving greater separation of church and [s]tate than is already ensured under the Establishment Clause of the Federal Constitution." 454 U.S. at 276. As the *Widmar* Court explained, that interest—the same concern the State of Missouri asserts here—"is limited by the Free Exercise Clause" and in this case by the Equal Protection Clause as well. *Id.*

1. *Funding for purely secular endeavor*

First, Trinity does not seek funding for an essentially religious endeavor where the state's antiestablishment concerns may be heightened. Trinity seeks a grant for a rubber pour-in-place playground surface where its children and those from the community play. Seeking to protect children from harm while they play tag and go down the slide is about as far from an "essentially religious endeavor" as one can get. As Judge Gruender explained in dissent:

> [S]choolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion. If giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be.

App. 29a.

The state cannot seriously argue that its desire to reduce the amount of used tires in landfills and illegal dump sites is an "essentially religious endeavor." Even the Eighth Circuit panel majority noted that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire Grant Program without violating the Establishment Clause." App. 9a. That should be the end of the matter.

2. *Categorical disfavor of religion*

Second, Missouri's disfavor of religion is not the mild sort this Court approved in *Locke*. The Scrap Tire Program categorically excludes all church applicants. If an applicant is a church, it cannot receive a scrap tire grant even if it meets all other criteria, as was the case with Trinity Lutheran. *See* App. 154a (noting that Trinity's application ranked fifth out of forty-four and DNR awarded fourteen scrap tire grants in 2012).

The only way Trinity could receive a scrap tire grant would be for it hand over control of The Learning Center to a secular group or non-church nonprofit. Contrary to the Washington scholarship program in *Locke*, here the DNR requires applicants to "choose between their religious beliefs and receiving a government benefit." 540 U.S. at 720-21. Trinity is in the untenable position of either choosing to follow its religious beliefs and foregoing a government benefit, or of jettisoning its status as a church simply to participate in the Scrap Tire Grant Program. The DNR's religious exclusion sends a message that some children are less worthy of protection simply because they play on a playground owned by a church. This is not a mild disapproval of religion.

3. Categorical exclusion of religion from a neutral benefits program

Third, unlike in *Locke*, the Scrap Tire Grant Program does nothing to include churches. Instead,

it categorically excludes them from any and all benefits of the program. This sends a message of animus to the faithful that this Court found absent in *Locke*.

The Eighth Circuit panel majority was concerned that there was no "break in the link" between scrap tire funding and churches. *See* App. 10a. In *Locke*, the "break in the link" was the independent private choice of the scholarship recipients. *See Locke*, 540 U.S. at 719. But this Court's precedent is not so simplistic as to invalidate all aid to churches solely because they are religious and without regard to how the aid operates practically.

Programs, such as the one in this case, that evenhandedly allocate secular aid to a broad class of recipients without regard to religion, generally do not violate the Establishment Clause. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809-14 (2000) (plurality opinion) (upholding program providing aid to parochial schools and stating that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs"); *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997) (upholding program providing remedial instruction to disadvantaged children on a neutral basis even though program included government employees on the premises of sectarian schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (upholding program that made funds generally available to any disabled child even though some children used the funds in a religious school).

Indeed, this Court has held that singling out religious entities for exclusion is unconstitutional. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (requiring school to allow religious groups access to school facilities on equal terms with other groups); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 840–43 (1995) (requiring equal access by religious group to student activity fee); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (requiring use of school facilities on neutral basis as to a religious group); *Widmar v. Vincent*, 454 U.S. 263, 273–75 (1981) (requiring religious group's equal access to open forum because it was generally available to all groups and any aid to religion was incidental).

This Court has never held that private choice in aid programs is the only way to "break the link" between government and religion. This Court has upheld neutral programs that benefit sectarian institutions where there is no private choice involved but where the aid had no religious content and furthering religious activities was either non-existent or *de minimis*. *See, e.g. Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 656–59 (1980) ("[T]here does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with state-furnished materials have no such effect."); *Roemer,* 426 U.S. at 736 (upholding direct grants to religious institutions

because of prohibition against using the grant for sectarian purposes); *Hunt v. McNair*, 413 U.S. 734, 736, 744-45 (1973) (upholding issuance of revenue bonds for benefit of religious college where there was a prohibition on use of funds for buildings or facilities used for religious purposes). That aid flows directly to a church or other sectarian institution is not alone determinative under this Court's precedent.

Under the Scrap Tire Grant Program, aid flows directly to the applicant, in this case a church, but it also flows to a variety of secular organizations. App. 102a. Importantly, the disbursement provided may *only* be used for materials and delivery costs and may not be used for any other purpose, such as site preparation or labor. App. 124a. There is therefore no possibility that state aid will be diverted to religious purposes.

Trinity cannot convert rubber protecting children from injury into the advancement of religious doctrines. All children playing on the playground are protected. And the aid is for recycled tires, which is a far cry from even the aid for instructional materials approved in *Mitchell*, or the provision of government-paid teachers to religious schools in *Agostini*. In short, there are simply no legitimate Establishment Clause concerns present that would justify reading *Locke* as authorizing the categorical disqualification of otherwise qualified churches from the receipt of a purely secular benefit.

4. Missouri Constitution Article I, § 7 is born of religious bigotry.

Article 1, § 7 of the Missouri Constitution, the provision the state relies upon here, was enacted in 1875—the same time as the federal Blaine Amendment was proposed and debated. *See* Mo. Const. Art 1, § 7, *available at* http://www.moga.mo.gov/MoStatutes/Consthtml/A010071.html (last visited Nov. 2, 2015). It thus shares the same grounding in "hostility to the Catholic Church and to Catholics in general" that this Court recognized in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

In upholding the DNR's policy excluding Trinity Lutheran from the Scrap Tire Grant Program, the Eighth Circuit did not follow *Locke*. None of the factors this Court relied upon in *Locke* are present here. If allowed to stand, instead of preserving a "play in the joints," the Eighth Circuit's opinion will result in the Establishment Clause devouring the Free Exercise and Equal Protection Clauses. That is not what the *Locke* Court intended.

