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VIA OVERNIGHT MAIL

September 15, 2017

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

**Re: *American Civil Liberties Union of New Jersey v.
Hendricks***
Docket No. 077885

Dear Honorable Justices of the Supreme Court:

Per the Court’s August 16, 2017 order, please find attached this letter brief, on behalf of Plaintiffs-Appellants, concerning *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017).

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Introduction

As explained in our prior briefs, the grants of over ten million dollars of taxpayer funds to a yeshiva and seminary — which will support sectarian religious instruction and the training of ministers — violate Article I, Paragraph 3, of the New Jersey Constitution (the “Religious Aid Clause”). This brief addresses whether the U.S. Supreme Court’s recent decision in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), impacts that result. As explained below, it does not.

The Supreme Court in *Trinity Lutheran* held that a state violated the federal Free Exercise Clause by denying a church-operated preschool — solely because of its religious status — a grant to purchase a rubber surface for its playground. *Trinity Lutheran* is inapplicable to this case for several reasons:

First, the parties in *Trinity Lutheran* agreed that the funding there did not violate the federal Establishment Clause. The grants here do.

Second, the Supreme Court limited its holding in *Trinity Lutheran* to funding that does not serve religious uses. States may refuse to fund religious uses, as the Court held in *Locke v. Davey*, 540 U.S. 712 (2004), which *Trinity Lutheran* reaffirmed. The grants here would serve religious uses, supporting the training of clergy and sectarian religious instruction.

Third, the Court in *Trinity Lutheran* concluded that denial

of the funding there did not serve any important, traditional state interest. Prohibiting the grants here would serve a long-standing, substantial state interest in not funding training of ministers or other religious instruction.

Finally, the funding denial in *Trinity Lutheran* rested solely on the preschool's religious character. New Jersey's Religious Aid Clause, by contrast, restricts funding that serves a religious use, and permits religious institutions to receive funding for non-religious endeavors.

I. The U.S. Supreme Court and other appellate courts have repeatedly rejected arguments that states can be compelled to fund religious activity.

To best understand *Trinity Lutheran's* narrow scope, one must understand its antecedents. The Supreme Court, federal appellate courts, and state appellate courts have repeatedly rejected arguments that government must fund religious activity if it funds comparable secular activity.

The leading case is *Locke*. It held that a Washington State regulation prohibiting use of state scholarship funds to pursue theology degrees did not violate the federal Free Exercise, Equal Protection, Free Speech, or Establishment Clauses. The Court explained that although allowing the scholarship funds to be so used would not violate the Establishment Clause, "there are some state actions permitted by the Establishment Clause but

not required by the Free Exercise Clause." 540 U.S. at 719.¹

The Court noted that the scholarship applicant was not denied a benefit based on his religious beliefs or status; instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 720-21. The Court emphasized that the funding limit was supported by an important, historic state interest in not funding training of ministers or religious instruction. *Id.* at 721-23. Because the state interest was "substantial" and any burden on religion was "minor," the student's Free Exercise claim failed. *Id.* at 725. In footnotes, the Court made clear that a religion-based challenge to a denial of funding for education cannot be successfully leveled under another clause if it does not violate the Free Exercise Clause. *See id.* at 720 n.3, 725 n.10.

Locke's conclusion was not novel. Earlier Supreme Court decisions involving primary and secondary schools rejected arguments that the Free Exercise or Equal Protection Clauses require states to provide funding for religious education if they fund public or private secular education. *See Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Sloan v. Lemon*, 413 U.S. 825, 834-35 (1973); *Brusca v. State Bd. of Educ.*, 405 U.S.

¹ Scholarships delivered to students that may be used at religious or secular institutions are not subject to the Establishment Clause's prohibitions against direct funding of religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

1050 (1972), *aff'g mem.*, 332 *F. Supp.* 275 (E.D. Mo. 1971).

