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 *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENT

ALICE O'BRIEN
KRISTEN L. HOLLAR
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

JOHN M. WEST
(*Counsel of Record*)
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600
jwest@bredhoff.com

Counsel for Amicus Curiae

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide organization of some three million education professionals, the vast majority of whom are employed by public school districts, as well as colleges and universities, throughout the United States. In furtherance of its goal of "great public schools for every student," NEA has worked actively to ensure that public education is not undermined by ill-considered "voucher" programs that undercut equitable education opportunities by diverting public-school funding to sectarian and other private schools. State constitutional provisions like Missouri's Article I, § 7, through which the people of that state have determined that public funds should not be used to pay for religious education and other forms of religious exercise, have been interpreted to protect against attempts to use public funds for such purposes. NEA has consistently advocated for that result and has opposed attempts to use the federal Constitution to nullify these state constitutional guarantees of religious liberty. This Court rebuffed such efforts over a decade ago in *Locke v. Davey*, 540 U.S. 712 (2004), and NEA submits this brief in opposition to current attempts to undermine state constitutions by limiting the Court's holding in *Locke* to its specific facts.[1]

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party, nor any person other than *amicus curiae*, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has granted blanket consent to the filing of *amicus* briefs, and Respondent has given written consent to the filing of this brief.

SUMMARY OF ARGUMENT

Missouri's interpretation of Article I, § 7 of its constitution as prohibiting the state from making a grant to the Petitioner church under its scrap tire program is consistent with a broad tradition under which the state courts have interpreted provisions of their state constitutions more expansively than this Court has construed analogous provisions of the federal Bill of Rights. Particularly over the last forty years, the states have looked to their own constitutions as independent guarantors of individual rights, which the state courts have increasingly construed on the basis of state-specific considerations rather than as mere reflections of analogous federal provisions. This development has been particularly pronounced with respect to public funding of religion, where state constitutional provisions guaranteeing freedom of conscience and separation of church and state typically have different historical origins and markedly different language from that found in the federal First Amendment. Thus, many state courts have departed from this Court's Establishment Clause precedents in construing their state constitutions to prohibit public funding of religion in ways that would be permissible under the Establishment Clause.

This Court's decision in *Locke v. Davey* stands for the proposition that states may do so, in order to vindicate their own anti-establishment interests, without running afoul of the federal Free Exercise or Equal Protection Clauses. Petitioner's attempt to limit *Locke* to its specific facts involving the training of clergy would effectively substitute a uniform federal standard regarding public funding of religion for the

states' ability to determine, under their constitutions, whether their citizens' tax payments should be used to support religion. More specifically, it would be a serious error for the Court to decide this case on the basis of Petitioner's argument that it involves nothing more sectarian than shredded tires. Although this Court has generally held the Establishment Clause to permit "purely secular" aid to religious institutions, many state courts have reached a different result under their state constitutions – including in cases involving public funding of bus transportation for students attending religious schools, secular textbooks for students at such schools, or construction of secular facilities at church-related colleges. Holding that the federal Constitution bars the states from prohibiting public funding of religious organizations through such aid that is secular in nature would effectively overrule decades of decisions in which the state courts have sought to ensure religious liberty under the provisions of their state constitutions.

ARGUMENT

In a seminal article nearly forty years ago, Justice William J. Brennan, Jr., called attention to what has become one of the most important developments in American jurisprudence in recent decades – the re-emergence of state constitutional law as a source of individual rights separate and independent from the federal Constitution. Thus, Justice Brennan noted in 1977 that "more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." William J. Brennan, Jr., *State Consti-*

tutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 495 (1977). The construction of state constitutional provisions independently of their federal analogues has, in the intervening years, only become more firmly established as a fundamental principle of constitutional law in many of the states.

This trend toward independent construction of state constitutions has found particular traction with regard to state constitutional protections of religious liberty. In this area, the state constitutional provisions often are cast in language quite different from, and more focused than, that of the federal First Amendment. In many cases – particularly with regard to the issue of public funding of religion – the state courts have construed their constitutional provisions in a manner that is more protective of religious liberty than what this Court has held to be mandated by the federal Establishment Clause. In *Locke v. Davey*, 540 U.S. 712 (2004), this Court found that the federal Constitution left "room for play in the joints," *id.* at 718, such that the states were not limited, either by the Free Exercise Clause or the Equal Protection Clause, to following the lead of this Court and the federal Constitution in determining how firmly to draw the line of separation between church and state.

The dozen years since *Locke* was decided have seen repeated efforts to eviscerate that decision, and thus to weaken state constitutional religion clauses, by limiting *Locke* to the specific facts upon which it was decided. This case, in which the Court has agreed to assess one such argument, will thus be of critical importance for the ability of state courts to continue to construe the religious liberty clauses of their state

constitutions in a manner independent of this Court's interpretation of the First Amendment.

