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* CHRISTIAN LEGAL SOCIETY, THE ANGLICAN CHURCH IN NORTH AMERICA, CHRISTIAN MEDICAL ASSOCIATION, FAMILY RESEARCH COUNCIL, NATIONAL RELIGIOUS BROADCASTERS, AND THE QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing religious congregations, broadcasters, physicians, lawyers, and other religious citizens, who are deeply concerned that, in this case, the state has excluded religious congregations from a benefit that serves, among other things, to promote the safety and health of children. By excluding church-operated entities and the children who attend or otherwise use them, the state has denied them equal treatment with respect to one of government's core functions: protection of the safety and health of persons within its jurisdiction. In a real sense, this exclusion treats religious communities, children, and families as less than equal citizens and relegates them to second-class status.

Detailed statements of interest for *amici curiae* are found in the Appendix.

[1] This brief was prepared entirely by *amici* and their counsel. No person other than *amici* and their counsel made any financial contribution to the preparation or submission of this brief. The consents of the parties are on file with the Clerk.

SUMMARY OF ARGUMENT

The state of Missouri has unconstitutionally excluded petitioner Trinity Lutheran Church, simply because it is religious, from eligibility for state benefits under the Missouri Scrap Tire Program. Petitioner operates a preschool and day care center. The program provides grants to nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. Because the current playground surface used at petitioner's preschool and day care center does not adequately protect children from injury, petitioner applied for funding under the state program to resurface the playground. Although the state ranked petitioner's application high enough under the program's neutral criteria to secure a grant, it denied the application solely on the ground that petitioner is a church.

By excluding petitioner from eligibility for benefits, the state discriminated against the organization – and effectively against the individuals who use it – solely on the basis of the organization's religious status. This discrimination is presumptively unconstitutional under the Free Exercise Clause. *Amici* file this brief to emphasize that it is particularly egregious to exclude religious entities from eligibility for neutral safety- and health-related benefits such as the scrap tire program. By its exclusion, the state has denied equal treatment with respect to one of government's core functions: protection of the safety and health of persons within its jurisdiction. In a real sense, such an exclusion treats religious persons as

less than equal citizens – as it would if the state were to deny other safety benefits such as police or fire protection. The children who attend petitioner's preschool and daycare are entitled to the same eligibility for state safety benefits as are children who attend nonreligious institutions.

The court of appeals justified petitioner's exclusion from the scrap tire program by concluding that government has discretion under the First Amendment to deny benefits to religious entities without violating the Free Exercise Clause, even though the denial is not required by the Establishment Clause. The court relied on *Locke v. Davey*, 540 U.S. 712 (2004), but this case falls outside of *Locke*, for at least two reasons. First, the discretion that government officials may exercise with respect to religion should be limited – particularly the discretion to single out religion for discriminatory treatment. Second, the exclusion upheld in *Locke* was limited to the funding of training for the clergy, which the state had strong anti-establishment interests in avoiding. Here, by contrast, the state excluded a religious institution altogether from receiving a safety-related benefit whose provision raises no Establishment Clause concerns: aid for playground resurfacing is nonreligious in content, and any possibility of its use for religious purposes is *de minimis* at most.

ARGUMENT

I. BY EXCLUDING PETITIONER AND CHILDREN WHO USE ITS PLAYGROUND FROM GENERALLY AVAILABLE SAFETY BENEFITS, THE STATE VIOLATED THE FREE EXERCISE CLAUSE.

As petitioner notes, this case implicates the bedrock principle that government may not impose disabilities on entities or individuals solely because of their religious status. Pet. Br. 11-20. *Amici* wish to emphasize a specific point: It is particularly egregious to exclude religious entities and individuals from eligibility for neutral, secular safety and health benefits.

A. The State's Exclusion Discriminates Against Entities and Individuals Based on Religious Status.

A core protection of the Free Exercise Clause is that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)). In *McDaniel*, this Court struck down a state legislative provision disqualifying clergy from serving in the state legislature. *McDaniel* has come to stand for the proposition that, as Justice Brennan put it, government may not "treat religion and those who teach or practice it, simply by virtue of their status as such, as . . . subject to unique disabilities." *Id.* at 641

(Brennan, J., concurring in the judgment); accord *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990); *Smith*, 494 U.S. at 877.

