No. 15-577

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise, Establishment, or Equal Protection Clauses of the First Amendment when the state has no valid Establishment Clause concern in preventing access to the program.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The present case concerns Cato because religious liberty is foundational to a free society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the adoption of the First Amendment, and even since the enactment of the Fourteenth Amendment, the Court has wrestled with the meaning of the religion clauses. At this point, it's clear that any "wall of separation between Church and State" created by the Establishment Clause is not impenetrable. *See* Letter from Thomas Jefferson, to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. of the Danbury Baptist Ass'n in the State of Conn. (Jan. 1, 1802) (on file with the Library of Cong.).

Not every aspect of a church's existence involves the government (thankfully), but in the modern

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[1] Rule 37 statement: All parties received timely notice of the *amicus curiae*'s intent to file this brief; the parties' consent letters have been filed with the Clerk. Counsel for the *amicus* certifies that no counsel for any party authored any part of this brief and that no person or entity other than *amicus* made a monetary contribution to fund its preparation or submission.

world, governments are inevitably involved in much of what churches do. This Court has determined that granting tax-exempt status to church property, for example, does not violate the Establishment Clause, *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 667 (1970). It is also well understood that the Free Exercise Clause is not violated when the government requires churches, like any other employer, to withhold taxes from their non-ministerial employees. Internal Revenue Service, Publication 1828, *Tax Guide for Churches & Religious Orgs.* 21 (2015).

A "church" is not merely an abstraction, nor even a collection of individuals. A "church" often comprises several symbiotic organizations that desire to impact the world, thus necessitating interaction with the government. Many churches operate charities, or schools, or daycares. Many let other groups—sometimes different churches or religious associations, but also ones that are not religious, like community dance clubs—use or rent the church's property. Countless churches have a playground or other type of outdoor space that locals use after hours as if it were a public park.

Yet because Trinity Lutheran is a church—and solely on that basis—Missouri denied its application to the scrap-tire grant program. Now the state defends its blatant and facial discrimination against religion under its own constitutional provision and this Court's holding in *Locke v. Davey*, 540 U.S. 712 (2004). Those arguments must fail.

Article I, Section 7 of the Missouri Constitution reads, in part: "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." This

"Blaine Amendment" was originally enacted in 1875, and it is a product of religious bigotry. The Court should not ignore the dark and prejudicial history of Missouri's Blaine Amendment, which was passed for explicitly anti-Catholic, discriminatory purposes. This is true regardless of the amendment's retention at the state's 1945 constitutional convention.

Missouri's discrimination here does not lie within the "play in the joints" between the Establishment and Free Exercise Clauses. To the contrary, the state's refusal to award Trinity Lutheran the playground-surface grant is unconstitutional viewpoint discrimination. Having decided to award these grants, Missouri must award them fairly, without reference to the religious or secular nature of the applicants. The fact that Trinity Lutheran can continue operating as a church without the grant does not remedy the violation.

Finally, the state's action violates the Equal Protection Clause by discriminating based on religion, an axiomatic foundation for strict judicial scrutiny.

ARGUMENT

I. MISSOURI'S BLAINE AMENDMENT CANNOT BE DIVORCED FROM ITS ANTECEDENTS IN RELIGIOUS BIGOTRY

This Court has recognized that Blaine Amendments are not a benign expression of a desire for a strict separation of church and state. Justice Thomas, writing for the four-member plurality in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), stated that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] Amendment arose at a time

of pervasive hostility to the Catholic Church and to Catholics in general. And it was an open secret that 'sectarian' was a code word for 'Catholic.'"

Similarly, the Arizona Supreme Court refused to apply that state's Blaine Amendment to a tax-credit program, noting that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic' menace." *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999).[2] Laws that are "born of bigotry" have no place in our system of liberty. *Mitchell*, 530 U.S. at 829.

