No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARAH PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

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

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS SUPPORTING PETITIONER

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QUESTION PRESENTED

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.

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of the United States Senate and House of Representatives with a common interest in robust protections for the free exercise of religion. The members of the Legislative Branch have long had a profound concern for protecting the religious liberties of

[1] Petitioner's counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. Respondent's counsel of record consented to the filing of this brief by email dated April 12, 2016. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici*, their counsel, or their members made a monetary contribution intended to fund the preparation or submission of this brief. Undersigned counsel were engaged by Senator Blunt (MO) and Representative Hartzler (MO) to prepare this brief. Additional *amici* subsequently consented to join this brief in support of Petitioner at the invitation of Senator Blunt and Representative Hartzler.

United States citizens, and when they have seen those liberties threatened, they have taken decisive action to bolster or restore those freedoms. The Religious Freedom Restoration Act of 1993, for example, was passed by a unanimous House and an almost-unanimous Senate, and the Religious Land Use and Institutionalized Persons Act passed in both the House and the Senate by unanimous consent. As members of the Legislative Branch, *amici* possess a unique perspective on the complex task of making laws that ensure neutral and even-handed treatment to persons of all faiths, and that comport with the solemn guarantees of the Free Exercise Clause of the First Amendment. *Amici* believe that applying Missouri's "no-aid" provision to deny Trinity Lutheran's participation in Missouri's scrap tire program explicitly targets religion for discrimination, and therefore runs afoul of both the Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause.

Amici are:

United States Senators

Roy Blunt (MO)
Ted Cruz (TX)
Steve Daines (MT)
James M. Inhofe (OK)
James Lankford (OK)
Jerry Moran (KS)
Marco Rubio (FL)
Ben Sasse (NE)
Thom Tillis (NC)

Members of the House of Representatives

Brian Babin (TX)
Diane Black (TN)
Jeff Duncan (SC)
John Fleming, M.D. (LA)
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Peter J. Roskam (IL)
Steve Russell (OK)
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SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment chart a course that prevents both "governmentally established religion" and "governmental interference with religion." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). As the Court has repeatedly recognized, neutrality in Government's treatment of religion is a key principle in avoiding "government control of churches or governmental restraint on religious practice." *Ibid.*; see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

The Free Exercise Clause has always been understood to guarantee a special solicitude toward religion, which is violated by anything less than neutral treatment of reli-

gion by government. The Court similarly has held that a central purpose of the Establishment Clause is to ensure governmental neutrality in matters of religion. This neutrality even allows government programs to benefit religion directly, so long as the programs are applied even-handedly to non-religious beneficiaries. Conversely, neutrality decidedly does not require the denial of generally available government benefits to religious persons and institutions because they are religious. See *Rosenberger*, 515 U.S. at 839.

Far from observing a "benevolent neutrality" toward religion, *Walz*, 397 U.S. at 669, Missouri's denial of Trinity Lutheran's application to participate in the scrap tire program evinces active hostility to religious institutions. Despite meeting all secular criteria for the program, Trinity Lutheran was denied participation solely because it is a church. This Court has rejected similar applications of that sort of strict "no-aid" policy as "unfaithful to our constitutionally protected tradition of religious liberty." *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring in judgment).

This Court has recognized only one exception to the neutrality principle in the provision of generally available public benefits, and that is in the context of providing government funding for the religious training of clergy. *Locke* v. *Davey*, 540 U.S. 712, 725 (2004). It is beyond dispute that providing a safe play area for children does not implicate the same historical concerns as funding the pursuit of devotional degrees. In excluding all religious entities from participating here, Missouri's prohibition sweeps far more broadly than the Washington provision upheld in *Locke*, which prohibited funding only to students who majored in devotional theology, while allowing funding to students who attended religious colleges and those who attended religious classes. Upholding the application of the Missouri no-aid provision in this case would cut

squarely against the neutrality principle articulated throughout this Court's Religion Clause jurisprudence.

