NO. 15-557

In the
Supreme Court of the United States

DOUGLAS COUNTY SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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January 19, 2016

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SUPPLEMENTAL BRIEF

On January 15, 2016, this Court granted a writ of certiorari in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577. In that case, the court of appeals held that a Missouri constitutional provision barring government funding of "any church, sect, or denomination of religion" could be invoked to prohibit a church-run daycare from receiving state grant money to resurface a playground. The case presents the question 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." Pet. for Cert. i (U.S. Nov. 4, 2015). That question substantially overlaps with the question presented for review by the petition here. Thus, at a bare minimum, the petition here should be held pending this Court's resolution of *Trinity Lutheran*. The Court has not yet calendared *Trinity Lutheran* for oral argument, and it is our understanding that it may not be calendared for argument until October. In the event *Trinity Lutheran* is not argued until October, this Court may wish to grant the petition here and have the two cases argued in tandem.

In this case, petitioners established a neutral school-choice program modeled on the program approved in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The program provided scholarships to qualifying students to attend a private school of their choosing. The Supreme Court of Colorado enjoined the program on the ground that it violated Article IX, §7 of the Colorado Constitution's prohibition on

government funding of "sectarian" institutions, because some of the participating private schools in the neutral aid program are religiously-affiliated.

Petitioners—along with the state of Colorado, No. 15-558, and a group of students and parents, No. 15-556—filed a petition for writ of certiorari on October 28, 2015, one week before the petition in *Trinity Lutheran* was filed. Petitioners argue that §7 is a provision "born of bigotry" against Catholics in 1876, *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op.); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting), that cannot be used to discriminate on the basis of religion today. Petitioners further argue that *Locke* does not permit states to disregard the neutrality required by the Religion Clauses and wholly exclude religious schools from otherwise neutral and generally available government aid. The petition has been distributed to the Court for consideration at its February 19, 2016 Conference.

This case overlaps with, and presents issues that are complementary to, the question presented in *Trinity Lutheran*. Indeed, the petition's *Locke* argument cited *Trinity Lutheran* as part of the divide in the courts on the proper interpretation of *Locke* and pointed to the exclusion of neutral aid for safe playgrounds as an example of the consequences of the misreading of *Locke* embraced by both the Colorado Supreme Court below and the Eighth Circuit in *Trinity Lutheran*. *See* Pet. 27-28, 36. Thus, at a bare minimum, this Court should hold the petition here pending its disposition of *Trinity Lutheran*.

In addition, consideration of the two cases in tandem would aid the Court in deciding the significant constitutional issues they implicate. First, this case presents the *Locke* question in a complementary context, as government aid here reaches religious institutions only through the intervening choices of private individuals. In *Trinity Lutheran*, aid flows to religious entities through what was designed as a neutral government program. Although we do not think this difference is outcome-determinative, this a recurring difference between programs this Court has evaluated under the Religion Clauses, and evaluating the *Locke* issue in the context of both types of programs could materially aid the Court. Considering the cases in tandem would also allow the Court to consider the interaction between neutral state laws, state prohibitions on religious aid, and the federal Constitution in cases arising out of both state and federal courts.

Second, and more important, this case separately presents the important question whether a state law born of anti-Catholic animus can be used to compel modern-day discrimination on the basis of religion. A majority of this Court has acknowledged the bigoted origins of provisions like §7 but has never squarely confronted whether they can be used to require discrimination today. This case is an ideal vehicle to answer that question, which is both related to yet distinct from the *Locke* question. Unlike in *Trinity Lutheran*, where the issue of animus underlying the relevant state constitutional provision was neither briefed nor addressed below, this case contains an extensive evidentiary record addressing the national and Colorado-specific anti-Catholic sentiment that

surrounded the 1876 enactment of §7, and the issue was pressed and passed on below. Furthermore, §7 has not been reenacted, amended, or reauthorized since its original enactment, leaving the taint of animus unmitigated.

Consideration of this case and *Trinity Lutheran* together would materially aid the Court's resolution of the important yet difficult constitutional questions they present. Accordingly, if this Court calendars *Trinity Lutheran* for argument in the October 2016 Term, we respectfully suggest that the Court grant the petitions in this case and have the two cases argued in tandem. At a bare minimum, however, the Court should hold this case pending its resolution of *Trinity Lutheran*.

Respectfully submitted,

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