These dark roots apply specifically to the Missouri's Blaine Amendment as well. Missouri originally enacted its constitutional amendment in 1875, about a year before Congress voted down the federal Blaine Amendment. *See* Steven B. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992). This proximity is no coincidence. Anti-Catholic sentiment was spreading throughout the United States, and Missouri was no exception. Indeed, political forces such as the Know-Nothing Party—partially spurred by religious animus—created a persistent atmosphere of political intimidation. *See* William Hyde, 4 *Encyclopedia of the History of St. Louis* 97 (So. History Co. 1899) (1917). This animus was noted by a Missouri state senator: "Why not say in plain English what is intended" by adding "Catholic" to the proposal? *Synopsis of Remarks by Senator Spaunhorst*, Weekly Tribune (Mar. 1870).

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[2] The court went on to say, "we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Kotterman*, 972 P.2d at 626.

In *Zelman v. Simmons-Harris*, Justice Breyer wrote that anti-Catholic "sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." 536 U.S. 639, 720 (2002) (Breyer, J., dissenting). In the words of two leading scholars, the "Blaine Amendment expressed Republican and Protestant hostility toward religious (meaning Catholic) schools." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 351 (2001).

Respondents seek to ignore the history of the Missouri Blaine Amendment by arguing that the amendment arose from factors other than anti-Catholicism, and that there is no evidence that Missouri's Blaine Amendment was motivated by anti-religious or anti-Catholic animus. That is not, however, what the history shows.

II. MISSOURI'S DISCRIMINATION AGAINST TRINITY LUTHERAN VIOLATES BOTH RELIGION CLAUSES, PLUS THE EQUAL PROTECTION CLAUSE

Religious freedom is vital to a free society, and the Constitution memorializes this sentiment in multiple places and ways. *See*, *e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). In the words of President Obama, "our commitment to religious freedom must be unshakeable. The principle that people of all faiths are welcome in this country and will not be treated differently by their government is essential to who we are." Kenneth C. Davis, *America's True History of Re-*

ligious Tolerance, Smithsonian Magazine (Oct. 2010), http://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/?no-ist.

Although the two clauses work in different ways, a law can violate both the Free Exercise Clause and the Establishment Clause. Conditioning a benefit on religious status imposes "a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity," thus violating the Free Exercise Clause. *McDaniel v. Paty*, 435 U.S. 618, 632 (1978) (Brennan, J., concurring). And "[t]he 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." *Id.* at 641 (Brennan, J., concurring). Both violations are present here.

In addition to the portions of the Constitution that apply directly to religion, the Fourteenth Amendment's Equal Protection Clause also protects against denying a benefit solely on the basis of religious status—which is precisely what Trinity Lutheran experienced here. Such a distinction must face strict judicial scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (strict scrutiny applies under the Equal Protection Clause where "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").

In short, under either the religion clauses or under the Equal Protection Clause, Missouri's discrimination here is unconstitutional.

A. Missouri's Refusal to Award a Generally Available Benefit to Trinity Lutheran Violates Both Religion Clauses

1. Withholding the Grant Violates the Free Exercise Clause.

In *McDaniel v. Paty*, this Court overturned a provision of the Tennessee Constitution—adopted in 1796 as part of the state's first constitution—that prohibited clergy from holding office. 435 U.S. at 621. The Court held that the prohibition "encroached upon McDaniel's right to the free exercise of religion" because the Free Exercise Clause "prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. In Justice Brennan's words, "disqualification provision imposed an unconstitutional penalty upon appellant's exercise of his religious faith." *Id.* at 633 (Brennan, J., concurring).

When the government "handicaps" religion, it violates the Free Exercise Clause. *Everson*, 330 U.S. at 18 ("State power is no more to be used so as to handicap religions than it is to favor them."). Although *Employment Division v. Smith*, 494 U.S. 872 (1990) changed the landscape for free exercise claims, it only did so for "neutral, generally applicable laws." *Id.* at 881. Post *Smith*, a state certainly could not ban the worship of the divine, for example. Nor could a state offer scholarships to all students except those who regularly attend church. A law that requires people to choose between scholarships and religious service would violate the Free Exercise Clause by "burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). It would "impose special disabilities on the basis of religious status." *Smith,* 494 U.S. at 877.

