No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

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

BRIEF OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, MISSOURI CATHOLIC CONFERENCE, NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE SALVATION ARMY NATIONAL CORPORATION, AND GENERAL SYNOD OF THE REFORMED CHURCH IN AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with 15 million members worldwide. Religious liberty is a fundamental Church doctrine: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith 11. And we believe that "governments … are bound to enact laws for the protection of all citizens in the free exercise of their religious belief." Doctrine and Covenants 134:7. This brief reflects the Church's determination to strengthen religious liberty as a fundamental constitutional right.

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[1] Petitioner has consented to the filing of all *amicus* briefs in a letter on file with the Clerk, and respondent consented to the filing of this brief in correspondence *amici* have filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Missouri Catholic Conference (MCC) is the public policy agency for the Catholic Church in Missouri, the members of which are the active Catholic Bishops for the four dioceses of the State of Missouri. MCC's purposes include: promoting the material and spiritual well being of all the people of the State of Missouri in the fields of health, education, and social welfare; participating in the democratic process of government, its legislative, executive, and judicial branches; serving as a forum for the dioceses of Missouri in developing positions on statewide and national issues; and providing moral leadership and vision to Catholics and others throughout the State, particularly in the area of public policy. In the area of education specifically, the MCC advocates for access to education for all, and for the rights of Catholic and parochial schools to participate fully in the material and social life of the statewide and local community.

The National Catholic Educational Association (NCEA) is a professional membership organization representing 150,000 Catholic educators serving 2 million students in Catholic elementary and secondary schools. The Association's mission statement and the expectations of its members call NCEA to provide leadership in shaping public policies and political actions that acknowledge and support the important role of Catholic schools in the United States. NCEA supports the rights of all parents to choose Catholic schools for their children and advocates for the equitable participation of Catholic school students in federal and state education programs. Since 1965, students, teachers, and other Catholic school personnel have participated in education programs authorized by the federal government as well as in some state programs. Participation in these programs does not provide direct aid to the schools but only secular,

neutral, and non-ideological benefits to students and their teachers. Religious discrimination that prevents students in faith-based schools from receiving secular benefits and services available to public school students is a violation of their exercise of their First Amendment rights.

The Salvation Army is an international religious and charitable organization with its headquarters in London, England. The Salvation Army is a branch of the universal Christian Church, its own religious denomination. The *amicus* in this action is The Salvation Army National Corporation, a non-profit religious corporation organized under the laws of the State of New Jersey. The Salvation Army National Corporation is the corporate instrumentality of The Salvation Army National Headquarters, which is responsible for coordinating national policies of the four independent Territories of The Salvation Army in the United States. The mission of The Salvation Army is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination. In furtherance of this mission, The Salvation Army delivers social services to over 25 million persons in the United States annually. The Salvation Army joins this *amicus* brief because of its interest in ensuring that The Salvation Army and other religious organizations will continue to qualify to receive government funding to support the provision of social services.

The General Synod of the Reformed Church in America is the highest assembly and judicatory in the Reformed Church in America. The Reformed Church in America traces its history in North America to 1628, and as a result is the oldest protestant denomination in North America with a continuous history. Today, the Reformed Church in America includes approximately 300,000 people of many cultures across

the North American continent. There are approximately 950 churches in the United States and Canada. These churches are assembled into 44 regional units (each called a classis), and the 44 classes are assembled into 8 regional units (each called a regional synod). Given the varied ministries engaged in by the Reformed Church in America through its local churches, classes, regional synods, institutions, and agencies, the issues addressed in this brief are of great interest and importance to the General Synod.

SUMMARY OF ARGUMENT

The First Amendment's guarantee of the free exercise of religion bars the government from singling out religious persons or groups for disfavored treatment. Yet Missouri has done just that by excluding petitioner Trinity Lutheran from the state's Scrap Tire Program, which subsidizes the replacement of asphalt playgrounds with rubberized material derived from recycled tires. Missouri's only reason for excluding Trinity Lutheran was a state constitutional provision barring public funding for religious organizations; indeed, the state denied Trinity Lutheran's application specifically on the ground that the school is operated by a church. Missouri's overt discrimination against Trinity Lutheran purely because of its religious status is repugnant to the First Amendment.

Like discrimination based on race or national origin, discrimination based on religion is inherently suspect and can be upheld only if necessary to serve a compelling governmental interest. Missouri lacks any legitimate, let alone compelling, interest in excluding Trinity Lutheran from the Scrap Tire Program. Including Trinity Lutheran would not violate the Establishment Clause, or even raise a serious Establishment Clause question. And Missouri cannot justify religious discrimination by pointing to a purported

state interest in maintaining greater church-state separation than the Establishment Clause requires. States have no more discretion to discriminate based on religion in violation of the Free Exercise Clause than to violate any other part of the Bill of Rights.

