NO. 15-577

In the
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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INTRODUCTION

The facts of this case are undisputed. The Department of Natural Resources ("DNR") discriminates—blatantly—on the basis of religious status. It proudly says so in its brief. One can hardly imagine a clearer case of discrimination than denying children a safe playground surface solely because they attend a religious preschool. Our Constitution prohibits reducing any group of citizens to second class status and excluding them from public life simply because they are religious. Yet the DNR does just that.

This case is not about subsidizing or preferring religion. Protecting children from sharp playground surfaces is as far as one can imagine from a religious benefit. Instead, this case is about prohibiting religious status discrimination which violates the Free Exercise and Equal Protection Clauses.

I. The Free Exercise Clause prohibits religious status discrimination.

This case hinges on the "noncontroversial principle… that the Free Exercise Clause requires neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 560 (1993) (Souter, J., concurring). As this Court has taught: "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. But by the DNR's own admission, "It is undisputed that the policy at issue in this case is not facially neutral—churches are, *by virtue of their religious character*,

ineligible for playground-resurfacing grant funding." Brief of Respondent ("Resp. Br.") at 29 (emphasis added).

The DNR also admits that Trinity Lutheran "was denied funding because of its *particular religious status*," and that its policy is one of "exclusion of religious organizations." Resp. Br. 14, 31 (emphasis added). These are direct admissions of religious status discrimination.

A. The Free Exercise Clause prohibits religious status discrimination whether or not government directly coerces or imposes criminal penalties on the exercise of religion.

The DNR claims that the Free Exercise Clause only applies when a law has a "coercive effect," or imposes a "criminal penalty." Resp. Br. 7. That argument was rejected by this Court nearly forty years ago in *McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (rejecting the assertion that a "law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions [the receipt of a benefit] on its abandonment"). Here, churches cannot be excluded from public safety programs any more than ministers can be excluded from public office. Under the First Amendment, "prohibiting" the free exercise of religion means more than direct coercion or criminal penalties. *See, e.g., Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981) ("It is true that… [the law] does not compel a violation

of conscience. But, 'this is only the beginning, not the end, of our inquiry'").

The DNR relies heavily on *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). But this Court held in *Lyng* that the Free Exercise Clause applies to "not just outright prohibitions," but also to "indirect coercion or penalties on the free exercise of religion." *Id.* at 450. Indeed, *Lyng* stated that it is unconstitutional to "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. The Court in *Lyng* cited *Sherbert v. Verner*, 374 U.S. 398 (1963), as an example of governmental action prohibited by the Free Exercise Clause because conditioning eligibility for government benefits on religious status has the "tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450.

In *Sherbert*, this Court held that discrimination in the provision of government benefits based on religious status violates the Free Exercise Clause because it pressures the faithful to choose between either following their religion or forfeiting equal access to benefits. The Court concluded that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404; *accord Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (noting that it would violate the Free Exercise Clause to "require students to choose between their religious beliefs and receiving a government benefit").

Building on *Sherbert*, this Court held in *McDaniel*, that conditioning the availability of benefits—legislative service in that case—on McDaniel's willingness to surrender his religious ministry, "effectively penalizes the free exercise of his constitutional liberties." 435 U.S. at 626. The DNR never distinguishes *McDaniel* or *Sherbert* and it substantially misreads *Lyng*.

The discrimination here is direct and explicit and it violates the Free Exercise Clause. The DNR singles out and excludes Trinity Lutheran solely because of its religious status. But the DNR cannot discriminate against church preschools in access to government safety funds any more than a state could choose to give Social Security checks only to atheists.

B. Trinity Lutheran Church is not seeking a subsidy of its religion but freedom from discrimination based on its religious status.

The DNR argues that Trinity Lutheran is seeking government subsidy of its religious activities. However, the playground is purely secular so it is implausible to argue that making it safer subsidizes religious activities. Indeed, the DNR concedes that the playground resurfacing is a "secular capital improvement project," and that the Scrap Tire Program is "benign." Resp. Br. at 21, 52.