Missouri's rejection of Trinity Lutheran's application solely because it is a church likewise violates the Equal Protection Clause, which separately guarantees religion equal treatment in the provision of generally available public benefits. When government action burdens religion and fails to meet the *Employment Division* v. *Smith* standard of neutrality and general applicability, it receives strict scrutiny. Here, Missouri has neither articulated a compelling state interest, nor shown that the blanket exclusion of religious institutions from generally available public benefits is narrowly tailored. Consequently, the no-aid provision fails strict scrutiny and violates the guarantee of equal protection under the law.

ARGUMENT

I. MISSOURI VIOLATED THE FIRST AMENDMENT'S MINIMUM REQUIREMENT OF NEUTRALITY TOWARD RELIGION.

A. The Free Exercise Clause requires at least neutrality toward religion.

1. As understood by the Framers, the Free Exercise Clause permits nothing less than neutrality toward religion in the provision of government benefits. That bare minimum requirement of neutrality prohibits the targeted discrimination against religion mandated by the Missouri Constitution's no-aid provision.

The impetus behind what became the Free Exercise Clause came from Antifederalists like Patrick Henry, who were alarmed by the Constitution's lack of explicit protection for religion, which threatened to leave the federal government unencumbered by the sort of protections "that had been hard won at the state level." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV.

1409, 1476 (1990). John Leland, the leader of the Virginia Baptists who voted unanimously to oppose ratification because the Constitution insufficiently protected religion, observed that "if Oppression dose not ensue, it will be owing to the Mildness of administration & not to any Constitutional defence." *Ibid.* (citing 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 528 (U.S. Dep't of State ed. 1905)). It was only Madison's concerted efforts to secure "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude," that ultimately allayed those concerns and led to the Constitution's ratification. *Id.* at 1477 (citing Letter from James Madison to Rev. George Eve (Jan. 2, 1789), in 11 THE PAPERS OF JAMES MADISON 404-405 (R. Rutland & C. Hobson eds. 1977)).

The Free Exercise Clause's drafting history confirms the Framers' understanding that they were guaranteeing *at least* government neutrality toward religion. As Professor McConnell has ably detailed, the drafters in both the Senate and the House approved the phrase "free exercise of religion" instead of the phrase "rights of conscience" to describe the protected rights. *Id.* at 1488-1500. This substitution communicated a special solicitude for religion by reflecting the then-universal understanding that the "exercise of religion" necessarily included conduct as well as belief. *Id.* at 1490. Moreover, the use of the term "religion" instead of "conscience" made clear that the freedom "encompasses the corporate or institutional aspects of religious belief," not just the individual judgment of religious people. *Ibid.* Accordingly, "the 'free exercise of religion' suggests that the government may not interfere with the activities of religious bodies, even when the interference has no direct relation to a claim of conscience." *Ibid.*

This widespread view—that religious freedom meant special protection for both the faith *and* the activities of individuals *and* their churches—is reflected in later Free Exercise Clause analysis. In 1947, for example, following the advent of the administrative state, this Court articulated the principle that a state "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude * * * the members of any * * * faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Board of Ed. of Ewing Twp.*, 330 U. S. 1, 16 (1947).

In light of this early prevailing view that churches were just as protected under the Free Exercise Clause as individuals, *Everson* is properly read to prohibit states from excluding a church "from receiving the benefits of public welfare legislation" merely because it is a church. *Ibid.* In other words, churches, just like individuals, must be treated at least neutrally in the provision of generally available public benefits. As Justice Kennedy has recognized, this principle has particular salience in the present day, for "as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *Cnty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-658 (1989) (opinion of Kennedy, J.).

2. While not always explicitly relying on the Framers' concern for a baseline posture of State neutrality toward religion, the Court has long applied the "general principle deducible from the First Amendment" that it "will not tolerate either governmentally established religion or governmental interference with religion." *Walz*, 397 U.S. at 669. Any "play in the joints" between the requirements of the Free Exercise Clause and the prohibi-

tions of the Establishment Clause must therefore be "productive of a benevolent neutrality." *Ibid.* This neutrality is not a rigid one, and the Court has "rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no-aid' theory." *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring in judgment).