Nor is Missouri's exclusion of Trinity Lutheran justified by this Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004). Neither *Locke*'s holding nor its reasoning "extend[s] to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J.). Unlike Missouri's religious discrimination here, the scholarship program in *Locke* did not exclude religious individuals or schools; it did not condition benefits on the surrender of religious rights; and it did not involve a "fungible," religiously neutral benefit like recycled rubber. In addition, Washington constrained the use of scholarship funds solely to further a "historic and substantial" state interest—avoiding taxpayer funding for the religious training of clergy—with no analogue here. No historic or substantial state interest justifies denying public benefits to religious institutions when the benefit is purely secular and cannot be diverted for religious purposes. To the contrary, the Nation has a long and venerable tradition of including religious institutions in neutral public aid programs.

Missouri's religious discrimination not only contravenes the First Amendment, it is profoundly demeaning to people of faith. Official discrimination based on religion is no less invidious or stigmatizing than discrimination based on other protected traits. It sends a message that religious people and their institutions are second-class citizens who deserve special disabilities and are not entitled to participate on equal terms

in government programs. Allowing illusory Establishment Clause concerns to trump the prohibition on religious discrimination would invite state officials to invoke those concerns as a pretext for penalizing religious groups whose beliefs or practices diverge from government-prescribed orthodoxy.

Whatever "play in the joints" exists between the Free Exercise Clause and the Establishment Clause, it does not authorize the blanket exclusion of religious institutions from public benefits programs that provide religiously neutral benefits to a wide range of recipients based on secular criteria and for secular purposes. Otherwise the government could exclude religious institutions from basic public services like police and fire protection. The decision below cannot be reconciled with the Nation's constitutional commitment to religious equality and should be reversed.

ARGUMENT

I. THE CONSTITUTION FORBIDS RELIGIOUS DISCRIMINATION ABSENT THE MOST COMPELLING CIRCUMSTANCES.

This Court's precedents have long recognized that, absent compelling circumstances, the Constitution bars state action that disfavors persons or groups based on their religion. This fundamental principle of religious nondiscrimination is embodied in multiple overlapping provisions of the Constitution, including the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Free Speech Clause. While each provision serves a distinct purpose, they "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 in part and in judgment).

The Constitution's nearly categorical ban on religious discrimination has many applications. It means that government may not discriminate against particular religious denominations or their adherents. *E.g., Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (invalidating a municipal ordinance that prohibited Jehovah's Witnesses from preaching in a public park but allowed other religious groups to conduct services there). It means that government may not discriminate against individuals or groups because they are *not* religious. *E.g.*, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (invalidating a Maryland constitutional provision requiring individuals to affirm belief in the existence of God as a condition of holding public office). And, conversely, it means that government may not discriminate against individuals or groups because they *are* religious. *E.g.*, *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (invalidating a Tennessee statute barring ministers and priests from serving as delegates to constitutional convention); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (invalidating disorderly conduct convictions of Jehovah's Witnesses who gave Bible talks in a park where secular groups had been permitted to hold patriotic celebrations).

Missouri's denial of Trinity Lutheran's application to participate in the Scrap Tire Program violates this bedrock constitutional command of equal treatment. The state admittedly denied Trinity Lutheran's application solely because the school is operated by a church, while granting applications of otherwise similarly situated secular nonprofit organizations. Pet. App. 152a–153a. This overt discrimination against Trinity Lutheran based on its religious status requires Missouri to demonstrate that its exclusion of

religious organizations from the Scrap Tire Program serves a compelling governmental interest that cannot be achieved through nondiscriminatory means.

A. The Free Exercise Clause Prohibits Laws That Target Religion For Special Disadvantages.

1. The Free Exercise Clause prevents government from saddling religious individuals or organizations with disadvantages not borne by others. Indeed, the prohibition against religious discrimination has been "so well understood that few violations are recorded in [this Court's] opinions." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 523 (1993). To ensure that religious discrimination remains rare, this Court has instructed that any law that overtly discriminates against religious individuals or groups, or that otherwise "target[s]" religious adherents for disfavored treatment, *id.* at 533, "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest," *id.* at 531–32. Thus, like distinctions based on race or national origin, distinctions based on religion are inherently suspect. See *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in judgment) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

Lukumi illustrates how "[t]he Free Exercise Clause protects religious observers against unequal treatment." 508 U.S. at 542 (alteration omitted). There the Court struck down ordinances that "singled out" a religious practice for "discriminatory treatment." *Id.* at 538. The City of Hialeah outlawed the ritual slaughter of animals for sacrificial purposes—a central practice of the Santeria religion—but allowed hunting, fishing, and the slaughter of animals for food. *Id.* at 535–38; see also *id.* at 542 ("the ordinances were ger-

rymandered with care to proscribe religious killings of animals but to exclude almost all secular killings"). This religious gerrymander breached a principle "essential to the protection of the rights guaranteed by the Free Exercise Clause": that government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. Because the ordinances targeted "religion alone" for special burdens not imposed on similar secular conduct, *id.* at 544, they were required to "undergo the most rigorous of scrutiny," *id.* at 546.

