COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12274

GEORGE CAPLAN, et al.,
Appellants

v.

TOWN OF ACTON,
Appellee

Appeal from the Superior Court of Middlesex County

APPELLANTS' MEMORANDUM OF LAW

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INTRODUCTION

The Town of Acton has identified *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), as supplemental authority. The decision recognized a free-exercise right for religious organizations to participate equally with nonreligious organizations in a government-funded playground-safety program. It did not authorize government payments to build, rebuild, or maintain active houses of worship—the archetype of establishments of religion. The Supreme Court and other federal courts have repeatedly held that the Establishment Clause expressly forbids funding of religious uses, including religious buildings. The Free Exercise Clause has not been and should not be applied to allow a state to violate the Establishment Clause. *Trinity Lutheran* did not change that.

This Court need not reach whether the Town's proposed grants to Acton Congregational Church violate the federal Establishment Clause, because *Trinity Lutheran* also does not override Massachusetts' Anti-Aid Amendment's clear ban on "maintaining or aiding" churches. The United States Supreme Court has consistently recognized, including in *Trinity Lutheran*, that states have latitude to advance their own disestablishment objectives, without violating the federal religion clauses. The Anti-Aid Amendment, and this Court's jurisprudence, already distinguishes between public funding of a

religious organization's nonreligious activities—the issue presented in *Trinity Lutheran*—and the indisputably religious "maintaining or aiding [of] any church." Because it recognizes that religious/nonreligious use distinction, *Trinity Lutheran* does not override Massachusetts' "more stringent"[1] constitutional prohibition on funding churches that was borne of the Commonwealth's own experience with religious establishments, before the federal religion clauses applied to the states.[2]

I. *Trinity Lutheran* Does Not Authorize Public Funding for Religious Uses

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center that cares for children regardless of their faith, and opens its playground to the public. *Trinity Lutheran*, 137 S. Ct. at 2017. It is not a house of worship; certainly its playground is not.

The Center was denied a grant from Missouri's Scrap Tire Program to purchase a rubber playground surface that it otherwise would have received, because of Missouri's "strict and express policy of denying grants to any applicant owned or controlled by a church." *Id.* at 2017. The majority in *Trinity*

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[1] *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 332 (1982) ("our anti-aid amendment is more stringent than the establishment clause of the First Amendment").

[2] The Free Exercise and Establishment Clauses were incorporated against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), respectively.

Lutheran did not address the Establishment Clause, because the parties agreed that funding a nonreligious playground would not violate the Clause. *Id.* at 2019.

The Supreme Court held that Missouri violated the Free Exercise Clause by excluding Trinity Lutheran from a public benefit "for which it is otherwise qualified, *solely* because it is a church." 137 S. Ct. at 2025 (emphasis added). Throughout the opinion, the Court emphasized that Missouri's violation of the Free Exercise Clause was rooted in its denial of state funds to the Center's playground "*solely* because of its religious character." *Id.* at 2024; *see also id.* at 2019 ("denying a generally available benefit *solely* on account of religious identity" triggers Free Exercise concerns); *id.* at 2023 (Church was denied grant "*simply* because of what it is—a church")(all emphases added).

The Court specified, however: "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).[3] Here, by contrast, the two proposed grants are

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[3] This footnote, joined by four Justices, is controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977) (when fragmented Court decides case with no single rationale adopted by five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").

for a "religious use"—the refurbishment of an active house of worship—the type of expenditure that the Court in *Trinity Lutheran* expressly stated it was not addressing.

II. The Free Exercise Clause Does Not Supersede the Establishment Clause's Prohibition Against Religious Uses of Public Funds

Until *Trinity Lutheran* was decided, Appellee had not relied on the Free Exercise Clause; accordingly, Appellants have not briefed the Establishment Clause on appeal or below, relying instead on the Commonwealth's more stringent Anti-Aid Amendment. To the extent the Town is now asserting a Free Exercise Clause defense, however, that Clause does not permit government funding of religious activities that the Establishment Clause forbids. *See Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970)("either [of the two Religion Clauses] if expanded to a logical extreme would tend to clash with the other"); *see also Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973)("any absolute right to equal aid [for church-sponsored schools] was negated, at least by implication, in [the seminal Establishment Clause decision] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).").

"[P]roviding funds for the construction of churches for particular sects" is "palpably unconstitutional conduct" under the Establishment Clause, *Flast v. Cohen*, 392 U.S. 83, 98 n.17 1968, so the Free Exercise Clause cannot require it. The Supreme Court has said so whenever the issue has been presented. *See*

Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973)("If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."); *Tilton v. Richardson,* 403 U.S. 672, 683-84, 689 (1971)(striking down statute providing federal construction grants to colleges and universities to the extent that prohibition against funding "any facility used or to be used for sectarian instruction or as a place for religious worship" expired twenty years after a facility's construction).

The Establishment Clause prohibits government spending even where the religious element falls far short of outright aid to a church building. *See, e.g., Cmty. House, Inc. v. City of Boise,* 490 F.3d 1041, 1059-60 (9th Cir. 2007)(enjoining city from leasing a homeless shelter to a religious organization for one dollar per year so long as the lessee continued to hold daily chapel services for its residents); *Foremaster v. City of St. George,* 882 F.2d 1485, 1489 (10th Cir. 1989) (striking down governmental electricity subsidy to light church from outside); *Wirtz v. City of S. Bend,* 813 F. Supp. 2d 1051, 1055, 1069 (N.D. Ind. 2011) (striking down city gift of property for construction of football field to parochial school that required all school athletic events and practices to be preceded or followed by prayer), *appeal dismissed as moot,* 669 F.3d 860 (7th Cir. 2012);

Annunziato v. New Haven Bd. of Aldermen, 555 F. Supp. 427, 433 (D. Conn. 1982) (striking down city transfer of property for one dollar to religious organization that intended to run religious school on property).

