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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL AND LUTHERAN CHURCH—MISSOURI SYNOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THOMAS G. HUNGAR
Counsel of Record
RUSSELL B. BALIKIAN
CHAD R. MIZELLE
KEVIN J. BARBER
NATHAN H. JACK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
thungar@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The Association of Christian Schools International ("ACSI") is a nonprofit organization that supports and promotes Christian schools across the United States and around the world. Based in Colorado Springs, ACSI has approximately 24,000 member schools—over 3,000 in the United States—that serve more than 5.5 million students worldwide. In addition to providing various services for Christian schools (including teacher certification, school accreditation, and textbook publishing), ACSI advocates for their fair legal treatment.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations which, in turn, have approximately 2,200,000 members. Member congregations of the Synod operate elementary schools and daycare centers throughout the United States, including in the State of Missouri, and as a group they operate the largest Protestant parochial school system in America.

In the decision below, the Eighth Circuit adopted an erroneous, expansive interpretation of this

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner is a member of The Lutheran Church—Missouri Synod but made no such monetary contribution. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for petitioner and respondent received timely notice of intent to file this brief. All parties have consented in writing to the filing of this brief.

Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), holding that Missouri did not violate the Free Exercise or Equal Protection Clauses when it excluded a daycare center from a playground-resurfacing grant program solely because the daycare was affiliated with a church. *See* Pet. App. 1a-22a. The rule adopted by the Eighth Circuit—and numerous other courts, *see*, *e.g.*, *Taxpayers for Pub. Educ.* v. *Douglas Cty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 27-28, 2015)—threatens to marginalize religious schools, churches, and other faith-based entities from public life in the United States by licensing religious discrimination against them in the administration of public benefits.

Believing firmly in the Constitution's guarantee of the free exercise of religion and in America's long tradition of affirming religious participation in the public square, *amici* urge this Court to grant certiorari to overturn the erroneous rule of law adopted below and confirm that *Locke*'s narrow, historically driven holding allowing a State to avoid public funding of the clergy does not repudiate this Court's numerous precedents teaching that the Constitution prohibits discriminating against religious groups that are otherwise eligible for public benefits.

SUMMARY OF ARGUMENT

The Free Exercise and Equal Protection Clauses of the U.S. Constitution prohibit government from discriminating against religion, including in the provision of public benefits. *See*, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hiale-*

ah, 508 U.S. 520, 532 (1993); *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). In *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court added a narrow qualification to that nondiscrimination principle by holding that the State of Washington did not violate the Free Exercise Clause when it applied a state constitutional prohibition against funding religious instruction to bar students from using public scholarship funds to pursue degrees in devotional theology. The Court rooted its decision in the State's historical practice of avoiding the use of public funds for clerical training. As the majority explained and the principal dissent agreed, "the only interest at issue" was "the State's interest in not funding the religious training of clergy." *Id*. at 722 n.5; *accord id.* at 734 (Scalia, J. dissenting).

Lower courts, however, have diverged over the breadth of the *Locke* exception to the general principle of nondiscrimination. While some courts have correctly recognized that *Locke* must be construed narrowly in light of this Court's other free-exercise and equal-protection precedents, *see*, *e.g.*, *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1254-56 (10th Cir. 2008), other courts have improperly extended *Locke* into areas far removed from vocational religious training, using it to justify sweeping exclusions of religion from government benefits programs, *see Bowman* v. *United States*, 564 F.3d 765, 767-69 (6th Cir. 2008), *cert. denied*, 558 U.S. 815 (2009); *see also* Pet. App. 1a-22a, and other public programs, *see Ass'n of Christian Schs. Int'l* v. *Stearns*, 362 F. App'x 640, 646 (9th Cir.), *cert. denied*, 562 U.S. 975 (2010); *see also Bronx Household of Faith* v. *Bd. of Educ.*, 750 F.3d 184, 187-88 (2d Cir. 2014), *cert. denied*, 135

S. Ct. 1730 (2015). Certiorari is warranted to resolve this conflict by rejecting these expansive readings of *Locke* as plainly contrary to the Free Exercise and Equal Protection Clauses' command of nondiscrimination.

