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 OF AMICI CURIAE LIBERTY COUNSEL AND NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE/CONELA IN SUPPORT OF PETITIONER SEEKING REVERSAL

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INTEREST OF AMICI[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious liberty, the family and sanctity of life across the United States. Liberty Counsel is committed to upholding the historical understanding and protection of the rights to free speech and free exercise of religion, and to ensuring that those rights remain an integral part of the country's cultural identity. Liberty Counsel has represented countless individuals and organizations whose free exercise and free speech rights have been violated, and has developed a substantial body of information related to the history, ubiquity and importance of these rights to maintaining the fabric of freedom in the nation.

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioner has filed a blanket consent to the filing of Amicus Briefs in favor of either party or no party. Respondent has consented to the filing of this Brief and its written consent is being filed simultaneously with the Brief.

The National Hispanic Christian Leadership Conference ("NHCLC") is America's largest Hispanic Christian evangelical organization. NHCLC was founded in 1995 and, on May 1, 2014, merged with Conela, a Latin America-based organization, to become NHCLC/Conela, representing more than 500,000 churches throughout the world. NHCLC/Conela member churches seek to serve their communities through programs and ministries that meet the physical, social and spiritual needs of their neighbors. In some cases this includes, as is the case with Trinity Lutheran Church, providing preschool and day care centers and playgrounds that are open to all. NHCLC/Conela believes in partnering with public agencies to provide resources and services that benefit the entire community in ways that neither the public agencies nor NHCLC/Conela members could do on their own. NHCLC/Conela is concerned that these valuable partnerships could be endangered by the Eighth Circuit decision in that it could lead to loss of opportunities for, and denial of equal access to, the people NHCLC/Conela's members serve.

Amici respectfully submit this Amicus Brief to assist this Court in evaluating Petitioner's Free Exercise claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

Are the children in the neighborhood surrounding Trinity Lutheran Church less deserving of a safe play space because their neighborhood playground happens to be owned by the church? Respondent believes so. Citing the misunderstood and misapplied mantra of "separation of church and state" as justification, Respondent denied Trinity Lutheran's request for a Scrap Tire Program grant solely because the church owns the property and Respondent feared that granting the request would constitute government aid to religion in violation of the Missouri Constitution.

Respondent's actions reflect a longstanding misconception that religious organizations must be quarantined from any contact with government funding or other benefits, even when, as is true here, the benefits are made available for purely secular functions, such as resurfacing a playground, and are distributed on the basis of neutral, objective criteria. This misconception marginalizes people like the children who use the playground for any distant association with a religious organization. More importantly, it displays the kind of hostility toward religion that this Court has long held incompatible with the First Amendment.

For the reasons that follow, Respondent's discrimination against and denial of equal access to Trinity Lutheran violates the Free Exercise and Free Speech clauses of the Constitution, and should be reversed.

LEGAL ARGUMENT

I. EXCLUDING TRINITY LUTHERAN'S DAY CARE CENTER FROM A NEUTRAL GRANT PROGRAM VIOLATES THE FREE EXERCISE CLAUSE AND DISREGARDS THIS COURT'S PRECEDENTS AND DECADES OF PUBLIC/PRIVATE PARTNERSHIPS THAT EFFECTIVELY MEET COMMUNITY NEEDS IN WAYS THAT ARE COMPATIBLE WITH THE FIRST AMENDMENT.

Like the carrier of a communicable disease, Trinity Lutheran Church has been excluded from fully participating in society for fear of passing on its "contagion." In this case, the "contagion" that threatens to "taint" the community is Trinity's status as a church. Despite placing fifth among forty-four applicants, Trinity Lutheran was denied, solely because it is a church, a grant that would have made the playground used by neighborhood

children safer and more accessible for disabled children. (Petition for Writ of Certiorari, at 7-8). The denial not only subjects neighborhood children to a suboptimal, inaccessible playground, but also contradicts this Court's precedents and decades of public-private partnerships that have improved the health and welfare of millions of children.

A. For More Than A Century, Communities Have Enjoyed A Social Welfare Safety Net Built Through The Cooperation Of Religious Organizations And Governmental Agencies.