Amicus NEA submits this brief in order to emphasize to the Court the history of the states' independent interpretation of their own constitutional protections of individual rights – both generally, and more specifically with regard to state constitutional guarantees of religious liberty and freedom of conscience that restrict the use of public funds to support religion. In a variety of contexts, many state courts have interpreted their state constitutional provisions governing separation of church and state in ways that depart from – and in many instances refuse to follow – the results that this Court has reached, and the interpretive methods it has applied, in construing similar questions under the federal Establishment Clause. Adopting the reasoning of Petitioner and its *amici* would effectively nullify long lines of state court decisions, replacing state courts' independent interpretation of their own religion clauses with a uniform federal standard for public funding of religion. Doing so would serve neither the interests of federalism nor of religious liberty.

I. STATE CONSTITUTIONAL LAW IS AN INDEPENDENT GUARANTOR OF FUNDAMENTAL RIGHTS, INCLUDING RELIGIOUS LIBERTY

A. The State Courts Have, in the Last Four Decades, Recognized State Constitutions as Independent Sources of Individual Rights

Like the Constitution of the United States, the constitutions of each of the several states contain provi-

sions protecting the rights of individual citizens vis-à-vis their government. Although these state constitutional declarations of rights typically overlap with much of what is found in the first ten amendments to the federal Constitution, they are – as a historical matter – not derivative of the federal charter. Instead, "[f]ar from being the model for the states, the Federal Bill of Rights was added to the Constitution to meet demands for the same guarantees against the new central government that people had secured against their own local officials." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 381 (1980). And indeed, as new states joined the union and wrote their own constitutions, these states "took their bills of rights from the preexisting state constitutions rather than from the federal amendments." *Id.* Until well into the twentieth century, moreover, these state constitutional provisions had been the *only* protection of individual rights against state authorities. *See*, *e.g.*, *Massachusetts v. Upton*, 466 U.S. 727, 738-39 (1984) (Stevens, J., concurring).

The incorporation of many portions of the federal Bill of Rights into the Fourteenth Amendment – thus making them applicable to the states – led, however, to a period during which state constitutional provisions protecting individual rights tended to be treated as merely duplicative of their counterparts in the federal Constitution. Incorporation thus "led many state courts and the lawyers who practice before them to ignore the state's law, enforcing only those personal rights guaranteed by federal law, or to assume that the state's own guarantees must reflect whatever the United States Supreme Court finds in their federal

analogues." Linde, 9 U. Balt. L. Rev. at 382. Indeed, as late as 1980, Justice Hans Linde of the Oregon Supreme Court could observe that "today, most state courts look to interpretations of the Federal Bill of Rights for the meaning of their own state constitutions, in the rare cases when they consider them at all." *Id.* at 382-83.

That is no longer the case. By 1992, when it struck down a judicial gag order as incompatible with the state constitution, the Supreme Court of Texas was able to point to some 600 published opinions during the previous two decades in which state courts had "relied on state constitutional grounds to provide protections broader than federally interpreted guarantees under the United States constitution." *Davenport v. Garcia*, 834 S.W.2d 4, 12 n.21 (Tex. 1992); *see also*, *e.g.*, *Arnold v. City of Cleveland*, 616 N.E.2d 163, 168 (Ohio 1993) (joining the "noticeable trend … among state courts," which are "increasingly relying on their constitutions when examining personal rights and liberties").[2]

---

[2] Apart from these state court decisions themselves, the doctrinal framework for this renewed reliance on state constitutional law has been developed in a series of scholarly articles by state court justices and judges. *See*, *e.g.*, Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399 (1986); Stanley G. Feldman & David L. Abney, *The Double Security of Federalism*, 20 Ariz. St. L.J. 115 (1988); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Valparaiso Univ. L. Rev. 427 (1996); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U. L. Rev. 887 (1980); Stewart G. Pollock, *State Constitutions as Separate Sources of fundamental Rights*, 35 Rutgers L. Rev. 707 (1983); Robert F. Utter,

Many of these state court decisions have emphasized not only that the state constitution may provide broader protection for individual rights, but that state constitutional provisions should be interpreted *independently* rather than as a function of their federal counterparts. Under this "primacy" approach, the Florida Supreme Court explained that,

> when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992). *See also*, *e.g.*, *State v. Jewett*, 500 A.2d 233, 236-37 (Vt. 1985) (interpretation of state constitution should be based on, *inter alia*, historical and textual analysis of the state constitution, as well as consideration of sibling state decisions involving identical or similar clauses); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (similar).

Under this view, "[t]he proper sequence is to analyze the state's law, including its constitutional law, be-

---

State Constitutional Law, The United States Supreme Court, and Democratic Accountability, 64 Wash. L. Rev. 19 (1989); Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981); Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951 (1982); Linde, 9 U. Balt. L. Rev., *supra*.

fore reaching a federal constitutional claim." *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981). And, in doing so, "[t]he right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984).[3]

Numerous state court decisions have emphasized the importance of such independent interpretation even where the state constitutional provision is one that closely tracks a federal provision. As the Indiana Supreme Court put it, "[t]he Indiana Constitution has unique vitality, even where its words parallel federal language," so that "[w]hen we interpret language in our state constitution substantially identical to its federal counterpart, 'we may part company with the interpretation of the Supreme Court of the United States or any other court based on the text, history, and decisional law elaborating the Indiana constitutional right.'" *Wallace v. State*, 905 N.E.2d 371, 378 (Ind.