Nearly seventy years ago, this Court held that the government may not exclude people of faith

"from receiving the benefits of public welfare legislation." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). This Court has reaffirmed that principle without fail in the years since. *Sherbert* reaffirmed that government could not condition the provision of governmental benefits on abandoning religious precepts. 374 U.S. at 404; *see also Thomas v. Review Board*, 450 U.S. 707, 717 (1981) ("Not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of religion, but the pressure upon [the employee] to forego that practice is unmistakable."); *accord Hobbie v. Unemployment Appeals Com'n.*, 480 U.S. 136, 140-41 (1987).

And in *Smith* the Court stated that "government may not … impose special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990). Likewise, in *Church of the Lukumi*, this Court held that the "Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" 508 U.S. at 542 (quoting *Hobbie*, 480 U.S. at 148).

More recently, a plurality of this Court concluded that government is prohibited "from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality with Justices O'Connor and Breyer concurring) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches*

Union Free Sch. Dist., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

The government, of course, is not required to provide a public benefit. But when it chooses to do so, it cannot condition eligibility upon foregoing the free exercise of religion. *See Sherbert*, 374 U.S. at 405-06. That principle is echoed in this Court's free speech jurisprudence concerning public fora where this Court has consistently held that: "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Widmar,* 454 U.S. at 267-68.

It misses the point for the DNR to argue that Trinity Lutheran is seeking a subsidy for religion. It is not. The playground is not religious. Rather, Trinity Lutheran seeks to prevent the DNR from discriminating against it within the Scrap Tire Program on the basis of its religious status, something the DNR concedes it does. *See* Resp. Br. 29. Allowing the government to deny a benefit on the basis of religious status means that a person's exercise of constitutional rights "would in effect be penalized and inhibited…. Such interference with constitutional rights is impermissible." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (citing *Sherbert* and noting that this unconstitutional conditions principle applies in the free exercise context).

The DNR's reliance on *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Harris v. McCrae*, 448 U.S. 297 (1980), is inapt. The Court

held in *Regan* that the prohibition in § 501(c)(3) of the Tax Code against substantial lobbying was constitutional because it applied to all non-profits equally. But the *Regan* Court acknowledged that things "would be different if Congress were to discriminate invidiously in its subsidies." *Id.* at 548. A law that allowed lobbying by anyone but religious nonprofits would surely fall outside *Regan's* bounds.

Similarly, in *Harris*, the Court upheld a general prohibition on funding certain abortions. But the Court noted that there would be a "substantial constitutional question" if Congress had attempted to withhold all Medicaid benefits simply because a woman had chosen to have an abortion. *Id.* at 317 n.19. That situation, in the Court's view, would be analogous to *Sherbert* because the government would be penalizing the woman for exercising a constitutional right. But that was not the case in *Harris*; accordingly, the Court stated that "[a] refusal to fund protected activity, *without more*, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* (emphasis added). The "more" the *Harris* Court was talking about is the kind of discrimination present here. Moreover, the Court made abundantly clear that citizens have a constitutional "right to be free from invidious discrimination in statutory classifications and other governmental activity." *Id.* at 322. In short, there was no discrimination present in *Regan* or *Harris*. There is unquestionably here.

C. The DNR's religious status discrimination in the Scrap Tire Program is far afield from what this Court approved in *Locke v. Davey*.

The DNR argues that this case fits squarely within the Court's decision in *Locke v. Davey* but none of its arguments hold water.

1. The religious status discrimination present in this case distinguishes it from Locke.

The DNR asserts that this case is like *Locke* because a "minimal burden" exists that is akin to the "milder kind" of religious disapproval this Court allowed, *Locke*, 540 U.S. at 720, and, in the DNR's view, "there is not a single thing that Trinity Lutheran is… penalized for doing as a consequence of state action." Resp. Br. 14. But neither is true.

