No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARAH 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 AMERICAN CIVIL LIBERTIES UNION, ACLU OF MISSOURI, AMERICAN HUMANIST ASSOCIATION, CENTER FOR INQUIRY, FREEDOM FROM RELIGION FOUNDATION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to defending the principles embodied in the U.S. Constitution and our nation•s civil rights laws. The ACLU of Missouri is a state affiliate of the national ACLU and has more than 4,500 members. As an organization that, for nearly a century, has been dedicated to preserving religious liberty, including the right to be free from compelled support for religious institutions and activities, the ACLU has a strong interest in the proper resolution of this case.

The American Humanist Association (AHA) is a national nonprofit organization that advocates progressive values and equality for humanists, atheists, freethinkers, and other nonthe ists, and a society guided by reason, empathy, and our growing knowledge of the world. Founded in 1941 and headquartered in Washington, DC, its work is extended through 180 local chapters and affiliates across America, including Missouri. AHA promotes Humanism, a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. AHA objects to the use of taxpayer revenue to support

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[1] The parties have consented to the submission of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

religious activities, and joins in filing this amicus brief in order to help defend the constitutional requirement of separation of church and state.

The Center for Inquiry (CFI) is a nonprofit educational organization dedicated to promoting and defending reason, science, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The Freedom From Religion Foundation (FFRF), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers in the United States, representing 24,000 atheists and agnostics. FFRF is a growing organization, with members in every state, including more than 300 in Missouri. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional separation between state and church. This second purpose includes ensuring that citizens, including FFRF members, are not forced to violate their conscience by financing religion, which gives FFRF a strong interest in this case.

People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now

has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise Clause and Establishment Clause of the First Amendment to the Constitution work to truly protect religious liberty for all Americans, and that the right to be free from compelled financial support for religious institutions and activities is a fundamental part of religious liberty, as our Founders recognized. PFAWF thus has a strong interest in the proper resolution of this case and accordingly joins this brief.

SUMMARY OF ARGUMENT

The question presented in this case is based on a fundamentally flawed assumption: that the government •has no valid Establishment Clause concernŽ respecting the direct payment of taxpayer dollars to a church. Pet. at i. The Court of Appeals, while correctly holding that Missouri was well within its constitutional authority to decline public funding of a church based on state-law protections, made the same erroneous assumption as Petitioner. In dicta, the court suggested that Missouri could have provided the funding at issue without violating the Establishment Clause.

In fact, the government•s provision of direct cash aid to a house of worship raises constitutional concerns of the highest order. Missouri could not have included Trinity Lutheran Church in the grant program without violating the First Amendment because the Establishment Clause squarely prohibits the direct payment of taxpayer funds to churches and other houses

of worship. In short, Missouri•s decision to exclude Trinity Lutheran Church from the program was not merely permissible; as a constitutional matter, it was required.

The use of taxpayer dollars to aid churches was one of the Framers• greatest concerns and, in large part, animated the passage of the Establishment Clause. James Madison and Thomas Jefferson recognized that compelling taxpayers to provide direct financial support to houses of worship encroaches on the right of conscience and threatens our freedom to decide for ourselves which faith to

Churches and houses of worship are the quintessential religious institutions. By tradition and design, they play a unique and central role in many faiths. As a practical, spiritual, and symbolic matter, they are often the lifeblood and focal point of the religious community. The many Establishment Clause concerns that this Court has identified with respect to the direct funding of non-church religiously affiliated institutions, such as schools, apply with even greater

playground supported by taxpayer dollars for religious purposes, such as a gathering space in which the church directs children in prayer or other religious instruction. And the state program includes no monitoring requirements or other precautions to protect against such impermissible religious uses of the playground. This is more than sufficient to render the grant unconstitutional.

ARGUMENT

I. The Establishment Clause Prohibits The State From Awarding Direct Grants Of Taxpayer Funds To Houses Of Worship.

Petitioner asks this Court to issue an unprecedented ruling that would require directs ch cash(o)5(ficbsidie protarch)]T. S

demonstrate, Missouri•s funding decision was not only permissible, but constitutionally commanded. Requiring Missouri to dispense taxpayer dollars to a church would contravene the fundamental principles underlying the First Amendment and gut one of its core religious-liberty protections.