---

[3] To be sure, not all state courts have adopted the same approach to their state constitutions. Some, for example, continue to look first to the federal Constitution, turning to the state counterpart only where they "have found the federal analysis unpersuasive, either because we deemed it flawed, … or because of distinctive state characteristics, … or because of undeveloped federal analogs." *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (adopting "interstitial" approach); *State v. Lessary*, 865 P.2d 150, 154 (Haw. 1994) ("We will only extend the double jeopardy protections of the Hawai'i Constitution, however, if we find that the protections afforded by the United States Constitution are not adequate.").

2009). And, while "an examination of related federal precedent may be useful as part of the state constitutional analysis," it is "not as binding authority, but as one form of guidance." *Edmunds*, 586 A.2d at 895.

Even where a state court previously has held a state constitutional provision to be "coextensive" with its federal counterpart, these courts nonetheless have often recognized that they "have the authority and, when necessary, duty" to construe the state constitutional language independently rather than following the decisions of this Court wherever they lead. *Doe v. State*, 189 P.3d 999, 1004-05 (Alaska 2008) (declining to follow this Court's changed interpretation of federal ex post facto clause, notwithstanding earlier holding that it was "coextensive" with the state provision). And, as the New York Court of Appeals put it, "[a]n independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright." *People v. Scott*, 593 N.E.2d 1328, 1342 (N.Y. 1992).

This movement among the state courts to construe their state constitutions independently of the federal Constitution has, if anything, only been encouraged by this Court and by individual Justices. Justice Brennan's 1977 article "has been regarded as the Magna Carta of state constitutional law," Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983), and any number of opinions by the Court itself have echoed that "a state court is entirely free to read its

own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *see also, e.g.*, *California v. Greenwood*, 486 U.S. 35, 43 (1988) (same); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983) (outlining how state courts should make clear that a decision rests on state constitutional grounds); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (acknowledging state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); *Massachusetts v. Upton*, 466 U.S. at 735 (Stevens, J., concurring) (admonishing state court for committing an "error of a … fundamental character" by "rest[ing] its decision on the Fourth Amendment to the United States Constitution without telling us whether the warrant was valid as a matter of [state constitutional] law").

B. Many State Courts Have Construed the Religious Liberty Provisions of their State Constitutions Differently from this Court's Interpretation of the First Amendment

1. Virtually all of the states' constitutions contain one or more clauses guaranteeing, in some form, freedom of conscience and separation of church and state. Few of these state constitutional provisions parallel the federal First Amendment in either text or history. Nearly all of them were written, at least initially, at a time when the First Amendment was not under-

stood to apply to the states, so that it was these state constitutional provisions that set the limits on the extent to which state authorities could use public funds to support religious activity.

Most of the state religion clauses that restrict the use of public funds are of one or the other of two types. First, approximately half of the states' constitutions contain a so-called "compelled support" clause. Typical is the Vermont Constitution, which provides "that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Vt. Const. ch. I, art. 3. Language of this type first appeared in Pennsylvania's 1776 Constitution, and its origins date back to that state's 1682 Frame of Government. *See Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539, 556 (Vt. 1999) (tracing the language adopted by Vermont in 1777); *Locke*, 540 U.S. at 723. The prohibition against compelled "support" has generally been held to include compelling citizens to support religious organizations through their taxes. *See*, *e.g.*, *Embry v. O'Bannon*, 798 N.E.2d 157, 161 (Ind. 2003); *Almond v. Day*, 89 S.E.2d 851, 858 (Va. 1955); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992); *Knowlton v. Baumhover*, 166 N.W. 202, 207 (Iowa 1918); *Chittenden*, 738 A.2d at 550.

A second common type of religion clause, contained in the constitutions of more than two-thirds of the states, prohibits the use of public funds "in aid of" or "for the benefit of" religion and religious institutions. The Colorado Constitution, for example, contains the following detailed prohibition:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colo. Const. art. IX, § 7. Such "no aid" clauses were, for the most part, added to state constitutions – or incorporated in the constitutions of newly admitted states – during the last half of the nineteenth century, at a time when the developing movement for free, secular public education intersected with increasing opposition to the diversion of public school funds to sectarian schools. *See*, *e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 646-47 (1971) (opinion of Brennan, J.); *see generally* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65 (2002).[4]

---

[4] These no-aid clauses are sometimes referred to – often pejoratively – as "Blaine Amendments," after a failed federal constitutional amendment of 1876. Petitioner and a number of its *amici* have joined a chorus of organizations promoting public funding of religious education which, over the last two decades, have mounted a campaign to discredit these nineteenth century constitutional amendments as the product of "the virulent anti-Catholic animus that dominated American domestic politics in the decade following the Civil War." Br. for Douglas County

2. Because both the text and the history of these state constitutional provisions differ markedly from that of the First Amendment, state courts have, if anything, been even more amenable to interpreting them independently of the federal Constitution than in the case of due process, search and seizure, or other provisions that often track the federal Constitution more closely. As the Indiana Supreme Court has explained:

> Clearly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.

