APPEAL NO. 14-1382

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.

Plaintiff-Appellant,

v.

SARA PARKER PAULEY, in her official Capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Missouri
Civil Case No. 2:13-CV-04022-NKL
(Nanette K Laughrey)

Appellant's Reply Brief

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I. Introduction

The district court improperly dismissed the case before Plaintiff was given an opportunity to complete discovery and present its case. The Complaint demonstrated that Trinity's claims were plausible, and thus Trinity should have been allowed to present its case.

The Department's policy and actions discriminate between religious organizations and excessively entangles the state with religion. While the Department claims that Missouri has a strong interest in maintaining a high separation between church and state, it has allowed a minimum of fifteen other religious organizations, including churches, to participate in the scrap tire program. Yet it has prohibited Plaintiff from participating in the program. These policies and actions evidence preference of certain religious organizations over others and are unconstitutional.

The Department defends its actions claiming that it is entitled to give aid to certain religious organizations that are not "controlled" by a church. But the determination as to whether such an institution is sufficiently "controlled" by a religious creed itself excessively entangles the state with religion. Under the Department's policy, fifteen other religious organizations, including churches, were allowed to participate in the scrap tire program. Under this same policy, other religious organizations, such as St. Louis University, have been allowed to

receive state aid despite being a religious organization. Plaintiff should have been allowed to pursue discovery to support its claims that the Department violated the Equal Protection, Free Exercise and Establishment Clauses.

II. The Department discriminates between religious organizations.

The Department's actions, and Missouri policy as codified in Article I, § 7 of the Missouri Constitution, discriminate between religious organizations. The Department claims to be serving its interest in maintaining a high separation between church and state by not allowing daycares that are run by a church to participate in its scrap tire program. *See* Appellee Brief 13. But the Department has allowed many religious organizations to participate in the scrap tire program, as well as given direct aid to religious organizations in other programs.

For example, the Department has permitted a minimum of fifteen religious organizations to participate in its scrap tire programs.[1] The Department disclosed during discovery that other religious entities have received scrap tires through the grant program. After further investigation, Trinity located a document entitled "Prior Recipients of Scrap Tire Surface Material" published on the Department of

[1] *See* JA 141 (Motion for Reconsideration). The district court improperly denied Plaintiff's Motion to Amend its Pleadings. *See Zutz v. Nelson*, 601 F.3d 842, 850-51 (8th Cir. 2010) (stating that in ruling on post judgment motions to amend, courts "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits."). This case is different than *Parnes v. Gateway 2000, Inc*., 122 F.3d 539, 550–51 (8th Cir.1997), cited by the district court. *Parnes* dealt with a Rule 9(b) fraud claim that required heightened pleading, and was dismissed after the summary judgment stage.

Natural Resources website, http://www.dnr.mo.gov. Not just one or two religious organizations, but at least fifteen religious organizations – including several churches – have received scrap tires. These recipients include:

1. First Christian Church Daycare
2. Christian Chapel Academy
3. Heartland Tabernacle, First Baptist Church of Belton
4. St. Joseph School
5. St. Joseph School PTO
6. First Baptist Church
7. St. Stanislaus School
8. Grace Child Care Corner
9. New Covenant Academy
10. Tri-County Christian School
11. St. Patrick's School
12. St. Therese Church of the Diocese of Kansas City
13. First Christian Church dba Noah's Ark Children Center
14. St. Peter's School
15. Torah Prep, Division of Torah Center Midwest, Inc.

See JA 159 (Attachment 1 to Motion for Reconsideration Requesting Leave to Amend Complaint), JA 193-204 (Exhibit B "Prior Recipients of Scrap Tire Surface

Material.") Each one of these organizations is overtly religious and controlled by a church, as is evidenced from their websites. *See* JA 205-212 (Attachment 1 to Motion for Reconsideration, Exhibit C "Prior Recipients of Scrap Tire Surface Material Websites.")[2]

In addition, Missouri has given aid to other religious organizations, including St. Louis University. *See Saint Louis University v. Masonic Temple Association of St. Louis*, 220 S.W.3d 721 (Mo. en banc 2007) (upholding state aid to university whose by-laws stated, "[SLU] has been operated and governed by [Jesuits] and enjoys a long, rich history and tradition as a Catholic university and as a Jesuit university. Its trustees acknowledge ... the University's operations will be conducted, in harmony with this history and tradition, and that … [t]he University will be publicly identified as a Catholic university and as a Jesuit university.")