This Court has consistently held that religious status discrimination in the availability of government benefits is a penalty on religious exercise that violates the First Amendment. The Court referred to this principle in *Locke* when it stated that forcing students to "choose between their religious beliefs and receiving a government benefit" would be unconstitutional, echoing cases like *Sherbert*, *Thomas*, *Hobbie*, *McDaniel*, and others. *Id.* at 720-21.

Religious status discrimination was not present in *Locke*. Davey was not denied a scholarship based

on who he was or what he believed. Rather, he was denied a scholarship based on his intended course of study. The exclusion in *Locke* was on only one use of the Promise scholarship—pursuing a devotional degree in theology. *Id.* at 716-17. Otherwise, the program went "a long way toward including religion in its benefits." *Id.* at 724. Students could use the scholarships at "pervasively religious schools," and could even "take devotional theology courses" as part of their education. *Id.* The program only prohibited using the scholarship for pastoral training.

In contrast, the Scrap Tire Program's prohibition is a broad *per se* exclusion of all religion. The program does not include religion in its benefits at all. Instead, the DNR blatantly discriminates on the basis of religious status.

2. The religious status discrimination in the Scrap Tire Program has no historical anti-establishment roots.

The DNR argues that there are "strong historical roots" against direct money payments to churches akin to the anti-establishment interest that *Locke* identified in not funding the devotional training of clergy. Resp. Br. 15. But this Court has never gone so far as to invalidate neutrally available, secular benefits provided directly to religious organizations. Instead, this Court has stated that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976).

Over forty years ago, this Court recognized that "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has been consistently rejected." *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973) (citing cases). Through the years, the Court has approved many forms of aid that flowed directly to churches and other religious institutions. *See, e.g., Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968) (upholding program loaning textbooks directly to church-related elementary schools); *Hunt*, 413 U.S. at 734, 749 (revenue bonds for religious school to build a cafeteria facility); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-58 (1980) (reimbursing church-sponsored schools for performing state-mandated testing and reporting).

The DNR's rationale has been rebuffed repeatedly by this Court—that money is fungible and a dollar given for playground resurfacing frees up money for other religious purposes. *See* Resp. Br. 16. This Court rejected this argument decades ago. *Hunt*, for example, noted that "the Court has not accepted the recurrent argument that all aid [to religious organizations] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." 413 U.S. at 743.

One searches this Court's precedent in vain for a case allowing funding for the devotional training of clergy. The absence of such caselaw speaks to the "historic and substantial state interest" in prohibiting "taxpayer funds to support church

leaders, which was one of the hallmarks of an 'established' religion." *Locke*, 540 U.S. at 722, 725. In stark contrast, this Court's precedent is littered with cases allowing direct aid to religious institutions for purely secular activities like the playground safety upgrade at issue here. If there was such a strong anti-establishment interest in avoiding direct money payments to a church, one would find no such thing.

The differences between this case and *Locke* are plain considering the purely secular nature of the benefit and the many safeguards against advancing religion built into the program. For instance, the program does not provide unrestricted money directly to a church but reimburses monies already documented and expended for playground resurfacing. *See* Pet. App. 94a. The grant is a one-time grant and does not create an ongoing relationship with the State. *See* Pet. Br. Addendum at 2a. The grant application process is entirely secular. *Id.* at 9a-19a. Trinity Lutheran signed and submitted a completed application and wrote to the DNR making clear the religious ownership of the Learning Center and the secular use of the playground. Pet. App. 129a-130a, 132a-133a. The DNR responded by thanking Trinity Lutheran for its candor and then excluding it solely because of its religious status. *Id.* at 152a-153a. And it did so despite the fact that the benefit was for a safer playground surface at a school open to those of any and all faiths and a playground open to anyone after school hours. *Id.* at 133a. In short, this case is unlike *Locke* in all respects.

3. Religious status discrimination is unconstitutional regardless of whether it flows from a credible connection to a Blaine Amendment.

