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

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether conditioning government benefits on religious status violates the First Amendment when the state has no valid Establishment Clause concern.

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INTEREST OF THE *AMICUS*[*]

The Becket Fund for Religious Liberty is a nonprofit, public-interest law firm dedicated to protecting the free expression of all religious faiths. It is founded on a simple but crucial principle: that religious freedom is a fundamental human right rooted in the dignity of every human person. To vindicate this principle, the Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, Zoroastrians, and many others in lawsuits across the country and around the world.

This case cuts to the heart of the Becket Fund's mission because it involves a decision by the State of Missouri to single out religious groups for disfavored treatment based solely on their religious status. That decision not only marginalizes and stigmatizes religious groups, but also, if allowed to stand, would threaten their access to a wide variety of important public benefits. This Court should reaffirm the basic principle that the First Amendment requires government neutrality toward religion.

SUMMARY OF THE ARGUMENT

A scraped knee is a scraped knee whether it happens at a Montessori daycare or a Lutheran daycare. But according to the State of Missouri, officers expending public funds have to check whether the playground's owner has a religious affiliation before supplying a protective surface. That is because Missouri

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[*] No party's counsel authored any part of this brief. No person other than the *amicus curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Petitioner provided a notice of blanket consent to the Court; Respondent provided *amicus* with written consent.

has interpreted its constitution to banish religious groups from all government aid programs. Missouri's categorical exclusion of otherwise eligible organizations from a generally available public benefit serving wholly secular needs, merely because of their religious affiliation, violates the First Amendment.

The First Amendment's command of neutrality prevents the government from "impos[ing] special disabilities on the basis of religious views or religious status," *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (citing *McDaniel* v. *Paty*, 435 U.S. 618 (1978)), and requires that "a law not discriminate on its face," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). Missouri's scrap tire program does both: on its face, it denies religious organizations access to a public safety benefit, and it does so based solely on their religious status.

This Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), provides no support for Missouri's program. *Locke* upheld a state's decision not to fund degrees in devotional theology. It did not say that states can exclude otherwise qualified individuals from a generally available benefit based solely on their religious status. The Court in *Locke* also suggested that the denial of funding there advanced a historic and substantial antiestablishment interest. But here, the supposed antiestablishment interest is nil. The scrap tire program simply reduces waste and makes playgrounds safer; it provides "secular and nonideological services unrelated to the primary, religion-oriented function of the sectarian school," and thus would have survived scrutiny even under the strictest strictures of the "no aid" period in this Court's jurisprudence. *Meek* v. *Pittenger*, 421 U.S. 349, 364 (1975), overruled by

Mitchell v. *Helms,* 530 U.S. 793 (2000). *See also Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 385 (1985), overruled by *Agostini* v. *Felton*, 521 U.S. 203 (1997) (permitting aid that does not "intentionally or inadvertently inculcat[e] particular religious tenets"). And under the Court's modern Establishment Clause decisions, including churches in the program would be no problem because it would simply make tires "available to both religious and secular beneficiaries on a nondiscriminatory basis" under "neutral, secular criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231.

Because Missouri has singled out religious organizations for the denial of public benefits based solely on their religious status, and because it has no legitimate antiestablishment basis for doing so, its scrap tire program violates the First Amendment's basic command of neutrality.

ARGUMENT

I. The scrap tire program violates the First Amendment by conditioning government benefits on religious status.

The Free Exercise and Establishment Clauses are not in conflict. They are complementary. They must "be read together * * * in light of the single end which they are designed to serve"—namely, "[t]he fullest realization of true religious liberty." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). The two parts of the Religion Clause "speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S.

687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). By conditioning eligibility for scrap tire grants on religious status, Missouri has violated the basic First Amendment requirement of neutrality, which forbids the government from "either encourag[ing] or discourag[ing] religious belief or * * * practice." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). Missouri's exclusion of religious entities is the clearest possible example of an unconstitutional penalty on the exercise of a constitutional right.