[2] The district court dismissed the case on a motion to dismiss, before the close of discovery, on the eve of depositions, and before summary judgment motions were to be filed. This is not a situation where Plaintiff sat on its legal theories and inexcusably failed to amend its pleadings. *See also Bills v. U.S. Steel LLC*, 267 F.3d 785 (8th Cir. 2001) (holding that court did not abuse its discretion to not allow amendment of pleadings when plaintiff had been warned of the flaw in his pleading and refused to amend the pleading while case was open). Plaintiff should have been given leave to amend its complaint to add these claims. But even Plaintiff's original complaint is sufficient to maintain a claim that the Department discriminated amongst religious organizations as Plaintiffs claimed that the Department violated Article I, § 7 of the Missouri Constitution requiring the Department to determine whether an organization is sufficiently controlled by a church to violate this section. *See* Complaint, ¶ 72-78.

This record of direct aid to some religious organizations, including churches, demonstrates that Missouri prefers some religious groups over others. *See Larson v. Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

The Department argues that Trinity did not raise the argument of preference among religious organizations below. *See* Appellee's Brief, 37. But this argument was raised below. During the hearing on Defendant's Motion to Dismiss, Plaintiff argued that Missouri was showing favoritism by allowing some religious organizations to receive funding and not others. *See* JA 253-54; *see also* Plaintiff's Response to Motion to Dismiss, 7 (in arguing that the Department violated the Equal Protection Clause, stated "Missouri cannot argue on one hand that it has a compelling governmental interest to maintain a high separation between church and state such that it will not allow a learning center to participate in a government program that provides recycled tires, while on the other hand allowing public financing of a Catholic University whose mission and bylaws state a blatantly religious purpose."); Complaint ¶ 72 ("The Department's policies and actions that prohibit organizations from participating in the Scrap Tire Program that are 'owned or controlled by a church, sect, or denomination of religions' and where such grant would 'directly aid any church, sect or denomination of religion' are hostile to

religion."); ¶ 92 ("Missouri's Blaine Amendment states that 'no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.'"; ¶ 93 ("The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church discriminates against Plaintiff because it is a church, in violation of Missouri's Blaine Amendment.); Motion for Reconsideration, JA 141.

And if the district court felt that this argument was not properly pled, then it should have given Plaintiff leave to amend its complaint so that its claims could be properly heard. *See Zutz*, 601 F.3dat 850-51 (stating that in ruling on post judgment motions to amend, courts "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits.").

The Department cannot justify its policy and actions that have resulted in various religious organizations participating in the scrap tire program while prohibiting Trinity from participating.

III. The Department's Policy excessively entangles the state with religion, resulting in hostility to religious beliefs and violates the Establishment Clause.

The Department's policy of allowing some religious organizations to receive state aid, but not others, depending on the pervasiveness of religion, excessively entangles the state with religion and violates the Establishment Clause. *See St.*

Louis University, 220 S.W.3d at 726 ("[a] key question is whether religion so pervades the atmosphere of the university that it is in essence under religious control or directed by a religious denomination.") Missouri has allowed religious organizations to receive state aid. *See id*., *see also* JA 141 (Motion for Reconsideration).

The Department defends this decision to allow certain religious organizations to receive state aid on the theory that such organizations are not "controlled" by a church. *See* Appellee Brief 22. But such a distinction requires the state to become excessively entangled with religion in violation of the Establishment Clause and is hostile to religion. Analyzing the pervasiveness of religiosity in an organization violates the Establishment Clause. The Tenth Circuit confronted this exact question in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). In that case, the State of Colorado provided scholarships to eligible students who attended an accredited college in the state, but prohibited scholarships to schools the state deemed "pervasively sectarian." To determine whether a school was "pervasively sectarian," state officials examined whether the policies enacted by school trustees adhere too closely to religious doctrine, whether all students and faculty share a single "religious persuasion," and whether the contents of college theology courses tended to "indoctrinate." *See Colorado Christian Univ.*, 534 F.3d at 1250.