Many other decisions have prohibited the use of public funds to support religious activities in other contexts. *See Mitchell v. Helms*, 530 U.S. 793, 840, 857 (2000) (O'Connor, J., controlling concurring opinion[4])(religious instruction); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988)(publicly-funded social-service providers must not inculcate religion); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754-55 (1976)(religious education); *Hunt v. McNair*, 413 U.S. 734, 743 (1973)(religious education). In each case, what mattered was not the recipient's religious identity but how the money was to be used. When the use was for religious structures or activities, the funding could not flow. *Trinity Lutheran* expressly recognized that boundary and the Supreme Court has repeatedly rejected attempts to violate it.

III. Massachusetts' Ban on Aiding Churches Is Permitted by the Federal Constitution

Just as the Free Exercise Clause cannot be read so expansively that it trespasses the Establishment Clause, it also

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[4] Justice O'Connor's concurring opinion in *Mitchell* represents controlling law because she provided the decisive vote to sustain the judgment on narrower grounds than the plurality in the case. *See Marks*, 430 U.S. at 193.

should not be read to override the Anti-Aid Amendment's unqualified prohibition against using public money to aid or maintain (i.e., establish) churches. States have legitimate, independent interests in protecting against establishment of religion beyond what the federal Establishment Clause requires—and do not violate the Free Exercise Clause by doing so. *See Locke v. Davey*, 540 U.S. 712 (2004); *see also Nyquist and Tilton*, *supra* at 4-5.

In *Locke*, the Supreme Court held that a regulation prohibiting use of state scholarship funds to pursue a degree in theology did not violate the Free Exercise Clause. 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. Following *Locke*, numerous federal and state appellate courts have rejected arguments that the Free Exercise or Equal Protection Clauses require governmental bodies to provide funding for religious uses on the same terms as for secular uses.[5]

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[5] *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.

This "play-in-the joints" between what the Free Exercise Clause requires and what the Establishment Clause forbids (*id.* at 718-19) leaves states room to advance their own "historic and substantial state interest[s]" (*id.* at 725) in protecting against religious establishment. In *Trinity Lutheran*, the Supreme Court affirmed the continued vitality of *Locke v. Davey* because, unlike playground resurfacing, training to be a minister is an "'essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit,' and opposition to such funding 'to support church leaders' lay at the historic core of the Religion Clauses." *Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 721-22).

A subsidy for building, maintaining, and beautifying houses of worship stands on equal, forbidden footing with funds for ministers. After all, it was colonists' indignation toward "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property . . . which found expression in the First Amendment." *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947) (emphasis added); *see also Locke*, 540 U.S. at 723 n.6 (in explaining scope of traditional state

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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); *see also Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563 (Vt. 1999) (religious education).

disestablishment interests, Court looked to "public backlash" that resulted from proposal in Virginia of *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784), which called for tax funding for "the providing of places of divine worship" (*see* http://bit.ly/2ssSCRw) among other aspects of religious ministries).[6]

Massachusetts may have been something of a late-comer to disestablishment, with an established church until 1833, but over time and as a consequence of its particular experience with governmental involvement with religion, the Commonwealth arrived at its "more stringent" Anti-Aid Amendment, which, among other things, forbids "maintaining or aiding" any church. *See* Br. Amici Curiae ACLU and ACLU of Massachusetts 3-11. To the extent there is any uncertainty that the public funding of church buildings is prohibited by the federal Establishment Clause, Massachusetts may, within the "play-in-the-joints," prohibit them via the Anti-Aid Amendment. And it has.

In all events, the Anti-Aid Amendment, with its two clauses, already strikes a balance akin to the one in *Trinity Lutheran*. The Anti-Aid Amendment does not preclude all public

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[6] *See also* 5 Annals of Cong. 92 (1834), http://bit.ly/2uLkHDH (Congressman, during debate on language of federal Establishment Clause, noted that Clause would restrict compelled funding of "building of places of worship" to same extent that it would restrict compelled "support of ministers").

grants to applicants based solely on their religious identity. Instead, it focuses on the purpose for which public funds are used. The first clause of the Amendment covers entities ("infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking") whose nonreligious use of public funds—including for resurfacing a school playground—is assessed under the *Helmes* guidelines. The second clause prohibits using public funds for a religious purpose without qualification—no "use of public money . . . for the purpose of maintaining or aiding any church." The second clause controls here.

CONCLUSION

The *Trinity Lutheran* decision brings the constitutional infirmity of the Town's position into sharper relief. It confirms that while under the United States Constitution the Town cannot exclude Acton Congregational Church from Community Preservation Act grants solely because it is a church—which the Anti-Aid Amendment largely anticipated—it leaves unchanged the federal and state constitutional proscriptions against public funding to build or maintain houses of worship.

[Signatures are on the following page.]

Date: August 2, 2017

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CERTIFICATE OF SERVICE

I certify that on August 2, 2017, I served a copy of this memorandum of law on counsel for appellee the Town of Acton at the following address:

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