A. The scrap tire program violates the basic requirement of neutrality.

Missouri's scrap tire program violates the basic principle of neutrality by singling out religious organizations for disfavored treatment based solely on their religious status. The Court recognized this principle in its very first decision applying the Establishment Clause to the states, explaining that the government may not exclude "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).

Some thirty years later, in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), the Court ruled that the Free Exercise Clause prohibits the government from excluding individuals, based on their religious status, from public rights or opportunities otherwise generally available to all. There, the Court struck down a provision of the 1796 Tennessee Constitution and a related statute, which prohibited any "minister of the gospel" from

serving in the state legislature or becoming a delegate to the state's constitutional convention. *Id.* at 621 n.1. As Chief Justice Burger explained for the plurality: "[U]nder the clergy-disqualification provision, McDaniel cannot exercise both [the right to be a minister and the right to hold office] simultaneously because the State has conditioned the exercise of one on the surrender of the other." *Id.* at 626. To "condition the availability of benefits" upon McDaniel's "*status* as a 'minister'" impermissibly "penalizes the free exercise of [his] constitutional liberties." *Id.* at 626–27 (quoting *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963)).

The plurality explicitly rejected the argument that the clergy-disqualification provision was justified by the Establishment Clause—even though similar clergy-disqualification provisions were present in seven of the thirteen state constitutions, including Virginia, at the time of the founding. *Id.* at 622 & n.3. As the Chief Justice explained: "[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *Id.* at 629.

In a separate concurrence, Justices Brennan and Marshall agreed that the clergy-disqualification provision violated the Free Exercise Clause because "it establishes a religious *classification*—involvement in protected religious activity—governing the eligibility for office." *Id.* at 632 (emphasis added). In their view, this created "a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* Unlike the plurality, Justices Brennan and Marshall would have held that this

was a *per se* violation of the Free Exercise Clause, not subject to balancing under the Establishment Clause. *Id.* at 634–35. But they also rejected the argument that the clergy-disqualification provision was justified by the Establishment Clause: "The Establishment Clause does not license government to treat religion and those who teach or practice it, *simply by virtue of their status* as such, as subversive of American ideals and therefore subject to unique disabilities." *Id.* at 641 (emphasis added). In short, *McDaniel* establishes the basic rule that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639.

The Court reaffirmed this rule in *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990), stating that government may not "impose special disabilities on the basis of religious views or religious status," (citing *McDaniel*, 435 U.S. 618). And it expanded on the rule in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), unanimously striking down ordinances that prohibited the sacrifice of animals for religious reasons. As the Court explained, "[t]he Free Exercise Clause protects religious observers against unequal treatment." *Id.* at 542 (internal quotation marks and citation omitted). The "minimum requirement of neutrality is that a law not discriminate on its face," and "[a] law that targets religious conduct for distinctive treatment" will survive strict scrutiny "only in rare cases." *Id.* at 533, 546. In short, a consistent line of cases, from *Everson* to *McDaniel* to *Lukumi*, establishes the baseline rule that the Religion Clauses forbid laws that deny public benefits based on religious classifications or target religious conduct for distinctive treatment.

That baseline rule is controlling here. As in *McDaniel*, the scrap tire program "condition[s] the availability of benefits" on Petitioner's "status" as a church. 435 U.S. at 626. If Petitioner were to give up its religious "mission and activities" and cease to identify as a "church," it would receive a grant. Pet. Br. Addendum at 2a–3a. But instead, the state "use[s] religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639. Similarly, as in *Lukumi*, the scrap tire program violates the "minimum requirement of neutrality * * * that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. On its face, the program "impose[s] special disabilities on the basis of religious * * * status." *Smith*, 494 U.S. at 877 (citing *McDaniel*, 435 U.S. 618).