Similarly, Missouri's discrimination against Trinity Lutheran also "imposes special disabilities" on the basis of religious status in violation of the Free Exercise Clause. In denying the church's application, the Department of Natural Resources made this quite clear: "the department is unable to provide this financial assistance directly to the church." Petition for Certiorari 7, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577. Because this is a facial distinction, and not a "neutral law of general applicability," *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982)), it must meet a higher level of scrutiny. The "minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi*, 508 U.S. at 533. Although Missouri's constitution disfavors religion generally—rather than religious practices—as in *Church of the Lukumi*, that difference is not material because the government must "maintain strict neutrality, neither aiding nor opposing religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

Missouri's facially discriminatory Blaine Amendment cannot meet the heightened scrutiny required by *Smith* and, ultimately, by *Sherbert v. Verner*, 374 U.S. 398 (1963). See, *Smith*, 494 U.S. at 878 (it would be unconstitutional to "to prohibit bowing down before a golden calf."). The Blaine Amendment is facial discrimination against religion *per se* that is as constitutionally intolerable as prohibiting the "casting of statues that are to be used for worship purposes." *Id.*

The Free Exercise Clause protects against facial discrimination based on religious status just as it protects against specific discrimination against religious beliefs. *McDaniel*, 435 U.S. at 643 ("Tennessee here has penalized an individual for his religious sta-

tus—for what he is and believes in—rather than for any particular act generally deemed harmful to society.") Although *McDaniel* predates *Smith*, the *Sherbert* test is still in place for non-neutral laws. *Smith*, 494 U.S. at 881; *see also*, Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 201 (2004) ("Under *Smith*, the threshold question is whether the law that burdens religious exercise is 'neutral' and 'generally applicable.' If so, the burden on religion requires no justification whatever. If not, the burden on religion is subject to the compelling interest test as before.") In *Sherbert*, a statute disqualifying from unemployment benefits those who were unwilling to work on Saturday was overturned because it forced the petitioner

> to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. Of course, that statute was neutral, so the outcome would have been different post-*Smith*. But the reasoning still applies to the non-neutral provision of Missouri's Constitution at issue here. Trinity Lutheran Church is being forced to choose between following "the precepts of [its] religion and forfeiting benefits." *Id.*

If Petitioner is viewed as a daycare center, this becomes clear. The state has in essence said that it

would have given the funds to the daycare but for the fact that it engages in religious practices. Thus, like *Church of the Lukumi*, the state is punishing an integral part of Petitioner's religion—the ability of believers to meet together to celebrate their common belief. It is irrelevant that the daycare is an entity rather than an individual, and that the state has refused to grant a benefit rather than exacted a punishment. *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[T]he First Amendment certainly has application to the subsidy context.").

2. Withholding the Grant Violates the Establishment Clause.

The Establishment Clause prohibits not only government actions establishing—endorsing, supporting, etc.—religion, but also those handicapping it. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("[The Establishment Clause] requires the state to be a neutral in its relations with groups of believers and nonbelievers; it does not require the state to be their adversary. *State power is no more to be used so as to handicap religions than it is to favor them.*") (emphasis added). Indeed, religious neutrality is the underpinning of this Court's longstanding *Lemon* test for assessing Establishment Clause cases.[3] But the Clause goes beyond merely allowing Missouri to give Trinity Lutheran a scrap-tire grant under its program. The Clause's mandate that government "nei-

[3] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court formulated the test for programs under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612–13 (internal citations omitted).

ther advances nor inhibits religion," *Lemon*, 403 U.S. at 612-13, means that the state cannot deny Trinity Lutheran a grant on the sole basis that it is a church.