While the ordinances in *Lukumi* targeted a specific religion and a specific religious practice, the Free Exercise Clause's nondiscrimination principle applies equally to laws that impose unique legal disabilities on religious observers without targeting any particular denomination or directly proscribing any religious practice. See *id.* at 532 ("the protections of the Free Exercise Clause pertain if the law at issue discriminates against some *or all* religious beliefs") (emphasis added). In *McDaniel*, for example, the Court invalidated a Tennessee law barring ministers and priests "of any denomination whatever" from serving as delegates to a state constitutional convention. 435 U.S. at 620. A majority of the Justices agreed that the law violated the Free Exercise Clause. *Id.* at 629 (plurality); *id.* at 629–39 (Brennan, J., concurring in judgment). It did not matter that serving as a delegate was not itself an exercise of religion. What mattered was that the state had conditioned "the availability of benefits"—the ability to seek and hold office—on "the surrender" of the right to be a minister, and thus had "effectively penalize[d] the free exercise" of religion. *Id.* at 626 (plurality). This discrimination against McDaniel "because of his *status* as a 'minister,'" the Court held, "encroached upon [his] right to the free

exercise of religion." *Id.* at 626–27; *id.* at 634 (Brennan, J., concurring in judgment).

2. These same principles apply to religious discrimination in public benefit programs. The state may not, for instance, deny unemployment benefits to employees who lose their jobs because they refuse to engage in activity contrary to their religious beliefs. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Hobbie* v. *Unemp't Appeals Comm'n*, 480 U.S. 136 (1987); *Frazee* v. *Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989). Thus, if the state provides benefits to individuals whose employment is terminated for legitimate nonreligious reasons, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 884 (1990); *accord Lukumi*, 508 U.S. at 537; *Hobbie*, 480 U.S. at 148 (Stevens, J., concurring) ("In such an instance, granting unemployment benefits is necessary to protect religious observers against unequal treatment.").

The unemployment benefit cases make clear that the government does not get a free pass under the Free Exercise Clause when spending its own money. See *Sherbert*, 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion … may be infringed by the denial of or placing of conditions upon a benefit or privilege."). Discriminatory denial of government benefits penalizes religious exercise and puts pressure on religious observers to abandon or modify their religious beliefs or practices so they can enjoy the same benefits afforded to others. See *id.* at 405 ("imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights"); *Thomas*, 450 U.S. at 717–18 (denying benefits on account of reli-

gion "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"). In an era of pervasive government spending, excluding religious individuals and groups from public benefit programs would put a heavy thumb on the scales against religion. See Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 235 (2004) ("Discriminatory funding is always the worst policy, because it pressures citizens to adapt their own religious choices to the state's favored categories.").

Nor does *Smith* give the government license to exclude religious individuals or groups from public benefit programs. *Smith* held that the Free Exercise Clause does not bar the application of neutral, generally applicable laws to religiously motivated conduct. 494 U.S. at 878–82. But a law that overtly discriminates against religion is neither neutral nor generally applicable. See *Lukumi*, 508 U.S. at 533, 542–43. Far from undermining the principle of religious nondiscrimination, *Smith* reaffirmed that the Free Exercise clause precludes government from "impos[ing] special disabilities on the basis of religious views or religious status." 494 U.S. at 877. And *Smith* expressly confirmed that laws discriminating based on religion are subject to strict scrutiny: "Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Id.* at 886 n.3 (citations omitted).[2]

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[2] Applying *Smith* and *Lukumi*, lower courts have recognized the need for exacting review of laws that discriminate based on religion. See, *e.g.*, *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 364–66 (3d Cir. 1999) (Alito, J.) (heightened scrutiny applies when "religious practice is being

B. Other Constitutional Provisions Likewise Prohibit The Government From Discriminating Against Religious Persons Or Organizations.

The fundamental principle of religious nondiscrimination extends beyond the Free Exercise Clause. It also has animated this Court's decisions under the Establishment Clause, the Free Speech Clause, and the Equal Protection Clause.

1. By prohibiting laws "respecting an establishment of religion," the Establishment Clause restricts governmental actions that discriminate against religion—the government has no more power to establish nonreligion than it has to establish religion. This Court has interpreted the Establishment Clause to ensure that legislation "neither advances *nor inhibits* religion." *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963) (emphasis added); *accord Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648–49 (2002); *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and in judgment) (the Establishment Clause "provide[s] no warrant for discriminating *against* religion").

This Court's seminal decision recognizing the incorporation of the Establishment Clause as binding on the states through the Fourteenth Amendment's Due Process Clause underscored that governments may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the member of any other faith, because of their faith, or lack of it, from receiv-

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singled out for discriminatory treatment") (emphasis omitted) (quoting *Lukumi*, 508 U.S. at 537–38); *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (Sutton, J.) (policies whose exceptions render them neither neutral nor generally applicable "must run the gauntlet of strict scrutiny").

ing the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). Cutting off access to government services, the Court held, is not required by the Establishment Clause; neither is it tolerable under the First Amendment for states to "handicap religions" by excluding them. *Id.* at 17–18. Rather, "[t]hat Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Id.* at 18.