A law singling out religious status for a disability also violates the "fundamental" and "minimum" requirement of the Free Exercise Clause that laws be neutral toward religion and generally applicable. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523, 532 (1993). A law that is not neutral or generally applicable must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id.* at 531-32. Under this "most rigorous [level] of scrutiny," a law singling out religion for disfavor is strongly presumed unconstitutional. *Id.* at 546 ("A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases.").

Unquestionably, the state discriminated against religious status when it held petitioner ineligible to receive a scrap-tire material grant to resurface its playground. Likewise, this exclusion from eligibility for aid is not neutral toward religion and is not generally applicable. Public school districts, private schools, park districts, nonprofit day care centers, and other nonprofit entities are eligible to apply for a grant.[2] The state ranked petitioner's grant application

[2] Playground Scrap Tire Surface Material Grant Application Instructions for Form 78-2143, http://dnr.mo.gov/pubs/pub2425.pdf (last visited April 10, 2016).

fifth among the 44 applications received, but the state refused to include petitioner among the 14 projects funded. Pet. App. 154a. The sole reason the state provided for the denial was that "the department is unable to provide this financial assistance directly to the church," because of Article I, section 7 of the Missouri Constitution. Pet. App. 152a-153a.

As the above quote shows, the state excluded petitioner solely on the basis of its status as a religious organization (a church) – not on the basis of any narrower interest in preventing funding from being used specifically to support religious instruction. As we discuss *infra* p. 23, that narrower interest provides no basis for denying assistance to resurface a playground. This means, among other things, that there is no Establishment Clause interest in excluding petitioner from assistance – and accordingly, no sufficient interest to justify the exclusion. See *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (Missouri constitution's rule of strict separation of church and state cannot be compelling enough to justify singling out religious views for exclusion from general program of benefits).

Singling out religious entities or individuals from an otherwise available government benefit can cause a number of *prima facie* harms. Not only does it treat religion unequally; it also interferes with the religious choice of individuals. In this case, for example, parents may truly desire to have their children experience a religiously grounded education. But without the receipt of this state aid, safety concerns

that result from an outdated and dysfunctional playground may discourage parents from considering the religious option. If schools do elect to repair and resurface their own playgrounds, tuition is likely to rise, discouraging parents and families who desire a religiously grounded education but struggle to pay for it.

The state relies on this Court's holding that not all instances of excluding religion from generally available funding programs violate the Free Exercise Clause. See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004). But as petitioner discusses at length, this case is distinguishable from *Locke* on multiple grounds. See Pet. Br. 35-44. *Amici* want to emphasize a particularly important point: The denial of safety and health benefits because of religious status is an especially serious disability, because it treats religious persons as less than equal citizens.

B. The Exclusion from Safety and Health Benefits Violates the Free Exercise Clause by Denying Religious Entities, and Persons Using Them, Rights of Equal Citizenship.

In this case, the state has excluded petitioner from a benefit that serves, among other things, to promote the safety of children playing on playgrounds. By excluding church-operated entities and the children who attend or otherwise use them, the state has denied them equal treatment with respect

to one of government's core functions: protection of the safety and health of persons within its jurisdiction. In a real sense, this exclusion treats religious communities, children, and families as less than equal citizens.[3]

This Court and its members have often connected the theme of neutrality toward religion with the theme that persons of varying faiths are equal citizens. As the plurality said in *Board of Education, Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687 (1994), "religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *Id.* at 698. See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (free exercise protects "the right to . . . establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community").

In the context of government-encouraged prayers at a city council meeting, four justices have emphasized that "[a] Christian, a Jew, a Muslim (and so forth)" each "stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that

[3] For similar reasons, we agree with petitioner that the exclusion also violates the Equal Protection Clause. See Pet. Br. 22-27. However, we focus here on the free exercise argument.

when each person . . . seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting). The same principle holds when government disqualifies a person or group from the benefits of citizenship based on their religious status.

Neutrally available safety and health benefits present the strongest instance of a case where withholding benefits on the basis of religion violates equal citizenship. "[T]he health, safety, and welfare of citizens" are the "cardinal civic responsibilities" of government. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 341 (2008) (footnotes omitted).

At the dawn of the modern era of Religion Clause cases, this Court stated that families using religious schools should not be excluded "from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). *Everson* involved government reimbursements to parents for the cost of sending their children to schools, including religiously affiliated schools, on public buses. The program's purpose was to promote safety: "to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools, rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.'" *Id.* at 7.