While the *Lemon* test has undergone restatement in recent years, *see Agostini v. Felton*, 521 U.S. 203 (1997), its core of evenhandedness has remained intact: government may not engage in actions that have the primary effect of advancing or inhibiting religion. Nor, under the "endorsement" aspect of the test, may government express endorsement or disapproval of religion.[4] Missouri's interpretation and application of its Blaine Amendment plainly has the primary effect of inhibiting religion and conveys an unmistakable message of disapproval, especially in light of the Blaine Amendment's sordid history. See *supra*, part I.

If a church such as Trinity Lutheran wants to install a safe rubber playground surface, it will have to pay for it itself. The denial of a grant for the scrap-tire playground surface occurs solely because the applicant is a church. But for that fact, Trinity Lutheran would have been awarded one of the 14 grants given that year. *See* Petition for Certiorari 7, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577. Such a rule clearly places religion at a disadvantage vis-à-vis non-religion.

There is no such thing as a complete separation of church and state, especially in a world where government is involved in so many aspects of everyday life. But the boundary between church and state is

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[4] *See, e.g.*, *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in the judgment); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Bd. of Ed. v. Mergens*, 496 U.S. 226, 249 (1990); *Edwards v. Aguillard*,482 U.S. 578, 585 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1984).

not properly policed by handicapping religion. See, *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring) ("[W]e have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no-aid' theory.") When a state decides to create a scrap-tire grant program for playgrounds, it will naturally find that its program reaches churches like Trinity Lutheran that have set up daycare centers or maintain a community playground. Having thus found itself face-to-face with religion, the state must either treat religious applicants to its program the same way it treats all others or somehow argue that its discrimination is justified. Missouri chose the latter course, but its protestations lack constitutional merit.

Moreover, *Locke v. Davey*, 540 U.S. 712 (2004), does not control here. *Locke* was a unique case that dealt with a state's refusal to fund a future minister's devotional training, a historical concern that, "[s]ince the founding of our country, [has seen] popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Id.*, 540 U.S. at 722. *Locke*'s Promise Scholarship Program allowed "students to attend pervasively religious schools, so long as they are accredited," and students were "still eligible to take devotional theology courses." *Id.* at 724-25. The Court also explicitly said that the program did not evince "hostility toward religion," but rather went a "long way toward including religion in its benefits." *Id.* at 724. Clearly, that is not the case here.[5]

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[5] *Amicus* filed a brief supporting Joshua Davey in *Locke v. Davey* and disagrees with the Court's holding that the scholarship program's exclusion of theology majors satisfied the Reli-

Safe playgrounds are worlds away from taxpayer-supported clergy. Missouri has shut the church out from its program even though the grants would go to something entirely distinct from religious instruction. This is not a "play in the joints" case, *id.* at 719, but one of intentionally inhibiting religion.

B. It Also Violates the Equal Protection Clause

The Equal Protection Clause limits how the government can use certain characteristics as a basis for government action. The Court has long held that the Clause, despite its Civil War-era origins, extends its protection far beyond race—*see, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (discrimination against, in the words of Justice Brennan, "so-called 'hippies' and 'hippie-communes'"); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (sex discrimination)—and that certainly includes religious discrimination. *See*, *e.g.*, *United States v. Armstrong*, 517 U.S. 687, 715 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900). Most classifications receive only rational basis review and are generally upheld. But where government's distinction between groups involves a fundamental right like religion, the action receives strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (strict scrutiny applies under the Equal Protection Clause where "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").

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gion or Equal Protection Clauses. Nevertheless, even if *Locke* was rightly decided, it does not support Missouri's actions here.

Certainly under the circumstances of this case, religion should constitute a suspect classification. Trinity Lutheran sought a scrap-tire grant for the playground its daycare children use to play outside. It did not seek a grant to buy more books for its library or even music books (*i.e.*, hymnals), which could have religious overtones. There is simply nothing religious about a playground surface that will make daycare and community children's duck-duck-goose games safer. Missouri cannot provide a compelling justification for discriminating against religion here.