Here, Missouri permits funding of some religious organizations, such as St. Louis University and the fifteen other religious organizations participating in the scrap tire program, while others are not allowed to receive any government funds. The distinguishing test is whether "religion so pervades the atmosphere of the university that it is in essence under religious control or directed by a religious denomination." 220 S.W.3d at 726. This test requires the Department to become excessively entangled with religion. As a result, the Department has allowed a minimum of fifteen organizations to participate in the scrap tire program, but has determined that Trinity cannot. Trinity should have been allowed to present its case that such a policy excessively entangled the state with religion and its case was improperly dismissed.

IV. Plaintiff has stated a claim under the Missouri Constitution.

The Department's actions of enforcing its laws and policies to prohibit Trinity from participating in the Scrap Tire Program violates Article I, § 7 of the Missouri Constitution. Article I, § 7 of the Missouri Constitution states,

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed or religion, or any form of religious faith or worship.

Standard statutory construction rules require constitutional provisions to be read in harmony with other sections. *See Frye v. Levy*, 2013 WL 1914393, at *4

(Mo. App. S.D. May 9, 2013); *Boone Cnty. Court v. State*, 631 S.W.2d 321, 324 (1982). Here, Article I, § 7 prohibits state moneys being given "in aid of" any church, but also prohibits "discrimination made against any church…." Read in harmony with each other, this constitutional provision prohibits state aid to a church. But outside of state aid, the state cannot discriminate against churches. Thus, the state is prohibited under this provision from simply giving money directly to a church. But this provision does not prohibit the state from contracting with churches. *See Kintzele v. City of St. Louis*, 347 S.W.2d at 695 (upholding sale of land to a religious university). The difference between the state contracting with a church and the state just giving money to a church is a question of fact that involves the interplay of contract law. A "contract" is the mutual exchange of considerations. *See Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 438 (Mo. Ct. App. 2010) ("Generally speaking, therefore, if a contract contains mutual promises, such that a legal duty or liability is imposed on each party as a promisor to the other party as a promisee, the contract is a bilateral contract supported by sufficient consideration.")

For example, in *Kintzele*, the court rejected a claim that a sale of land to a religious university violated Missouri's No Preference Clause even though the facts demonstrated that (1) the University was a sectarian organization, (2) the City

had spent over $1,624,617 to acquire the property, but (3) sold it to the sectarian university for $535,800. The court held that it was a valid sale under the law.

The Department argued, "[t]he holding [in *Kintzele*] had nothing to do with mutual considerations between the University and the City." *See* Appellee Brief 17. The Department has a flawed understanding of contract law and *Kintzele*. A valid contract between two parties is an agreement where there are mutual considerations flowing to both parties. If one side does not have any obligations under the contract, then it is not a contract. *See Sumners v. Serv. Vending Co.*, 102 S.W.3d 37, 41 (Mo.App. S.D.2003) (stating that it is an elemental principle of contract law that a contract "that contains mutual promises imposing some legal duty or liability on each promisor is supported by sufficient consideration to form a valid, enforceable contract.")

The court in *Kintzele* recognized this basic contract principle. In discussing *64th St. Residences, Inc. v. City of New York*, 4 N.Y.2d 268 (1958), involving similar issues, the court said, " '[S]ince this sale is an ***exchange of considerations*** and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding." *Kintzele v. City of St. Louis*, 347 S.W.2d 695, 700 (Mo. 1961) (emphasis added).