The religious status of the Trinity Lutheran daycare bears not the slightest relevance to the purpose of the state's program. Indeed, petitioner's application was ranked number five out of forty-four applications under the neutral and secular criteria of the program. The children who use this playground—not just students at Trinity Lutheran, but all the kids of the neighborhood—are just as precious as any others, and just as entitled to the protection of a civilized state. If Missouri excluded all entities with names beginning with a "T," the restriction would be struck down in a second. But this exclusion is worse than arbitrary and irrational; it burdens an enumerated constitutional right.

B. The scrap tire program is not saved by *Locke*.

Respondent offers *Locke* v. *Davey*, 540 U.S. 712 (2004), as a justification for departing from this rule. But *Locke* is inapplicable for two reasons. First, *Locke* did not involve a denial of benefits based on religious

status. The question in *Locke* was whether the state was constitutionally required to fund degrees in devotional theology, merely because it funded degrees in other programs such as history or biology. *Id.* at 719. This Court said "no," reasoning that states have the authority to choose what kinds of educational programs to fund. *Id.* at 721, 725. A state university may choose not to create a theology department—as Thomas Jefferson decided for the University of Virginia—or it may make the opposite choice. No person is treated differently on account of his religion by virtue of the state's decision not to fund a particular program of study. *Id.* at 720.

In that sense, the state's funding decision in *Locke* is parallel to a state's decision not to fund abortions, which this Court upheld in *Harris* v. *McRae*, 448 U.S. 297 (1980). A state has authority to choose what types of medical services it wishes to fund, including funding services that support childbirth but not abortion. *Id.* at 315. But it would be an unconstitutional penalty on the abortion right if a person who obtained an abortion was for that reason excluded from benefits to which she was otherwise entitled. Cf. *id.* at 317 n.19.

Here, by contrast, there is only one pertinent program—the scrap tire program—and Trinity Lutheran is excluded from the entire program solely because of its religious character. The benefits of the program are entirely conditional on the religious or nonreligious nature of the recipient. The state's decision to deny eligibility to an otherwise worthy daycare solely because of that daycare's religious identity and conduct is a classic example of an unconstitutional condition. *See, e.g.*, *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l,*

Inc., 133 S. Ct. 2321, 2330 (2013) (striking down a condition on funding that went "beyond defining the limits of the federally funded *program* to defining the *recipient*") (emphasis added); *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545 (1983) (holding that "the government may not deny a benefit to a person because he exercises a constitutional right") (citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)); *Perry*, 408 U.S. at 597 (stating that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958) (explaining that "[t]o deny a[] [property tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech").

Second, *Locke* is inapplicable because the Court suggested that the denial of funds in that case advanced a "historic and substantial [antiestablishment] interest" that was tied to "one of the hallmarks of an 'established' religion." 540 U.S. at 725, 722. But the antiestablishment interest in this case is nil. Shredded tires have no religious, ideological, or even instructional content. They simply make playgrounds safer. Like public bus transportation or auditory diagnosis for students at religious schools, a rubberized playground is existentially incapable of advancing religion. And the grants are available to a wide variety of recipients, the vast majority of whom are not religious.

The grants debated at the time of the founding were not part of neutral programs available to religious and nonreligious groups alike, but were grants "solely for the support of clergy in the performance of

their religious functions." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 49 (1997). If anything, the founding-era practice of including churches in a wide variety of public benefits—from tax exemptions, to incorporation rights, to land grants, to postage subsidies, to educational funding, and more, *see Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 858–63 (1995) (Thomas, J., concurring)—strongly suggests that including religious groups in neutral public benefit programs was not viewed as an establishment. *See also Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009) (Sutton, J.) ("Reliance on the *Memorial* [*and Remonstrance* to forbid all cash reimbursements] gives historical analogy a bad name.").