Since the Pilgrims landed on Plymouth Rock in 1620, religious adherents have dedicated themselves to caring for their neighbors, particularly the indigent, neglected and sick, as part of their "fundamental theological commitment to charity and good works."[2] "Religious groups traditionally have

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[2] Thomas W. Pickrell & Mitchell A. Horwich, *Religion As An Engine Of Civil Policy: A Comment On The First Amendment Limitations On The Church-State Partnership In The Social Welfare Field,* 44 LAW & CONTEMPORARY PROBLEMS 111, 112 (1981).

worked to meet community welfare needs of every type,"[3] including, in Trinity Lutheran's case, the need for child care and for safe places to play. Thousands of faith-based organizations have received government funds and even partnered with government agencies to strengthen the social welfare safety net. As one researcher observed, "faith-based programs, especially in urban communities, are the backbone of broader networks of voluntary organizations that benefit the least, the last, and the lost of society."[4]

The American Jewish Congress describes some of the history and philosophy behind faith communities' commitment to social welfare and community betterment:

> The American Jewish community has historically devoted considerable effort to the founding and maintenance of various

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[3] *Id.*

[4] Scott W. Allard, *Access and Stability: Comparing Faith-based and Secular Nonprofit Service Providers*, 13-14, presented at The Impact of Religion and Faith-Based Organizations on the Lives of Low Income Families, National Poverty Center University of Michigan (2007), http://www.npc.umich.edu/news/events/religion&poverty_agenda/Allard.pdf.

> community welfare agencies: hospitals, nursing homes, child care agencies, day-care centers, community centers, and employment and guidance agencies. Along with traditional welfare services, some of these institutions provide the Jewish community with programs not offered in other such agencies; for example, kosher food, observance of Jewish holidays, [and] Jewish chaplains. . . . [B]y creating a distinctive Jewish ambiance in which social services are offered, these sectarian welfare agencies not only make it more likely that their service will reach and be used by all community members who need them, but also advance the organized Jewish community's stake in Jewish continuity.[5]

Notably, as the American Jewish Congress stated, faith-based organizations provide resources and services to all community members who need them. That is true of Trinity Lutheran, which makes its playground

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[5] American Jewish Congress, *Report of Task Force on Public Funding of Jewish Social Welfare Institutions* 1 (1986).

available not only to the students in its Learning Center, but also to neighborhood children, thus providing them with a safe place for recreation and exercise.

Trinity Lutheran's service to the community is part of a decades-old tradition of community service by faith-based organizations. In fact, 20 percent of all nonprofit human service organizations are religious organizations.[6]

> In many communities, religious nonprofits such as Catholic Charities, the Salvation Army, or Lutheran Social Services have provided critical service delivery capacity for several decades in a wide range of areas: job training; adult education; domestic violence counseling; child welfare; emergency food or cash assistance.[7]

In some cases, localities actually contract with faith-based organizations to provide material needs for low income citizens. "The city [New York] pays the organization [the Salvation Army] to run city shelters, and the state provides money for the Salvation Army's work

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6 Allard, at 13-14.

7 *Id.* at 16.

with parolees."[8] In New York City and throughout the country, "[f]aith-based organizations are an important component of the safety net, both public and private,"[9] and are provided with government funding to help in their endeavors. Today, religious organizations participate in a myriad of federal, state and local programs substantially similar to the Scrap Tire Program at issue in this case.[10]

Just as the Salvation Army provides critical services to assist families in New York, Trinity Lutheran provides critical services to assist families in Columbia, namely, child care and a safe outdoor play space. A Scrap Tire Program grant would enhance the safety of these beneficial services available to all in the community. Denying a grant, as Respondent has done, casts those in Trinity Lutheran's neighborhood as second class citizens,

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[8] Simpson, *Friend of the Poor: Salvation Army's Job Is Growing Tougher As Cries for Help Rise*, WALL ST. J. at sec. 1, p. 1 (Dec. 21, 1987).

[9] Allard at 41-42.