Reading Article I, § 7 to prohibit aid to a religious organization, but also prohibiting discrimination against religious organizations when it comes to

contracting with the state, harmonizes the different sections of this provision. Thus the issue in this case is whether the mutual considerations of the parties are sufficient to consider the scrap tire program a contract between the parties, or direct aid. Do the facts of this program constitute direct aid or simply the mutual consideration between contracting parties?

The Department cites several cases where the courts have found direct aid. *See* Appellee Brief, 19-20. But those cases are fundamentally different than this situation as those cases did not involve the exchange of considerations. *See Paster v. Tussey*, 512 S.W.2d 97 (state funds purchased textbooks); *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1941) (state took over parochial school and brought it into the public school system and funded it as such); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (use of public funds to transport students to parochial schools); *Luetkemeyer v. Kaufmann*, 364 F Supp. 376 (W.D. Mo. 1973) (bus transportation for public schools but not private schools); *Brusca v. Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971) (First Amendment does not require public assistance to secular and religious schools).

Rather, this case is more analogous to the cases where the courts have not found direct aid, such as *Kintzele* and *Americans United*. In any event, Trinity should have been given the opportunity to pursue discovery and present its case that the obligations it incurred under the program are more analogous to the mutual

exchange of considerations approved in these cases, rather than the cases involving direct aid, and thus Article I,§ 7 was violated.

V. The Department violated the Free Exercise Clause.

The Department's policies and actions violate the Free Exercise Clause as they target religion for disparate treatment. A state violates the Free Exercise Clause when either a regulation is not neutral or generally applicable or when it targets religion specifically. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-47 (1993) (striking down law under the Free Exercise Clause without considering whether it imposed a substantial burden on religion); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("Under *Smith* . . . there is no substantial burden requirement when government discriminates against religious conduct"); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (because the challenged law is not neutral or generally applicable, Trinity "need not demonstrate a substantial burden on the practice of their religion."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("After *Smith*, it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny.")

The Department argues that the Free Exercise Clause was not violated in light of *Locke v. Davey*, 540 U.S. 712 (2004). *See* Appellee Brief 28. But this case involves fundamentally different facts than were at issue in *Locke*, which should

not apply here. In *Locke*, the Supreme Court upheld a Washington statute that prohibited state scholarships for students studying to become clergy. *See* 540 U.S. at 725. The holding was explicitly limited to the issue of funding for "the religious training of clergy." *Id*. at 722, n. 5, 722-24. The Court explained that its narrow holding reflected long-standing historical concerns over public funding of the clergy. The statute in question did not apply to general religious studies. In fact, the statute "permit[ted] students to attend pervasively religious schools, so long as they [were] accredited." *Id*. at 724. The Court recognized the limited application of the state's Establishment Clause interest:

> Justice Scalia notes that the state's "philosophical preference" to protect individual conscience is potentially without limit, see *post*, at 1318; however **the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference" commands."**

Id. at 722 n. 5 (emphasis added).

Locke does not endorse blatant discrimination against religious organizations. 540 U.S. at 724 (noting that the law under scrutiny permitted students to attend pervasively religious schools and take devotional theology courses).

Missouri's prohibition in this case is fundamentally different than the prohibition which was upheld in *Locke*. There is no chance that recycled tires will be used for religious instruction or for religious exercise. This is in marked

contrast to Washington's prohibition in *Locke* on the funding of devotional studies for theology students which would be directly used for religious instruction and exercise.

Missouri does not have a compelling interest in avoiding an illusory Establishment Clause violation. But Missouri does have a significant interest to prevent discrimination against religious groups. In *Oliver v. State Tax Commission of Missouri*, 37 S.W.3d 243 (Mo. 2001) (en banc), the court said,

> In *Widmar* there unquestionably was the use of state facilities by a religious organization, which might violate a literal reading of the first clause of article I, section 7, of the Missouri Constitution. But the overriding requirement of the federal constitution is that the religious organization not be discriminated against on the basis of the content of its activities, and in this case the Missouri Constitution is consistent with this principle.

Id. at 252 (upholding constitutionality of "So help me God" oath).