Absent review by this Court, lower courts' conflicting interpretations of *Locke* will jeopardize many religious entities' ability to participate on equal terms in hundreds of generally accessible state and local programs across the country. Like their secular counterparts, religious organizations are frequently eligible for direct or indirect aid from neutral government programs supporting activities that benefit the public. These programs provide, for example, educational vouchers and scholarships for primary- and secondary-school education at private schools; textbook and transportation subsidies; scholarship tax credits; grants for construction projects; funding for rehabilitation centers; and grants for resurfacing playgrounds with recycled tire rubber. Yet under the expansive reading of *Locke* adopted by the decision below, religious institutions could be excluded not only from these programs, but also from receiving basic public support—such as fire protection and sidewalk maintenance—solely on account of their religious practices. Certiorari is warranted to prevent governments from engaging in active hostility to religion and leveraging the weight of the administrative state against religious conviction.

ARGUMENT

The First Amendment "commands" that government "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot ex-

clude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947).

In *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court held that *Everson*'s nondiscrimination principle did not require the State of Washington to fund the devotional training of clergy. Relying on the historical pedigree of state laws against funding that "essentially religious endeavor" and the specifics of the Washington scholarship program, the Court upheld the program "as currently operated." *Id.* at 721-25.

The Eighth Circuit's decision below dramatically expands *Locke*'s narrow holding, transforming it into a license for religious discrimination in the administration of public benefits that have nothing to do with religious activity. This unwarranted extension of *Locke* is hardly unique, however: Courts across the country have mistakenly relied on *Locke* to uphold burdensome exclusions of religious persons and institutions from a growing variety of public programs. "[A]s the modern administrative state expands . . . and redirects [citizens'] financial choices through programs of its own," this trend threatens to turn *Locke* into a First Amendment cudgel for imposing a regime of "latent hostility to religion" by preventing all manner of religious actors from participating in the ever-expanding number of generally available public benefits programs. *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-58 (1989) (opinion of Kennedy, J.). This Court should grant certiorari to

lay to rest the view that *Locke*—contrary to every other relevant decision of this Court—permits States to exclude people of faith, solely on the basis of their religion, from neutral public aid programs for which they otherwise qualify.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE LOWER COURTS HAVE ERRONEOUSLY TRANSFORMED *LOCKE* INTO A LICENSE FOR RELIGIOUS DISCRIMINATION IN THE PROVISION OF PUBLIC BENEFITS.

Since *Locke*, the free-exercise and equal-protection rights of religious Americans have become increasingly defined by geography rather than constitutional principle. By extending *Locke*'s narrow holding beyond its original context—funding the devotional training of clergy—numerous lower courts have granted States essentially "unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a (Gruender, J., concurring in part and dissenting in part). That expansion of *Locke* cannot be reconciled with this Court's free-exercise and equal-protection precedents and warrants review.

A. This Court Has Repeatedly Confirmed That The First Amendment Does Not Permit Discrimination Against Religion In The Provision Of Public Benefits.

When the government "discriminates against some or all religious beliefs," this Court has consistently recognized that "the protections of the Free Exercise Clause pertain." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 532 (1993); *see also*, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (inval-

idating state law that disqualified clergy from participation in state constitutional convention due to antiestablishment concerns). Just as the Establishment Clause guards against excessive government entanglement with religion, the Free Exercise Clause bars the government from adopting "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Laws burdening religious practice that are not neutral and generally applicable are therefore subject to "the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546; *accord id.* at 531-33, 543.

In particular, this Court has consistently maintained that a government violates the Free Exercise Clause's "guarantee of neutrality" when it refuses to provide generally available public "benefits" to religious entities. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *see Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 746-47 (1976) ("Neutrality is what is required."). No person may be "compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981); *see also*, *e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) ("The Court has made clear" that government "must 'work deterrence of no religious belief.'" (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring))). Instead, the Constitution enables all people, regardless of creed, to insist on evenhanded treatment from government in the provision of public benefits. *See 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.").

B. *Locke*'s Holding Is Rooted In A Specific, Well-Established, Historic Practice Of Avoiding Public Funding Of The Devotional Training Of Clergy.