[10] Pickerell & Horwich at 113 n.16. This includes child care programs such as Title XX Day Care Services, 42 U.S.C. § 1397a (1976) and Head Start, 42 U.S.C. §§ 2931-2932 (1976). *Id.*

unworthy of a safer playground space merely because the playground is owned by a church.

Nothing in the decades-long tradition of public-private partnerships or this Court's precedents (described *infra*) supports such prejudicial treatment.

B. This Court Has Established That Excluding Faith-Based Organizations From Neutrally Available Government Benefits Used for Non-Sectarian Purposes Violates the Free Exercise Clause.

As far back as 1899 this Court established that government aid to church-affiliated nonprofit organizations that provide secular community services (such as Trinity Lutheran's preschool and playground), is constitutionally permissible, so long as the public funds are not used for sectarian purposes. *Bradfield v. Roberts,* 175 U.S. 291, 298 (1899). In *Bradfield,* this Court upheld a congressional grant of $30,000 to Providence Hospital which was owned and operated "under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital." *Id.* at 298. The decisive question

for the Court was whether the hospital would fulfill the secular purposes of the statute; the mere fact of Providence Hospital's religious affiliation was "wholly immaterial." *Id*. at 299. Significant to this Court's analysis was the fact that the hospital receiving the grant in *Bradfield* did not confine its services to members of the Roman Catholic Church, but provided health care to all who needed it. *Id.* The same is true here. Trinity Lutheran does not limit access to its playground to church members, or the adherents of any particular faith, but makes it available to all neighborhood children who want a safe place to play.

In circumstances similar to this case, this Court found that the First Amendment did not preclude the state of New Jersey from extending taxpayer-funded bus transportation to students in parochial schools as well as to students in public schools. *Everson v. Bd. of Ed. of Ewing Twp*., 330 U.S. 1, 16 (1947).

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment *commands that New Jersey cannot*

> *hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude 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.* While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Id. at 16-17 (emphasis added). *See also, Board of Education v. Allen,* 392 U.S. 236, 242 (1968) (secular textbooks loaned by the State on equal terms to students attending both public and church-related elementary schools was merely "extending the benefits of state laws to all citizens."). The same is true here. Approving a grant to Trinity Lutheran's Learning Center along with other qualified recipients would

mean merely extending the benefits of the Scrap Tire Program to all citizens, and in particular, to all of the children in the community. Under the Free Exercise clause, Respondent cannot hamper its citizens' free exercise rights by excluding Trinity Lutheran from receiving the benefits of state grants to improve playground safety.

Citing *Everson,* Justice Brennan said that excluding a private organization from participation in public benefits solely because of religious affiliation or inspiration violates the Free Exercise Clause by imposing a penalty for religious affiliation. *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits. 'State power is no more to be used so as to handicap religions than it is to favor them.'" *Id.* (citing *Everson*, 330 U.S. at 18). In *McDaniel*, the Tennessee constitution contained a provision that disqualified ministers from serving as legislators. This Court held that the constitutional provision violated ministers' Free Exercise rights.

> The right to the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions, or, in

> other words, to be a minister of the type McDaniel was found to be. . . . Yet, under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. 'To condition the availability of benefits including access to the ballot upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties."

McDaniel, 435 U.S. at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). "If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id*. at 634 (Brennan, J., concurring).

Because the "provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. . . . [it] compels the conclusion that it violates the Free Exercise Clause." *Id.* at 632. *See also, Falwell v. Miller*, 203 F.Supp.2d 624, 631 (W.D. Va. 2002) (finding the Virginia constitutional provision that prohibited incorporation of a church in violation of the free exercise clause of the First Amendment).

So too, here, Respondent's decision imposes a unique disability upon those like Trinity Lutheran who exhibit a defined level of intensity of involvement in protected religious activity–namely, running a day care and playground as a ministry of their church. As was true in *McDaniel*, in this case, if Trinity's Learning Center were to renounce its church affiliation it could retain eligibility for the grant program, but if it does not it must forgo an opportunity for playground safety improvements that all others enjoy. As was true in *McDaniel*, that Hobson's choice violates the Free Exercise clause. *Id.* at 632

In *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970), this Court reiterated that government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential

to a vigorous, pluralistic society." *Id.* at 689. Emphasizing the constitutional principle of "neutrality," this Court noted that the tax benefit was provided to churches, "within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673. Similarly here, the Scrap Tire Program is provided to a broad class of nonprofit property owners from which churches should not be excluded.