The DNR spends a great deal of space arguing that Article 1, § 7, has no credible connection to a Blaine Amendment. *See* Resp. Br. 15-22. But the outcome in *Locke* was not dependent on whether the Washington provision had a credible connection to the Blaine Amendment. The Court merely noted that it did not. *Locke*, 540 U.S. at 723 n.7. If Article 1, § 7, has a credible connection to the Blaine Amendment, that is simply additional evidence of the hostility to religion that already exists in the Scrap Tire Program's categorical exclusion. But the outcome of this case remains the same even if Article 1, §7, does not have such a connection. That is because the DNR engages in religious status discrimination, which this Court has invalidated or condemned in situations that have nothing to do with the Blaine Amendment. *See, e.g.*, *McDaniel*, 435 U.S. at 618.

Whether Article 1, § 7, has a credible connection to the Blaine Amendment is merely one way of distinguishing this case from *Locke*. There are numerous other ways of doing so. *See* Pet. Br. 35-42. Unlike in *Locke*, this case involves: (1) a generally available public benefit that is completely secular and that does not involve an inherently religious activity; (2) an unmistakable hostility to religion; and (3) a categorical exclusion

of religion that bars all religious preschools from even submitting an application.[1]

Moreover, there is, in fact, a credible connection between Article 1, §7, and the Blaine Amendment. *See* Amicus Br. of the Union of Orthodox Jewish Congregations of Am. at 13-18; Amicus Br. of Douglas Cty. Sch. Dist. & Douglas Cty. Sch. Bd. at 27-36; Amicus Br. of Inst. for Justice at 27-34.

Finally, Missouri is among the states with the most restrictive Blaine provisions. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003) (stating "Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates that the state educational fund be used only for the establishment and maintenance of 'free public

[1] One amicus brief argues that abstention may be appropriate because the Missouri Supreme Court should construe its own Constitution. *See* Amicus Br. of Nat'l. Assoc. of Evangelicals. There is no need for abstention in this case for at least two reasons. First, the DNR's policy applying Article 1, § 7, is what Trinity Lutheran challenges under the First and Fourteenth Amendments, and how the DNR construes its meaning is unmistakable. In addition, the Missouri Supreme Court's interpretation of the state constitution is clear and spans a number of cases. *See, e.g., Paster v. Tussey*, 512 S.W. 2d 97, 101 (Mo. Banc 1974); *Harfst v. Hogan*, 163 S.W. 2d 609 (Mo. Banc 1942); *see also Widmar v. Vincent*, 454 U.S. 263, 275 n.16 (1981) (citing Missouri Supreme Court cases construing Article 1, § 7).

schools'"). Even the DNR admits that the Missouri Constitution contains a "broader 'no aid' provision" than that at issue in *Locke*. Resp. Br. 17. And it concedes that Missouri's adoption of Article 1, § 7, "expanded upon" the original Blaine Amendment concept of no funding for sectarian schools by also prohibiting funding for "any church, sect, or denomination of religion," *id*. at 20, and that it did so in the very year the federal Blaine Amendment was originally proposed. *Id*. at 16. Thus, Missouri's provision is connected to—but is even more extreme than—the Blaine Amendment.

4. Religious status discrimination is unconstitutional even in a merit-based government benefit program.

The DNR finally attempts to place this case within *Locke* by asserting that the Scrap Tire Program is a program of "limited availability" which it suggests allows administrators to make "subjective, discretionary decisions regarding who will receive funds and who will not." Resp. Br. 22-23. But the denial here was not discretionary and there is no dispute that Trinity Lutheran would have received the grant but for its religious status. *See* Resp. Br. 29. The sole reason Trinity Lutheran was denied was because it was a church, not because of limited funds or some murky exercise of discretion.[2] *See* Pet. App. 152a-153a.

[2] Even where discretion is allowed, this Court should apply the high bar of *Sherbert* to the extent the State engages in

The argument also misses the point entirely. The DNR claims that its decision to deny Trinity Lutheran a grant was no different than if the church's application had been uncompetitive or the grant program had not been created at all. *See* Resp. Br. 23-24. But the discrimination occurs because Trinity Lutheran was not permitted to compete on an even footing with others solely because of its religious status. The DNR cannot ignore the undisputed facts that Trinity Lutheran's application scored higher than all but four other applicants and it would have received a grant if it were not a church.