In *Locke*, this Court recognized a narrow, historically rooted, fact-dependent qualification to the First Amendment's general requirement of nondiscrimination in the administration of public benefits. The Court held that the State of Washington did not violate the Free Exercise Clause by excluding students pursuing degrees in devotional theology from an otherwise neutral public scholarship program. *See* 540 U.S. at 715. The Court relied on several related factors in making this determination, including the relative mildness of the State's exclusion of religion, *see id.* at 720-21; the absence of evidence that the State's policy reflected animus or hostility toward religion, *id.* at 721, 725; the scholarship program's effort to "go[] a long way toward including religion in its benefits," *id.* at 724; and especially the Nation's history of resisting public funding of the clergy, *see id.* at 722-23. Justice Scalia dissented, taking a different view of the application of the historical record to the facts and arguing that the Court's decision could not be reconciled with precedent holding that facial religious discrimination invites the strictest scrutiny, *see id.* at 726-28 & n.1 (Scalia, J., dissenting) (citing *Church of Lukumi*, 508 U.S. 520).

Although *Locke* diverged from the general rule that States may not discriminate against religion in the provision of public benefits, *see supra* Section I-A,

the Court made clear that it was carving out only a limited exception to that rule. The *Locke* majority emphasized that "the only interest at issue here is the State's interest in not funding the religious training of clergy," 540 U.S. at 722 n.5; *see id.* at 722-23, and it acknowledged the narrowness of the decision at the conclusion of its opinion, stating, "We need not venture further into this difficult area in order to uphold the [scholarship program] as currently operated by the State of Washington," *id.* at 725. The principal dissent likewise agreed that Locke's holding was "limited to training the clergy." *Id.* at 734 (Scalia, J., dissenting). Nowhere in *Locke* did the Court purport to overrule or abrogate its numerous holdings forbidding discrimination on the basis of religion in the administration of generally available public programs.

Accordingly, various courts and commentators have correctly recognized that *Locke* was (necessarily) decided narrowly. In *Colorado Christian University* v. *Weaver*, for example, the Tenth Circuit rejected the argument that "*Locke* subjects all 'state decisions about funding religious education' to no more than 'rational basis review.'" 534 F.3d 1245, 1254-55 (2008) (McConnell, J.). Professor Laycock has similarly argued for a limited reading of *Locke*. *See* Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1184 (2007) (book review) (repudiating the argument that, under *Church of Lukumi* and *Locke*, "the Free Exercise Clause requires strict scrutiny only where the claimant proves governmental hostility or animus toward religion" (internal quotation marks omitted)). And other commentators agree that by "going no further than absolutely necessary

to reach its conclusion," the *Locke* Court "decided the case almost entirely on the ministry-funding theory and gave no indication of a willingness to extend its holding to other categories of discrimination." Susanna Dokupil, *Function Follows Form:* Locke v. Davey*'s Unnecessary Parsing*, 3 Cato Sup. Ct. Rev. 327, 353-54 (2004).

C. Some Lower Courts Have Improperly Extended *Locke* In A Manner Contrary To This Court's Free-Exercise And Equal-Protection Precedents.

Not all courts have appreciated the narrowness of *Locke*'s holding and reasoning, however. Indeed, numerous courts have erroneously extended *Locke* to eviscerate the nondiscrimination rule that prevails in this Court's free-exercise and equal-protection jurisprudence.

In the decision below, for example, the Eighth Circuit dramatically expanded the reach of *Locke* to approve the exclusion of a daycare center from a public grant program solely on the basis of its affiliation with a church. Pet. App. 10a-12a. After being denied a grant of public funds to finance the resurfacing of a playground on church property with recycled tire material, the church sued the director of the Missouri Department of Natural Resources, alleging violations of its First Amendment and equal-protection rights. *See* Pet. App. 6a. In rejecting the church's claims, the Eighth Circuit acknowledged that there is "active academic and judicial debate about the breadth" of *Locke*'s holding, Pet. App. 10a, and ultimately took the sweeping view that States have broad discretion under *Locke* to refuse to spend

any "public funds to aid a church," Pet. App. 12a n.3—even though the funds were earmarked for purchasing recycled tire material and thus "separate" and "indisputably marked off" from any religious function, *Everson*, 330 U.S. at 18; *see* Pet. App. 2a-3a.[2]

As petitioner explains, the decision below is the latest development in a sharp and growing conflict among the lower courts on the question 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. *See* Pet. 14-20. But the lower courts' misapplication of *Locke* extends beyond the significant division of authority identified by petitioner: In a diverse array of contexts, federal and state courts have seized upon *Locke* to uphold laws and regulations isolating religion for negative treatment.