A. The Establishment Clause Reflects The Framers• Profound Concern Over Taxpayer Funding Of Churches.

1. The Framers opposed taxpayer support of houses of worship and other religious institutions, even as part of a general, nondiscriminatory program.

In drafting and adopting the Establishment Clause, the Framers, including Madison (the principal architect of the First Amendment) and Jefferson, were reacting to what they viewed as the unconscionable treatment of religious dissenters and minorities throughout the colonies. Religious minorities and nontheists were imprisoned and persecuted for their purported heresy, and they were •compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.Ž Everson v. Bd. of Educ., 330 U.S. 1, 10 (1947) (footnote omitted). In fact, at the time, •[a]lmost every colony exacted some kind of tax for church support.Ž Id. at 10 n.8.

It was against this historical backdrop that Madison drafted his famous •Memorial and Remonstrance

Against Religious Assessments,Ž opposing Virginia•s •Bill establishing a provision for Teachers of the Christian Religion.Ž Under the original text of the bill, each taxpayer could direct his taxes to support religious education car7

About Original Intent , 27 Wm. & Mary L. Rev. 875, 921, 923 (1986) (The Framers •did not substitute nonpreferential taxes for preferential taxes; they rejected all taxes. . . . The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but th e government would neither help nor interfere.Ž); Flast v. Cohen, 392 U.S. 83, 103-04 (1968)(•The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.Ž).

While the Virginia bill promoting taxpayer support for religious education languished in the wake of Madison•s famous protest, another bill„rooted in the same religious freedom ideals espoused by Madison„ flourished. Drafted by Thomas Jefferson and passed in 1786, the •Virginia Bill for Religious LibertyŽ declared that •compel[ling] a man to furnish contributions of money for the propagation of opinions[,] which he disbelieves[,] is sinful and tyrannical,Ž and provided, as a remedy to this evil, •[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.Ž Everson, 330 U.S. at 12-13 (internal quotation marks omitted).

Through the Memorial and Remonstrance and the Virginia Bill for Religious Freedom, Madison and Jefferson gave voice to many who objected to the abusive treatment of religious minorities and dissenters.

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling

> of abhorrence. The imposition of taxes to pay ministers• salaries and to build and maintain churches and church property aroused their indignation. It was th ese feelings which found expression in the First Amendment.

Id. at 11 (footnotes omitted).

2. The Establishment Clause was intended, in part, to protect religious freedom from the specific threats associated with taxpayer funding of religious institutions.

The non-establishment principle embraced by the Framers was not incorporated into the First Amendment out of hostility toward religion. Rather, it reflected the Framers• understanding that religious

Tying houses of worship financially to the State also undermines religious freedom by inviting the government to scrutinize and oversee their operations. See Lemon v. Kurtzman, 403 U.S. 602, 621 (1971) (•The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.Ž). Despite any short-term gain for the government-funded religious institution, in the long run, religious liberty is eroded, and, in the case of

and Remonstrance ¶ 9: •It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.Ž).

Further, it pits faith against faith, sect against sect, by creating competition and conflict among denominations and religions as they fight for an ever-larger share of the government•s largesse. See id. at 53-54 (Rutledge, J., dissenting). This type of religiously based discord threatens the political process and, ultimately, our democracy. See Lemon, 403 U.S. at 622-23; Everson, 330 U.S. at 54 (Rutledge, J., dissenting) (•The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state

In Walz v. Tax Commission of City of New York , 397 U.S. 664 (1970), the Court upheld tax exemptions for churches in the face of an Establishment Clause challenge. The Court•s ruling hinged on the •unbroken practice of according the exemption to churchesŽ that spanned •our entire national existence and indeed predates it,Ž as well as the fact that •the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.Ž Id. at 675, 678. But the Court warned of the dangers of direct taxpayer grants for churches:

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation.

Id. at 675 (footnote omitted).

Twenty-five years later in Rosenberger, the Court again acknowledged that the government•s award of cash aid for churches would violate the Establishment Clause: •It is, of course, true that if the State pays a

The Court•s wariness is well founded. Houses of worship are uniquely situated religious institutions. While faith-based nonprofits and religiously affiliated schools may play some role in the religious community, houses of worship are the lifeblood of many faith systems; they stand at the heart of organized religion. Churches occupy vital and central roles in Christianity, as do mosques in Islam, temples in Hinduism, synagogues in Judaism, gurdwaras in Sikhism, and so on. Symbolically, these houses of worship are inextricably intertwined with the faiths they represent in a manner that is just not true of other religious institutions.

For these reasons, our laws frequently distinguish between houses of worship and other religiously affiliated institutions and organizations in different contexts. For example, Section 501(c)(3) of the Internal Revenue Code differentiates between houses of worship and other nonprofits, religiously affiliated or otherwise. Relying on this distinction, many provisions of the tax code provide exemptions to houses of worship that are not afforded to other religiously affiliated entities. Although tax-exempt organizations are generally required to file a Form 990 (Return of Organization Exempt From Income Tax), for instance, churches are not. 26 U.S.C. § 6033(a)(3)(A)(i). Churches also are exempt from registering wit h the IRS as nonprofit organizations. 26 U.S.C. §§ 501(c)(1)(A), 501(c)(3). The Lobbying Disclosure Act does not apply to churches. 2 U.S.C. § 1602(8)(B)(xviii). And churches enjoy enhanced protection against audits. 26 U.S.C. § 7611. Similarly, •in order to prevent excessive government entanglement with religion,Ž the Employee Retirement

the concerns associated with providing such aid to non-church religiously affiliated institutions. These concerns cannot be overcome by any measure of safeguards. On the contrary, such government intrusion into the operation of a church would, with great likelihood, itself violate the First Amendment. See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (noting that the Constitution guarantees churches •an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrineŽ); see also Lemon, 403 U.S. at 620-22.

Accordingly, Missouri was not only permitted to deny funding to Trinity Lutheran Church; it was constitutionally mandated to do so. In contrast to non-church religiously affiliated institutions that have sought aid in previous cases before this Court, Trinity Lutheran is a house of worship.

Although the Church purports to lay claim to this subsidy for the preschool and day care center it operates on church premises, they are one and the same: The preschool and day care merged into the church in 1985. Pet. App. 2a. And, ultimately, it is the church that seeks taxpayer dollars to improve chu rch facilities (in this case a playground), which will benefit not only the preschool and day care center but the church as a whole.

The aid sought by Petitioner is thus of an entirely different character than generally available services provided to houses of worship by police and fire departments. See Everson, 330 U.S. at 60-61 & n.56 (Rutledge, J., dissenting). And it goes far beyond the

indirect, tax-exempt aid th at this Court upheld for churches in Walz: Here, the State would be •transfer[ring] part of its revenueŽ into the coffers of a house of worship. Cf. Walz, 397 U.S. at 675; Zelman v. Simmons-Harris , 536 U.S. 639, 649 (2002) (•[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programsof true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.Ž (internal citations omitted)); Zobrest v. Catalina Foothills Sch. Dist. , 509 U.S. 1, 10, 12…13 (1993) (upholding provision of government-paid sign-language interpreter for deaf student at religious school because •no funds traceable to the government ever find their way into sectarian schools• coffersŽ and the interpreter would •be present in a sectarian school only as a result of the private decision of individual parentsŽ); Everson, 330 U.S. at 18 (•The State contributes no money to the schools. It does not support them.Ž).[3] In short, no matter how well-meaning the grant program may be, the funding proposed by Petitioner cannot be reconciled with our constitutional

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[3] That the grants are distributed as part of a general program does not render them constitutional when directed to a church or house of worship. The Framers resisted such funding, see supra Part I(A)(1), and the Court has •never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid.Ž Mitchell v. Helms, 530 U.S. 793, 839 (2000) (O•Connor, J., controlling concurrence). Moreover, the discretionary nature of the Scrap Tire Program, see Resp. Br. at 22-23 (citing Pet. App. 120a-154a), compounds the Establishment Clause dangers here.

(O•Connor, J., controlling concurrence). Thus, in its rulings severely limiting such aid, the Court has continually highlighted the •special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.Ž Rosenberger, 515 U.S. at 842.

In Committee for Public Education & Religious Liberty v. Nyquist , 413 U.S. 756, 763-64 (1973), for example, the Court struck down a law that would have provided direct cash aid to private elementary and secondary schools, including religious schools, serving large numbers of low-income students. The aid was to be used for a worthy causeæthe •maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.Ž Id. at 762 (internal quotation marks omitted); see also id. at 763 (noting the legislature•s findings that a •fiscal crisis in

religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the

expiration of the prohibition on religious use after twenty years, which would have •open[ed] the facility to use for any purpose at the end of that period.Ž Tilton , 403 U.S. at 683. In that regard, the Court held that the program failed to satisfy the Establishment Clause because •the unrestricted use of a valuable property is in effect a contribution of some value to a religious body.Ž Id. (explaining that if the building were converted to a chapel or •otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religionŽ).