This Court's rejection of a "no-aid" interpretation of the First Amendment dovetails with its strong condemnation of laws that would specifically target religion for unfavorable treatment. As the Court affirmed in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, laws that affirmatively discriminate against religion "violate[] the Nation's essential commitment to religious freedom." 508 U.S. 520, 524 (1993). When a law ceases to act at least neutrally toward religion, it is no longer a law of general applicability. And a "law failing to satisfy these requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-532.

B. The baseline requirement of neutrality also underpins the Establishment Clause.

The Establishment Clause requires a baseline of neutrality no less than the Free Exercise Clause. Indeed, the "central purpose of the Establishment Clause * * * [is to] ensure[] governmental neutrality in matters of religion." *Gillette* v. *United States*, 401 U.S. 437, 449 (1971). It is therefore unsurprising that this Court has recognized "a general harmony of purpose between the two religious clauses of the First Amendment." *Id.* at 461.

Importantly, neutrality cannot mean hostility to religion. The Establishment Clause "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." *Everson*, 330 U.S. at 18; see also *Sch. Dist. of Abington*

Twp., Pa. v. *Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring) ("[T]he First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion."). "To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances *nor inhibits* religion." *Abington*, 374 U.S. at 222 (emphasis added). Thus, while the Establishment Clause prohibits official support of any particular religious belief, it also forbids official hindrance of religion.

Neutrality means that "there may be myriad forms of involvements of government with religion which * * * should not * * * be deemed to violate the Establishment Clause." *Id.* at 295 (Brennan, J., concurring). "Government activities" may "touch on the religious sphere" so long as they are "secular in purpose, evenhanded in operation, and neutral in primary impact." *Gillette*, 401 U.S. at 450. Indeed, "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-145 (1987).

Examples abound of permissible government involvement with religious institutions. "[T]he [public] fire and police protection received by houses of religious worship" is not at odds with the Establishment Clause. *Walz*, 397 U.S. at 676. Nor is exempting religious institutions from taxes. See *id.* at 680. States can (and sometimes must) account for religious obligations in their unemployment laws. See *Hobbie*, 480 U.S. at 146 ("[T]he State may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, * * * and abandoning one of the precepts of her religion in order to accept work.'" (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963)). States also may appropriate public funds to

pay for transporting students to parochial schools without violating the Establishment Clause. See *Everson*, 330 U.S. at 17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."). As these examples demonstrate, neutrality does not and, as a practical matter, cannot mean purposeful exclusion of religious persons and institutions from generally available government benefits.

C. Missouri's denial of Trinity Lutheran's application to participate in the scrap tire program violates the First Amendment's neutrality principle embodied in both the Free Exercise and Establishment Clauses.

It is undisputed that Missouri rejected Trinity Lutheran's application to participate in the scrap tire program for the *sole reason* that Trinity Lutheran is a church. Trinity Lutheran was one of forty-four applicants for a scrap tire grant in 2012. Under the State's neutral evaluation criteria, Trinity Lutheran's application not only qualified it for funding, it ranked fifth. Because fourteen projects were funded, there is no dispute that, but for its status as a church, Trinity Lutheran would have received a grant. Missouri's application of its no-aid provision to deny Trinity Lutheran the right to participate in the scrap tire program contravenes the neutrality principle that informs both the Free Exercise and Establishment Clauses.

1. As applied in this case, the no-aid provision violates the Free Exercise Clause. Unlike the prohibition on peyote use upheld in *Employment Division* v. *Smith*, Missouri's no-aid provision is not a "neutral law of general applicability," 494 U.S. 872, 879 (1990), but rather is discriminatory on its face, singling out parties for dispar-

ate treatment solely on the basis of religion. Indeed, viewed in *Smith*'s light, the Missouri no-aid provision works a particularly cruel irony. While *Smith* ensures that Trinity Lutheran cannot escape the adverse effects of a neutral law of general applicability that abridges religious freedoms, Missouri's constitution requires that Trinity Lutheran be denied the privileges of neutral laws of general applicability that confer benefits. Thus, under the no-aid provision, religious institutions get *all* the burdens but *none* of the benefits of generally applicable laws. Such an untenable position is anathema to the notion of benevolent neutrality.