Even under this Court's most stringent "no aid" decisions in the 1970s, the inclusion of churches in the scrap tire program would easily have survived scrutiny. In those cases, the Court struck down various forms of aid to religious schools, such as grants for the repair of facilities, *Comm. for Pub. Educ.* v. *Nyquist*, 413 U.S. 756 (1973); reimbursements for testing costs, *Levitt* v. *Comm. for Pub. Educ.*, 413 U.S. 472 (1973); loans of instructional materials, *Meek* v. *Pittenger*, 421 U.S. 349 (1975), overruled by *Mitchell,* 530 U.S. 793; "auxiliary services" such as remedial, therapeutic, speech, and hearing services, *id.*; transportation for field trips, *Wolman* v. *Walters*, 433 U.S. 229 (1977), overruled by *Mitchell,* 530 U.S. 793; and remedial classes taught by public school teachers, *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373 (1985), overruled by *Agostini*, 521 U.S. 203, *Aguilar* v. *Felton*, 473 U.S. 402 (1985), overruled by *Agostini*, 521 U.S. 203. The basic

rationale was that these types of aid could be "intentionally or inadvertently [used to] inculcat[e] particular religious tenets," could "provid[e] a subsidy to the primary religious mission of the institutions," or could reasonably appear to do so. *Ball*, 473 U.S. at 385. But even at the apogee of its no-aid jurisprudence, the Court acknowledged that "a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities," because these are "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school." *Meek*, 421 U.S. at 364. Shredded tires are just that. They are "secular and nonideological" services (*id.*) that simply make playgrounds safer; they do not "intentionally or inadvertently inculcat[e] particular religious tenets." *Ball*, 473 U.S. at 385.

A fortiori, including churches in the scrap tire program would be no problem under the Court's modern Establishment Clause jurisprudence. Absent the church-disqualification provision, the program would make tires "available to both religious and secular beneficiaries on a nondiscriminatory basis" and would employ "neutral, secular criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231. Thus, it would create no "incentive to undertake religious indoctrination"; and even if shredded tires could somehow be used as a medium of indoctrination, that indoctrination could not be "attributed to the State." *Id.* at 230–31; *see also Mitchell*, 530 U.S. at 829–30 (plurality opinion). Nor are shredded tires capable of any meaningful diversion to religious use, *Mitchell*, 530 U.S. at 840–41, 857 (O'Connor, J., concurring in the judgment), even assuming the question of "diversion" is still relevant, compare *id.* with *id.* at 832–33 & nn.14–

17 (plurality opinion). Finally, there is no reason to suspect that the facially neutral criteria in the scrap tire program have the hidden effect of channeling aid disproportionately to religious entities. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 707 (2002) (Souter, J., dissenting) (noting that "96.6% of current voucher money go[es] to religious schools"). Here, the vast majority of grant applicants are nonreligious. Thus, this case is more like the unanimous decision in *Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986), where the benefit went to only one religious entity among many secular ones, rather than the vouchers in *Zelman*, where 96.6% went to religious schools.

Respondent may argue that the scrap tire program is different because it would involve "outright money grants" to churches. *See Mitchell*, 530 U.S. at 890–91 (Souter, J., dissenting). But this argument misapprehends the applicable doctrine. "Outright money grants" were never forbidden even at the height of no-aid separationism. Rather, direct aid was subject to the limitation that it could not be used for forms of aid that had, or could be diverted to, religious content. Just like bus rides and school lunches, government could pay the cost of rubberized play surfaces for the benefit of all children, wherever they chose to attend, even in the days of *Meek*, *Wolman*, *Aguilar*, and *Ball*.

In short, the antiestablishment interest in this case is far weaker than any possible interest in *Locke*, where there were purported historical concerns about governmental involvement in clerical theological instruction, or even in *McDaniel*, where seven of the thirteen original states had clergy-disqualification provisions. Here, the antiestablishment interest asymptotically approaches zero.

* * * * *

There are difficult cases at the outer bounds of the Religion Clauses. But this is not one of them. Missouri has singled out religious organizations for the denial of public safety benefits based solely on their religious status. It has no legitimate antiestablishment basis for doing so. Accordingly, its scrap tire program violates the First Amendment.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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