1. Numerous cases confirm that lower courts have construed *Locke* with little regard for that deci-

---

[2] The Court of Appeals also relied heavily on *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974), in which this Court summarily affirmed a district court's ruling that Missouri did not violate the Free Exercise or Equal Protection Clauses by refusing to bus private-school students. *See* Pet. App. 7a-9a, 11a. As petitioner notes, Pet. 10 n.2, *Luetkemeyer* is inapposite: In that case, all private-school students were excluded from the busing program, whereas petitioner was excluded from Missouri's scrap-tire program solely because of its religious affiliation. The decision below states that *Luetkemeyer* establishes that the provision of the Missouri Constitution cited to deny petitioner's grant application is "not *facially* invalid," Pet. App. 8a (emphasis altered), but petitioner is not bringing a facial challenge, *see* Pet. 9-10.

sion's necessarily narrow scope and historical, fact-intensive reasoning. These cases' invocations of *Locke* indicate that *Locke* has wrongly been interpreted as wholly supplanting the nondiscrimination requirement established in this Court's precedents, and as squarely controlling all public-benefits free-exercise claims.

In *Bowman* v. *United States*, for example, an Air Force veteran sought credit toward retirement benefits from the Department of Defense for several years of community service he performed with an Ohio church. 564 F.3d 765, 767-69 (6th Cir. 2008), *cert. denied*, 558 U.S. 815 (2009). The Sixth Circuit held that the Government did not violate Bowman's free-exercise or equal-protection rights by denying him credit pursuant to a regulation that provides credit for community service for nonprofit organizations—including teaching at schools—but excepts certain religious forms of community service, such as teaching a church youth group. *See id.* at 770, 774; *see also* 32 C.F.R. § 77.3(a), (d)(1)-(2), (12). Citing *Locke*, the court reasoned that because the government had not directly *prohibited* Bowman from practicing his religion, the fact that he had been denied a critically important public benefit on the basis of his religious activity was immaterial. *See Bowman*, 564 F.3d at 774.

In *Association of Christian Schools International* v. *Stearns*, the Ninth Circuit concluded that, under *Locke*, the University of California did not violate the Free Exercise Clause by disqualifying certain religious high-school courses for purposes of students' eligibility for admission, even though the university frequently approved comparable courses offered by

secular schools. 362 F. App'x 640, 646 (9th Cir.), *cert. denied*, 562 U.S. 975 (2010); *see also Ass'n of Christian Schs. Int'l* v. *Stearns*, 679 F. Supp. 2d 1083, 1090 (C.D. Cal. 2008). The court asserted that, because the case concerned a "civil regulation" as opposed to a "criminal prohibition," it was controlled by *Locke* instead of *Church of Lukumi*, *Ass'n of Christian Schs.*, 362 F. App'x at 646, even though this Court has never attached significance to that distinction in its free-exercise jurisprudence.

And just last year, in *Bronx Household of Faith* v. *Board of Education*, the Second Circuit approved a New York City regulation prohibiting the use of public-school facilities for religious services outside of school hours. 750 F.3d 184, 187-88 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1730 (2015). Over a dissent by Judge Walker, the court held that *Locke* compelled approval of this facially discriminatory regulation—not because of any identified historical exception to the general principle of nondiscrimination, but because both cases ostensibly involved refusals to "subsidize" religion that imposed only "minor" burdens on religion. *Id.* at 194-95.

Lower courts' improper expansions of *Locke*'s holding have not stopped there. In *Liberty University, Inc.* v. *Geithner*, a district court held that *Locke* had "significantly softened the facial neutrality rule of *Lukumi*" en route to upholding the Affordable Care Act's individual and employer mandates against a free-exercise challenge. 753 F. Supp. 2d 611, 642 (W.D. Va. 2010), *aff'd*, 733 F.3d 72, 99 (4th Cir. 2013) (affirming the district court's free-exercise holding without discussing *Locke*).

