No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 45,000 local churches from forty different denominations and serves a constituency of over twenty million people.

The NAE believes religious freedom is a gift of God and vital to the limited state which is our American constitutional republic. Among its policy positions, NAE believes "school choice" empowers parents, who have the best interests of their children at heart, and that school choice is an important means by which our failing K-12 educational system in America's inner-cities can be reformed.

NAE has also been a supporter of "charitable choice" in faith-based social service funding, and in that regard has encouraged the promulgation of the Equal-Treatment Regulations in the Bush and Obama Administrations. This appeal involves both policies.

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[1] *Amicus curiae* affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person, other than *amicus*, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

INTRODUCTION[2]

This appeal concerns an important issue of religious liberty. The question is whether Missouri may deny a religious daycare and nursery school participation in a program providing rubber pellets made from recycled tires to schools for use under playground equipment to prevent injury to children. Missouri's program was created for the neutral nonreligious purpose of making playgrounds safer for children and keeping old tires out of Missouri landfills.

Trinity Lutheran Church of Columbia, Inc. (Trinity Lutheran), applied to participate in Missouri's program so its nursery school playground would be safer. Everyone agrees the grant would have been awarded but for the fact that the applicant was a church. But, because Trinity Lutheran's nursery school is operated by a church, Missouri would not authorize the grant to provide rubber pellets for Trinity Lutheran's playground. Missouri refused to let Trinity Lutheran participate in this program pursuant to the first clause of Article I, § 7, of Missouri's constitution.

Sara Parker Pauley is Director of the Missouri Department of Natural Resources (DNR) Solid Waste Management Program. The federal district court granted DNR's motion to dismiss because it "conclude[d] that *a Missouri court* addressing this issue *would find* that when a state complies with the directive in clause one of Section 7 (no aid to religious organizations), it does not violate the second clause

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[2] We adopt the Statement of the Case provided by Petitioner in its opening brief, filed April 14, 2016, pp. 3-10.

(discrimination against religion)." *Trinity Lutheran Church of Columbia* v. *Pauley*, 976 F. Supp.2d 1137, 1141 (W.D. Mo. 2013) (emphasis added). Trinity Lutheran appealed the district court's decision to the Eighth Circuit, and an Eighth Circuit panel affirmed, with Judge Gruender concurring in part and dissenting in part. See *Trinity Lutheran Church of Columbia* v. *Pauley*, 788 F.3d 779, 790 (8th Cir. 2015), reh'g denied August 11, 2015.

HISTORICAL BACKGROUND

As a result of the Missouri Compromise Maine was admitted as a free state in 1820 and Missouri as a slave state in 1821. The Missouri Constitution of 1820, adopted in territorial convention in St. Louis (and subsequently approved, with amendments, by Congress), included provisions concerning the separation of church and state.[3] For example, a provision prohibited members of the clergy from holding public office.[4]

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[3] "That no person, on account of his religious opinions, can be rendered ineligible to any office of trust or profit under this state; that no preference can ever be given by law to any sect or mode of worship; and that no religious corporation can ever be established in this state." Mo. Const. 1820, Art. XIII, § 5.

[4] "No person while he continues to exercise the functions of a bishop, priest, clergymen, or teacher of any religious persuasion, denomination, society, or sect, whatsoever, shall be eligible to either house of the general assembly; nor shall he be appointed to any office of profit within the state, the office of justice of the peace excepted." Mo. Const. 1820, Art. III, § 13. This Court later held such restrictions on political participation by clergy to violate the First Amendment. *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (plurality opinion) (provision in Maryland constitution that

Missouri adopted its second constitution in 1865 directly after the Civil War. The Constitution of 1865 was influenced by the polarized politics of the Radical Republicans. The dominant issues surrounding the drafting and adoption of the Constitution of 1865 involved emancipation of former slaves, the ability of state officials suspected of being disloyal to the Union to continue in office, and the desire to disenfranchise those who served the Confederacy or sympathized with its cause.[5] The disenfranchisement was accomplished by requiring all individuals to swear an oath affirming they had always been loyal to the Union. The 1865 Constitution further declared a person could not practice law, serve on a corporate board, or serve in any capacity as a clergyman without signing the oath.[6]

A Catholic priest, Father Cummings, refused the oath and challenged Missouri's ability to require it. This Court invalidated the oath requirement in *Cummings* v. *Missouri*.[7]

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disqualified clergy from holding public office violates First Amendment).

[5] See Dennis W. Belcher, *The Judicial Ouster Ordinance of 1865 and Radical Reconstruction in Missouri*, in Kenneth H. Winn, ed., *Missouri Law and the American Conscience* (2016), pp. 88-89.

[6] *Id.* at 89.

[7] 71 U.S. (4 Wall.) 277 (1872) (priest cannot be deprived of right to function as cleric for refusal to take exculpatory oath, as the provision was a bill of attainder and *ex post facto* law).

The 1865 Constitution adopted additional church-state separationist measures, discriminatory by present standards. Ironically, for example, the constitution's "Declaration of Rights" prohibited churches from owning more than five acres of land in rural areas and more than one acre in a town or city, and it voided any sale or gift of real estate in excess of these amounts to any minister, preacher, or religious sect.[8]

In 1875, Missouri again convened a constitutional convention and approved a provision requiring the Missouri legislature to appropriate 25% of the general revenue to support public schools.[9] Public education in the nineteenth century was "unabashedly patriotic and unmistakably Protestant." John C. Jeffries and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-98 (2001). Public, or "common," schools "featured Bible reading, prayer, hymns, and holiday observances ****." *Id.* To counter Catholic initiatives to obtain a share of tax money for Catholic schools, public school advocates promoted "least-common-denominator Protestantism," where King James Bible reading[10] in public school became the "basis for a pan-Protestant compromise, a vague and inclusive Protestantism that, when augmented by specific doctrinal instruction at Sunday school, proved

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[8] The application of a similar law in Illinois, one restricting churches to ownership of no more than ten acres, was eschewed by this Court in *Gilmer* v. *Stone*, 120 U.S. 586 (1887) (interpreting the discriminatory restraint so as not to be applicable).