City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 446 (Ind. 2001). Thus, in assessing the extent to which public funds may be used

---

Sch. Dist. *et al.* at 27; *see also* Ptr. Br. at 43 ("bigotry"; "hostility to the Catholic Church and to Catholics in general"); Br. of Institute for Justice at 32 ("steeped in anti-Catholic animus"). This attempt to characterize the "no aid" provisions adopted by many states during the latter half of that century as simply the product of anti-Catholic bigotry rests on historical analysis that is at best shoddy and at worst tendentious. In fact, the nineteenth century debate over the "school question" involved multiple and complex historical threads going back well beyond the rise of nativism, which cannot simplistically be ascribed to "bigotry." *See generally* Br. of Legal and Religious Historians in Support of Respondent; *see also* Feldman, 18 J.L. & Pol. at 92-117 (demonstrating that the "non-sectarian ideal" that motivated the no-aid movement was far broader than simple anti-Catholicism, and that as it succeeded it lost its anti-Catholic coloring).

to support religious endeavors, the state courts have developed a rich body of caselaw construing both "compelled support" and "no aid" provisions in accordance with their own state constitutional doctrine, independently of federal Establishment Clause jurisprudence.

As might be expected, the outcomes of these cases differ from state to state. But many state courts, in a variety of contexts, have interpreted their state constitution religion clauses as providing greater religious liberty protection to taxpayers than does the federal First Amendment (as this Court has construed it), and thus as proscribing more strictly the use of public funds to pay for religious activities.

(a) Thus, for example, while this Court has long held that the Establishment Clause does not prohibit states from providing secular textbooks or bus transportation to students attending religious schools, *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (secular textbooks) – on the reasoning that "bus rides have no inherent religious significance," *id.* at 244 – a number of states have reached the opposite conclusion under their state constitutions. *See Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) (textbooks); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981) (textbooks); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (textbooks); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550 (Neb. 1974) (textbooks); *Dickman v. School Dist. No. 62C*, 366 P.2d 533 (Or. 1961) (textbooks); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971) (bus transportation); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968) (bus transportation); *Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963) (bus

transportation); *State ex rel. Reynolds v. Nusbaum*, 115 N.W.2d 761 (Wis. 1962) (bus transportation); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) (bus transportation); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (bus transportation); *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949) (bus transportation).

These decisions have been based on reasoning like that of the California Supreme Court in "declin[ing] to follow the rationale of *Allen*":

> [I]t is not the meaning of the First Amendment which is critical to our determination, but section 8 of article IX and section 5 of article XVI of the California Constitution. Those provisions do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction.

Riles, 632 P.2d at 812. Similarly the Nebraska Supreme Court, in reaching the same result, explicitly rejected reliance on Establishment Clause analysis:

> The standards [under the Nebraska Constitution] are not secular purpose, primary aid, or political divisiveness and state-church entanglement. They are whether there is a public appropriation, whether the grant is in aid of any sectarian or denominational school or college, and … that any educational institution which receives such aid must be exclusively owned and controlled by the state or a governmental subdivision thereof.

Gaffney, 220 N.W.2d at 553; *accord Fannin*, 655 S.W.2d at 483 (declining to follow *Allen* based on "the much more detailed and explicit proscriptions of the

Kentucky Constitution"); *Epeldi*, 488 P.2d at 865 (unlike the First Amendment, the Idaho Constitution "in explicit terms prohibits any appropriation … or payment from any public fund, *anything in aid* of any church or to help support or sustain any sectarian school") (emphasis in original); *Visser*, 207 P.2d at 204-05 (refusing to follow *Everson*); *Antone*, 384 P.2d at 912-13 (same).

(b) This Court has also, on more than one occasion, upheld state and federal programs that provide funding assistance to sectarian colleges and universities for the construction of college facilities, as long as those facilities were used only for secular purposes. *E.g.*, *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973). Again, some state courts have, to the contrary, held that under their state constitutions public funds cannot be used to finance the construction even of purely secular facilities at religious colleges or universities. Just a few years ago, the Kentucky Supreme Court held that a state appropriation to pay for construction bonds to finance the building of a pharmacy school at a Baptist college violated the "no aid" clause of the Kentucky Constitution. *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 673-79 (Ky. 2010). Even though the university had agreed "not to use any of the pharmacy building funds for 'church, sectarian or denominational' purposes," the court held that this pledge "cannot change the character of the institution itself," which was "precisely the type of school referenced" in the constitutional prohibition on the use of public funds "by, or in aid of, any church, sectarian or denominational school." *Id.* at 673.

(c) In the context of private-school vouchers, this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), upheld against an Establishment Clause challenge the unrestricted public funding of religious education that comes with such programs – declining to follow its 30-year-old precedent in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which had reached the opposite result on similar facts.[5] In doing so, the *Zelman* Court reasoned that the state was not funding religious education – even though it was paying the cost of a program under which 96% of the participants attended religious schools – because parents were making independent choices of which schools their children would attend with the state-provided vouchers. 536 U.S. at 652-53.