Moreover, this Court has rejected the argument that scarce resources justify discrimination. *See Rosenberger*, 515 U.S. at 835. In *Rosenberger*, the Court held that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.* The Court pointed out that it is "incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in *Lamb's Chapel*, 508 U.S. at 384,] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Id.* The same is true here.

The point is not whether the Scrap Tire Program is one of general or limited availability

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individualized assessments regarding religion. *See Smith*, 494 U.S. at 884.

(as all government programs are) or contains discretion in the selection process. Because Trinity Lutheran met all the secular scoring requirements of the program, it was entitled to participate without being discriminated against because of its religious status.

D. Religious status discrimination violates the neutrality demanded by the Free Exercise Clause.

The DNR argues that the First Amendment does not require neutrality between religious and non-religious citizens. But this assertion cannot be squared with the essential rule that laws must be neutral and generally applicable to comply with the Free Exercise Clause. *See Church of the Lukumi*, 508 U.S. at 531. To be sure, whether the Free Exercise Clause always demands neutrality between religion and non-religion is not something the Court must decide here. All this Court must conclude is that government discrimination based on religious status violates the minimum degree of neutrality required by the Free Exercise Clause. Such discrimination "manifests patent hostility toward, not neutrality respecting, religion." *McDaniel*, 435 U.S. at 636 (Brennan, J., concurring).

In *Church of the Lukumi*, this Court explained that "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. Yet the DNR concedes that its policy facially excludes churches solely because they are

religious. The requirement of neutrality is not limited to instances where the government encounters a request for a "religious exemption," as the DNR claims. Resp. Br. 25. Religious status discrimination violates the First Amendment whether it occurs in a case involving denial of a government benefit, as in *Sherbert*, *Hobbie*, *Thomas*, or *McDaniel*, or whether it occurs in a case involving a government prohibition on religious conduct, as in *Church of the Lukumi*.

II. The religious status classification in the Scrap Tire Program violates the Equal Protection Clause.

The DNR makes a truly novel argument that the Equal Protection Clause of the Fourteenth Amendment does not treat "all religious groups" as a suspect class meriting strict scrutiny. Resp. Br. 32-44. But this argument is a straw man that directly contradicts this Court's precedent.

A. Discrimination against churches is discrimination based on religious status.

Initially, the DNR focuses on a proposed class of "all religious groups." But the class applicable in this case is that of a "church." It is undisputed that Trinity Lutheran was denied participation in the Scrap Tire Program solely because it is a church. *See* Pet. App. 152a-153a; Resp. Br. 29 ("[C]hurches are, by virtue of their religious

character, ineligible for playground-resurfacing grant funding."). Thus, the DNR discriminates against—in its own words—those of a "particular religious status." *Id*. at 14.

Because Trinity Lutheran is treated unequally solely because of its "particular religious status," it is clear that the DNR "classif[ies] along suspect lines like… religion," a practice that automatically requires strict scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that a law triggers strict scrutiny if it "is drawn upon inherently suspect distinctions such as… religion").

B. Religious status discrimination against even a class of all religions must meet strict scrutiny under the Equal Protection Clause.

This Court has never limited suspect classification to only "distinctions among religious denominations," as the DNR suggests. Resp. Br. 34. The DNR's argument is akin to suggesting the Equal Protection Clause would not reach an exclusion based on race—such as an exclusion of persons of Asian ancestry—but only disparate treatment of racial subgroups (such as an exclusion of those descended from the Han Chinese). Instead, "[t]he idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious,

sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal marks omitted).

Indeed, the famous "footnote four" in *Carolene Products* included religion in the list of classifications deserving a "more searching judicial inquiry." *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). The Court in that case pointed to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as involving a statute directed at "particular religious… minorities." *Id.* But the statute in *Pierce* was not limited to some religious groups, it burdened all religions generally. *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1006 (2013) (discussing the statute in *Pierce's* application to all religions generally).