When, as is true here, a grant program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," the fact that a religious organization might be a recipient of the funds does not offend the First Amendment. *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986). As this Court explained:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without

> constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State.

Id. at 486-87. In *Witters,* this Court found that the vocational rehabilitation grant program was of the former, permissible type, not the latter, impermissible kind. *Id.* at 488.

Furthermore, the critical question in analyzing a statute such as the grant program at issue here is not whether a recipient is "of a religious character," but "how it spends its grant." *Bowen v. Kendrick*, 487 U.S. 589, 624-25 (1988) (Kennedy, J. concurring). In this case, there is no question that Trinity Lutheran will spend its grant on improving the safety of the playground used by neighborhood children, not on sectarian instruction or materials.

Religious organizations such as Trinity Lutheran Church "need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 746-47 (1976). "We have never said that 'religious institutions are disabled by the First Amendment from

participating in publicly sponsored social welfare programs.'" *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), (citing *Bowen*, 487 U.S. at 609). That being the case, Trinity Lutheran should not be denied grant funding that Respondent admits it is eminently qualified to receive, solely because Trinity Lutheran is a religious entity.

C. Carried To Its Logical Conclusion, Respondent's Denial Of Grant Funding Would Strip Faith-Based Organizations Of Public Safety Protection And Other Public Services.

Respondent's expansive interpretation of Article I §7 of the Missouri Constitution, if upheld, would lead to the kind of absurd results that this Court has said are incompatible with the First Amendment. In its letter denying Trinity Lutheran's grant request, Respondent said that it could not provide funds for safety improvements to the playground because it would violate the prohibition against state treasury funds being used to directly or indirectly aid any "church, sect, denomination or religion." (Petition for Certiorari, pp. 7-8). If the Missouri Constitution were read so broadly, then it would mean that neither Trinity Lutheran nor any faith-based property owner

could receive any publicly funded services, including police and fire protection, water and sewer service, or street and sidewalk maintenance. This Court has specifically rejected such expansive (and absurd) interpretations.

In *Everson,* this Court analyzed a similar "no aid" claim related to New Jersey's payment of bus fare for school transportation for all students, including those at parochial schools. 330 U.S. at 17.

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to

and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. *Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment.* That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-

> believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Id. at 17-18 (emphasis added).

Similarly, this Court found that the First Amendment does not require that church-based schools be excluded from loans of state-purchased textbooks on secular subjects. *Board of Education v. Allen*, 392 U.S. 236, 248 (1968). "[W]here the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to * * * divisive influences and inhibitions of freedom,' it is not forbidden by the religious clauses of the First Amendment." *Id.* at 249 (Harlan, J., concurring).

Therefore, "*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity." *Roemer*, 426 U.S. at 746.

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the

> institution's resources to be put to sectarian ends. *If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way*.

Id. at 746-47 (emphasis added).

As this Court said in *Zobrest,* if religious groups were barred from receiving general government benefits, then it would lead to the "absurd result" that "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." 509 U.S. at 8. Consequently, "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.*

Respondent's denial of a Scrap Tire Program grant to improve playground safety for the children in Trinity Lutheran's neighborhood is precisely the kind of "absurd result' that this Court cautioned against in *Zobrest.* As a neutrally available government grant, the Scrap Tire Program should not be

denied to groups such as Trinity Lutheran merely because its playground is owned by a church.

II. PROVIDING TRINITY LUTHERAN EQUAL ACCESS TO NEUTRALLY AVAILABLE GRANT FUNDS WILL COMPORT WITH THIS COURT'S FREE SPEECH JURISPRUDENCE AND PREVENT IMPERMISSIBLE DISCRIMINATION ON THE BASIS OF RELIGION.