Following *Locke*, numerous appellate courts have spurned contentions that the Constitution requires governmental bodies to provide funding for religious uses on the same terms as for secular uses. See *Bowman v. United States*, 564 *F.3d* 765, 772, 774 (6th Cir. 2008) (religious ministry to youth); *Teen Ranch, Inc. v. Udow*, 479 *F.3d* 403, 409-10 (6th Cir. 2007) (religious programming in childcare services); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 *F.3d* 344, 353-57 (1st Cir. 2004) (religious education); *Bush v. Holmes*, 886 *So.2d* 340, 343-44, 357-66 (Fla. Dist. Ct. App. 2004) (religious education), *aff'd on other grounds*, 919 *So.2d* 392 (Fla. 2006); *Anderson v. Town of Durham*, 895 *A.2d* 944, 958-61 (Me. 2006) (religious education).

II. *Trinity Lutheran* is a narrow decision restricted to status-based denials of funding for non-religious uses.

Trinity Lutheran is limited to circumstances far different from those of *Locke* and the other above-cited cases. The Court held that a state violated the Free Exercise Clause by denying a church-operated preschool — solely because of its religious status — a grant to purchase a rubber surface for its playground. 137 *S. Ct.* at 2017-18, 2024-25. The Court did not analyze whether the grant violated the federal Establishment Clause but instead simply accepted the parties' agreement that it did not. *Id.* at 2019.

The record in *Trinity Lutheran* contained no evidence that the playground was used for religious activity. See *id.* at 2017-18, 2024 n.3. The Court thus strictly limited the scope of its holding: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” *Id.* at 2024 n.3 (emphasis added).²

Indeed, *Trinity Lutheran* reaffirmed *Locke*’s holding that “there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” *Id.* at 2019 (quoting *Locke*, 540 U.S. at 718). The *Trinity Lutheran* Court emphasized that, in the case before it, the state had “expressly den[ied] a qualified religious entity a public benefit solely because of its religious character.” *Id.* at 2024 (emphasis added). *Locke* differed because the plaintiff there “was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do — use the funds to prepare for the ministry.” *Id.* at 2023.

² Though this footnote was joined by only four Justices, it is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the body of the majority opinion but not the footnote. See *Trinity Lutheran*, 137 S. Ct. at 2025-26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks v. United States*, 430 U.S. 188, 193 (1977). In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. See *id.* at 2026-27.

Moreover, the funding denial in *Locke* was based on a state "interest in not using taxpayer funding to pay for the training of clergy" that "lay at the historic core of the Religion Clauses." *Id.* "Nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Id.*

III. *Trinity Lutheran* is inapplicable because the grants here violate the Establishment Clause.

Unlike in *Locke* and what the Court assumed in *Trinity Lutheran*, the grants here violate the federal Establishment Clause. The Establishment Clause prohibits direct grants of tax funds to institutions that would use the funds to support religious instruction, including by financing facilities where religious instruction would occur or equipment that would aid that instruction. See Pls.' Br. at 42-46; Pls.' Reply Br. at 14-19; Pls.' Resp. to *Amicus* Brs. at 45-47.

When the Establishment Clause prohibits funding, the Free Exercise and Equal Protection Clauses cannot override it. See *Norwood*, 413 U.S. at 462, 469; *Sloan*, 413 U.S. at 834-35. Compliance with the Establishment Clause is a compelling governmental interest that satisfies heightened scrutiny even if it is triggered under the other clauses. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (four-Justice plurality); *id.* at 783 (O'Connor, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

IV. Even if the grants are not barred by the federal Establishment Clause, applying the New Jersey Constitution to bar them does not run afoul of the Free Exercise Clause.

Even if the federal Establishment Clause does not prohibit the proposed grants, applying New Jersey's Religious Aid Clause to bar them is well within the "play in the joints" affirmed in *Locke*, 540 U.S. at 718, and *Trinity Lutheran*, 137 S. Ct. at 2019. For three principal reasons, *Locke*, and not *Trinity Lutheran*, governs here.

A. The grants here would go to religious uses.

First, as in *Locke*, and unlike in *Trinity Lutheran*, this case involves "religious uses of funding." Cf. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. The grants provide funding not for playgrounds, but for projects that would further the grantees' "essentially religious endeavor[s]" (*Locke*, 540 U.S. at 721) of training ministers and teaching particular religious tenets.