The Court rejected a taxpayer's suit arguing that reimbursements for children's transportation to

religious schools violated the Establishment Clause. The Court began with a strong statement of the general importance of separation of church and state. 330 U.S. at 15-16. It then held that the bus reimbursements did not violate the Establishment Clause, or the separation principle, and it relied for its rationale on the Free Exercise Clause: "[O]ther language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion." *Id.* at 16. "Consequently, [the state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id.* (emphasis in original).

The *Everson* Court described an exclusion from generally available safety benefits as a form of burden on free exercise. It characterized the exclusion as imposing a "handicap" on religious believers, making the state their "adversary":

> The [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; 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 18. Applying the principle against handicapping religion, the Court said that denying religious school children the benefit of safe transportation to

school would not serve the purposes of the First Amendment. *Id.*

Everson specifically held that the exclusion of religious persons from safety benefits was not required by the Establishment Clause, but the Court also unmistakably understood the exclusion to be a violation of free exercise. Consequently, in *McDaniel v. Paty*, *supra*, Justice Brennan's crucial opinion finding clergy disqualifications unconstitutional relied on *Everson*'s statement that "'the state cannot exclude individual[s] . . . , because of their faith . . . from receiving the benefits of public welfare legislation.'" 435 U.S. at 633 n.7 (Brennan, J., concurring) (quoting *Everson*, 330 U.S. at 16).

Unsurprisingly, *Everson* analogized the transportation benefits to other safety- and health-related benefits provided directly to church-operated entities, such as "police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18. The Court noted that "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." *Id.* at 18. Among other things, "parents might be reluctant to permit their children to attend schools which the state had cut off" from benefits that promoted children's safety. *Id.* "But such is obviously not the purpose of the First Amendment." *Id.*

Amici agree with Justices Scalia and Thomas that presumptively, "[w]hen the State makes a public

benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured"; thus, to withhold that benefit "solely on the basis of religion" presumptively violates the Free Exercise Clause. *Locke*, 540 U.S. at 726-27 (Scalia, J., dissenting). But this Court need not adopt that broad principle here. Safety and health benefits present a clear case where a disqualification of religious entities denies them and the families they serve the equal "benefits of citizenship" (*Town of Greece*, *supra*), and thereby imposes an unconstitutional disability on free exercise of religion (*McDaniel*, *supra*; *Kiryas Joel*, *supra*).

The Missouri program fits squarely within these principles. The playground-resurfacing program contributes to the welfare of the general public by providing safe playground surfaces at an affordable cost. Pet. App. 102a. In its grant application, petitioner highlighted the safety risks posed by the condition of its pea gravel surface playground, which "is unforgiving if/when a child falls and thereby poses a basic safety hazard." Pet. App. 132a (noting also that the migration of the pea gravel creates a "trip[ping] hazard").

The children who attend petitioner's preschool and daycare should be accorded the same eligibility for these safety benefits as are children who attend nonreligious institutions. When a Lutheran child trips or falls on an "unforgiving" surface, her head injury is no less serious than if she attended a nonreligious private school. The state's categorical exclusion of

petitioner's preschool from program eligibility gives no weight to the safety of children attending the school and instead relegates them to second-class status.

Contrary to the ruling of the court below, the right of petitioner and individual families to be treated equally is not forfeited because petitioner is a church. See Pet. App. 10a (ruling against petitioner on the ground that it "seeks to compel the direct grant of public funds to churches, [one] of the 'hallmarks of an "established" religion'") (quoting *Locke*, 540 U.S. at 722). For starters, the scrap tire grant is no less a benefit to children and families simply because it is provided to the organization they attend. Funding to support a safer playground for children can only be provided to the organization; there cannot be playground-safety grants to families. This case is no different from *Mitchell v. Helms*, 530 U.S. 793 (2000), where this Court upheld the provision of instructional materials and equipment directly to religious schools (among other schools), noting that the program was designed "to assist children in [those] schools." *Id.* at 802 (opinion of Thomas, J.); see *id.* at 836 (O'Connor, J., concurring in the judgment) (direct grants were designed "to address the needs of educationally deprived children of low-income families").