[9] Mo. Const. 1865, Art. I, §§ 12-13.

[10] The King James translation was not recognized by the Catholic Church.

acceptable to all. Thus, the "instruction behind [school] doors was nondenominational but emphatically not secular." *Id.* at 299.

"American public education was religious but *nonsectarian*." *Id.* at 299 (emphasis added). The "swirling" anti-Catholic sentiments at the time "came to a point in controversies over the public schools. Catholic educational separatism challenged the Protestant vision of a Christian America. Protestants responded by trying to keep Bible reading in the public schools and to interdict funding of *sectarian* education." *Id.* at 303-04 (emphasis added). For the latter half of the nineteenth century, the Protestant position was that "public schools must be '*nonsectarian*' (which was usually understood to allow devotional Bible reading and other Protestant observances), but public money must not support '*sectarian*' schools which in practical terms meant Catholic." *Id.* at 301 (emphasis added).

James G. Blaine, Republican Senator and Congressman from Maine,[11] proposed amending the U.S. Constitution to prevent "any religious sect" from controlling public primary and secondary education and preventing public funds from being given directly to "religious sects or denominations."[12] The Blaine

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[11] Blaine was a Congressmen at the time but went on to be Senator from Maine, Secretary of State, and Republican candidate for president, losing to Grover Cleveland in 1884.

[12] H.R. Joint Res. 1, 44th Cong., 1st Sess. (Dec. 14, 1875). The Blaine Amendment provided:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no

Amendment passed the House but failed in the Senate. Supporters of the Blaine Amendment, however, worked to have the States adopt similar provisions in state constitutions.

Even as Blaine was proposing his amendment to the United States Constitution, Missouri was adopting a similar amendment to its 1875 Constitution. Article I, § 7, of Missouri's current constitution provides:

> [Cl. 1] That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister, teacher thereof, as such; and
>
> [Cl. 2] that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.[13]

Article IX, § 8 of Missouri's constitution provides:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an

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> money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

[13] Originally Art. II, § 7 of the Missouri Constitution of 1875. The first clause has been described as the "no-aid" clause, and the second clause is called the "no-discrimination" clause.

> appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.[14]

In 1945, Missouri voters called a constitutional convention by initiative and a new state constitution was adopted. The 1945 constitution – which is the current Missouri constitution – retained the foregoing provisions from the 1875 constitution.

SUMMARY OF ARGUMENT

The Eighth Circuit's opinion turned on a novel and controversial interpretation of Article I, § 7, of Missouri's constitution. No Missouri court had ever reconciled the two clauses in Article I, § 7. This Court counsels federal courts when confronted with a novel issue of state law to avoid declaring state law and abstain, allowing state courts to interpret state law.

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[14] Originally XI, § 11 of Mo. Const. of 1875.

See *Erie Railroad*,[15] *Pullman*,[16] and *Arizonans for Official English*.[17]

The panel majority erred by failing to follow this Court's abstention jurisprudence. Thus, the panel's decision should be vacated and the case remanded with directions that the district court abstain so that this important provision of Missouri's Constitution can be interpreted by a Missouri state court. It may be that, by abstaining and allowing Missouri courts to interpret this provision of Missouri's constitution, the federal courts can avoid having to address various federal constitutional claims.

The Eighth Circuit likewise erred as to the merits. The majority applied *Locke* v. *Davey*, 540 U.S. 712 (2004), too broadly such that it is inconsistent with the Free Exercise Clause. Should this Court reach the merits, Judge Gruender's dissent provides the correct analysis. Specifically, the panel majority misconstrued Trinity Lutheran's pleading as a facial challenge, instead of an as-applied challenge, to Art. I, § 7; and it misapplied the free exercise and antiestablishment principles set forth in *Luetkemeyer* v. *Kaufmann*,[18] and *Locke*.

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[15] *Erie R. Co.* v. *Tomkins*, 304 U.S. 64 (1938).

[16] *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

[17] *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997).

[18] 364 F. Supp. 376 (W.D. Mo. 1973), summarily aff'd, 419 U.S. 888 (1974).

ARGUMENT

I. This appeal turns on a novel issue of Missouri state law that should be resolved in the first instance by Missouri courts.

A. This Court's jurisprudence in *Erie*, *Pullman*, and *Arizonans* counsels lower federal courts to avoid declaring novel issues of state law.

Federal courts should abstain from making novel declarations of state law. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). This Court has provided three reasons for *Pullman* abstention: first, the avoidance of needless friction with state policy makers;[19] second, reduction of the likelihood of erroneous interpretations of state law by federal judges;[20] and third, constitutional avoidance – avoiding unnecessary federal constitutional rulings when the matter can be resolved under state law.[21] As we explain below, all three of these considerations are present here. Federal courts may raise abstention on their own motion, including on appeal. *Bellotti* v. *Baird*, 428 U.S. 132, 143 n.10 (1976).

We are also mindful of the current vacancy on the Court. An equally divided affirmance of the Eighth Circuit's decision would leave Missouri law unsettled. By vacating the panel's decision and remanding with

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[19] *Pullman*, 312 U.S. at 500.

[20] *Id.* at 499-500.

[21] *Id.* at 501.

directions to order the district court to abstain from deciding a Missouri constitutional issue, this Court could avoid engendering further confusion by affirming the split-decision of the Eighth Circuit.

Indeed, the Eighth Circuit panel believed the district court should have abstained from deciding the unsettled issue of Missouri law, but inexplicitly, the majority went on to review the district court's decision of this important and novel state law issue on the merits. The panel stated:

> This inversion of the theories pleaded *distracted the district court from a very serious issue* – after dismissing the federal claims, should the court have declined exercise its supplemental jurisdiction over a state law claim that is based on an *important provision of the Missouri Constitution* and turns on the proper interpretation of *rather ambiguous* Supreme Court of Missouri precedents? *We think that question should have been answered affirmatively*, but we will nonetheless review the district court's dismissal of this claim on the merits.

Trinity Lutheran,788 F.3d at 786 (emphasis added).

B. The Eighth Circuit panel premised its decision upon a novel interpretation of Missouri constitutional law.

Trinity Lutheran brought five counts. *Trinity Lutheran*, 788 F.3d at 782. Four counts alleged violations of the Free Exercise Clause, Establishment Clause, Free Speech Clause, and Equal Protection Clause. The fifth count was a supplemental claim

alleging intentional discrimination on the basis of religion in violation of Missouri Constitution, Art. I, § 7, cl. 2. *Id.* Although a part of the Missouri Constitution since 1875, the no-discrimination clause has *never* been interpreted in a reported opinion by *any* Missouri state court.[22] DNR relied exclusively upon the first clause of Article I, § 7, to deny Trinity Lutheran the grant to obtain rubber pellets for its playground.[23] *Trinity Lutheran*, 788 F.3d at 782, 790.

For all practical purposes, DNR admits that it intentionally discriminated against Trinity Church solely because it was a church. Discrimination against Trinity Lutheran is a violation of the no-discrimination clause in Art. I, § 7, clause 2. DNR argues, however,

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[22] The "no-discrimination" clause of Mo. Const. Art. I, § 7, along with other statutory and constitutional provisions, was invoked, not as an original claim but as a point on appeal in a child-custody dispute where the trial judge was accused of preferring the parent who had not converted to the Jehovah's Witnesses. See *Waites* v. *Waites*, 567 S.W.2d 326, 333 (Mo. 1978) ("Judges should not even give the appearance of such preference or favor."); see also *id.* at 331 n.2.

[23] When DNR wrote Trinity Lutheran to tell Trinity Lutheran the DNR was denying Trinity Lutheran's application, DNR did not rely on Mo. Const. Art. IX, § 8. Art. IX, § 8 is inapplicable. The provision applies only to schools, and a preschool or day-care center is not a school. The Missouri Department of Social Services licenses preschools and day-care centers. They are social service providers. In contrast, K-12 schools are accredited by the Missouri Department of Elementary and Secondary Education. Schools are schools, not social service providers. Preschools and day-care centers may help to prepare a child for school (as well as provide custodial care in a parent's absence, often at her place of employment), but they are not themselves schools.

that its intentional discrimination is excused – if not compelled – by the no-aid clause, Art. I, § 7, cl. 1. Specifically, DNR relied on the text, "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church *** as such." DNR's argument casts the two clauses of Art. I, § 7, into unnecessary conflict.

These clauses do not conflict; more on this below. But assuming a conflict, both the district court[24] and the majority of the circuit panel said that the conflict should be "harmonized" by *subordinating* clause 2 to clause 1. *Trinity Lutheran*, 788 F.3d at 786 ("if granting Trinity Church's application would have constituted 'aid' to a church prohibited by the first clause *** then denying the grant was not a discriminatory action prohibited by the second clause"). Subordination is not harmonization. Rather, it is downgrading the importance of one coordinate clause to another, all without supplying any principled rationale for doing so. On what principle can a federal court say that a no-aid clause is more important than a no-discrimination clause? This is surely plain error. And if a federal court engages in a balancing of state policy (clause 2 is subordinate to clause 1), the court is doing precisely what this Court said a federal judge must not do. Avoiding the need for federal courts to engage in this type of state policymaking is why this Court adopted its *Pullman* abstention jurisprudence.

Clause 1 and clause 2 of Art. I, § 7, are part of Missouri's Bill of Rights. As a canon of construction they ought to be read, if at all possible, so as not to

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[24] *Trinity Lutheran*, 976 F. Supp.2d 1137, 1141.

conflict. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012), p. 180 ("there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously").

There are various ways that the two clauses can be reconciled. By its plain language, the DNR rubber-pellets-for-playgrounds program is secular in purpose and content, to wit: the use of recycled tires to provide a safer surface for children on a playground while disposing of old tries that otherwise would go to a landfill. The rubber pellets did not go to a "church *** as such," meaning to a "church *** as a church," but went to a preschool operated by a church. If a preschool *qua* preschool is considered a proper object of aid, then such a construction, pursuant to the "surplusage canon," gives meaning to the limiting words "as such" at the end of clause 1. See Scalia & Garner, ch. 26.[25] Moreover, the grant was not "money *** from the public treasury *** as such," but rubber pellets from recycled auto tires.

Then there is the question of what is "in aid of" a church? On that question, Trinity Lutheran has argued a *quid pro quo* theory. 788 F.3d at 786. We agree with that argument, but we also ask whether "in aid of" means something explicitly religious, such as support for prayer, worship, classes in religion, sacred books as opposed to a secular-purpose of creating safer playgrounds and keeping old tires out of state landfills. Stated differently, is there a difference between the

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[25] "If possible, every word and every provision is to be given effect (*verba cum effecto sunt accipienda*). None should be ignored."

state giving rubber pellets made from old tires and giving Bibles or hymnals? Rubber pellets have absolutely nothing to do with the sectarian mission of a religious institution. But Bibles, hymnals, copies of the Koran, or prayer rugs further a sectarian purpose. If the phrase, "in aid of," is read as the Eighth Circuit suggests, fire departments could not put out a fire in a church building (or church nursery school). Similarly, under the majority's view, police officers could not direct traffic for an Easter or Yom Kippur service at a church or synagogue.

Under this Court's Establishment Clause jurisprudence, programs of aid, made available without regard to the religious character of the provider, are upheld.[26] Moreover, a virtue of this narrower meaning of the term "in aid of" is that tension with the Free Exercise Clause rule of no-intentional-religious-discrimination is avoided.[27]

The no-discrimination clause could also be understood as applicable only to intentional discrimination, not disparate-impact cases.

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[26] A program of direct secular aid to K-12 schools, including religious schools, was found not to violate the Establishment Clause in *Agostini* v. *Felton*, 521 U.S. 203 (1997), and again in *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality). See also *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (upholding program of direct secular aid to social service providers, including religious providers).

[27] This Court's rule prohibiting intentional discrimination on account of religion is stated in *Church of the Lukumi* v. *Hialeah*, 508 U.S. 520 (1993), following the same rule stated in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

Our point is not, "How should these questions of Missouri Constitutional law ultimately be resolved, including reconciling Art. I, § 7, clause 1 with clause 2?" Rather, our point is that the answers should and must come in the first instance from a Missouri state court.

This case entails an important political and policy question, one for Missouri state officials not the federal judiciary. It is well known that inner-city public education is a failure.[28] Missouri experiences this problem in the City of St. Louis and Kansas City. Other states are innovating with school-choice legislation. In addition to state educational vouchers in Ohio,[29] income tax deductions for educational expenses in Minnesota,[30] and tax credits for contributors to nonprofit student scholarship funds in Arizona,[31] sister states are adopting innovations to improve K-12 education and enhance parental choice.[32]

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[28] See, e.g., Robert D. Putnam, *Our Kids: The American Dream in Crisis* 135-90 (2015).

[29] *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

[30] *Mueller* v. *Allen*, 463 U.S. 388 (1983).

[31] See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436 (2011).

[32] See, e.g., *Duncan* v. *State*, 166 N.H. 630, 102 A.3d 913 (N.H. 2014) (school choice program); Florida (tax credit scholarship program, Fla. Stat. § 1002.395); Nevada (student educational savings accounts, <http://dailysignal.com/2015/06/02/nevada-becomes-fifth-state-to-enact-groundbreaking-education-savings-accounts/>); and North Carolina (student opportunity scholarship grants).

All these states have Blaine Amendments, but for now the reforms are proceeding. The aim is to rescue inner-city students. The Eighth Circuit's decision will halt such educational reform efforts in Missouri. *Pullman* abstention exists to prevent such preemption of state policy decisions by the federal judiciary.

II. The Eighth Circuit wrongly concluded *Luetkemeyer* v. *Kaufmann* and *Locke* v. *Davey* were controlling.

A. *Luetkemeyer* is not controlling.

The panel opinion below held that this Court's summary affirmance in *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974), summarily aff'g, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), was binding on the Eighth Circuit and required judgment for DNR. See 788 F.3d at 783-84. The panel wrote:

> [W]hile the parameters of the Supreme Court's summary affirmance in *Luetkemeyer* may not be free from doubt, given the issues addressed in the dissent from summary affirmance, we conclude that the Court necessarily decided that Article I, § 7, of the Missouri Constitution is *not* facially invalid.[33]

This statement is wrong for multiple reasons.

First, contradictory to the panel's claim, the pleading of Trinity Lutheran was not a facial attack on Art. I, § 7. Trinity Lutheran brought an "as applied" challenge to the DNR denial of Trinity Lutheran's

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[33] *Id.* at 784 (emphasis in original).

application to participate in the rubber pellets for playgrounds program administered by DNR. This program did not, on its face, exclude preschools operated by churches. Trinity Lutheran's lawsuit challenged only DNR's denial of the church's application to participate in the program. As such, Trinity Lutheran's burden was only to show that the grant program was unconstitutional as applied to Trinity Lutheran.

The majority, inexplicably, leapt to the notion that Trinity Lutheran was bringing a facial challenge to the first clause of Art. I, § 7. *Trinity Lutheran*, 788 F.3d at 83. This is incorrect. Federal Rule of Civil Procedure 8(e), requires pleadings "must be construed so as to do justice" to the parties. Judge Gruender noted the majority's error. *Id.* at 791 (Gruender, J., dissenting in part).

Second, *Luetkemeyer* does not stand for the rule, as the panel claimed, that Art. I, § 7, was constitutional in a challenge under the Free Exercise Clause. That line of reasoning would have a provision in a state constitution preempting an individual's otherwise admitted right to relief under the Free Exercise Clause. Such a rationale turns the Supremacy Clause, U.S. Const. Art. VI, § 2, on its head.

Widmar v. *Vincent*, 454 U.S. 263 (1981), rejected a similar argument. In *Widmar* a state university complied with strict separationist provisions in Missouri's constitution. But this Court held Missouri's state constitutional provisions did not override the Free Speech Clause of the First Amendment. *Id.* at 275-76. It must be admitted, of course, that in a proper case an individual's federal constitutional right to be free of a

state's overt religious discrimination can be overridden by a showing of a compelling government interest achieved by the least restrictive means. But the mere presence of a state's policy preference embedded in its constitution cannot equate, *ipso facto*, with the state successfully satisfying its heavy burden of overcoming strict scrutiny review.

Third, *Luetkemeyer* stands for a far more modest proposition than that stated by the panel below. That is, a state may, consistent with the Free Exercise Clause, choose to provide free bussing only for students attending public schools, notwithstanding that there are children in the state that wish to attend private schools, including private religious schools. The rule is entirely sensible and is the law today. What a state cannot do, consistent with the Free Exercise Clause, is to provide free bussing for students attending public schools and those attending private nonreligious schools, without providing bussing for students attending religious schools. It is the latter, a question not reached by this Court's summary affirmance in *Luetkemeyer*, that is presented, in another form, in this case.[34]

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[34] The panel claimed support for its reading of *Luetkemeyer* in *Brusca* v. *State of Mo. ex rel. State Bd. of Educ.*, 405 U.S. 1050 (1972), summarily aff'g, 332 F. Supp. 275 (E.D. Mo. 1971). See 788 F.3d at 784. *Brusca*, however, stands for the far more limited principle that Missouri may, consistent with the Free Exercise Clause, provided free education to students attending public schools but not to students attending private schools, including students in private religious schools.

B. *Locke* v. *Davey* is not controlling.

Judge Gruender explained the panel's fundamental error:

> When the *Locke* Court spoke of a substantial antiestablishment concern, I seriously doubt it was contemplating a state's interest in not rubberizing a playground surface with recycled tires.

Trinity Lutheran, 788 F.3d at 793 (Gruender, J., dissenting).

The panel majority relied on *Locke*. See 788 F.3d at 785, 785 n.3. In doing so, the panel committed three errors.

First, the panel majority read *Locke* as excusing a violation of what would otherwise be overt religious discrimination prohibited by the Free Exercise Clause, not because the nature of the aid was religious but because the recipient of the aid was a church. *Second*, the panel read *Locke* as sometimes allowing "indirect" aid but not "direct" aid. Subsequent decisions no longer support this distinction. *Third*, the panel fixated on the metaphor in *Locke* that the Free Exercise and Establishment Clauses are in "tension," and thus the question is whether Missouri's (in the panel's view) rubber pellets for playgrounds program falls safely "within the play in the joints" between the two Religion Clauses.

As we show below, "tension" or conflict between the Free Exercise Clause and the Establishment Clause is not possible. Of course, a conflict can occur between the Free Exercise Clause and a state's constitution,

such as a Blaine Amendment. And that is the case here, with the consequence that Missouri state law, as applied, is preempted by the Free Exercise Clause of the United States Constitution. Indeed, such conflicts occur with regularity. See, e.g., the cases discussed above of *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (Missouri Constitution); *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (plurality opinion) (Maryland constitution); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1872) (Missouri Constitution); cf. *Gilmer* v. *Stone*, 120 U.S. 586 (1887) (Illinois statute).

1. The panel majority reads *Locke* too expansively.

Permission for a state to withhold aid to a college student pursuing a degree in devotional theology to be a minister of the Gospel bears no similarity to a non-sectarian program to use old tires to make playgrounds safer. *Church of the Lukumi* v. *City of Hialeah*, 508 U.S. 520 (1993), is controlling. The Free Exercise Clause does not permit DNR to intentionally discriminate against Trinity Lutheran because it is a church.

Judge Gruender was correct that the majority over-reads *Locke*.[35] See, e.g., *Colorado Christian University* v. *Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (discussing the scope of *Locke* v. *Davey* in opinion by McConnell, J., a recognized national expert in religious liberty and now a law professor at Stanford University). See also Thomas C. Berg and Douglas

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[35] Compare 788 F.3d at 785 (majority) with *id.* at 791-92 (Gruender, J., dissenting in part).

Laycock, *The Mistakes in* Locke *v.* Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227 (2004). Judge Gruender correctly noted that Trinity Lutheran had properly stated a claim based on the Free Exercise Clause's prohibition on intentional discrimination because of religion. 788 F.3d at 793.

Locke involved what has been characterized as "indirect" aid, whereas the DNR solid waste program is "direct" aid.[36] This is now a distinction without a difference. This Court has since upheld both "indirect" and "direct" programs-of-aid, provided that they are administered without regard to the religious character of the charitable or educational providers in the grant program.

This Court first upheld the constitutionally of an "indirect" form of aid to religion in *Mueller* v. *Allen*, 463 U.S. 388 (1983) (parental state income tax deduction for expense of enrolling child in K-12 school, including religious school, does not violate Establishment Clause). Later "indirect" aid programs, in chronological order, are *Witters* v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation aid for blind used to attend religious school does not violate Establishment Clause); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (federal legislation providing interpreter to student attending school, including religious school, as part of special education program does not violate

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[36] Justice O'Connor has straightforward definitions of "indirect" and "direct" aid in *Mitchell* v. *Helms*, 530 U.S. 793, 843 (1988) (O'Connor, J., concurring in the judgment).

Establishment Clause); and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (voucher plan to attend school of student's choice, including a religious school, does not violate the Establishment Clause).

With respect to programs where the nature of the aid is "direct," the first such modern case[37] to uphold a program was *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (federal program awarding grants to counseling centers, including religious centers, did not violate Establishment Clause). Later decisions are *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (state university program to encourage student writing via publication of newspapers, including religious newspapers, did not violate Establishment Clause);[38] *Agostini* v. *Felton*, 521 U.S. 203 (1997) (federal program providing special education teachers at schools, including religious schools, did not violate the Establishment Clause); and *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality opinion) (federal Primary and Secondary Education Act providing aid to K-12 schools, including religious schools, does not violate the Establishment Clause).

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[37] A pre-modern case, but one that nonetheless upheld a direct aid program to construct college buildings on a religious campus, is *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (plurality opinion in part) (federal program of construction grants for secular-use buildings at colleges, including religious colleges, does not violate Establishment Clause). See also *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (federal funds to construct religious hospital does not violate Establishment Clause).

[38] The shift from pre-modern to modern neutrality theory was unmistakable when *Agostini* reversed *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

There are, of course, limits imposed by the Establishment Clause to such funding and other forms of aid when administered by religious service providers. Care must be taken that the program has controls such that funds are not diverted to religious "indoctrination." *Mitchell*, 530 U.S. at 836, 857-66 (O'Connor, J., concurring in the judgment, joined by Breyer, J.).[39] Likewise, the nature of the aid must not be "inherently religious," such as worship, proselyting, or devotional Bible reading. *Kendrick*, 487 U.S. at 605. As it happens, the rules preventing diversion have been worked-out in considerable detail. A congressional statute enacted in 1996, 42 U.S.C. § 604a, took the lead (for grants awarded according to neutrality theory, no direct aid "shall be expended for sectarian worship, instruction, or proselytization"). This was followed by two Executive Orders, one issued by President George W. Bush and one by President Barack Obama.[40] Together, the legislation and executive orders authorized the promulgation of multiple sets of regulations by various federal departments under the

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[39] In *Mitchell* (plurality opinion), the Court upheld a general federal program providing educational materials to K-12 schools, public and private, secular and religious, allocated on a per-student basis. Because *Mitchell* was a plurality opinion, Justice O'Connor's concurring opinion, *id.* at 836 (joined by Breyer, J.), is controlling because it worked the lesser alteration to the prior law. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on the narrowest grounds is controlling).

[40] President Bush's Executive Order 13279 was issued in December 2002. It was amended by President Obama's Executive Order 13559.

heading of "Equal Treatment Regulations,"[41] and overseen, *inter alia*, by The White House Office of Faith-based and Neighborhood Partnerships.[42]

These modern cases allowing aid to grant recipients, including religious recipients, is consistent with the original meaning of church-state relations in the U.S. Constitution. For that meaning this Court most often looks to the Virginia experience between 1776 and 1786 for guidance. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 Geo. J. of L. & Pub. Pol'y 51-103 (2009).

In *Rosenberger* v. *Rector & Visitors*,[43] Justice Souter and Justice Thomas squared off with respect to the Virginia experience, in particular the meaning of the defeat of Patrick Henry's Assessment Bill. In a separate opinion concurring in the Court's decision, Justice Thomas argued that the defeat of the bill

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[41]Almost a dozen departments and agencies recently publish final regulations for federal social service programs when it comes to religious freedom principles for treatment of faith-based social service providers and their beneficiaries. See https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-07339.pdf (April 4, 2016).

[42] Concerning church-state issues and religious freedom, these matters are overseen by the White House Office of Faith-Based and Neighborhood Programs. See <https://www.whitehouse.gov/administration/eop/ofbnp/values>.

[43] 515 U.S. 819 (1995) (holding that state university's denial of student activity funds to pay for printing of student newspaper with specifically religious perspective as part of a limited public forum to enlarge student writing was viewpoint discrimination contrary to Free Speech Clause).

supported the "nonpreferentialist" position with respect to the meaning of the Establishment Clause.[44] This school of thought argues that, although the Establishment Clause does not permit the government to prefer some religions over other religions, the clause does permit government to support religion so long as all religions are treated equally.

On the other hand, in dissent Justice Souter argued the defeat of the Assessment Bill supported his view that the Establishment Clause means government can never aid religion, not even when the aid program is equally available to a large class of providers with none excluded because of their religious character.[45] If Justice Souter's dissenting view was correct, money from the student activity fees in *Rosenberger* could not be used to defray the cost of printing the student religious newspaper. No aid is no aid, insisted Justice Souter, regardless of the resulting discrimination within the university-created forum based on the religious content of the plaintiff's newspaper.[46]

The historical record does not support either of these two interpretations of the defeat of Henry's Assessment Bill.[47] First, Henry's bill, as amended and engrossed on December 24, 1784, and then tabled until

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[44] *Id.* at 855-56 (Thomas, J., concurring).

[45] *Rosenberger*, 515 U.S. at 868-69, 872 n.1 (Souter, J., dissenting).

[46] *Id.* at 870-76 (Souter, J., dissenting).

[47] The narrative that follows in the text is drawn from Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 Geo. J. of L. & Pub. Pol'y 51-103 (2009).

the next General Assembly which was to convene in October 1785, was a special or "earmarked" tax. The assessment was for funding only the activities described in the bill (clergy salaries and church buildings), as opposed to appropriating monies from a general tax that was to be paid into the state treasury.

This Court has twice ruled that there is no burden on religious conscience with respect to a general tax the monies of which are paid into the general treasury.[48] Unlike a general tax that is paid into the treasury without conditions directing how the money is later used, a special earmarked tax has the required causal link between the extraction of the tax from the taxpayer and the monetary support of religion. The "tax" in *Rosenberger* (i.e., student activity fees) was like a general tax payment into the treasury, not like Henry's tax earmarked for religion.