State courts construing their own constitutions, of course, are not bound to apply this Court's "parental choice" rationale. While some state courts have followed this Court's lead, many others – both before and after *Zelman* – have refused to do so. Thus, for example, the Vermont Supreme Court both anticipated the *Zelman* decision and explained why the parental choice argument that proved successful under the First Amendment was not persuasive under Chapter I, Article 3 of the Vermont Constitution:

---

[5] The program at issue in *Nyquist* provided tuition reimbursement grants to parents of children attending nonpublic schools, the great majority of which were religious schools. *See* 413 U.S. at 780-89. Rejecting the argument that was subsequently accepted in *Zelman*, the Court declined to find it dispositive "that aid is disbursed to parents rather than to the schools." *Id.* at 781.

> [T]he United States Supreme Court may well decide that the intervention of unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education. We cannot conclude, however, that parental choice has the same effect with respect to Article 3. If choice is involved in the Article 3 equation, it is the choice of those who are being required to support the religious education, not the choice of the beneficiaries of the funding.

Chittenden, 738 A.2d at 563. Similarly, and more recently, the Arizona Supreme Court rejected *Zelman*'s logic: "For all intents and purposes, the voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial …." *Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009). Numerous other decisions, cited in the margin, are to the same effect.[6]

---

[6] *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015) (plurality op.) ("[T]he CSP awards public money to students who may then use that money to pay for a religious education. In so doing, the CSP aids religious institutions."), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 28, 2015); *Bush v. Holmes*, 886 So. 2d 340, 352-53 (Fla. Dist. Ct. App. 2004) (immaterial under Florida no-aid clause that vouchers were made payable to parents who chose the school in which to enroll their children), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Almond v. Day*, 89 S.E.2d 851, 856 (Va. 1955) ("The fact that ... the funds may be paid to the parents or

* * *

As the foregoing discussion should make clear, Missouri's interpretation of its constitution as prohibiting the state from making a grant to a religious institution under its scrap tire program is consistent with a broad tradition under which citizens' religious liberty, as well as other individual rights, are protected by state constitutional law independently of the federal Bill of Rights as it is construed by this Court.

---

guardians of the children and not directly to the institutions does not alter their underlying purpose and effect."); *Sheldon Jackson College v. State*, 599 P.2d 127, 132 (Alaska 1979) (striking down tuition grant program even though grants were made to students who conveyed the funds to the private colleges of their choice); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (unconstitutional for school districts to pay partial tuition for parents who sent students to private schools of their choice); *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 919 P.2d 334, 342 (Idaho 1996) (payment of public funds for tuition at sectarian school chosen by parents was contrary to Idaho Constitution); *Opinion of the Justices to the Senate*, 514 N.E.2d 353, 356 (Mass. 1987) (tax deduction for private-school tuition unconstitutional; channeling aid to student rather than school was not dispositive where the effect was indirect aid to private schools); *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971) (rejecting argument that tuition grants "do not constitute aid to the participating schools"); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726 (Neb. 1974) (tuition grants to students for private colleges of their choice unconstitutional); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (use of vocational rehabilitation grant at religious college contrary to state constitution, even though previously upheld under Establishment Clause); *Otken v. Lamkin*, 56 Miss. 758 (1879) (statute that paid students attending private schools their pro rata share of state education funds unconstitutional).

II. MISSOURI'S CONSTITUTIONAL DETERMINATION NOT TO SUPPORT CHURCHES WITH PUBLIC FUNDS SHOULD BE RESPECTED

The State of Missouri, as the Court of Appeals observed, "has a long history of maintaining a very high wall between church and state." *Trinity Lutheran Church v. Pauley*, 788 F.3d 779, 783 (8th Cir. 2015) (quoting *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974)). Its constitution contains a "compelled support" clause, Mo. Const. art. I, § 6, as well as "no aid" language found in both the constitution's Bill of Rights, *id.*, art. I, § 7, and its education article, *id.*, art. IX, § 8. The state's refusal to award a scrap tire grant to the Petitioner church is fully consistent with the Missouri Supreme Court's longstanding construction of these anti-establishment provisions as prohibiting the use of public funds to pay the cost of even "secular" aid to religious institutions. *See McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (providing bus transportation of parochial school students unconstitutional); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (providing textbooks for teachers and students in private schools unconstitutional).

That Missouri may assert its constitution's longstanding anti-establishment interest without running afoul of the federal Free Exercise and Equal Protection Clauses is established by this Court's decision in *Locke v. Davey*, and the Court should affirm the decision below on that basis. In particular, Petitioner's attempt to limit *Locke* to its facts, and specifically to distinguish this case on the ground that the aid that

was denied to the Petitioner church was not in itself of a religious nature, should be rejected.