A. Applying An Equal Access Paradigm Would Promote Religious Neutrality.

Implicit in this Court's decisions upholding faith-based organizations' participation in neutrally available government benefits is the concept that equal access shows neutrality toward religion. In each of the cases, this Court found that the First Amendment was not offended when religious organizations received government-funded support on the same terms and conditions as did state-run or secular organizations. *See e.g., Zobrest,* 509 U.S. at 8. In fact, this Court has said that excluding religious organizations from such neutrally available benefits actually discriminates against religion in a way that violates the Constitution. *Mitchell v. Helms*,

530 U.S. 793, 827-29 (2000). Such exclusions are "born of bigotry" and "should be buried now." *Id.*

This Court's decisions rejecting religiously-based discrimination against faith-based organizations in the free speech context should be equally applied in Free Exercise challenges because equal access to government facilities is analogous to the neutrality required in government funding cases. As one commentator noted:

> Although *Good News Club*[11] and *Rosenberger*[12] analyzed the legality of the discrimination under the Free Speech Clause, the discriminatory character of the exclusions also raises Free Exercise concerns. Specifically, denying funding to a "Christ-centered" education in this context, as required under a broad exclusion, constitutes religious discrimination and violates the neutrality required by the Free Exercise Clause.[13]

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[11] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).

[12] *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 839-40 (1995)

[13] Stuart J. Lark, *Equal Treatment for Religious Expression After Colorado Christian*

In the words of constitutional scholar Eugene Volokh:

> Equality rings truer to our notions of the government's proper role with regard to religion than does discrimination. The Constitution bars the "establishment of religion," and treating everyone the same without regard to religion is hard to see as "establishing" anything--except equality.[14]

The Establishment Clause does not permit government preferences for religion. *Larson v. Valente*, 456 U.S. 228, 244 (1982). However,

> equal treatment of religious and nonreligious people and institutions is perfectly fine, and such equal treatment maintains the separation of church and state by keeping the government scrupulously separate from people's decisions about religion.

University v. Weaver, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 121, 125 (2009).

[14] Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 345 (1999).

> The government facilitates a particular sort of behavior (whether it be university education, charitable giving, or K-12 education) *[or in this case, operating a child care center and playground]* without any concern about whether the behavior is religious or not.[15]

Providing support to a religious organization on an equal basis with similar non-religious organizations is consistent with the First Amendment since, "the government is not in any way 'mak[ing] adherence to a religion relevant to a person's standing in the political community.'"[16] Such equal treatment also comports with the Founders' view of the meaning of the Establishment Clause, *i.e.*, that it was aimed at preventing government preference for religion, not inclusion in neutral benefit programs.[17] James Madison wrote his *Remonstrance Against Religious Assessments* to oppose a bill that would have accorded preferential governmental funding for "Teachers of the Christian Religion," which Madison said "violate[d] that equality which

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15 Id.

16 *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment)).

17 *Id.* at 351.

ought to be the basis of every law."[18] By contrast, including a religious organization in a funding program will foster the equality that ought to be the basis of every law.

Applying an equal access paradigm in the Free Exercise context recognizes a critical component underlying the protections described throughout the Bill of Rights, *i.e.,* protection from impermissible discrimination.[19]

> The Free Exercise Clause is generally and properly understood as barring discrimination against religion. The Free Speech Clause is generally and properly understood as barring discrimination against religious speech, a constraint that fits well into the general principle that free speech means no government discrimination based on viewpoint (or often even content). The Equal Protection Clause asserts that certain traits, including religion and, I believe, religiosity, should not be bases for governmental classifications. [20]

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18 *Id.*

19 *Id.* at 365.

20 *Id.* at 371-72.

Therefore, just as the Free Speech clause condemns the exclusion of religious organizations from public fora as impermissible viewpoint discrimination, so too should the Free Exercise clause condemn the exclusion of religious organizations from neutral government grant programs as impermissible discrimination on the basis of religion.[21]

> Whereas the state establishes a public forum under the Free Speech Clause to facilitate private speech within the confines of the subsidized program, an equivalent concept under the Free Exercise Clause would apply to those instances in which the government facilitates private action within the confines of the subsidized program.[22]

Applying the equal access paradigm to Free Exercise challenges creates a familiar framework for determining when exclusion of a religious organization from a government program constitutes religion-based

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[21] John P. Scully, *Unifying The First Amendment: Free Exercise, The Provision Of Subsidies, And A Public Forum Equivalent*, 54 DEPAUL L. REV. 157, 185 (2004).

[22] *Id.*

discrimination in violation of the Free Exercise clause.[23] Under this framework, the state can limit participation to organizations and activities that comport with the overall purpose of the government program, but cannot exclude organizations that engage in the activities served by the program merely because they happen to be religious.[24] In other words, "[a]s public forums in free speech case law must be viewpoint neutral, any analogous concept under the Free Exercise Clause would necessarily demand neutrality with regard to religion."[25]

B. Protection From Government Hostility Toward Religion Is Critical In Free Exercise Analysis.

Just as viewpoint neutrality is critical to Free Speech analysis, religious neutrality is at the heart of this Court's Free Exercise jurisprudence, which emphasizes that the government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S.

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23 *Id.* at 186.

24 *Id.*

25 *Id.* at 187.

872, 877 (1990). "Free exercise of religion" encompasses more than just religious beliefs and professions of faith, but also includes physical acts such as gathering for worship, abstaining from certain foods, or abstaining from certain modes of transportation. *Id.* Or, in the case of Trinity Lutheran, the provision of educational and recreational facilities for the neighborhood. "It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.*

That was the case in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), in which this Court concluded that an anti-animal cruelty ordinance violated the Free Exercise Clause. This Court found that the ordinance prohibited the killing of animals only in ways that corresponded to religious practices. *Id.*

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.

Id. at 532. Even if, as was the case of the ordinance in *Lukumi*, the language is facially neutral, it will be invalidated under the Free Exercise clause if it targets religious conduct for disfavored treatment. *Id.* at 534. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.*

C. Protection From Government Hostility Toward Religious Viewpoint Is Integral To Free Speech Analysis.

Protection from government hostility toward religious organizations is also at the heart of this Court's Free Speech decisions invalidating state actions excluding religious organizations from public fora. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995); *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 114 (2001). These precedents provide further support for overturning the Eighth Circuit's decision as improperly sanctioning Respondent's impermissible discrimination against Trinity Lutheran on the basis of religion.

In *Lamb's Chapel*, this Court concluded that the school district had violated the First Amendment when it excluded a church-sponsored film on family values from use of school buildings after hours because the film dealt with the issue from a religious viewpoint. 508 U.S. at 393. The Court found that showing a film about child rearing and family values would be a permissible use of school buildings for social or civic purposes, but because the film presented that subject matter from a religious perspective it was disallowed. *Id.* at 393-94.

> In our view, denial on that basis was plainly invalid under our holding in *Cornelius* [*v. NAACP Legal Defense & Education Fund*]…473 U.S. [788,] 806 [(1985)]…that "[a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum ... or if he is not a member of the class of speakers for whose especial benefit the forum was created ..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

Id. at 394. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, (1984)). "That principle applies in the circumstances of this case." *Id.*

As Respondent does here, the school district in *Lamb's Chapel* claimed that it was justified in excluding the film because permitting the showing would violate the Establishment Clause. *Id.* at 395. This Court rejected the claim.

> The posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances,… there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the

> Church would have been no more than incidental.

Id. at 395. The same is true here. Approving a Scrap Tire Program grant so that Trinity Lutheran's neighborhood playground could be resurfaced would not be viewed by the community as an endorsement of religion. All children in the community who use the playground would benefit from the safer surface. The fact that some of the children who benefit might be the children of church members would be incidental at best.