Petitioner is a church, but it is operating a preschool, and the state should respect the children's safety and must not discriminate against them based on their religion. That petitioner chooses to operate

the school within its own (church) legal structure, rather than as a separate legal entity, should not change its eligibility for safety- and health-related benefits. To make that distinction would discriminate against religious schools based on their choices of organizational structure, thus violating the "clearest command" of the Religion Clauses: the government must not discriminate among various religious denominations. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Even if the case involved simply the house of worship itself, the result should not change. The concern with "direct grant[s] of public funds to churches" is inapposite when the funding in question is for the safety of persons who use a church's facilities. People attending a house of worship have no less an interest in their safety and health than do persons who utilize the many other facilities that have participated in the scrap tire program. The safety and health protections this Court has endorsed – police and fire protection, water and sewer connections – are typically extended to houses of worship as well, and to refuse them to a house of worship would plainly be unconstitutional.

Churches and their congregants cannot be excluded from safety benefits merely because the benefits take the form of money grants. The court of appeals' holding would wrongly permit discrimination against religious citizens in multiple situations.

- If the state of Michigan addressed the crisis of lead in the water in Flint by providing money grants to entities to help them replace their lead water pipes, surely a house of worship would have an equal claim to assistance in avoiding lead poisoning and its effects on children.
- If a state provides funds to entities to remove asbestos from their buildings, surely houses of worship should not be categorically excluded from such a program. Religious persons have an interest in avoiding asbestos-related cancer that cannot be ignored or minimized.
- If New Jersey provides funds after a devastating hurricane to help tear down or stabilize damaged buildings, surely synagogues, churches, mosques, and temples should not be denied participation.

Finally, the free exercise right here is not defeated because the scrap tire grants are selective rather than automatic. Of course, neither petitioner nor any other applicant is entitled to receive a grant. But they are entitled to be considered without regard to their religious identity, or lack of it. Under religion-neutral criteria, petitioner would have received the grant; its application ranked fifth out of 44 submitted, and 14 were awarded grants. In an analogous context, this Court has emphasized that a state entity may allocate scarce funds based "on some acceptable neutral

principle," but it cannot use this scarcity to justify "viewpoint discrimination among private speakers." *Rosenberger v. Rector and Visitors of Univ. of Virginia.*, 515 U.S. 819, 835 (1995) (holding that university's exclusion of religious publication from student activity fee funding for student publications violated the Free Speech Clause). The same principle holds true for the fundamental constitutional right to be free of discrimination against one's religious status.[4]

The importance of safety and health benefits to the enjoyment of equal citizenship makes *McDaniel v. Paty*, *supra*, doubly relevant in this case. Under *McDaniel*, it is impermissible to condition a secular benefit or right on the relinquishing of a religious one. *McDaniel*, 435 U.S. at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). But that is precisely what the state has done here. If religious organizations in Missouri want a benefit crucial to providing children with safer playgrounds, they must relinquish the right to operate their schools and learning centers as church-related institutions. And if parents want their children to benefit from state assistance to assure their safety on the playground, they must abandon their constitutional right to send their

[4] Moreover, like the safety and public welfare benefits endorsed in *Everson*, the benefits involved here are "separate and . . . indisputably marked off from the religious function" (*Everson*, 330 U.S. at 18). Therefore, as we discuss in part II, any Establishment Clause interest in excluding churches is minimal or non-existent. See pp. 21-24 *infra*.

children to a church-operated school (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

McDaniel is especially relevant because there the state imposed a religious condition on an individual's right to run for public office, a basic component of citizenship. See *Locke*, 540 U.S. at 720 (noting that in *McDaniel* the state withdrew from religious leaders "the right to participate in the political affairs of the community"). Similarly, here the state withdraws eligibility to receive a protection related to safety and health, the "cardinal civic responsibilities" of government. *Davis*, 553 U.S. at 341. To exclude persons attending church-operated schools from eligibility for a safety benefit strikes at their equal citizenship in the same way that excluding religious leaders from basic political participation struck at theirs.

II. THE EXCLUSION HERE CANNOT BE JUSTIFIED BY ANY "PLAY IN THE JOINTS" BETWEEN THE RELIGION CLAUSES.

The court below justified petitioner's exclusion from the scrap tire program as supposedly falling within the discretion government has within the Religion Clauses of the First Amendment. Pet. App. 12a n.3. The court relied on this Court's ruling in *Locke v. Davey*, 540 U.S. 712. But *Locke* does not control this case for two reasons. First and foremost, the discretion that government has with respect to religion is limited – particularly the discretion to single out religion for discriminatory treatment. And

for multiple additional reasons, *Locke* is far different from this case and easily distinguishable.