A. The Court Should Reject Petitioner's Attempt to Limit *Locke v. Davey* to its Specific Facts

In many areas of the law, a state's determination to give greater constitutional protection to individual rights than does the federal Constitution gives rise to no federal constitutional issue: the federal Bill of Rights simply establishes the "floor" standard, which is not infringed if states choose to go beyond it in protecting the same rights. Religion, however, creates more difficult problems, because in many instances there are, at least arguably, individual rights on both sides of an issue. Thus, a state's decision to give greater constitutional protection to its citizens' rights of conscience by determining that they should not be compelled to support religious activities through their tax payments may be countered by the contention that treating religious activities differently than otherwise comparable secular endeavors infringes on rights protected by the Free Exercise or Equal Protection Clauses.

The Court addressed precisely this issue in *Locke v. Davey*, holding that, with regard to the funding of religious activity, a state may "draw[] a more stringent line than that drawn by the United States Constitution," 540 U.S. at 722, and that the "exclusion" of a student pursuing postsecondary education in "devotional theology" "from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment." *Id.* at 715. Noting the "tension" between the Establishment and Free Exercise Clauses of the

First Amendment, the Court held that "'there is room for play in the joints' between them," so that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)). That Washington state could have funded the theological education at issue without infringing the federal Establishment Clause was thus not dispositive of whether Washington could prohibit that funding, pursuant to its own constitution, without running afoul of the Free Exercise Clause.

Holding that the state constitutionally could do so, this Court rejected reliance on the argument – grounded in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) – that the exclusion was "presumptively unconstitutional because it is not facially neutral with respect to religion." 540 U.S. at 720. Applying that "facial neutrality" test to the case before it, the Court held, "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Id.* Rather than imposing criminal or civil sanctions or otherwise impairing the practice of religion in some way, as in the *Lukumi* cases, here "[t]he State has merely chosen not to fund a distinct category of instruction." *Id.* at 721.[7]

---

[7] Notwithstanding the Court's refusal to apply the *Lukumi* "facial neutrality" test to a state's prohibition on public funding of religion, Petitioner and many of its supporting *amici* continue to argue, in reliance on *Lukumi*, that a state may not "discriminate" against religion by refusing to fund religious organizations on the same terms as comparable nonreligious entities. *See, e.g.*, Ptr. Br. at 20 ("this case is akin to *Lukumi*"); Br. for Douglas Cty. Sch. Dist. *et al.* at 22 (excluding "religious people and institutions from receiving otherwise neutral and

The teaching of *Locke* is, in sum, that it is within a state's discretion to determine that, as a matter of state constitutional law, it will not require the state's taxpayers to help pay the cost for a church or other religious organization to carry out its religious mission – whether by funding the training of its ministers (as in *Locke*) or in some other way. Petitioner and its *amici* endeavor to avoid that conclusion by relying on Free Exercise cases,

---

generally available aid plainly is 'discrimination on the basis of religion'"); Br. of Becket Fund for Religious Liberty at 2 (citing *Lukumi* for the proposition that "a law may not discriminate on its face"); Br. of Association of Christian Schools International *et al.* at 8-9 (arguing, in reliance on *Lukumi*, that "laws singling out religion for adverse treatment" constitute "discrimination against religion" in violation of the Free Exercise and Equal Protection clauses). But *Locke* makes clear that the federal Constitution – far from flatly prescribing "neutrality" in the sense of evenhanded treatment of religion and nonreligion – in fact *requires* a measure of "discrimination" in the sense of differential treatment. In some contexts that means that the state must treat religion and religious entities more favorably than their secular counterparts. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (exempting religious school from suit under employment discrimination laws). In other contexts, particularly where the issue of public funding is involved, the reverse is true. As this Court explained in *Locke*: "[T]he subject of religion is one in which both the United States and state constitutions embody distinct views – in favor of free exercise, but opposed to establishment – that find no counterpart with respect to other callings or professions." 540 U.S. at 721; *see also id.* at 723 ("religious instruction is of a different ilk"). At least after *Locke*, "opponents [of laws restricting public funding of religious entities] cannot rely on the simple lack of facial neutrality between religion and nonreligion in such laws to establish their unconstitutionality." Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 Tulsa L. Rev. 267, 272 (2004).

including prominently *Lukumi*, that have nothing to do with public funding of religion. But, as is manifest from *Locke*, the states have greater discretion in crafting constitutional rules when it comes to *funding* religion than with regard to other kinds of regulation that may impinge on religious practice. Just as there is a "fundamental divide" "between 'abridging' speech and funding it," *National Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., concurring), there is a fundamental distinction between "prohibiting the free exercise" of religion and refusing to fund it. While we would not go so far as to say, with Justice Scalia, that "the First Amendment is inapplicable" on the funding side of that divide, *id.*, it remains the case that a state's refusal to fund religious institutions or religious exercise – even where it funds comparable non-religious endeavors – is something fundamentally distinct from "prohibiting" or even impairing the free exercise of religion.[8]

The contention of Petitioner and its *amici* that *Locke* should be limited to its specific facts and read as a "narrow exception … based on a unique historical concern" related to the "religious training of