Official hostility toward religion is no more permitted under the Establishment Clause than it is under the Free Exercise Clause. See *Lukumi*, 508 U.S. at 532 (the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general"). Far from justifying exclusion of religious persons or groups, the Establishment Clause requires that government "not be hostile to any religion." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); see *Cty. of Allegheny* v. *Am. Civil Liberties Union*, 492 U.S. 573, 657–58 (1989) (Kennedy, J., concurring); *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment) ("hostility toward religion … has no place in our Establishment Clause traditions").

2. The Free Speech Clause likewise protects persons from discrimination or exclusion based on their religious views. The government may not discriminate against speech on account of its content or viewpoint without a compelling interest. This prohibition applies equally to religious expression and association. See *Lukumi*, 508 U.S. at 543 (noting "parallels" between the principles of general access required under free speech and free exercise law). Thus, the Court has consistently held that government may not exclude religious speakers from a public forum, and that free speech standards do not change solely be-

cause the state is pursuing greater church-state separation than the Establishment Clause requires. See *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981); see also *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (affirming the right of religious groups and speakers to access after-hours facilities on equal footing with secular counterparts).

Even with respect to funding, the Court has "[m]ore than once … rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 839 (1995). Rather, the Court "ha[s] held 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." *Id.*

3. Under the Equal Protection Clause, religious exercise is a "fundamental right." See*, e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). Classification by religion is accordingly an "inherently suspect distinctio[n]," triggering heightened judicial scrutiny. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *accord, e.g.*, *Burlington N. R.R.* v. *Ford*, 504 U.S. 648, 651 (1992) (heightened scrutiny applies to laws that "classify along suspect lines like race or religion"). Thus, like the Religion Clauses, the Equal Protection Clause forbids religious discrimination unless it is narrowly tailored to serve a compelling governmental interest.

For example, this Court has rejected the use of "unjustifiable standard[s] such as race, religion, or other

arbitrary classification[s]" as factors that may be used in the exercise of prosecutorial discretion. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); see *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364–65 (1978) (listing religion as an unjustifiable classification for purposes of plea negotiations); *Wade* v. *United States*, 504 U.S. 181, 186 (1992) (prosecutors may not refuse to file a substantial-assistance motion "because of the defendant's race or religion"). And perhaps the Court's most celebrated equal protection passage—*Carolene Products*' footnote four—explained that the Fourteenth Amendment forbids discrimination on the basis of religion just as it forbids discrimination on the basis of race or national origin. *United States* v. *Carolene Prods. Co.,* 304 U.S. 144, 153 n.4 (1938).

C. *Locke* Does Not Exempt Religious Discrimination From Strict Scrutiny.

In rejecting Trinity Lutheran's claims below, the Eighth Circuit did not cite, let alone distinguish, *any* of this Court's precedents forbidding religious discrimination. Pet. App. 5a–12a. The court relied instead on this Court's decision in *Locke*.[3] Its reliance

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[3] The Eighth Circuit also relied on this Court's summary affirmance in *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974). But that case is inapposite because the policy at issue there did not classify based on religion—it distinguished between public and private schools, not between religious and nonreligious schools. 364 F. Supp. 376, 387 (W.D. Mo. 1973) ("We find and conclude that the Constitution of the United States does not compel the State of Missouri to provide equal transportation services to private and church-sponsored schools and that it may, as it has, elect to provide such service only for its public schools."). Moreover, any suggestion in the lower court's opinion in *Luetkemeyer* that states are free to exclude religious institutions from public benefit programs when the Establishment Clause permits their inclusion is not binding on this Court, and whatever persuasive force its reasoning once held has been fatally eroded by subse-

on *Locke* was error for two independent reasons. *First*, *Locke* confirmed that a law discriminating based on religion may be upheld only by satisfying strict scrutiny. *Second*, Missouri's asserted interest in not subsidizing the resurfacing of a religious school's playgrounds does not remotely approach the "historic and substantial" state interest at issue in *Locke*. See *infra*, at 23–24. Both aspects of *Locke*—its discussion of the standard for claims of religious discrimination and its discussion of the state interest sufficient to overcome such a claim—merit separate consideration.

Far from altering settled free exercise principles, *Locke* confirmed that religious discrimination triggers strict scrutiny. The Court's opinion expressly reaffirmed precedents like *Lukumi*, *McDaniel*, and *Sherbert*, 540 U.S. at 720–21—all of which applied strict scrutiny to policies that discriminated against religion. Although the Court concluded that Washington's scholarship program did not "disfavor" religion in a way that rendered it "presumptive[ly] unconstitutiona[l]," *id.* at 720, it did not disturb the rule that governmental classifications that disadvantage persons or groups based on their religious status must undergo strict scrutiny. Rather, the Court emphasized three aspects of Washington's scholarship program that made strict scrutiny inappropriate there—and that have no counterpart here.

First, *Locke* distinguished *Sherbert* and its progeny on the ground that Washington's scholarship program "[did] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21. That was so because Davey did not have to abandon his pursuit of a theology de-

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quent decisions. See, *e.g.*, *Smith*, 494 U.S. at 877 ("government may not … impose special disabilities on the basis of religious view or religious status"); *infra,* at 22–23.

gree in order to use his scholarship. *Id.* at 721 n.4. Here, by contrast, that is precisely the choice that Trinity Lutheran faces—it must either abandon its religious character or forgo a government benefit. Missouri cannot put Trinity Lutheran to that forbidden choice. See *Thomas*, 450 U.S. at 716 ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program").