IV. The Eighth Circuit's Equal Protection Ruling Conflicts with this Court's Precedent.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In this case, DNR is willing to award grants to secular daycares (and religious daycares not operated by churches) but denied

Trinity's application solely because it "is a 'church.'" App. 152a-153a. But "the Religion Clauses … and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

Because the free exercise of religion is a fundamental right, the state's decision to make Trinity's religious status "relevant to [its] standing in the political community," *id.*, is subject to strict scrutiny under the Equal Protection Clause, *see Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988) (noting that "'strict judicial scrutiny'" applies when a law "interferes with a 'fundamental right'"). Indeed, under this Court's precedent, religious classifications are inherently "suspect" and must serve a compelling government interest and be narrowly tailored to that end. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Here, DNR denied "equal treatment" to Trinity solely because it is a church. *Kiryas Joel*, 512 U.S. at 715 (O'Connor, concurring). That arbitrary decision to deny Trinity a scrap tire grant because a church—rather than a secular (or other form of religious) nonprofit—holds title to the Learning Center serves no rational purpose, let alone a compelling one. Funding safe rubber playground surfaces for children poses no threat whatsoever to the state's antiestablishment goals. The state's extreme policy of "no churches allowed" is simply

unfounded here.

"Freedom of [religion], and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among [providing safe playground surfaces to daycares] on such a wholesale and categorical basis." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 101 (1972). That is particularly true given that this Court generally treats religious classifications as "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

The Eighth Circuit's decision upholding Trinity's exclusion from a wholly secular benefit enjoyed by all similarly situated daycares, based on the mistaken application of *Locke* and subsequent conclusion that Trinity did not present "a valid Free Exercise claim," warrants this Court's review. It not only contributes to an existing circuit conflict regarding equal protection analysis, but also misapplies *Locke* to a factually inapposite case.

Below, the Eighth Circuit panel majority compounded its error by rejecting Trinity Lutheran's equal protection claim based on its erroneous free exercise analysis. The Eighth Circuit cited *Locke* for the proposition that "in the absence of a valid Free Exercise claim, Trinity['s] Equal Protection Claim is governed by rational basis review" and held that "[t]he high wall of separation between church and state created by Article I, § 7" satisfies that standard. App. 12a; *see Locke*, 540 U.S. at 720 n.3 ("Because we hold … that the program is not a violation of the Free Exercise Clause, however, we

apply rational-basis scrutiny to [Davey's] equal protection claims. For the reasons stated herein, the program passes such review.") (internal citations omitted).

The Eighth Circuit's decision adds to an existing circuit conflict between the First Circuit and the Tenth Circuit regarding equal protection analysis in cases that also involve free exercise claims.

First Circuit

In *Eulitt*, the First Circuit also cited *Locke* for the proposition that "if a challenged program comports with the Free Exercise Clause, that conclusion wraps up the religious discrimination analysis" and "rational basis scrutiny applies to any further equal protection inquiry." 386 F.3d at 354 (citing *Locke*, 540 U.S. at 720 n.3).

Tenth Circuit

But the Tenth Circuit in *Colorado Christian University* rejected this holding by explaining that "[v]iolations of the Equal Protection and Free Exercise Clauses are generally analyzed in terms of strict scrutiny" and concluding that "statutes involving discrimination on the basis of religion … are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." 534 F.3d at 1266 (citing *Locke*, 540 U.S. at 720 n.3, among other cases).

The Tenth Circuit's equal protection holding was grounded on its adherence to the plain language of

Locke and refusal to misread this Court's decision as subjecting "all 'state decisions about funding religious education to no more than rational basis review.'" *Id.* at 1254-55 (quoting Appellee's Br. 33).

In stark contrast, the Eighth and First Circuits applied *Locke* out of context to situations that bear no resemblance to "the clergy training involved in *Locke*" or that implicate any similar historical establishment concern. *Id.* at 1254; *see supra* Part III (outlining the unique historical bases for *Locke's* free exercise and equal protection holdings).

As a result, in the Tenth Circuit, federal courts would hold that the DNR's exclusion of churches from the scrap tire program triggers strict scrutiny and violates the Equal Protection Clause. But in the Eighth and First Circuits, federal courts would conclude that such religious discrimination is subject to rational basis review and that it readily hurdles that standard. This conflict regarding *Locke's* application to equal protection analysis in the free exercise realm can only be resolved by this Court.

V. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented, an important and longstanding question of federal law. The facts are straightforward and are not open to dispute. And because this case was decided on a motion to dismiss, the facts alleged in the Complaint must be taken as true. Accordingly, the question presented can be decided as a matter of law.

Moreover, the grant program at issue makes this case a particularly clean vehicle. The Scrap Tire Program is completely secular and free of any nuances that could detract from deciding the issues presented in this appeal. Specifically, the state's program provides purely secular aid in the form of grants that can be used only for the purchase and delivery of scrap tire material and cannot be used for any other purpose. No aid provided through the program could arguably be labeled religious, thus allowing this Court to confront directly the issue of whether Trinity can be excluded from participating in a purely secular and neutral aid program solely because it is a church.

The parties are also particularly well suited for resolution of the question presented. Petitioner is a church that operates a daycare that was previously operated under the auspices of a separate nonprofit organization. Thus, the issue of participation by a church in a purely secular grant program is presented cleanly for resolution.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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