In sum, Missouri does not have a compelling governmental interest to prevent a church from participating in a secular recycled tire program on the same terms and conditions as all other organizations. This case does not involve state monies for training clergy, paying for religious education, or buying religious textbooks.

VI. The Department violated the Equal Protection Clause

This is a classic case of treating similarly situated people differently in violation of the Equal Protection Clause. Plaintiff is similarly situated both to non-

religious day cares and to other religious day cares. The Plaintiff, secular daycares, and the fifteen other religious day cares given scrap tire grants all run day cares in Missouri. Yet these other non-religious day cares and fifteen religious day cares are permitted to participate in the scrap tire program while Trinity is not. The Department has no valid reason to prohibit Plaintiff from participating in the scrap tire program. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (striking down law that treated group home inhabitants on less than equal terms than others); *see also Larson v. Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

The Department contends that it is required to discriminate against Plaintiff because Article I, § 7 requires it to not give aid to religious organizations. *See* Appellee Brief 13. But if this were true, then why did the Department allow a minimum of fifteen other religious organizations to participate in the scrap tire program?

The Department argues that rational basis is the appropriate standard as the Free Exercise Clause was not violated. *See* Appellee Brief 30. However, the Free Exercise Clause was violated, and so strict scrutiny applies. *See supra*, at 12. But the Department's actions fail even rational basis review. The Department has no valid reason to allow fifteen other religious organizations to participate in the scrap

tire program, but not allow Plaintiffs on the theory it is controlled by a church. *City of Cleburne*, 473 U.S. at 439 (applying rational basis to strike down law that discriminated against group home inhabitants); *see also Larson*, 456 U.S. at 244 (prohibiting favoring one religious denomination over another).

VII. The court should have allowed the pleadings to be amended.

The District Court stated that Trinity failed to present evidence that Missouri has deviated from its interest of maintaining a high separation of church and state. *See* Order, 13 ("Trinity has failed to identify any evidence that might support its claim, nor has it shown that a state could ever forfeit its interest in complying with its own laws").

Trinity did not believe it had to present evidence in its Complaint as to this issue, as it sufficiently pled that the Department did not have a valid interest to deny Trinity participation in its Programs and that it was permitting other similarly situated groups to participate. *See* JA, 9 ("Defendant has allowed other similarly-situated non-profit organizations to participate in the Scrap Tire Program.") ("Defendant does not have a compelling governmental interest to justify such disparate treatment of Plaintiff") ("Excluding Plaintiff from the Scrap Tire Program because the Learning Center is connected to a church is not rationally related to a legitimate governmental interest.").

But in light of the court's order, Trinity sought leave to amend the Complaint to add allegations that Missouri, and the Department, have acted contrary to its alleged purpose, including the fifteen examples it learned through discovery where the Department allowed religious organizations to participate in the Program. *See* JA, 159.

The court abused its discretion in not allowing Trinity to amend its complaint to add these allegations. *See Zutz v. Nelson*, 601 F.3d at 850-51 (courts "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits."). Here, the case had not progressed to the summary judgment stage, nor was Trinity given any warning that it needed to amend its pleadings as was done in the above cases.

As to the futility grounds cited by the court, because Trinity has stated a claim for relief, amending the complaint would not be futile. *See Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir.2008) (stating that denial of a motion for leave to amend on the basis of futility "means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.")

To the extent the district court believed that Plaintiff failed to properly plead that the Department's policy and actions excessively entangled the state with

religion, or that the Department violated the Equal Protection Clause by allowing some religious organizations to receive state aid and not others, then it should have allowed Plaintiff leave to amend its pleadings.

CONCLUSION

The District Court erred in weighing the evidence and concluding that Trinity had not pled a claim for relief. Trinity should have been allowed to pursue its claims and have them decided based upon the evidence. The District Court's opinion should be reversed and this case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVCE

I hereby certify that on this 16th day of July, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Joel L. Oster

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7) and Eighth Circuit Rule 32.3, the undersigned counsel certifies that this brief :

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
    a. This brief contains 4,869 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
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Dated this 16th day of July, 2014.

/s/ Joel L. Oster
Joel Oster