In *Trinity Lutheran* not only was there no record evidence that the playground was used for religious activities, but the resurfacing grant by its nature could serve only safety purposes and not religious ones. What a playground surface is made of has no connection with whether a religious preschool can provide religious instruction there or how effectively it can do so.

The grants here, by contrast, would directly support and enhance the grantees' religious training and instruction. The grants to the Yeshiva would support construction of classrooms,

libraries, and other facilities that would be used for religious instruction. See Pls.' Br. at 17-18; Pls.' Resp. to *Amicus* Brs. at 9-10. These grants would "significantly increase the capacity of" the Yeshiva's religious "academic programs." Ja157; accord Ja5, 33, 166. Similarly, the grants to the Seminary would be "essential to" and "multiply the impact of" "the Seminary's educational mission" of "preparation of men and women for theological leadership." Ja496, 641. They would pay for technological training and equipment that would enhance religious study through aids such as "biblical software programs." See Pls.' Resp. to *Amicus* Brs. at 13-15.

B. Barring the grants serves a historic and substantial state interest.

Second, again like *Locke* and unlike *Trinity Lutheran*, barring the grants here would serve long-standing, substantial state interests in not financing training of ministers or other religious instruction. *Locke* explained that from the founding of our republic states have recognized that "religious instruction is of a different ilk" than other endeavors and have "prohibit[ed] . . . using tax funds to support the ministry." 540 *U.S.* at 722-23. Indeed, New Jersey's Religious Aid Clause is among early state enactments that *Locke* cited to illustrate these traditional interests. See *id.* at 723 (citing *N.J. Const. of 1776*, Art. XVIII). To explain the scope of these interests,

Locke also looked to the "public backlash" (*id.* at 722 n.6) that resulted from the proposal in Virginia of *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784), <http://bit.ly/2ssSCRw>, which called for tax funding of "learned teachers" of "Christian knowledge."

C. New Jersey's Religious Aid Clause does not prohibit funding based on an institution's status.

Third, unlike the funding prohibition in *Trinity Lutheran*, New Jersey's Religious Aid Clause does not bar funding based on an institution's status as religious, but instead restricts funding based on how the money will be used. The Clause disallows public funding "for *building or repairing* any church or churches, place or places of worship, or for the *maintenance* of any minister or ministry." (Emphasis added.) It does not prohibit religiously affiliated universities, such as Seton Hall, from receiving state grants to support purely secular education. But the grants here will further the Yeshiva's and Seminary's religious education and training of ministers.³

What is more, the New Jersey Constitution's Private Aid Clause (Art. VIII, § III, ¶ 3) restricts state aid to

³ Taxpayers acknowledge that, after *Trinity Lutheran*, this Court's decision in *Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88 (1978), should not be interpreted to bar based on religious status funding not supporting religious uses. But that does not matter in this case, because the Religious Aid Clause prohibits the grants here based on use, not status.

nonreligious institutions to an extent similar to the Religious Aid Clause's limitation on aid to religion, ensuring that the State Constitution is, in its entirety, neutral toward religion. The Private Aid Clause requires state grants to serve a public purpose and benefit the community as a whole. See Pls.' Br. at 56-60. Thus, just as state grants cannot support propagation of a religion, they cannot go to, for instance, a school of government that trains leaders of only one political party.⁴

Finally, *Locke* noted that Washington State has "been solicitous in ensuring that its constitution is not hostile toward religion." 540 *U.S.* at 724 n.8. So has New Jersey, through clauses that protect religious exercise, prohibit religious discrimination, exempt religious groups from taxes, and permit them to run games of chance. See *N.J. Const.* Art. I, ¶¶ III-V; Art. IV, § VII, ¶¶ 2(A)-(B); Art. VIII, § I, ¶ 2.

Conclusion

For these reasons, *Trinity Lutheran* does not forbid applying the Religious Aid Clause to bar the grants.

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⁴ Taxpayers argued in the Appellate Division that the grants here also violate the Private Aid Clause. See Pls.' Br. at 56-60. The Appellate Division did not rule on this claim. Taxpayers understand that — like their claims under the New Jersey Constitution's Establishment Clause and the Law Against Discrimination — this claim is not before this Court, but Taxpayers reserve the right to pursue these three claims if the case is remanded.

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