In *Rosenberger,* this Court similarly rejected an Establishment Clause defense raised by the University of Virginia as justification for its denial of student activity funds for a religious student newspaper. 515 U.S. 819, 839-40 (1995). This Court reiterated that in "enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.'" *Id.* at 839 (citing *Everson*, 330 U.S. at 16). "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* (citing *Witters,* 474 U.S.

at 487-88). "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design" [such at the Scrap Tire Program at issue here]. *Id.* (citing *Lamb's Chapel*, 508 U.S. at 393-94).

As is true of the Scrap Tire Program, the governmental program at issue in *Rosenberger* "is neutral toward religion." *Id.* at 840.

> There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.

Id. In *Rosenberger* the religiously themed student newspaper was one of 15 applicants for support for "student news, information, opinion, entertainment, or academic communications media groups." *Id.* The student organization "did not seek a subsidy because of its Christian editorial viewpoint; it

sought funding as a student journal, which it was." *Id.*

Likewise, in this case, Trinity Lutheran is one of more than 40 applicants seeking grants for safety improvements to playgrounds. It was not seeking a subsidy because of its religious viewpoint, but because it has a playground available to the general public that is in need of resurfacing. As was true with the student publication in *Rosenberger*, Trinity Lutheran should not be excluded from the neutral funding program aimed at improving playground safety.

Citing *Rosenberger*, this Court similarly rejected exclusion of the Christian-based Good News Club from an elementary school's after hours program. *Good News Club,* 533 U.S. at 114.This Court reiterated that neutrality toward religion is key, and that state benefits will be upheld when they are offered to "a broad range of groups or persons without regard to their religion." *Id.* (citing *Mitchell*, 530 U.S. at 809). The Court said that the school district's "implication that granting access to the Club would do damage to the neutrality principle defies logic." *Id.* The "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* (citing *Rosenberger*, 515 U.S. at 839). "The Good News

Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups." *Id.*

Likewise, here, Trinity Lutheran seeks nothing more than to be treated neutrally and given the opportunity to obtain funds to improve the safety of its playground, as have other nonprofit organizations. Excluding Trinity Lutheran from the Scrap Tire Program exhibits hostility toward religion that is contrary to the neutrality principle central to this Court's Free Exercise and Free Speech precedents.

This Court has recognized that the neutrality principles espoused in its Free Exercise and Free Speech precedents specifically limit the State of Missouri's interest in offering greater separation between church and state than is implied in the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). In *Widmar*, as in this case, the university attempted to justify its exclusion of a religious organization from a student activities forum by citing to the same exact state constitutional provision at issue in this case, *i.e.*, the "no government aid to religion" clause of the Missouri Constitution, Article I §7. *Id.* at 275. As Respondent does here, the university in *Widmar* argued that the state constitution required an even higher "wall of separation" between church and state than does the United State Constitution, thereby heightening the

state's compelling interest in avoiding an establishment of religion. *Id.* The Court rejected the claim without reaching the question of whether the state constitution could enact a greater separation than does the federal constitution. *Id.* Regardless of whether the state constitution can erect a "higher wall," its interest in avoiding establishment of religion is limited by the free exercise and free speech rights of the student organizations. *Id.* at 276. In light of the special solicitude given to those rights, "we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.*

In this case, the state's interest in avoiding an establishment of religion is even less compelling than in *Widmar* since Trinity Lutheran is not seeking to use grant funds for religious activities, but solely to resurface the playground that is used by all neighborhood children. The more attenuated connection between Trinity Lutheran's religious activities and the grant expenditures means an even lower likelihood that Respondent reasonably could be viewed as giving government money to aid religion. This Court should reject Respondent's attempt to use the state constitution to justify religious discrimination.

CONCLUSION

The children who use Trinity Lutheran's playground do not deserve to be treated as constitutional orphans, barred from receiving a grant to improve the safety of their play area just because it happens to be owned by a church. This Court has consistently rejected attempts to exclude religious organizations from neutrally available federal aid programs.

Trinity Lutheran was eminently qualified to receive a Scrap Tire Program grant and it should not have been denied that opportunity solely because it is a church. Respondent's denial of grant funding constitutes impermissible religious discrimination with no extenuating circumstances, including threat of an Establishment Clause violation.

For these reasons, this Court should reverse the Eight Circuit's ruling.

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