Even if Missouri's practice of denying publicly available benefits solely on the basis of religion were not facially discriminatory, the denial would still be invalid because the Free Exercise Clause forbids even "subtle departures from neutrality" and "covert suppression." *Lukumi*, 508 U.S. at 534. The denial of Trinity Lutheran's application thus exemplifies the "prohibit[ed] misuse of secular governmental programs" to "impede the observance of one or all religions * * * even though the burden may be characterized as being only indirect." *Gillette*, 401 U.S. at 462.

2. The no-aid provision also finds no support in the neutrality principle that undergirds the Establishment Clause. But for the application of the no-aid provision, the scrap tire program would have treated all comers equally on the basis of its objective, secular criteria. The scrap tire program is analogous to the funding of transportation to all schools, parochial or public, upheld in *Everson*. It deploys government funds to fulfill the secular aims of the program—providing safe recreational facilities for Missouri's children. The mere fact that a church owns a playground to which the program granted funds raises no Establishment Clause concern. Indeed, this Court has found that the "guarantee of neutrality is

respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839.

The Missouri no-aid provision, however, transformed what would have been a "benevolent neutrality" toward religious institutions, *Walz*, 397 U.S. at 669, into outright hostility. Disqualifying an entity from receiving state aid solely because it is a religious institution violates the Establishment Clause's prohibition against laws with a "legislative purpose [or] a primary effect that * * * inhibits religion." *Abington*, 374 U.S. at 222. The no-aid provision "handicap[s] religions," *Everson*, 330 U.S. at 18, putting religious institutions at a distinct disadvantage by shutting them out of secular government programs that could have otherwise funded the secular aspects of their operations, such as providing a recreational area for students and the public. The Establishment Clause neither requires nor permits such hostility towards religion.[2]

3. The consistent emphasis this Court has placed on neutrality throughout its Religion Clause jurisprudence is not undone by *Locke*. Children playing on an outdoor playground are far afield from "the pursuit of devotional degrees" at issue in *Locke*. 540 U.S. at 725. Indeed, unlike the "essentially religious endeavor" of "[t]raining someone to lead a congregation," *id.* at 721, there is no such thing as an "essentially religious" playground. And

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[2] *Luetkemeyer* v. *Kaufmann* does not change this conclusion. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). The trial court in that case characterized Missouri's no-aid provision as merely "enforc[ing] a more strict policy of church and state separation than that required by the First Amendment." *Id.* at 386. That justification of the no-aid provision is flatly inconsistent with the Court's later decisions in *McDaniel* and *Widmar*, which rejected heightened enforcement of church-state separation as a compelling state interest.

the recycled rubber poured on a church-owned playground at state expense implicates no greater pieties than rubber surfacing at a secular facility. Thus, Missouri's broad exclusion of religious entities warrants the "presumption of unconstitutionality" that the Court declined to apply in *Locke*.

Denial of Trinity Lutheran's application solely because it is a church goes beyond even the hypothetical "what next?" that Justice Scalia posed in his *Locke* dissent. There, he asked incredulously whether we would next "deny priests and nuns their prescription-drug benefits." *Locke*, 540 U.S. at 734 (Scalia, J. dissenting). Here, Missouri refuses to provide a safe play area not only for children attending a day care, but also for neighborhood children who play there after hours, solely because the day care is church-run. Like the unconstitutional ordinances in *Lukumi*, Missouri's denial of Trinity Lutheran's application on the basis of its no-aid provision violates the "minimum requirement of neutrality," that a law or a government practice "not discriminate on its face," not "subtl[y] depart[] from neutrality," or not "covert[ly] suppress[]" religion. *Lukumi*, 508 U.S. at 533-534.

II. MISSOURI'S ACTION CANNOT SATISFY STRICT SCRUTINY UNDER EITHER THE RELIGION CLAUSES OR THE EQUAL PROTECTION CLAUSE.

A. The no-aid provision warrants strict scrutiny.

Because Missouri treated entities differently solely on the basis of religion, it violated the Religion Clauses of the First Amendment as well as the Equal Protection Clause, and can only prevail if it advances a compelling government interest that is narrowly tailored to achieve that interest.