Although this Court has recently gone far towards reducing government-sponsored religious discrimination, there can be no serious question that the history is replete with examples of religious bias in state law, of which the Blaine Amendments are but one aspect. In many circumstances, the Equal Protection Clause presents a straightforward way of identifying and rectifying religious discrimination, in much the same way that the clause has dealt with the prevalence of race discrimination.[6]

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[6] Some of the confusion regarding the Court's religion-clause jurisprudence might be dispelled by using equal-protection analysis. For example, *Sherbert*, 374 U.S. 398 (1963), *Thomas v. Review Bd.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987), might appear to be inconsistent with *Smith*, 494 U.S. at 881-82 (holding that a classification must be based upon religion to be actionable under the religion clauses). This has resulted in the *Sherbert* line of cases as being viewed as exceptions requiring neutral rules to accommodate religion. They could, however, also be viewed as discrimination cases, to the extent that non-religious excuses for failing to meet the religion-neutral requirements were accepted while religious excuses were not. Similarly, *Walz v. Tax Comm.*, 397 U.S. 664 (1970), upholding tax exemptions for church property, can be analyzed as a case refusing to single out religious institutions from the class of institutions afforded tax relief. *See* Susan

In denying Trinity Lutheran a grant on the sole basis that it is a church, Missouri violated the church's right to the equal protection of the laws. If government refused to supply religious institutions with police and fire protection because they were religious, the equal protection problem would be undisputable. Similarly, for New Jersey to provide free transportation to students in all but religious schools (*Everson*) or New York to supply free secular textbooks to all students but those attending religious schools (*Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)) constituted impermissible religious discrimination.

This case can thus be easily resolved under this Court's existing equal-protection jurisprudence. It is no answer to the discrimination that occurred here to say that Trinity Lutheran remains free to conduct its religious services, preach its gospel, and even operate its daycare—just as for African Americans excluded from jury service, it was no answer to argue that they could still live out all the other aspects of their lives. *See Strauder v. Virginia*, 100 U.S. 303 (1879). Or for Asian-owned laundries, it was no answer to say that they could go into another business. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Or for an African American denied admission to a state law school, it was no answer to say that he would still be given funds to attend an out-of-state one. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Discrimination of this sort is not remedied by other outlets. For that matter, that Abigail Fisher went to another college and has begun a successful career did not

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Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religious Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665 (2008).

cause the Court to summarily dismiss *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).[7]

Missouri's discrimination against Trinity Lutheran in the Scrap Tire Grant Program simply cannot be excused by reference to the church's continued ability to operate a church or even a daycare. Furthermore, the state's action cannot be re-characterized as anything other than discrimination on the basis of religion: Seeing that Trinity Lutheran was a church, Missouri denied it the program funds. Yes, having a daycare is not essential to running a church, but a statute banning Muslims from holding office would be religious discrimination even though holding political office is not a central tenet of the Islamic faith.

Since the religious discrimination is facial, Missouri's must meet strict scrutiny and establish that its actions achieved a compelling governmental interest through the least restrictive means. *See Fisher*, 133 S. Ct. at 2417. Missouri has asserted an interest in not violating its Blaine Amendment by giving funds to a religious organization. Because it is stipulated that no Establishment Clause violation would be present if the funds were given, and because of the Blaine Amendment's pedigree, see *supra* Part I, it is difficult to call this a compelling purpose. Moreover, however persuasive that interest may appear at first glance, it cannot stand up to constitutional challenge. Missouri cannot assert an interest arising from its own constitution that would outweigh the U.S. Constitution's ban on religious discrimination any more than it could ask for leeway in discriminating based on race if that was called for under its constitution.

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[7] Note that this is a separate issue from whether Fisher's enrollment at another university made the case moot.

Beyond the fact that a state constitutional provision is invalid if it conflicts with a federal constitutional provision, it would be illogical to allow that provision to constitute a compelling governmental interest here. Missouri's argument boils down to asserting a compelling interest in "not providing any funds to churches." This is circular reasoning; an interest cannot justify itself.