A. Government's "Play in the Joints" to Single Out Religion for Discriminatory Disabilities Should Be Very Limited.

This Court in *Locke* referred to the "play in the joints" between the two Religion Clauses: the idea that there is state action that is permitted by the Establishment Clause but not required by the Free Exercise Clause. 540 U.S. at 718-19. But this concept must be applied with caution.

The Religion Clauses of the First Amendment were never intended to give government substantial discretion with respect to religion. Indeed, the notion stands the First Amendment on its head: the Religion Clauses actually impose a two-fold restriction on government action, a restriction aimed at *limiting* government's power over religion. The spirit of the Religion Clauses was captured by one member of the First Congress during the debate over the provisions:

> As the rights of conscience are, in their nature, *of peculiar delicacy, and will little bear the gentlest touch of governmental hand*; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words.

1 Annals of Cong. 757-58 (1789) (Joseph Gales ed., 1834) (statement of Daniel Carroll) (emphasis supplied).

Locke referred to the concept of "play in the joints" immediately after saying that the Establishment and Free Exercise Clauses "are frequently in tension." 540 U.S. at 718. And indeed, if the two clauses at their hearts conflict or point in different directions, then it is necessary to cut down the reach of one or both of them, or else the state could not operate at all.

But the two clauses are not conflicting; they are complementary. To interpret them as conflicting "is a mistake at the most fundamental level." Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1088 (1996). It "imputes incoherence to the Framers," and it ignores the historical record: "The Religion Clauses were no compromise of conflicting interests, but the unified demand of the most vigorous advocates of religious liberty." *Id.*[5] The Religion Clauses, in fact, constitute two aspects of a single statement or principle about religion and government. Together the two clauses serve the goal of protecting the neutrality of government and the religious choices of individuals and communities.

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[5] See also Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 245-46 (2004).

With that understanding, it makes perfect sense to say that a law discriminating against religious status – one singling out religious choices for a disability – is not required by the Establishment Clause *and* also violates the Free Exercise Clause. Or put differently, if a law discriminating against religion does not serve strong establishment values, it is also very likely to violate free exercise values.

There are a few instances in which the state needs discretion to create policy that interferes with religious choices. For example, the Free Exercise Clause permits the state discretion to burden religion when the burden is justified by a compelling interest. *Lukumi*, 508 U.S. at 531. There may also be discretion in some cases where the application of the constitutional principles at stake is ambiguous, so that either aspect of action may affect religious freedom. But in a case such as this one, involving the provision of religion-neutral safety and health benefits, there is no ambiguity in the application of Religion Clause principles. Exclusion from such benefits denies equal citizenship to families on the basis of their choice of religious schooling, and it discourages that choice by making it less attractive. And the exclusion of religious entities serves no significant Religion Clause purpose – as is shown by how much this exclusion differs from the one that the Court upheld in *Locke v. Davey*.

B. The Exclusion Here Is Entirely Different from the One Upheld in *Locke v. Davey*.

The holding in *Locke* is inapplicable to this case, especially in light of the very limited state discretion to discriminate against religious status. Missouri's exclusion of petitioner from safety benefits in this case differs in multiple ways from the condition on state scholarships upheld in *Locke*. As petitioner puts it, "This case is as far from *Locke* as one can conceive." Pet. Br. 11. Because the program in *Locke* excluded students majoring in "devotional theology," this Court rested its decision on the state's interest in avoiding funding the religious training of clergy. *Id.* at 721-23. Indeed, the Court said that was "the only issue" in the case. *Id.* at 722 n.5.

The first difference is that the exclusion in *Locke* targeted a "distinct category of instruction" – training to be a member of the clergy – that is "not fungible" with "training for secular professions." *Id.* at 721. By contrast, the state here has excluded petitioner from the benefit even though petitioner's relevant activity is comparable to those of nonreligious entities that receive the benefit. Church-operated schools such as petitioner's provide education and care to children just as their nonreligious counterparts do. Certainly, the activity of children on a playground is the same for religious and nonreligious schools alike, and the state's concern for children's safety on the playground is – and should be – the same for all. The state has thus targeted petitioner's "conduct because it is

undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Petitioner was excluded solely because of its status as a religious institution (see *McDaniel*; *infra* pp. 4-7), not because its activity involved the "distinct category of instruction" involved in the religious training of clergy.