Several state appellate courts have also construed *Locke* to validate wide-ranging discrimination against religion in the provision of government benefits, in direct conflict with this Court's other free-exercise and equal-protection precedents. Florida state courts, for example, have liberally cited *Locke* in upholding discrimination against religion pursuant to the state constitution's "no-aid" provision. *See Council for Secular Humanism, Inc.* v. *McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010) (upholding "bar [on] religious entities from participating in state contracting" for post-release transitional-housing-program services for prison inmates); *Bush* v. *Holmes*, 886 So. 2d 340, 363-66 (Fla. Dist. Ct. App. 2004) (upholding invalidation of a school voucher program as to sectarian schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). The Maine Supreme Judicial Court similarly upheld a state statute banning the use of public funds for sectarian-school tuition. *Anderson* v. *Town of Durham*, 895 A.2d 944, 958-59 (Me.), *cert. denied*, 549 U.S. 1051 (2006). And the Kentucky Supreme Court relied exclusively on *Locke* to reject a free-exercise challenge to the withholding of public funding for the construction of a pharmacy-school building on the campus of a private Baptist college. *See*, *e.g.*, *Univ. of Cumberlands* v. *Pennybacker*, 308 S.W.3d 668, 679-81 (Ky. 2010).

2. Each of these decisions extends *Locke* beyond—sometimes far beyond—its original bounds. In doing so, they also distort *Locke* by selectively applying and emphasizing (or de-emphasizing) the factors the *Locke* Court considered in its analysis. For example, the district-court opinion approved by the Ninth Circuit in *Association of Christian Schools*

misreads *Locke* to "*require* an element of animus" for free exercise claims relating to government regulations burdening religion, 679 F. Supp. 2d at 1103 (emphasis added), even though *Locke* considered the government's apparent intent only as one factor in its analysis, *see* 540 U.S. at 724; *see also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (holding that a police department's mere differential treatment of secular and religious objections to the department's "no beard" policy was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny"); Laycock, *supra*, at 1184 (explaining that neither *Church of Lukumi* nor *Locke* conditions strict scrutiny on proof of hostility or animus).

Along the same lines, the Sixth Circuit in *Bowman* rested its rejection of the veteran's free-exercise and equal-protection claims largely on the supposed lightness of the burden imposed on his religious exercise. *See* 564 F.3d at 774-75. *But see, e.g.*, *Williams* v. *Morton*, 343 F.3d 212, 217 (3d Cir. 2003) (stating that "[t]here is no support for th[e] assertion" that a free-exercise claimant must show that a challenged policy "'substantially burdens' his or her religious beliefs" to prevail); Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 Wm. & Mary Bill Rts. J. 103, 143 (2008) (explaining that *Locke* considered several factors in rejecting the free-exercise claim and did not base its decision solely on a finding that the burden on religion was insubstantial).

The district court's decision in *Liberty University*, moreover, reads *Locke* as "significantly soften[ing]" *Church of Lukumi*'s requirement of "facial neutrali-

ty" in laws implicating religious practice. 753 F. Supp. 2d at 642. The district court reached this conclusion even though nothing in *Locke* purports to undermine *Church of Lukumi*'s strict-scrutiny analysis for laws that discriminate against religion. *See supra* Section I-B.

Perhaps most importantly, hardly any of these decisions make an effort to show that a religious exclusion is historically rooted in a specific public policy, like the American tradition against public funding of the clergy discussed at length in *Locke*. *See* 540 U.S. at 722-23.

This Court should grant certiorari to correct these erroneous expansions of *Locke* and make clear that *Locke*'s holding is necessarily limited by other precedent forbidding discrimination against religion—and certainly does not permit the government to deny publicly available benefits to otherwise eligible persons or groups simply because they are religious. *Cf. Schempp*, 374 U.S. at 225 ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'").