Second, Henry's bill was amended to deal with the contingency where a taxpayer paid his assessment but neglected (or refused) to designate the Christian minister or church to receive the money. These undesignated monies were to be held in a separate account and later applied to "seminaries of learning" (schools) operating within the county where the undesignated tax money was collected. The bill needed to instruct officials what to do with these undesignated

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[48] This Court has twice rejected taxpayer claims brought under the Free Exercise Clause because of the absence of religious coercion to the taxpayer. See *Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (holding taxpayers lacked the requisite burden on religion to pursue free-exercise claim); *Central Bd. of Educ.* v. *Allen*, 392 U.S. 236, 248-49 (1968) (same).

monies. This amendment was added by pro-assessment forces to give the bill an even broader appeal. The option gave taxpayers more choices, especially for those who did not associate with any Christian church. Perhaps the taxpayers were Jewish, perhaps they were Christian but not affiliated with a local church, or perhaps they were of no religion.

Contrary to what Justice Souter assumes, however, the use of the undesignated tax monies for schools did not turn Henry's bill into the modern-day equivalent of a "neutral" program of aid to education available to a broad array of schools without regard to religion. With respect to the relatively small amount of undesignated tax money, the funds could only be used for "seminaries of learning." But in Henry's bill the nature of these schools was unclear. In Virginia between 1784 and 1785, there was no public school system. To the extent there were schools (as opposed to home education by tutor), they were mostly church-affiliated, likely Protestant.[49] Justice Thomas is correct that the special fund created by the undesignated assessments awaited future legislation by the Virginia General Assembly with respect to how the monies were to be appropriated.[50] There is no reason to assume that these undesignated monies would go to a "neutral" mix of secular and religious schools. Because Henry's bill did not create a "neutral" program of aid to schools

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[49] *Rosenberger*, 515 U.S. at 853 n.1 (Thomas, J., concurring) (citing authorities).

[50] *Id.* (noting that under the terms of the Assessment Bill undesignated tax monies could fund schools operated by a religious organization).

chosen without regard to religion, the bill's defeat cannot be read as a rejection of modern neutrality theory.

Third, Henry's Assessment Bill funded all Christian churches. An attempt to have the bill fund all religious groups was defeated. Thus the proposed assessment was not non-preferentialist, and thereby the defeat of the bill was not a defeat of non-preferentialism. It cannot be said that Henry's bill would have passed if only the assessment had been available to Jews, Muslims, Hindus, Buddhists, and Scientologists. Rather, the principle reason Henry's bill was defeated was the opposition believed it was best for religion and best for the body politic if support for religion was voluntary, not compulsory.

There are legitimate inferences to be drawn from the defeat of Henry's bill. The Protestant dissenters and James Madison, would have opposed the bill regardless of whether undesignated tax monies went to a special school fund. That is consistent with the central argument of the many petitions from those objecting to the tax. Moreover, the immediate follow-up to the defeat of Henry's bill was the passage of Jefferson's Bill for the Establishment of Religious Liberty. The operative paragraph of that bill codified what had de facto taken place over the last ten years, namely, Virginia's defunding of the Anglican Church. The unifying idea behind both the defeat of Henry's bill and the passage of Jefferson's was that support for religion should be voluntary – which is to say, not by the government. And the rationale was two-fold: to protect religion from government corrupting the church by bending her ministry to objectives set by the state;

and, that denying governmental cognizance over religious questions was best for unifying the body politic, which in turn bode well for sustaining the fledging republic.[51]

That still leaves the question: What did the opponents to Henry's bill regard as government-funded religion? The bill's opponents clearly regarded a special earmarked tax for clergy salaries and church buildings to be government support for religion. But would general treasury funds appropriated for science, math, and reading classes in K-12 schools, funded on a per student basis without regard to the religious or secular character of the organization operating the school, be regarded as support for religion? Based on the defeat of Henry's bill, we honestly cannot say. We hasten to add that the Court ought not to be troubled by the failure of the Virginia experience to answer the issue in *Rosenberger* (arising 210 years later). It is sufficient that we know the general principle to come out of the Virginia disestablishment experience is voluntarism. The rest is just so much detail left for others to answer as questions arose down the road

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[51] It was believed that for government to take sides in disputes over creeds, doctrine, and other forms of specific religious observance was to dangerously risk dividing the body politic just at the moment when unity was most needed. Hence, for example, the germ of an idea at the founding was that religious tests for public office were bad for civic peace, as were civil courts attempting to resolve disputes over religious doctrine. See, e.g., U.S. Const. Art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *Watson* v. *Jones*, 80 U.S. 679 (1871) (no civil court jurisdiction to resolve disputes over religious doctrine, polity, or church discipline).

concerning the principle's particular application. As already recorded above, this Court has since supplied that detail in a string of cases, all of which flesh-out the meaning of voluntarism: *Mueller*, *Witters*, *Zobrest*, *Zelman*, *Kendrick*, *Rosenberger*, *Agostini*, and *Mitchell*.

2. The Free Exercise and Establishment Clauses are not "frequently in tension."

The Eighth Circuit relied on *Locke*, and *Locke* quoted with approval a metaphor to the effect that the Free Exercise and Establishment Clauses are "frequently in tension." 540 U.S. at 718. Thus its assignment, as the Court saw it, was to determine if Missouri Const. Art. I, § 7, fell safely in the narrows where "'there is room for play in the joints' between the Clauses" and thus there remained space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. *Id.* The metaphor contemplates that the free-exercise and no-establishment principles run in opposite directions, and indeed will often conflict. It is as if the metaphor envisions free-exercise as pro-religion and no-establishment as, if not anti-religion, then at least tasked to hold religion in check. Such a view – wrongheaded, as we point out below – places the nine Justices in the power seat, balancing free-exercise against no-establishment, in whatever manner a 5 to 4 majority deems fair and just on any given day. Such unguided balancing accords maximum power to the Court (or worse, power to one "swing" justice), while trenching into the power of the elected branches.