---

[8] At least since *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), proponents of public funding for religious programs have regularly invoked the specter that, "[i]f this were impermissible, … a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair," *id.* at 747, and Petitioner and its *amici* do not neglect this line of argument. *E.g.*, Ptr. Br. at 29. Should any state ever actually prohibit its fire or police departments from responding to emergencies at religious facilities, or disallow the construction of public sidewalks in front of churches, it would not seem difficult to distinguish such services, which are provided to all for the benefit of the entire community, from what is at issue here.

clergy," Ptr. Br. at 35, has no merit – for the reasons one state court recently found persuasive in rejecting a similar attempt to limit *Locke* to its facts:

> Just as there are strong state "antiestablishment interests" in formal prohibitions on using tax funds to support the ministry there are strong state antiestablishment interests in prohibitions on the support of religious establishments such as the "church, sectarian or denominational schools" referenced in Section 189 of our Constitution. *Locke v. Davey* firmly supports our conclusion that the Kentucky Constitution does not contravene the Free Exercise Clause when it prohibits appropriations of public tax monies to religious schools.

Pennybacker, 308 S.W.3d at 680.[9]

---

[9] Other courts considering the issue have similarly refused to read *Locke* as no more than a "narrow exception" applicable only to ministerial training. *See, e.g.*, *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (upholding Maine's exclusion of parochial schools from voucher program, and finding "unpersuasive" the attempt "to cabin *Davey* and restrict its teachings to the context of funding instruction for those training to enter religious ministries"); *Anderson v. Town of Durham*, 895 A.2d 944, 958-59 (Me. 2006) (same); *Bush v. Holmes*, 886 So. 2d 340, 362-66 (Fla. Dist. Ct. App. 2004) (en banc) (no federal constitutional issue raised by striking down voucher program involving predominantly religious schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Bronx Household of Faith v. Board of Educ.*, 750 F.3d 184, 193-95 (2d Cir. 2014). Indeed, even in the Tenth Circuit case relied on by Petitioner and its *amici*, the court was "disinclined to think that *Locke* is confined to its facts." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008).

Accepting Petitioner's cramped reading of *Locke* would effectively substitute a uniform federal standard for public funding of religion (except with regard to the "narrow exception" for the training of clergy) for the states' discretion – applying their diverse state constitutional provisions, many of which pre-date the federal Bill of Rights – to determine how and when, if at all, their citizens' tax payments may be spent to finance religion. Doing so would overturn decades of state constitutional decisions that depart from this Court's interpretation of the federal Establishment Clause. *See supra* pp. 14-20 & n.6. It would largely nullify state constitution religion clauses – and the states' sovereign choices on how to draw the line separating church and state – as independent constraints on public funding of religion. As this Court made clear in *Locke*, the federal Constitution does not require that result.

Petitioner's interpretation of *Locke* would instead subject state constitutions to the vagaries of this Court's construction of the federal First Amendment. It is no secret, for example, that this Court reads the Establishment Clause differently today than it did forty years ago with respect to public funding of religious education. *Compare Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780-89 (1973) (striking down public funding for students to attend religious schools), *with Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding public funding for students to attend religious schools). Under Petitioner's theory, a state's exclusion of religious schools from such public-funding programs, which forty years ago not only would have been *consistent with* but in fact *mandated by* the First Amendment, would now be *impermissible* under the federal Constitution. This potential for change in this Court's interpretation of the

federal Constitution is one more reason why *Locke* appropriately recognized the need for "room for play in the joints," 540 U.S. at 718, rather than subordinating state constitutions to this Court's First Amendment jurisprudence.

B. The States Should Not Be Required to Follow the Federal Model of Allowing "Purely Secular" Aid to Religious Institutions

A state's constitutional determination that taxpayer dollars should not be used to fund religion or religious institutions is a valid "antiestablishment interest[]," *Locke*, 540 U.S. at 722, which merits this Court's respect – and that is so notwithstanding the state's departure from this Court's interpretation of the Establishment Clause by prohibiting public funding of religious institutions even through aid that in itself is secular in nature.

Petitioner would distinguish this case from *Locke* on the ground that Missouri's scrap tire program "is entirely secular from top to bottom," and "[t]he surface that children play on as they enjoy recess is about as far as one can get from the devotional training of clergy." Ptr. Br. at 37. That may be. It is certainly true that there is nothing inherently religious about shredded tires. But it would be a serious error for the Court to decide this case on that basis.

To be sure, the case might be seen as an easier one if the state aid at issue were the payment of tuition for the study of theology (as in *Locke*), or for K-12 children to attend religious schools (as in the school voucher cases cited above, including the *Douglas*

County School District case, *supra* note 6, as to which the petitions for certiorari apparently are being held for this case). In such cases it would be impossible to argue, as does Petitioner here, that the aid itself was "entirely secular."