The majority in *Locke* also emphasized that Washington's exclusion of "devotional theology" majors left students many alternative means to include religion in their college studies. *Id*. at 724. Students could still attend pervasively religious institutions, take non-theology courses that incorporated religious perspectives, and even take devotional theology courses, as long as they did not major in devotional theology. *Id.* at 724-25 (finding that the program "goes a long way toward including religion in its benefits"). The Court held that the availability of religious options showed that the state was not hostile to religion (*id.*); the fact likely also contributed to the Court's conclusion that the burden in *Locke* was relatively mild (*id.* at 720). Here, in contrast, there is no alternative for petitioner or any other church in Missouri to pursue its program and simultaneously participate in a state program to improve playground safety. The state completely bars grants to a church or any entity, such as petitioner's preschool, operated by a church.

Finally, the Court in *Locke* held that avoiding state funding for the training of clergy was a "historic and substantial state interest," *id.* at 724, dating back to the early days of the Republic. *Id.* at 722-23.

"In fact," the Court said, "we can think of few areas in which a State's antiestablishment interests come more into play." *Id.* at 722.

In contrast, the antiestablishment interests here are minimal. The scrap tire grant provides no money for school instruction, educational materials, or teacher salaries. It simply provides financial assistance to install playground surfaces that increase safety of a playground facility. The equal inclusion of churches and their preschools in this program does not come close to violating the Establishment Clause under this Court's precedents. The benefit – recycled rubber playground surfaces – is not itself religious in content. See *Mitchell v. Helms*, 530 U.S. 793, 822-23 (2000) (plurality opinion of Thomas, J.). It is most unlikely to be used for religious purposes; the prospect is utterly speculative and, at best, *de minimis*. *Id.* at 861 (O'Connor, J., joined by Breyer, J., concurring in the judgment) (upholding aid where its use for religious purposes was "*de minimis* and therefore insufficient to affect the constitutional inquiry").

Finally, allowing persons using religious facilities to benefit from a safety program is extremely unlikely to provoke resentment or "divisiveness" along religious lines. *Van Orden v. Perry*, 545 U.S. 677, 703-04 (2005) (Breyer, J., concurring). Certainly the record shows no such spiteful reaction has occurred. But even if it did, it would not justify disqualifying organizations and persons from a core component of citizenship: government programs aimed at protecting children's safety. The disqualification here "exhibit[s]

a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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April 21, 2016

APPENDIX

DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 1961, the **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with attorney chapters nationwide and law student chapters at approximately 110 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty and the sanctity of human life in the courts, legislatures, and the public square. Since 1981, CLS has filed briefs in most Religion Clause cases heard by this Court. Twice CLS has represented religious organizations before this Court when they have been excluded from a broadly available governmental program.

CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected. Pluralism is advanced in this case by protecting the right of all Americans to participate in health and safety programs regardless of their religious status.

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing

70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

The **Christian Medical Association** ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 17,000, CMA advocates for policies on healthcare issues, conducts overseas medical evangelism projects, provides doctors overseas with continuing medical education resources, and sponsors student ministries in over nine out of ten medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for the poor and needy from their commitment to practicing according to faith-based moral standards.

Family Research Council is a non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies for consistency with traditional religious values, and believes in protecting the rights of all people to adhere to and pursue their religious beliefs. Integral to this freedom of religion is the freedom to organize into churches and religious organizations and to participate in the public life of the nation. Consequently, Family Research Council has a strong interest

in ensuring that religious organizations and churches are not treated differently by the government because of their religious nature or their values.

National Religious Broadcasters ("NRB") is a nonpartisan international association of Christian broadcasters and communicators united by purpose and message: to proclaim the Good News of eternal life through Jesus Christ; to transform culture through the application of sound biblical teaching; to advance biblical truth; to promote media excellence; and to defend free speech. NRB reaches every continent through Christian radio, television, internet, and other media arts.

NRB members hold deep-rooted beliefs that religious liberty is the cornerstone of a free society, and that we must protect those freedoms so that the transforming reality of Jesus Christ can reach hearts and minds the world over. NRB also works to protect access to the world's electronic and digital media, ensuring that the Gospel goes out unimpeded to reach the four corners of the earth.

The **Queens Federation of Churches**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations

participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty.