No. 15-556

In The Supreme Court of the United States

FLORENCE AND DERRICK DOYLE, ET AL.,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

SUPPLEMENTAL BRIEF

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The Doyle, Anderson, and Oakley families (hereinafter "the Families") file this supplemental brief pursuant to Rule 15.8 to bring to the Court's attention "intervening matter not available at the time of the [Families'] last filing." That "intervening matter" is the Court's grant of certiorari in *Trinity Lutheran Church of Columbia, Inc. v. Pauley* (No. 15-577) on January 15, 2015.

Although *Trinity Lutheran*, on the surface, raises an issue similar to the Families' case – namely, the federal constitutionality of denying public aid based on religion – there is a critical difference between the cases. As the Families noted in their petition and reply brief, *Trinity Lutheran* involves a program of direct aid to institutions – *not* a student aid program, like Douglas County's, that operates on the independent and private choice of students and their parents. *See* Families' Pet. 19 n.8; Families' Reply Br. 5-6.

This Court "ha[s] drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citations omitted). The Court drew this distinction as early as *Mueller v. Allen*, 463 U.S. 388, 400 (1983), and it has reiterated the distinction in, among other cases, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986), *Zobrest v. Catalina Foothills School*

District, 509 U.S. 1, 10 (1993), *Agostini v. Felton*, 521 U.S. 203, 225-26 (1997), and *Locke v. Davey*, 540 U.S. 712, 719 (2004). It is a distinction that the Eighth Circuit itself drew in *Trinity Lutheran*. *See* 788 F.3d 779, 785 (8th Cir. 2015).

Simply put, this Court uses a distinct constitutional test in determining whether religious schools may participate in direct institutional aid programs, as opposed to student aid programs. Although the Court has allowed religious institutions to participate, alongside secular ones, in institutional aid programs, it has required safeguards to ensure that the aid is not diverted to the advancement of the recipient institution's religious mission. *See Mitchell v. Helms*, 530 U.S 793, 840-41 (2000) (opinion of O'Connor, J., joined by Breyer, J.). By contrast, the Court has not required such safeguards in student aid programs, because "the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. The greater caution the Court has exercised in the institutional aid context reflects the heightened Establishment Clause concerns implicated when governmental aid is provided directly to religious institutions, as opposed to students.

Resolution of *Trinity Lutheran* and the present case will therefore likely involve consideration of different lines of cases, different legal tests, and different governmental interests. It makes sense for this Court to hear both cases at the same time in order to

address the important, but unique, issues that arise in the institutional and student aid contexts and to resolve the distinct circuit splits that have developed in the two areas. Hearing both cases would give the Court the opportunity to provide much needed guidance to the lower courts as they continue to grapple with issues of religious neutrality in both types of programs.

Finally, given the heightened Establishment Clause concerns in the institutional aid context, it is quite possible that this Court could conclude that a State has a sufficiently important interest for barring churches or other religious entities from institutional aid programs but *not* for barring religious options from student aid programs. In other words, this Court could conclude that affirming the Eighth Circuit's judgment in *Trinity Lutheran* is warranted but that reversing the Colorado Supreme Court's judgment in this case is necessary. The converse, however, is unlikely: if this Court concludes that the judgment in *Trinity Lutheran* must be reversed, then reversal of the Colorado Supreme Court's judgment in this case would almost certainly be required.

For this reason, this Court should grant the Families' petition and hear both cases at the same time, on a non-consolidated basis. At a minimum, it

should hold the Families' petition pending resolution of *Trinity Lutheran* on the merits.

Respectfully submitted,

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