The Court consistently cites "religion" when discussing suspect classifications that merit strict scrutiny. As the Court stated in *Smith*, "[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race, … so too we strictly scrutinize governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3. Governmental decisions "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

The DNR's citations to *Locke* and *Johnson v. Robison*, 415 U.S. 361 (1974), do not support its

position that religion is not a suspect class. Both *Locke* and *Johnson* analyzed only whether the fundamental right to religion was violated under those particular facts presented. *See* Pet. Br. 24-26. Neither of those cases discussed whether religion was a suspect class.

The DNR's attempt to argue that a class of all religions does not meet the criteria of a suspect class advances a narrow view that focuses only on a particular religious group's experience. But this puts too fine a point on the issue. "[R]eligion itself is generally an inappropriate basis for classification because of the likely use of religious classifications to oppress religious minorities." Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 57 (1992). The history of religion has, unfortunately, been marked by persecution which shifts as different groups enjoy the toleration of society while others are disfavored, only to later have the tables turned. *See, e.g., Everson*, 330 U.S. at 9 (noting the shifting history of religious persecution and intolerance).

The point is not that certain groups are entitled to greater protection under the Equal Protection Clause simply because their particular denomination or sect had a more intense history of persecution or intolerance than others.[3]

[3] The Lutheran denomination does have a well-known history of persecution. Martin Luther himself was threatened with legal penalties for his religious beliefs, including confiscation and burning of his writings. *See* 2 JUSTO L. GONZÁLEZ, THE

Instead, the Equal Protection Clause demands strict scrutiny of any classification based on religion as a whole because the history of religious persecution illuminates how easily religion—or certain aspects of it—can fall into disfavor.

Indeed, religion itself may be falling into disfavor. Citing studies of religious identification, one commentator concluded "that secularization, long anticipated in the United States, finally is making significant inroads." Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1772 (2011). The resulting effect may be an increasing disfavor of religion. And, as the U.S. State Department reports, discrimination and persecution based on religion is global. *See* U.S. Dep't. of State, Bureau of Democracy, H.R. and Lab., International Religious Freedom Report 7 (2014) (stating that "[i]n every region during the year, discriminatory laws, repressive policies, marginalization, and discriminatory application of laws had a negative impact on the ability of groups and individuals to practice their faiths").

This is why the DNR's claim that religion is politically powerful misses the point. The free exercise of religion is enshrined in our Constitution and is protected by various laws to

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STORY OF CHRISTIANITY 27 (1985). And Lutherans from Salzburg fled to this country in 1734 to escape persecution. *See* EDWIN GAUSTAD & LEIGH SCHMIDT, THE RELIGIOUS HISTORY OF AMERICA 111 (2002).

serve as a barrier against religious persecution or governmental disfavor. After all, "[w]ho knows what kind of havoc legislatures could potentially wreak in the absence of those deterrents?" Calabresi & Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. at 1009.

Besides, membership in a suspect class is not limited to the traditionally persecuted and powerless. S*ee, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 290 (1978) (applying strict scrutiny in case involving race discrimination against white males who have historically not been politically powerless or persecuted); *see also Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 273 (1986) ("The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination").

The DNR argues that treating religion as a suspect class would result in the invalidation of laws benefiting or protecting religion. *See* Resp. Br. 41-44. This argument is exceedingly weak and presents an artificial choice that holds the First Amendment hostage to the Fourteenth. No case the DNR cites holds anything close to what it argues. Instead, this Court has always drawn a distinction between discrimination and benevolent neutrality to religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely

tolerance, of all religions, and forbids hostility toward any").

It is undisputed that the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 697 (2012) (finding a ministerial exception from nondiscrimination laws that is only applicable to religious groups). This Court "has long recognized that the government may (and sometimes must) accommodate religious practices." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Such "benevolent neutrality" does not violate the Fourteenth Amendment. *Walz v. Tax Comm'n.*, 397 U.S. 664, 669, 673 (1970)).