Consistent with the neutrality principle in the Religion Clauses, the Court has regularly held that religious groups are entitled to heightened protection from unequal treatment by the government, and where govern-

ment actions burden religion and fail to meet the standard of neutrality and general applicability, they receive not rational basis review, but strict scrutiny. See, *e.g.*, *Lukumi*, 508 U.S. at 546; *Hobbie*, 480 U.S. at 140-141; *Thomas* v. *Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). The analysis is no different under the Equal Protection Clause, which protects against unequal application of neutral, generally applicable laws on the basis of religion.[3] Whether analyzed under the Religion Clauses or the Equal Protection Clause, Missouri's denial of Trinity Lutheran's participation in a generally available program solely because it is a church fails both prongs of the strict scrutiny analysis: It advances no compelling state interest and it is not narrowly tailored.

B. Denying Trinity Lutheran a safe, rubber-surfaced playground for its children advances no compelling governmental interest.

The governmental interests that have been held to satisfy strict scrutiny are far more compelling than Missouri's purported interest here.[4] Indeed, the Court has even rejected the very interest that Missouri asserts in this case: "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution." *Widmar* v. *Vincent*,

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[3] This Court has long recognized the applicability of the Equal Protection Clause in the religious freedom context. In *Walz*, the Court noted that "neutrality in its application requires an equal protection mode of analysis." 397 U.S. at 696. Similarly, in his *McDaniel* concurrence, Justice White noted he would hold the religion-burdening state provision at issue "unconstitutional under the Equal Protection Clause of the Fourteenth Amendment." 435 U.S. at 643 (White, J., concurring).

[4] See, *e.g.*, *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (finding a "broad public interest in maintaining a sound tax system" sufficiently compelling to justify denying tax exemption for contributions to the Church of Scientology when contributions had *quid pro quo* elements).

454 U.S. 263, 276 (1981). In *Widmar*, the Court held that a Missouri university's decision to exclude religious groups from a school forum failed strict scrutiny, concluding that the interest Missouri asserted was not sufficiently compelling to justify discrimination against religious speech. *Id.* at 267.

The Court has also rejected the argument that avoiding an illusory Establishment Clause violation constitutes a compelling government interest justifying a burden on religion. In *Lamb's Chapel* v. *Center Moriches Union Free School District*, a church brought First Amendment and Equal Protection claims against a school district for refusing to allow viewing of a religious video after school hours, when the school allowed myriad other types of community meetings during after-school hours. 508 U.S. 384, 394-395 (1993). Although the district claimed a compelling interest in avoiding an Establishment Clause violation, the Court found no credible threat to the Establishment Clause in allowing the presentation of a video not sponsored by the school and open to the public—much less one that could be considered a compelling government interest. *Id.* at 395.

Lamb's Chapel teaches that states may not point to an interest in avoiding an imaginary Establishment Clause violation as sufficiently compelling to deny equal treatment to religious groups and individuals. It follows that Missouri's defense must fail, for it does not even *claim* that allowing Trinity Lutheran's participation would violate the Establishment Clause.[5]

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[5] Notably, the Court did not apply strict scrutiny in *Locke* because the narrow prohibition on funding devotional degrees prohibited neither funding of religious institutions nor even students taking religious classes. 540 U.S. at 724-725. Missouri's prohibition here triggers strict scrutiny because it sweeps far more broadly, depriving all religious institutions of funding that is otherwise generally available.

C. The no-aid provision is not narrowly tailored.

Even if this Court determined that Missouri's interest in pursuing enhanced church-state separation constituted a compelling interest, Missouri could not show that the measure is narrowly tailored. The denial of an otherwise deserving application solely on religious grounds harms all the children and families who would otherwise benefit from state-sponsored improvements to playgrounds owned by religious institutions.

Further, to the extent the intended goal is to prohibit any public aid to religious entities, the goal is both impractical and legally unacceptable. After all, nobody seriously contends that states may refuse to offer law enforcement protection, utilities, or other basic municipal services to religious individuals and entities.

Because Missouri is unable to satisfy either prong of the strict scrutiny standard, the burden it places on Trinity Lutheran is impermissible under the Religion Clauses and the Equal Protection Clause.

CONCLUSION

Amici respectfully request that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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