II. THE INCORRECT APPLICATION OF *LOCKE* BY LOWER COURTS THREATENS NUMEROUS EXISTING BENEFITS PROGRAMS.

The Eighth Circuit's sweeping misinterpretation of *Locke* implicates an alarming number of public aid programs, including: vouchers and scholarships for schools; subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; funding for rehabilitation centers;

and subsidies for resurfacing playgrounds with rubber made from recycled tire scrap, like the Missouri program at issue here. Religious institutions, of course, operate many organizations that satisfy the neutral requirements for receiving public aid established by these generally available programs.

But the rule adopted by the Eighth Circuit licenses governments to withhold these benefits (and many others) from otherwise eligible organizations based solely on the religiosity of their operators. Particularly in the modern age, that result evinces at least latent hostility against religion, not neutrality toward it: "[A]s the modern administrative state expands to touch the lives of its citizens" in "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." *Cty. of Allegheny*, 492 U.S. at 657-58 (opinion of Kennedy, J.). Certiorari is warranted to prevent the ghettoization of religious organizations from the public square.

A. Vouchers and Scholarships. At least thirteen States offer vouchers or scholarships to students for use at private schools.[3] Most of these States permit these funds to be used at religious schools. The Establishment Clause does not prohibit these voucher or scholarship programs, *see Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), but legal chal-

---

[3] *See School Voucher Laws: State-by-State Comparison*, Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/education/voucher-law-comparison.aspx (last visited Nov. 17, 2015).

lenges have produced inconsistent rulings regarding whether these programs run afoul of state Blaine Amendments and similar laws—and, if so, whether the First Amendment and Equal Protection Clause prevent that result.

For example, in a case now pending before this Court, the Colorado Supreme Court held that Colorado's Blaine Amendment barred a voucher program that permitted funds to be used at religious schools, citing *Locke* for support of that result. *See Taxpayers for Pub. Educ.* v. *Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 27-28, 2015). Vermont reached the same result under the compelled-support clause of the Vermont Constitution, *Chittenden Town Sch. Dist.* v. *Dep't of Educ.*, 738 A.2d 539, 563 (Vt.), *cert. denied* 528 U.S. 1066 (1999), while Indiana took the opposite view, declaring that the voucher program at issue did not violate the State's Blaine Amendment, *Meredith* v. *Pence*, 984 N.E.2d 1213, 1220 (Ind. 2013).

Some States, like Maine, have explicitly *prohibited* scholarships from being used at religious schools. Me. Rev. Stat. tit. 20-A, § 2951(2). Maine courts have determined that this arrangement is constitutional, relying in part on *Locke*. *Anderson*, 895 A.2d at 955-56.

Furthermore, several States—Arizona, Florida, Mississippi, Tennessee, and Nevada—offer Education Savings Account programs that award grants to parents who enroll their students in private schools,

including religious institutions.[4] Nevada's program, for example, provides that parents may withdraw their children from public school and receive grants that can be used to pay for tuition, textbooks, tutoring, or transportation.[5] The decision below, however, would permit these States to discriminate against religion by withholding funds from parents who would like to send their children to religious (as opposed to secular) private schools, further distorting *Locke*'s holding.

B. School Textbooks, Transportation, and Health Services. In lieu of or in addition to school vouchers, many States offer support for textbooks and transportation for students attending private schools. Rhode Island, for example, reportedly provided over $5 million in 2014 in financial support for its longstanding textbook and transportation programs.[6] New York similarly operates a textbook-loan program and transportation program, and these funds are explicitly made available to students attending nonpublic schools that provide religious in-

---

[4] Lindsey Burke, *Nevada Becomes Fifth State To Enact Groundbreaking Education Savings Accounts*, Daily Signal (June 2, 2015), http://dailysignal.com/2015/06/02/nevada-becomes-fifth-state-to-enact-groundbreaking-education-savings-accounts/.

[5] Nev. State Treasurer, *Nevada's Education Savings Account Program*, http://www.nevadatreasurer.gov/SchoolChoice/Home/ (last visited Nov. 19, 2015).

[6] *See* Bob Plain, *State Spends $5 Million on Private School Transportation, Textbooks*, RI Future (Apr. 7, 2015), http://www.rifuture.org/state-spends-5-million-on-private-school-transportation-textbooks.html.

struction as part of their curricula.[7] This Court's holdings in *Everson* and *Mueller* v. *Allen*, 463 U.S. 388 (1983), correctly recognize that these programs are permissible under the Establishment Clause.