For the "tension" fallacy, *Locke* cited *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971) ("Numerous cases considered by the Court have noted the internal

tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."). *Tilton*, in turn, relied on *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."), which is where this fallacy got its start.

Let it be noted that this "tension" fallacy was wholly dicta, not necessary for reaching the decision in *Walz*, *Tilton*, or *Locke*. So correcting the "tension" fallacy will not change the result in any of these cases, but will do a world of good to clarify how to think rightly about the Religion Clauses.

The view that the First Amendment's text, free-exercise and no-establishment, are frequently in tension, and at times in outright war with one another, is quite impossible. The full powers of the national government are both enumerated and limited, an original understanding later made explicit in the Tenth Amendment.[52] When ratified in 1791, the Bill of Rights did not vest more power in the national government.

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[52] The narrative in the text is drawn, with citation to authorities, from Carl H. Esbeck, *The First Federal Congress and the Formation of the Establishment Clause of the First Amendment*, 208-51, in T. Jeremy Gunn & John Witte, Jr., eds., *No Establishment of Religion: America's Original Contribution to Religious Liberty* (Oxford 2012), and Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 508-24 (2011) (Federalist and Anti-Federalist maneuvering concerning the absence of a bill of rights in the 1787 Constitution).

Rather, the fears of the Anti-Federalists, who were prominent in the First Congress, drove them to just the opposite objective: to deny to the new central government the power to interfere with essential liberties (for example, speech, press, civil jury trial) that might otherwise be implied from the more open-ended delegations of power in the Constitution of 1787 (e.g., Commerce Clause and the Spending Power).

The Federalists, in turn, gave little resistance to this enterprise because their position all along was that the national government had not been delegated such powers in the first place. Indeed, James Madison, a Federalist at this time in his career and the principal theorist behind the 1787 Constitution, led the charge for a Bill of Rights. The Federalists harbored a different anxiety, namely, to avoid a second constitutional convention as sought by Patrick Henry and others favoring increased state sovereignty. Adding a Bill of Rights would sap whatever popular support Henry had behind his effort. So Congress settled on the text of the proposed articles of amendment in mid-September 1789 with little more than the usual give and take. Twelve articles were submitted to the states, but only ten were ratified. The successful articles (numbers three through twelve) were thought to alter very little the status quo, but the Bill of Rights did calm the anxieties of many citizens over the centralization of national power, all while serving as a useful hedge against possible future government encroachments.

Most pertinent for present purposes is that each substantive clause in the first eight amendments (the Ninth and Tenth read as truisms) was designed to

anticipate and negate the assumption of certain powers by the national government – a government already understood to be one of limited, enumerated powers. Thus, for example, the free-speech provision in the First Amendment further limited national power – or, from the Federalists' perspective, merely made clear that the central government had never been delegated power to abridge freedom of speech in the first place. Likewise, the free-press provision further limited national power. These two negations on power – the speech and press clauses – can reinforce one another but they cannot conflict. Simply put, it is impossible for two denials of power to conflict. Similarly, the free-exercise provision further restricted national power and the no-establishment provision likewise restrained national power. These two negations – the Free Exercise Clause and the Establishment Clause – can overlap and thereby doubly deny the scope of permissible governmental action, but they cannot conflict.[53]

It is easy enough to envision how this works out in practice. Consider a young Muslim enrolled in the fourth grade of a public school. Her teacher begins the classroom day by having the students stand next to

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[53] Quite apart from the theoretical impossibility of "tension," the idea defies common sense. The clauses-in-conflict fallacy would attribute to the drafters, the founding Congress of 1789-90, the error of placing side by side two constitutional clauses that work to cancel one another. That is just too implausible to be taken seriously. Further, if it was possible for them to conflict, then how is a court to choose which is controlling? Why not choose free exercise over Non-establishment? Is one clause of the Constitution more important than the other? It all makes no sense; no sense, because the clauses cannot conflict.

their desks and recite together the Lord's Prayer. Our student, along with her parents, sue alleging a violation of the Free Exercise Clause. After the exchange of appropriate motions and argument, a federal district court concludes that the plaintiff's conscience is burdened and thus the Free Exercise Clause is violated. The relief granted, however, is an order permitting our Muslim fourth grader to remain seated and silent while the daily prayer exercise continues involving the teacher and other students. Our Muslim student, along with her parents, again sue, this time alleging a violation of the Establishment Clause. After the exchange of appropriate motions and argument, the federal district court concludes that the Establishment Clause is violated. This time the relief ordered is that the prayer exercise is suspended entirely for all the students.

The two Religion Clause compliment, both providing relief, but they do not – and cannot – conflict. If two other students in the classroom, along with their parents, now sue alleging that their right to religious liberty is denied because of the discontinuance of the prayer, this third complaint will be dismissed. Paraphrasing *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 225-26 (1963), the district court will explain that the right to religious freedom does not extend to a right to capture the engines of government, and put its machinery to work for you to better practice your faith.

Locke needs correcting when it said, following dicta in *Tilton* and *Walz*, that the Free Exercise Clause can conflict with the Establishment Clause and vice versa. The two clauses can, on rare occasions overlap and complement one another, but they can never conflict.

CONCLUSION

This Court should vacate the decisions below and remand with directions to abstain from reaching the state constitutional claim.

In the alternative, this Court should reverse the decision below relying on an overly expansive reading of *Locke* v. *Davey*, and find that Missouri Const. Art. I, § 7, as applied, violated Trinity Lutheran's rights under the Free Exercise Clause.

Respectfully submitted,

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