Second, *Locke* concluded that Washington's decision to fund training for secular professions did not require it to fund training for religious professions because the two were not "fungible." 540 U.S. at 721. Training for religious professions was qualitatively different from training for other professions because "majoring in devotional theology is akin to a religious calling as well as an academic pursuit." *Id.* Here, by contrast, the benefit is "fungible." There is *no* difference between the benefit denied to Trinity Lutheran—recycled tires to resurface a playground—and the benefit granted to secular schools. Rubber is rubber.

Third, *Locke* emphasized that the scholarship program *accommodated* rather than excluded religious students, religious schools, and even religious instruction: religious students could use the scholarship to attend religious colleges and to pay for religion courses. *Id.* at 724–25. The program did not exclude religious persons or colleges, but only declined to fund a single course of professional study. Here, by contrast, Missouri has categorically excluded religious schools from the Scrap Tire Program, rather than trying to "includ[e] religion in its benefits." *Id.* at 724.

Thus, in stark contrast to *Locke*, Missouri has categorically excluded religious institutions from a public program that provides purely secular benefits, and it has forced Trinity Lutheran to choose between its re-

ligious affiliation and participation in the program. The contrast with *Locke* further confirms that Missouri's exclusion of Trinity Lutheran from the Scrap Tire Program based on its religious status is subject to the longstanding rule of strict scrutiny applicable to governmental classifications based on religion.

D. The Constitution Protects Religious Institutions From Discrimination Just As It Protects Individual Believers.

Missouri's exclusion of Trinity Lutheran from its Scrap Tire Program breaches the fundamental constitutional norm of religious equality. Trinity Lutheran met every neutral criterion for a subsidy to improve its school playground, ranking fifth in the state in the year it applied. Pet. App. 3a. It lost that subsidy only because of the school's affiliation with a church. *Id.* at 152a–153a. A more straightforward case of religious discrimination would be hard to find.

Under the Free Exercise Clause, it makes no difference that Trinity Lutheran is an organization rather than an individual believer. Religious organizations have First Amendment rights, too. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 132 S. Ct. 694 (2012). If this case involved an individual believer, rather than a school, the discriminatory character of Missouri's decision would be easy to see. Suppose that Missouri provided recycled tires to qualifying individuals to resurface their driveways, but excluded anyone who belonged to a church. No court in the country would hesitate in concluding that strict scrutiny applied. See *Everson*, 330 U.S. at 16.

The same exacting standard applies to Missouri's exclusion of Trinity Lutheran. Discrimination against religions institutions does not, under this Court's precedents, receive lesser scrutiny than discrimina-

tion against individual believers. Religious institutions may implicate different governmental interests than do individual believers, but those interests are properly accounted for when assessing whether an asserted governmental interest is compelling—not in determining whether the state has engaged in religious discrimination triggering strict scrutiny. Cf. *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003) ("the time to consider" the tailoring of a policy to governmental interests "is when applying scrutiny at the level selected, not in selecting the standard of review itself"). And, as discussed below, Missouri has no legitimate, let alone compelling, interest in excluding Trinity Lutheran or other religious schools from the Scrap Tire Program based on their religious status.

II. NO COMPELLING, OR EVEN LEGITIMATE, GOVERNMENTAL INTEREST JUSTIFIES THE DISCRIMINATORY EXCLUSION OF TRINITY LUTHERAN FROM MISSOURI'S SCRAP TIRE PROGRAM.

Missouri's exclusion of Trinity Lutheran from the Scrap Tire Program, a rare instance of overt discrimination against religion, cannot withstand strict scrutiny. Subsidizing the resurfacing of a religious school's playground with recycled rubber would not offend the Establishment Clause. And absent an actual Establishment Clause violation that it is attempting to avoid, Missouri lacks a compelling state interest that could justify religious discrimination.

Even if a lower level of scrutiny applied, Missouri has no interest comparable to the "historic and substantial" state interest in *Locke* in declining to fund the training of ministers. Because the Scrap Tire Program is available to a wide range of nonreligious recipients, and because a rubber playground surface cannot be used to advance religion, any asserted an-

tiestablishment interest here is, at best, "negligible." Pet. App. 29a (Gruender, J., dissenting). Negligible establishment concerns cannot justify religious discrimination that violates the Free Exercise Clause.

A. Including Trinity Lutheran In The Scrap Tire Program Would Not Violate The Establishment Clause.

Missouri cannot justify its religious discrimination as necessary to comply with the Establishment Clause. As every member of the Eighth Circuit panel correctly recognized, "Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." Pet. App. 9a.

Agostini v. *Felton*, 521 U.S. 203 (1997), sets forth the criteria for determining whether including religious schools in a public aid program is consistent with the Establishment Clause. In *Agostini*, this Court rejected the rule that "all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. Instead, such aid is consistent with the Establishment Clause so long as it has a secular purpose and does not have the primary effect of advancing or inhibiting religion. *Id.* at 222–23; *accord Mitchell* v. *Helms*, 530 U.S. 793, 807 (2000) (plurality). The Court further clarified that government aid to religious schools does not have the primary effect of advancing religion if it does not result in "governmental indoctrination" of religion; does not "define its recipients by reference to religion"; and does not "create an excessive entanglement" between church and state. *Agostini*, 521 U.S. at 234.

These criteria are easily satisfied here. It is undisputed that Missouri's Scrap Tire Program has a secular purpose by offering grants "to qualifying organiza-

tions for the purchase of recycled tires to resurface playgrounds, a beneficial reuse of this solid waste." Pet. App. 2a–3a (citing Mo. Rev. Stat. §§ 260.335.1, .273.6(2)). Subsidizing the resurfacing of playgrounds with reused rubber has the thoroughly secular purposes of protecting the safety of schoolchildren while reducing the environmental and safety hazards associated with disposing of used tires in landfills.

Likewise, including Trinity Lutheran in the Scrap Tire Program would not impermissibly advance religion. Providing recycled rubber to resurface Trinity Lutheran's playground would result in no government-sponsored religious indoctrination; accepting the subsidy would merely obligate Trinity Lutheran "to promote the Scrap Tire Program and educate the public about the benefits of recycling." Pet. App. 38a. The program awards subsidies based on criteria that have no reference to religion—except as a discriminatory, post-application disqualification. And allowing religious schools to participate in the program on equal terms with others would not result in excessive entanglement. Neither the "administrative cooperation" necessary for a short-term contractual relationship nor any purported "dangers of political divisiveness" would create an excessive church-state entanglement. *Agostini*, 521 U.S. at 233–34 ("Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two.") (citation omitted).

Missouri, in short, need not single out religious institutions for exclusion to satisfy the Establishment Clause. States do not offend the Establishment Clause when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

at 231. See, *e.g.*, *Mitchell*, 530 U.S. 793 (upholding federal funding program providing a variety of educational materials for schools, including media and reference materials and computer software and hardware); *Agostini*, 521 U.S. 203 (upholding federal program providing remedial teaching to disadvantaged children on the premises of religious schools); *Everson*, 330 U.S. 1 (upholding state law funding bus transportation for public and religious schools).

B. Missouri Cannot Justify Its Religious Discrimination Based On An Interest In Church-State Separation Beyond What The Establishment Clause Requires.

1. Because including Trinity Lutheran in the Scrap Tire Program would not violate the Establishment Clause, Missouri lacks any compelling interest necessary to justify its religious discrimination. While the Court has said that an interest in avoiding an *actual* Establishment Clause violation "may be characterized as compelling," *Good News Club*, 533 U.S. at 112, the Court has never approved as compelling an interest in separating church and state beyond what the Establishment Clause requires.

Absent a "valid Establishment Clause claim," *id.* at 120, the Court has consistently held that government may not discriminate against religious groups in the name of church-state separation, *e.g.*, *id.* at 112–19; *Rosenberger*, 515 U.S. at 837–46; *Lamb's Chapel*, 508 U.S. at 394–97; *Widmar*, 454 U.S. at 270–76. In *Widmar*, the Court expressly held that a state's asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause" was not "sufficiently 'compelling' to justify content-based discrimination against … religious speech." 454 U.S. at 276. It is likewise insufficient to justify Missouri's overt dis-

crimination against religious institutions in its Scrap Tire Program. See *McDaniel*, 435 U.S. at 628–29 (plurality) (antiestablishment interests did not justify Tennessee's clergy-disqualification provision).

Nor did *Locke* rule that a prophylactic interest in church-state separation was a compelling interest that meets the exacting demands of strict scrutiny. *Locke* declined to apply strict scrutiny. See 540 U.S. at 720 (rejecting Davey's "claim of presumptive unconstitutionality"). And the Court never characterized Washington's interest in not funding the training of clergy as "compelling." Because *Locke* did not apply strict scrutiny, it offers no support for Missouri's claim that an interest in church-state separation beyond what the Establishment Clause requires is sufficiently compelling to excuse religious discrimination. See *Lukumi*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment … will survive strict scrutiny only in rare cases.").

2. Even if a lower level of scrutiny applied, *Locke* still would not validate Missouri's exclusion of Trinity Lutheran from the Scrap Tire Program. *Locke* did not hold that every asserted interest in church-state separation can justify the blanket exclusion of religious individuals and groups from public aid programs. Rather, the Court focused narrowly on "the historic and substantial state interest" in avoiding public funding of "the religious training of clergy," which the Court emphasized was "the only interest at issue" in the case. 540 U.S. at 725, 722 n.5. And the Court expressly confirmed that "nothing in [its] opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5.