But this case can be made out as the harder one only by focusing exclusively on the nature of the aid itself, rather than on the nature of the institution that receives the aid. What Petitioner and its *amici* would have the Court ignore is that through this grant the state would not simply be paying for scrap tires; rather, it would be paying part of the cost for a religious institution to conduct its religious mission – here, for a church to operate a "Church ministry," Ptr. Br. at 3, that provides religious instruction to young children. That the state aid takes the form of helping pay for physical facilities the church uses for its school does not change the fact that the state is contributing to the cost of operating the school.

The distinction between public funding that pays for specifically religious activities, and aid to religious institutions that can be and is cabined to secular purposes, is one that this Court has embraced as a basis for upholding public funding of religious institutions under the Establishment Clause. In *Everson*, its seminal public funding case of the modern era, a sharply divided Court upheld a state's provision of bus transportation for students attending religious schools on the ground that – as the Court subsequently put it – "bus rides have no inherent religious significance." *Allen*, 392 U.S. at 244. The Court later explained its reasoning for permitting such "secular" aid to religious institutions in this way:

> Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

Nyquist, 413 U.S. at 775; *see also*, *e.g.*, *Allen*, 392 U.S. at 244-48 (discussing secular nature of loaned textbooks); *Tilton*, 403 U.S. at 679 ("The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions."); *Mitchell v. Helms*, 530 U.S. 793, 820 (2000) (agreeing that "the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature").

Even under the Establishment Clause, however, allowing such "secular" aid to religious institutions was highly controversial from the outset, as the multiple opinions in *Everson* attest. *See* 330 U.S. at 18 (Jackson, J., dissenting); *id.* at 28 (Rutledge, J., joined by Frankfurter, Jackson and Burton, JJ., dissenting). And many state courts have refused to follow this Court in construing the often more specifically worded religion clauses of their state constitutions. As the discussion above of state caselaw makes clear, there is a very long history of state courts holding that their state constitutional prohibitions on "aid" to, or of com-

pelled taxpayer "support" for, religious institutions prohibit such aid even where the form of the assistance is, as Petitioner asserts, "entirely secular from top to bottom." Ptr. Br. at 37. Were the Court to adopt the reasoning of Petitioner and its *amici* – and hold that the federal Constitution bars states from prohibiting the public funding of religious institutions where the "aid" or "benefit," like the shredded tire material in this case, is itself secular in nature – the result would be to overrule numerous state court decisions, going back decades, that have struck down aid to religious institutions as in violation of state constitutional provisions, regardless of whether the aid provided was itself of a religious nature or was used for specifically religious purposes. *See supra* pp. 15-17 (citing cases).

Doing so would replace the states' independent interpretations of their own constitutions' religion clauses with a uniform federal standard on public funding of religion, based on this Court's current understanding of the First Amendment – with the attendant damage to the principles of federalism on which our legal system is based. If *Locke v. Davey* means anything, it is certainly that the "room for play in the joints" of the First Amendment does not require this Court, in the name of Free Exercise of religion, to impose on the states the standards at which it has arrived in interpreting the federal Establishment Clause. More specifically, the states should not be compelled to apply the standard adopted by *Everson* and its progeny that permits "purely secular" aid to religious institutions. Instead, the states should remain free, in applying the religious liberty provisions of their own constitutions, to look not only to the nature of the

state assistance itself but also to the nature of the institution that is receiving the assistance, and to reach the conclusion that their constitutions do not allow government to require taxpayers to help pay the costs for a church to carry out its religious mission – even if it is through the provision of facially secular aid like scrap tires.

C. The Missouri Constitution's Prohibition on Funding Religion with Taxpayer Dollars Respects Both the Free Exercise of Religion and Citizens' Freedom of Conscience

Should this Court hold that the federal Constitution does not permit Missouri to prohibit public funding of religious institutions in the form that is at issue in this case, it would not only do lasting damage to principles of federalism, but would also seriously impair the ability of the states to protect principles of religious liberty by giving effect to their "state constitutions [that] are the basic charters of individual liberties." Pollock, 35 Rutgers L. Rev. at 718.

A state constitutional provision that prohibits the use of taxpayer dollars to support religious endeavor in no way evinces "hostility" to religion, as Petitioner would have it. Ptr. Br. at 41. To the contrary; a state's determination that it will not compel its citizens, through their tax dollars, to support financially the religious missions of churches and other religious entities, whose religious teaching they may not accept, demonstrates the greatest respect for the principles of religious liberty on which our country was founded. As much as religion is a part of American life and tradition, public funding of religion is not. Far from

evincing hostility to religion, state court decisions enforcing constitutional prohibitions on public funding of religion "have paved the way for religion to grow and prosper in this land of the free." *Pennybacker*, 308 S.W.3d at 686 (Cunningham, J., concurring). State constitutional provisions like Missouri's that go farther than does the federal Establishment Clause in prohibiting public funding of religion demonstrate only respect – both for believers' exercise of religion free from government entanglement, and for freedom of conscience of those who do not embrace their religious beliefs.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ALICE O'BRIEN
KRISTEN L. HOLLAR
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

JOHN M. WEST
(*Counsel of Record*)
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600
jwest@bredhoff.com

July 5, 2016