Additionally, New Hampshire permits school districts to provide health services to all nonpublic-school students requesting such services. *See* Opinion of the Justices, 115 N.H. 553 (1975) (advisory opinion affirming this practice). New York *requires* school districts to provide to students of nonpublic schools the same level of health and welfare services as is available to students of public schools. *See* N.Y. Ed. Law § 912. The rule of law announced below, however, imperils the ability of students at religious schools to continue benefiting from these programs on the same terms as their contemporaries attending secular private schools.

C. Scholarship Tax Credits. States have begun experimenting with programs that grant tax credits to individuals who donate money to nonprofit organizations that, in turn, distribute those funds to students as scholarships. Students may then use those scholarships to attend the school of their choice, including religious schools. At least fourteen States employ such a program,[8] and to date, state courts have declined to invalidate them as violating state Blaine Amendments. *See*, *e.g.*, *Magee* v. *Boyd*, 175 So. 3d 79, 132-33 (Ala. 2015) (rejecting Blaine

---

[7] N.Y. State Educ. Dep't, *Nonpublic Schools*, http://www.p12.nysed.gov/nonpub/ (last updated Nov. 9, 2015).

[8] *See Scholarship Tax Credits*, Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx (last visited Nov. 17, 2015).

Amendment challenge); *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz.) (same), *cert. denied*, 528 U.S. 921 (1999); *see also Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125 (2011) (holding that Arizona taxpayers lacked standing to bring Establishment Clause challenge in federal court). Nonetheless, Montana has proposed to implement its recently enacted scholarship tax credit to explicitly exclude religious *schools* (not merely clerical *degrees*) from the program, and the interpretation of *Locke* adopted by the decision below would justify that act of state-sponsored hostility to private religious education.[9]

D. Construction Grants. Many States permit private nonprofit organizations to apply for publicly available construction grants to help build new facilities or renovate existing ones. Maryland, for example, makes funds available to nonpublic schools to update aging buildings.[10] And New Jersey recently awarded $1.3 billion for 176 higher-education construction projects to public and private universities; over 250 applications were reviewed.[11] Two of the

---

[9] 19 Mont. Admin. Reg. 1682, 1682-83 (Oct. 15, 2015) (Notice No. 42-2-939); Associated Press, *Public Mulls Exclusion of Religious Schools from Montana Tax Credit*, Billings Gazette (Nov. 5, 2015), http://billingsgazette.com/news/state-and-regional/montana/public-mulls-exclusion-of-religious-schools-from-montana-tax-credit/article_edee80f5-ac36-53ae-85a4-fb3448c54748.html.

[10] *Non-Public Aging School Program Documents*, Md. Pub. Sch. Constr. Program, http://www.pscp.state.md.us/Programs/NonPubASP/nonpubaspindex.cfm (last visited Nov. 25, 2015).

[11] Press Release, N.J., *Governor Christie Announces $1.3 Billion for Higher Education Construction, Putting Thousands to Work and Improving Facilities for 350,000 Students*

recipients, however—the Princeton Theological Seminary and rabbinical school Beth Medrash Govoha—are religious institutions, and their grants have been challenged in New Jersey state court. *See ACLU* v. *Hendricks*, No. A-4399-13 (N.J. Super. Ct. App. Div.). The plaintiffs cite *Locke* for the proposition that federal courts have "repeatedly rejected" the State's argument that "the federal Constitution may prevent states from declining to provide government aid . . . to religious groups."[12] This sweeping argument is of a piece with the decision below, and would improperly limit the schools' free-exercise and equal-protection rights to seek the same grants as similarly situated secular institutions.

E. Rehabilitation Centers. Religious organizations receive aid for more than just schools. For example, many religious organizations run rehabilitation centers and halfway houses and are eligible to receive generally available state funds on the same terms as their secular counterparts. One Florida law, for example, specifically requires the Department of Corrections to "make every effort to consider qualified faith-based service groups *on an equal basis* with other private organizations" when selecting "contract providers to administer substance abuse treatment programs" to Florida inmates. Fla. Stat. § 944.473(2)(c) (emphasis added). But pending litigation in Florida would bar faith-based rehabilita-

---

(Apr. 29, 2013), http://nj.gov/governor/news/news/552013/approved/20130429i.html.