Missouri's "philosophical preference" for excluding religious institutions from public benefit programs is supported by nothing like the substantial and histori-

cally rooted constitutional objections to public funding for the training of clergy. Needless to say, Madison wrote no *Memorial and Remonstrance* against the government donating recycled tires to religious schools, on equal terms with nonreligious schools, to resurface their playgrounds. Nor is there a historical tradition supporting the exclusion of religious institutions from public aid programs. Quite to the contrary, the Nation has a "long tradition of allowing religious adherents to participate on equal terms in neutral government programs." *Rosenberger*, 515 U.S. at 852–53 (Thomas, J., concurring). That tradition stretches as far back as the Northwest Ordinance of 1787, under which Congress set aside federal lands for use by schools—including church-affiliated schools. *Id.* at 862–63; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988) (noting the "long history of cooperation and interdependency between governments and charitable or religious organizations").

Missouri's preference for greater church-state separation gets no boost merely because it is embodied in the state constitution rather than a statute or policy. See *McDaniel*, 435 U.S. at 621; *Torcaso*, 367 U.S. at 495. A state's interest in promoting the separation of church and state under its own constitution is necessarily limited by its overriding duty to comply with the federal Constitution. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

3. The courts below tried to equate this case with *Locke* by contending that the state has a substantial interest in avoiding "the direct expenditure of public funds to aid a church." Pet. App. 12a n.3; see *id.* at 54a ("the direct payment of government funds to a religious institution" raises "antiestablishment concerns that are at least comparable to those relied on

by the Court in *Locke*"). This reasoning is deeply flawed. Subsidizing the use of recycled tires to resurface a school playground is about as far removed as possible from *Locke*'s historic concern with the use of tax money for the training of professional ministers.

There is, for example, no merit to the claim that a grant to Trinity Lutheran under the Scrap Tire Program would pose "special Establishment Clause dangers" simply because it would involve a "direct money paymen[t] to [a] sectarian institutio[n]." Pet. App. 54a. The grant merely reimburses the recipient for the cost of purchasing recycled tires; it is in substance an in-kind contribution, not an unrestricted grant of money. Nothing of constitutional magnitude turns on whether the government purchases the tires itself and donates them to the school or instead reimburses the school for the cost of the tires. See *Comm. for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 658 (1980) (rejecting a "formalistic dichotomy" that would invalidate "reimbursements simply because they involve payments in cash").

"Nor does it matter that, by providing funds for [recycled tires], the agency may have freed up the recipients' resources for other activities." *Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 296–97 (6th Cir. 2009) (Sutton, J.). This Court has repeatedly rejected "the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Regan*, 444 U.S. at 658. Moreover, it may well be that without a grant, some religious schools would be unable to resurface their playgrounds. In that event, the grant would not "free up" any funds; it would simply allow the school to make the state's desired secular improvement—a safer, more environmentally friendly playground.

Likewise, it does not matter that the grant flows directly to the school rather than passing through private hands. "The Court has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—where the aid itself had no religious content and any actual diversion was de minimis." *Am. Atheists*, 567 F.3d at 295. *E.g.*, *Regan*, 444 U.S. 646; *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). This case falls squarely within this long line of precedent.

Indeed, this case should be easy because there is "no substantial risk that [recycled tires] could be used for religious educational purposes." *Regan*, 444 U.S. at 656. Recycled tires have no religious content and cannot be diverted for religious purposes. Under any view of the Establishment Clause, such "aid of a secular character with no discernible benefit to … a sectarian objective is allowable." *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting). As Judge Gruender aptly put it below, "schoolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion." Pet. App. 29a (dissenting op.); cf. *Am. Atheists*, 567 F.3d at 293 ("Unlike a teacher, a sign-language interpreter or even an overhead projector—all of which conceivably can be used to communicate secular *and* religious messages—a brick, gutter or bush (unless burning) cannot be coopted to convey a religious message").[4]

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[4] Because resurfacing a playground does not advance religion, the Court need not reach the question whether a state may exclude religious institutions from public aid programs that provide benefits that could be used for religious ends.

In short, when state aid cannot be used to fund religious activities, this Court has repeatedly held that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer*, 426 U.S. at 746. Otherwise "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Id.* at 747. "The Court never has held that religious activities must"—or even may—"be discriminated against in this way." *Id.* Missouri has no legitimate antiestablishment interest in excluding Trinity Lutheran from the Scrap Tire Program. Absent such an interest, the decision below should be reversed, regardless of the level of scrutiny this Court applies.

III. FAILING TO ENFORCE THE PRINCIPLE AGAINST RELIGIOUS DISCRIMINATION WOULD THREATEN LASTING INJURIES TO RELIGIOUS INSTITUTIONS.

A. Excluding Religious Institutions From Public Benefit Programs Harms Both The Institutions And Those They Serve.

The consequences of condoning Missouri's discriminatory exclusion of Trinity Lutheran could be devastating—not only for religious believers, but also for the disadvantaged individuals and communities they serve. The United States has a proud tradition of encouraging secular social-services ventures between government and religious organizations. That "long history of cooperation and interdependency," *Bowen*, 487 U.S. at 609, has led this Court to reject Establishment Clause challenges to religious groups' participation in public programs. Indeed, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id.*

Congress has likewise recognized that "[c]haritable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy." *Id.* (quoting S. Rep. No. 98-496, at 10 (1984)). The ecumenical Christian organization Habitat for Humanity, for example, has leveraged government funding to help millions of people build and own their homes. See Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834, 841–45, § 11. Many religiously affiliated hospitals rely on state funding as providers of last resort for underinsured and medically needy patients. See, *e.g.*, J. David Seay, Catholic Health Ass'n, *Beyond Charity Care* 9 (2007). And states implementing the federal Temporary Assistance to Needy Families program contract with religious organizations to deliver housing, rehabilitation, and food assistance to the underprivileged. See, *e.g.*, 42 U.S.C. § 604a.

