No. 15-558

IN THE

Supreme Court of the United States

COLORADO STATE BOARD OF EDUCATION, ET AL,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

STATE PETITIONER'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The State Petitioners file this supplemental brief under Rule 15 based on "intervening matter not available at the time of the [State's] last filing." The relevant "intervening matter" is this Court's January 15 decision to grant certiorari in *Trinity Lutheran Church of Columbia, Inc. v. Pauley* (No. 15-577). In light of that decision, the State Petitioners respectfully request that this Court grant the petitions for certiorari in this case and in the related cases, 15-556 and 15-557, and hear them simultaneously with *Trinity Lutheran*, on a non-consolidated basis. In the alternative, the State Petitioners request that the Court hold the petitions in this case pending resolution of *Trinity Lutheran*.

Trinity Lutheran presents a question substantively identical to the one presented here: whether, under *Locke v. Davey*, 540 U.S. 712 (2004), "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." *Trinity Lutheran*, Cert. Pet. i (Nov. 4, 2015); *cf.* Pet. i. But *Trinity Lutheran* arises in particular circumstances. There, the State declined to award a public grant *directly to a church*. *See Trinity Lutheran*, 788 F.3d 779, 784 (8th Cir. 2015) (declining to "compel[ ] Missouri to provide grants *directly to churches*" (emphasis added)). This case, in contrast, presents different—but closely related and complementary—circumstances: whether *Locke* permits a State to categorically deny funding, not directly to a church, but to individual citizens who may then independently choose to spend public funds at religious institutions.

As the Eighth Circuit majority recognized in *Trinity Lutheran*, *Locke* arose in a setting directly analogous to the setting in this case. There, a state grant program awarded funds to *individuals* who could independently choose to spend those funds on religious instruction. In other words, in *Locke* "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients." *Trinity Lutheran*, 788 F.3d at 785 (quoting *Locke*, 540 U.S. at 719) (alterations in *Trinity Lutheran*). This distinction between direct aid to churches on the one hand, and aid to individuals on the other, is potentially dispositive, as both the majority and dissent in *Trinity Lutheran* recognized. *See id.* at 793 (Gruender, J., dissenting).

This case is thus distinct from and complementary to *Trinity Lutheran*. It, like *Locke*, involves *indirect* funding to religious entities. It therefore more squarely confronts the issue that *Locke* expressly declined to decide: whether, absent a "historic and substantial" antiestablishment interest, a mere "philosophical preference" can justify categorically excluding religious institutions from public grant programs. 540 U.S. at 725, 722 n.5. The lower courts are divided on this very issue, and the split is most evident in the indirect funding context. *See, e.g., Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (striking down discrimination in an indirect funding program and concluding that *Locke* "does not imply that states are free to discriminate in funding against religious institutions however they wish"); *contra Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (upholding the categorical exclusion of religious schools from an indirect funding program and concluding that there is "no authority that suggests that the 'room for play in the joints' identified

by [*Locke*] is applicable to certain education funding decisions but not others").

Petitioners therefore respectfully request that the Court grant the petitions here and set this case and *Trinity Lutheran* for argument together, on a non-consolidated basis. A decision in *Trinity Lutheran* alone, which presents only the direct-aid context, may leave lingering questions about how the indirect nature of funding affects the validity of an exclusion of religion from a public program. The Eighth Circuit dissent in *Trinity Lutheran* "agree[d] with the [majority] that, in many cases, a concern about giving money *directly* to a church-run school may amount to a historic and substantial state interest." *Id.* at 793 (Gruender, J., dissenting) (emphasis added). Here, Colorado did not "giv[e] money directly to a church-run school." *Id.*; *see* Pet. App. 25a (controlling plurality) ("To be sure, the CSP does not explicitly funnel money directly to religious schools ...."). And in Colorado there is no historical pedigree that would amount to a "historic and substantial state interest" against including religious institutions in public grant programs.[1] Because the direct-indirect distinction is a

[1] Here, the categorical prohibition that the Colorado Supreme Court read into the Colorado Constitution has not been "a bedrock principle of state law," as is Missouri's prohibition on direct grants to churches. *Trinity Lutheran*, 788 F.3d at 784. As the dissent below explained, Colorado's categorical ban on indirect funding of religious institutions is new. *See* Pet. 22 n.5; *see also* Pet. App. 49a (Eid, J., dissenting) ("[The plurality's] reading is contrary to *Americans United for Separation of Church and State Fund, Inc. v. [Colorado]*, 648 P.2d 1072, 1083 (Colo. 1982), in which we upheld a state grant program similar to the [program at issue] on the ground that the aid is designed to assist the student, not the institution."). This further illustrates why this case more directly confronts the question *Locke* expressly left open. 540 U.S. at 722 n.5 ("[T]he only interest at issue here is the

recurring issue in the lower courts, this Court's simultaneous consideration of cases presenting both scenarios—*i.e.*, a direct grant to a religious institution and a program based on private choice—would ensure that there will be no further confusion in this area.

Simultaneous consideration of *Trinity Lutheran* and this case would materially aid the Court's resolution of important constitutional questions that have split the lower courts. Petitioners therefore respectfully request that the Court grant the petitions in this case and set argument together with *Trinity Lutheran* on a non-consolidated basis. Alternatively, the Court should at a minimum hold this case pending its resolution of *Trinity Lutheran*.

Respectfully submitted,

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State's [historic and substantial] interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands.")