[12] Reply Brief at 26 & n.11, *ACLU* v. *Hendricks*, No. A-4399-13 (N.J. Super. Ct. App. Div. July 17, 2015), *available at* https://www.aclu-nj.org/download_file/view_inline/1695/1000/.

tion groups from receiving public funds to support their substance-abuse rehabilitation centers. *Council for Secular Humanism, Inc.* v. *McNeil*, No. 1D08-4713 (Fla. Dist. Ct. App.). In a preliminary ruling, the state court relied on *Locke* in stating that "the United States Supreme Court has recognized that a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause." *Council for Secular Humanism, Inc.* v. *McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010). The broad misinterpretation of *Locke* adopted below and by other courts would deprive these organizations of otherwise available contract funds solely because their motivation to serve stems from religious convictions.

F. Scrap Tire Programs. Finally, the rule enforced by the Eighth Circuit and other lower courts would affect other programs similar to the one at issue in this case. Nebraska, for example, has awarded funds to religious schools for playground-surface improvement pursuant to its own scrap-tire program.[13] Kentucky and Kansas likewise have provided public funds to religious schools to replace playground surfaces.[14] And all three States have consti-

---

[13] Press Release, Neb. Dep't of Envtl. Quality, *More Than $2 Million Awarded for Tire Collection, Recycling Projects* (June 12, 2015), http://deq.ne.gov/Press.nsf/pages/PR061215.

[14] Div. of Waste Mgmt., Ky. Dep't for Envtl. Prot., *Waste Tire Program* (2014), *available at* http://waste.ky.gov/Waste%20Tire%20Program%20Report/Waste%20Tire%20Report%202014%201-15-15-FINAL.pdf; *Waste Reduction, Public Education, & Grants*, Kan. Dep't of Health & Env't, http://www

tutional provisions that, under the decision below, could be cited as a basis for excluding religious schools from these socially beneficial programs based solely on the schools' religious nature. Neb. Const. art. VII, § 11; Ky. Const. § 184; Kan. Const. art. 6, § 6(c).

* * *

This discussion provides only a sampling of the areas in which the Eighth Circuit's interpretation of *Locke* would justify blatant religious discrimination. Under the erroneous interpretations of *Locke* adopted below and by numerous other courts, the government could at any time "cu[t] off" "such general government services as ordinary police and fire protection, connections for sewage disposal, [or] public highways and sidewalks," asserting that such a decision is merely a permissible refusal to subsidize religion under the First Amendment and Equal Protection Clause. *Everson*, 330 U.S. at 17-18.

"But such is obviously not the purpose of the First Amendment." *Everson*, 330 U.S. at 18; *see Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.) ("Th[is] Court never has held that religious activities must be discriminated against in this way."). Particularly in an age when the government is "expand[ing] to touch the lives of its citizens in . . . diverse ways and redirect[ing] their financial choices through programs of its own," it is pure "fiction" to believe "that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality."

.kdheks.gov/waste/about_grants.html (last visited Dec. 3, 2015) (providing lists of grant recipients).

Cty. of Allegheny, 492 U.S. at 657-58 (opinion of Kennedy, J.).

This Court should grant certiorari to correct the Eighth Circuit's erroneous reading of *Locke* by reaffirming that neither *Locke* nor any other decision of this Court broadly licenses the government to discriminate against otherwise eligible religious groups in the provision of generally available public benefits, and that lower court rulings declaring otherwise contravene this Court's precedent.

CONCLUSION

This Court's review is warranted to correct the Eighth Circuit's improper expansion of *Locke* v. *Davey*, 540 U.S. 712 (2004), from a narrow decision tied to the historical aversion to funding religious training for clergy, into a sweeping license to deny generally available public benefits to religious groups solely on the basis of their religious affiliation.

Respectfully submitted.

THOMAS G. HUNGAR
Counsel of Record
RUSSELL B. BALIKIAN
CHAD R. MIZELLE
KEVIN J. BARBER
NATHAN H. JACK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
thungar@gibsondunn.com

Counsel for Amici Curiae

December 7, 2015