Even if Missouri's interest is reframed as not showing favor to or endorsing religion—a compelling Establishment Clause interest—denying the scraptire grant to Trinity Lutheran would not achieve that interest. Because this Court has made clear that the Establishment Clause is not violated when a government program gives aid to religious organizations on the same terms as secular ones, *Mitchell*, 530 U.S. at 835, then this Court has effectively said that including religious groups in general government programs does not promote religion.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, the Court held that a state university that makes its facilities generally available for the use of registered student groups cannot close its facilities to groups that wish to use them for religious worship and discussion. *Id.* at 264–65, 267. Coincidentally, *Widmar* involved the University of Missouri, and the state argued that its discrimination was justified by its "compelling interest in maintaining strict separation of church and State" under the federal and state "Establishment Clauses." *Id.* at 265, 270.

The Court rejected Missouri's argument that opening the forum to religious groups would not violate the federal Establishment Clause. *Id.* at 271–75. The state's asserted interest "in achieving greater

separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" was limited by federal constitutional provisions, and the Court was "unable to recognize the State's interest as sufficiently 'compelling' to justify" its discrimination in that case. *Id.* at 276. The Court added: "If the Establishment Clause barred 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,*, 454 U.S. at 274–75 (quoting *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976)); c*ontra* Brief in Opposition to Petition for Certiorari 9–10, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577.

Finally, contrary to decision below, this Court can, consistent with precedent, hold that the Equal Protection Clause requires Missouri to award Trinity Lutheran a grant on the same basis as non-religious applicants. In *Widmar*, this Court required that generally open facilities be made available to religious groups, even though providing such facilities required the University of Missouri to spend more money on electricity and other utilities, as well as paying for the extra time of security guards. 454 U.S. at 265. Although students paid "an activity fee of $41 per semester to help defray the costs to the University," opening up facilities to religious groups unquestionably raised the total costs to the university.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 13–14 (1993), this Court held that the school district would not violate the Establishment Clause by providing a sign-language interpreter to a

student attending a sectarian school.[8] *Zobrest* arose from a request that the district provide a sign-language interpreter for a boy enrolled in a sectarian high school. *Id.* at 3. When the district refused on the basis that doing so would violate the Establishment Clause, his parents filed suit under the Individuals with Disabilities Education Act (IDEA). *Id.* at 4. The district court granted and the Ninth Circuit affirmed summary judgment in favor of the district. This Court's ruling did more than merely allow the school district to provide the interpreter. It had the practical—and legal—effect of requiring the district to provide a grant for use in a sectarian school.

Even though it was the IDEA that compelled action in *Zobrest*, that case still rebuts the Eighth Circuit's claim that nothing in "the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause compel[s] Missouri to provide public grant money directly to a church." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). Instead, the requirement of equal access—for "compel[ing] Missouri to provide public grant money directly to a church—is triggered by the existence of the scrap-tire grant program, something that Missouri was certainly not required to create.

Nor is this case similar to *Palmer v. Thompson*, 403 U.S. 217 (1971), where the closing of all public pools after racial integration gave rise to an equal-protection claim that was denied by this Court because nothing in the Constitution "*requires* that public swimming pools, once opened, may not be closed."

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[8] Before Catalina Foothills High School—which happens to be counsel Weber's alma mater—was established in 1992, district children attended various schools scattered throughout Tucson.

Id. at 228 (Burger, CJ, concurring) (emphasis original). In *Palmer*, had there been evidence "to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only"—in other words, white-only pools—the outcome would have been different. *Id.* at 225. Similarly, if Missouri eliminated its scrap-tire program, this Court certainly could not compel it back into existence. Yet, by maintaining the program while discriminating on the basis of religion, the state is, by analogy, running white-only pools.

In sum, the Equal Protection Clause does not require Missouri to have a scrap-tire grant program, but it does demand that if the state has one, it must open it to all without regard to religious status.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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