Similarly, in Levitt v. Committee for Public Education & Religious Liberty , 413 U.S. 472, 479-80 (1973), the Court affirmed a permanent injunction barring direct money grants for religious schools to provide, among other services, the administration, grading, and reporting of certain examination results. Noting that •no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction,Ž the Court held that the grants ran afoul of the Establishment Clause because •the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.Ž Id. at 480. The Court reaffirmed that •th e State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.Ž Id. But see Comm. for Pub. Educ. & Religious Liberty v. Regan , 444 U.S. 646, 659 (1980) (upholding subsequent version of the Levitt program after statute was amended to provide •effective means for insuring that the cash reimbursements would cover only secular servicesŽ and

•ample safeguards against excessive or misdirected reimbursementŽ).

On at least one occasion, this Court has held that, despite numerous safeguards to protect against religious uses, a direct cash aid program was nevertheless unconstitutional. In Lemon, the Court invalidated a Pennsylvania law that directly reimbursed private elementary and secondary schools, including religious schools, for expenses relating to teachers• salaries, textbooks, and instructional materials. 403 U.S. at 609, 620-25. The measure was passed after the Legislature determined that rising costs in the State•s private schools had caused a •crisis.ŽId. at 609. Under the statute, the reimbursement aid was restricted to •courses presented in the curricula of the public schoolsŽ„specifically, •solelyŽ secular subjects such as mathematics, foreign languages, physical science, and physical education. Id. at 610 (internal quotation marks omitted). Moreover, the use of the aid in connection with •any subject matter expressing religious teaching, or the morals or forms of worship of any sectŽ was explicitly prohibited, and the State Superintendent of Public

surveillance necessary to ensure that teachers play[ed] a strictly non-ideological roleŽ engendered their own troubling result: unconstitutional entanglement between religion and government. Id. at 620-21.[5]

B. The Church Cannot Receive A Direct Grant Of Taxpayer Funds Without Adequate Safeguards.

Trinity Lutheran has made it clear that it will not (and cannot) provide the certifications that Missouri requires for participation in the Scrap Tire Program: that it is •not owned or controlled by a church,Ž that its •mission and activities are secular,Ž and that the grant will be used for non-religious purposes. Pet. App. 128a-129a (ECF No. 36-3). Absent those certifications, there is simply no way to ensure that any grant that Trinity Lutheran receives will not be used to promote religion in violation of the Establishment Clause. That alone is sufficient to uphold the decision below.

But, even if the Church could and did provide the certifications that Missouri requires, it would be insufficient to protect the constitutional interests at stake because there is no way for the State to enforce these restrictions. Unlike the funding programs upheld in Tilton and Roemer, for example, the State is not

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[5] The Court•s long-standing commitment to ensuring that direct aid to religious institutions is not used for religious purposes extends as well to in-kind„as opposed to direct cash„aid. See, e.g.Mitchell , 530 U.S. at 840-41, 848-49 (O• Connor, J., controlling concurrence) (detailing numerous safeguards put in place to ensure that government•s direct, in-kind loans of materials and equipment to public schools were not diverted to religious uses).

authorized under the Scrap Tire Program to conduct inspections, or otherwise monitor the playground facilities to ensure that they are restricted to non-religious uses. See generally Mo. Rev. Stat. §§260.335, 260.273.6(2); Mo. Code Regs. tit. 10 § 80-9.030. Likewise, there appears to be no mechanism for the State to recover all or part of a grant should a recipient use the playground for impermissibl e sectarian activities.

Trinity Lutheran argues that, if awarded to the Church, the grant at issue here would be •wholly secular.Ž Pet. Br. at 39. Not so. The limited record before the Court shows a signifi cant risk that the Church will use its taxpayer-improved playground for religious activities. Trinity Lutheran Church integrates religious See t6snsmo4

CONCLUSION

The suggestion by Petitioner and the Court of Appeals that providing direct cash aid to a church raises no valid Establishment Clause concerns is belied by our constitutional history and this Court•s precedents. The judgment of the Eighth Circuit should be affirmed for the reasons presented herein.

Respectfully submitted,

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