ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY
65102

P.O. Box 899
(573) 751-3321

April 17, 2017

VIA OVERNIGHT DELIVERY AND EMAIL (dmcnerney@supremecourt.gov)

Mr. Scott S. Harris
Clerk of the Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, Case No. 15-577 – Response to the Court

Dear Mr. Harris:

This letter provides the views of the Missouri Attorney General's Office[1] in response to the Clerk's letter of April 14, 2017, directing the parties to "submit their views on whether this case is affected by the press release relating to access to Missouri grant programs issued by Governor Greitens on April 13, 2017."

A. Factual background.

Missouri's Department of Natural Resources ("DNR") administers the Scrap Tire Grant Program, which subsidizes the installation of rubber safety flooring for playgrounds. Under former Governor Jeremiah Nixon, DNR refused to provide grants under the Program to religiously affiliated entities. This case involves a constitutional challenge to that policy.

On January 9, 2017, Eric Greitens became Missouri's new Governor. On April 13, 2017—six days before oral argument—Governor Greitens announced that DNR would no longer exclude religious entities from participation in the Scrap Tire Grant Program. *See* Statement from the Office of the Missouri Governor (April 13, 2017), *available at* https://governor.mo.gov/news/archive/governor-greitens-announces-new-policy-defend-

[1] The Attorney General of Missouri, Joshua D. Hawley, personally recused himself from this case upon taking office on January 9, 2017, because, prior to his election as Attorney General, he filed an *amicus curiae* brief on behalf of a private client in support of the Petitioner in this case.

religious-freedom. Under this new policy, "religious organizations will have their applications judged on the merits like any other applicant. DNR will also update its application materials, so that religious organizations are no longer prohibited from applying." *Id.* Prior to April 13, 2017, to the knowledge of the Attorney General's Office, DNR adhered to the previous policy that Petitioner challenges in this case.

B. DNR's change of policy does not render this case moot.

It is the opinion of the Attorney General's Office that the recent change in policy does not render this case moot. This Court has held that a defendant's voluntary cessation of challenged conduct moots a case only if "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). "The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth*, 528 U.S. at 189 (quoting *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Moreover, this Court casts a "critical eye" on voluntary cessation that occurs after the Court has granted a writ of certiorari. *Knox* v. *SEIU Local 100*, 132 S. Ct. 2277, 2287 (2012).

Here, though the state agency is no longer denying benefits to organizations solely because of their religious affiliation, there is no clearly effective barrier that would prevent the agency from reinstating that policy in the future. The Governor or the Director of DNR—or, more likely, one of their successors—could reinstate the previous policy just as easily as the new policy was adopted. Thus, the new policy does not moot this case. *See City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982) (holding that a city's repeal of the challenged ordinance did not moot the case, because that repeal "would not preclude [the city] from reenacting precisely the same provision"); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (holding that the fact that a party had voluntarily ended the challenged corporate-governance structures "and disclaimed any intention to revive them" did not render case moot). Under this Court's cases, moreover, the timing of the new policy's enactment—less than a week before oral argument in this Court—further counsels against finding the case moot. *See Knox*, 132 S. Ct. at 2287.

In addition, there is a realistic possibility that Missouri's courts may enjoin any future payments to Petitioner under the new policy, absent a judgment from this Court in favor of Petitioner in this case. Missouri law grants standing to taxpayers who seek an injunction prohibiting disbursements of state funds that would violate the state constitution. *See, e.g., Lebeau* v. *Comm'rs of Franklin Cnty.*, 422 S.W.3d 284, 288-89 (Mo. 2014). In the wake of the Governor's announcement of the new policy, media outlets have already reported that a taxpayer lawsuit challenging the policy under the state constitution may be forthcoming. *See, e.g.*, Celeste Bott, *Greitens instructs DNR to consider religious organizations for grants*, St. Louis Post-Dispatch (April 13, 2017),

available at http://www.stltoday.com/news/local/crime-and-courts/greitens-instructs-dnr-to-consider-religious-organizations-for-grants/article_68b8bb5a-c6a8-56de-87d7-b6e31e2e2418.html. The prospect of such future litigation forecloses the conclusion that this Court "cannot grant 'any effectual relief whatever' in favor of [Petitioner]." *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (quoting *Church of Scientology* v. *United States*, 506 U.S. 9, 13 (1992)).

For the reasons stated above, this Court should conclude that the case is not moot. However, if the Court were to conclude that the case has become moot, the proper disposition would be to vacate the judgment of the United States Court of Appeals for the Eighth Circuit and to remand with instructions that the case be dismissed by the district court. "Vacatur is in order when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997) (quoting *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 23 (1994)).

C. Litigation challenging DNR's new policy may create a positional conflict for the Missouri Attorney General's Office with respect to this case. As a result, the Attorney General's Office is recusing itself from this case out of abundance of caution. The Attorney General's Office authorizes Mr. James Layton to argue the case on behalf of Respondent as private outside counsel.

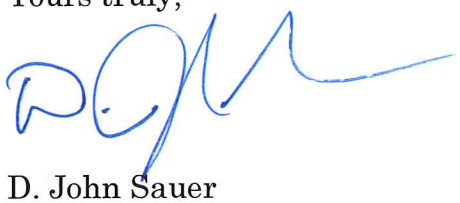
As noted above, imminent litigation challenging DNR's new policy is expected. Under state law, the Missouri Attorney General's Office will be responsible for the vigorous defense of the new policy. *See* Mo. Rev. Stat. § 27.060. A review of the issues raised in this case, and the issues anticipated in litigation challenging the new policy, raises the concern that the Attorney General's Office might become involved in taking inconsistent positions on appeal in the different cases. In other words, litigation against the new policy may result in a positional conflict for the Attorney General's Office arising from the defense of the former policy at oral argument in this case.

Accordingly, out of abundance of caution, the Missouri Attorney General's Office is recusing itself from this case, to avoid the possibility of a conflict of interest that would impact its ability to vigorously defend the new policy from legal challenge. Under Missouri law, when the Attorney General's Office determines that a potential conflict of interest interferes with its ability to represent a state agency or official, the Attorney General's Office may authorize the agency or official to proceed with representation by private counsel. The Attorney General's Office has authorized Mr. James Layton of Tueth Keeney Cooper Mohan Jackstadt P.C. to serve as private counsel for Respondent in this case to present oral argument to this Court in defense of the former policy. Because Mr. Layton is already counsel of record for the Respondent in this case, the change in his representation should have no impact on the parties or the Court's schedule. By separate communication to Respondent and Mr. Layton, the Attorney General's Office is

terminating Mr. Layton's appointment as Special Assistant Attorney General, and authorizing him to appear as private counsel to present oral argument on behalf of Respondent.

Mr. Layton and the Director of DNR have authorized the Attorney General's Office to advise the Court that Respondent agrees with the conclusion of the Attorney General's Office regarding mootness as expressed in this letter.

Yours truly,



D. John Sauer
First Assistant and Solicitor
Missouri Attorney General's Office

cc: Mr. David Cortman, Counsel for Petitioner
Mr. James Layton, Counsel for Respondent