These and countless other faith-based organizations deliver essential services to marginalized and at-risk individuals and communities, while simultaneously alleviating the government's burden of delivering aid. Under the rule adopted below, however, religious institutions would have no constitutional protection against being excluded from these programs solely because of their religious status. If Missouri can deny Trinity Lutheran access to playground rubber because of its religious affiliation, then states could deny funding to Habitat for Humanity or a church-run Meals on Wheels service on the same discriminatory basis. Such a result would be untrue to our national tradition and would inflict a palpable injury on both religious institutions and the many Americans who rely on them to deliver vital social services.

B. Religious Discrimination Demeans Religious Believers And Institutions.

Religious organizations and their secular counterparts in Missouri do not participate equally in government benefit programs. The state openly discriminates against religious institutions. Indeed, the opinion below acknowledged the breadth of Missouri's disapproval of "church participation in a host of publicly-funded programs." Pet. App. 11a.

But pervasive religious discrimination is no more acceptable than targeted religious discrimination. Denying believers and their religious institutions the same rights and privileges available to nonreligious persons and their institutions sends the powerful and demeaning message that people of faith are second-class citizens: "Believers need not apply." Permitting such official discrimination against religion would "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." *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 248 (1990) (plurality) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment)). Including churches on equal terms with secular groups in generally available public benefit programs conveys no governmental endorsement of religion. Excluding them, by contrast, "send[s] a far stronger message—a message not of endorsement but of disapproval." *Am. Atheists*, 567 F.3d at 292.

This message is a deep affront to the dignity of the many millions of Americans for whom religion is central to their identity and way of life. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). For such believers, religious duty is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."

James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in James Madison: Writings* 29, 30 (Jack N. Rakove ed., 1999). The Founders reconciled the twin demands of faith and country in the First Amendment's Religion Clauses: the state may not establish religion, nor may any person be "restricted or demeaned by government in exercising his or her religion." *Burwell*, 134 S. Ct. at 2786 (Kennedy, J., concurring). This Court's precedents have long honored that principle, treating religious discrimination as no less stigmatizing and no more tolerable than other forms of invidious discrimination. *E.g., Carolene Prods.*, 304 U.S. at 153 n.4.

Rather than respecting the constitutional commitment to equal treatment of religious observers, the decision below transforms the administration of government benefits into a potent weapon against religion. Armed with the no-aid-to-religion principle, government officials could abuse the power to administer benefits to suppress or penalize religious organizations whose beliefs or practices are politically disfavored. While this Court has properly rejected such viewpoint discrimination, see *Rosenberger*, 515 U.S. at 829, under the holding below a policy broadly excluding all religious organizations from a category of benefits could fall with calculated force on a targeted religious organization if it is the only, or one of a few, religious groups participating in that government program. A state or municipality where Catholic Charities is the only religious adoption agency, for instance, could penalize it for its religious practices under the guise of withholding public funding from *all* religious adoption agencies.

No express connection between the disfavored religious practice and the denied government benefits would be necessary. And nothing in the decision be-

low cabins its tolerance for religious discrimination to comprehensive or constitutional exclusions; individual civil servants could likewise exercise their discretion to exclude religious institutions for reasons like those Missouri advances here. A bureaucrat irritated because of a church's support for expansive immigration policies could penalize the church by disqualifying all religious groups from a category of government benefits under the guise of advancing church-state separation. Amorphous and unsubstantiated Establishment Clause concerns would thus offer a shield for targeted "disabilities on the basis of religion." *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). Such an assault on religious liberty would unmistakably violate the Free Exercise Clause, which "protects against governmental hostility which is masked as well as overt." *Id.* at 534.

Whatever Missouri's intent, its exclusion of Trinity Lutheran from an otherwise neutral, secular aid program based solely on its religious status suggests that the state "disapprove[s] of a particular religion or of religion in general." *Id.* at 532. But in our constitutional tradition, religious people and institutions are not second-class citizens, and freedom of religion under the First Amendment is not a second-class right. As with any other suspect classification, Missouri's religious discrimination is unlawful and cannot be upheld unless it is necessary to serve a compelling governmental interest. Because there is no legitimate, let alone compelling, reason to exclude religious schools from the Scrap Tire Program, the denial of Trinity Lutheran's application violated its constitutional right to the free exercise of religion.

CONCLUSION

For these reasons, the Court should hold that Missouri may not exclude Trinity Lutheran from the Scrap Tire Program based on its religious status and reverse the judgment below.

Respectfully submitted,

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