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), this Court stated that the appellate court "misread our precedents to require invalidation of RLUIPA [42 U.S.C. §§ 2000cc, *et seq*.,] as 'impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.'" 544 U.S. at 724. The Court then pointed to *Amos* for the proposition that religious accommodations "need not 'come packaged with benefits to secular entities.'" *Id.* (quoting *Amos*, 438 U.S. at 338). Protecting religion in some instances does not require that the government be hostile to religion in others.

C. The DNR's religious status discrimination cannot meet strict scrutiny, nor is it supported by any rational basis.

The DNR never attempts to justify the religious status discrimination in the Scrap Tire Program under strict scrutiny. Nor can this kind of discrimination meet that standard. The DNR's lack of argument effectively concedes the point.

Instead, the DNR focuses solely on rational basis. But it does so abstractly, focusing on Article 1, § 7, on its face. However, Trinity Lutheran challenges the DNR's application of Article 1, § 7, not its very existence. This errant focus fundamentally misapplies the rational basis test. *See U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (stating that: "[w]hen faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes"). Here, the purposes of the Scrap Tire Program are to reduce scrap tires and promote playground safety. *See* Pet. App. 89a. The DNR's scoring of Trinity Lutheran's application—fifth out of forty-four applications—is a conclusive determination that Trinity Lutheran advances the purposes of the program better than all but four other applicants.

The DNR's other bases for its religious status discrimination bear no rational relationship to any of its asserted interests.

First, the DNR claims that "preferential treatment is inherent" in a competitive grant process like the Scrap Tire Program. Resp. Br. 46. But excluding *all* churches is like using a chainsaw to trim a bonsai tree. Equal treatment is, by definition, not favoritism and the scoring requirements of the program ensure fair dealing. *See* Pet. Br. Addendum 9a-19a. The scoring criteria include things like the percentage of use of scrap tires generated in Missouri, how the material will be contained in the playground, and an evaluation of the poverty level of the surrounding area. *Id*. Even in the case of a tie the applicants are selected in a random draw. *Id*. at 19a. The application process is undeniably fair and there is no rational perception of favoritism.

The DNR also argues that the limited availability of the program distinguishes it from the open forum in *Widmar v. Vincent*, 454 U.S. 263 (1981), or from benefits like police and fire protection. Resp. Br. 48-50. But government funding is always limited and this Court has never assigned any constitutional significance to that fact. The open forum in *Widmar* was limited by the space and the money to operate the buildings. Likewise, police and fire protection are limited by funding decisions. It is just as likely that denominational favoritism could exist in these instances as it would in the Scrap Tire program. It is irrational to

categorically exclude all churches from the program as a means of pursuing denominational equality. Moreover, this case is not about religious denominations squabbling over limited government funds; rather, it is about *eligibility* and whether religious organizations can compete on an even playing field.

Third, the DNR argues that a religious exclusion furthers its interest in protecting taxpayers from being required to "contribute funds to religious denominations whose values are different than their own." Resp. Br. 50. But there is no stopping point in this argument and it could just as easily apply to prohibiting police and fire protection or street and sidewalk creation and maintenance. The completely secular nature of the program makes any particular conscience objection to Trinity Lutheran's participation unreasonable at best.

Finally, the DNR's asserted interest in avoiding government control and surveillance of religious institutions bears no rational relationship to its religious exclusion. It is remarkable that the DNR raises its own anticipated misconduct to justify discrimination when the solution is for the DNR to not engage in the misconduct in the first place. The program's requirements are already tailored to prevent entanglement. The program is a one-time grant that only gives a reimbursement for money already expended. *See* Pet. App. 94a. The recordkeeping and reporting requirements are simple and do not allow the government to troll through religious beliefs or interfere with the

religious practice of a church. Given these realities, a categorical religious exclusion bears no rational relationship to preventing government control or interference with churches.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and hold that categorically excluding Trinity Lutheran from the Scrap Tire Grant Program based solely on its religious status violates the church's free exercise and equal protection rights.

Respectfully submitted,

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