Office of Legislative Legal Services

Colorado General Assembly

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Statutory Revision Committee (SRC)
Friday, March 23, 2018
State Capitol, Upon Adjournment, SCR 352

1. Update on nonstatutory legislative declarations
2. Presentation of memoranda describing potential SRC legislation:
    a. Concerning manufacturers performing warranty work
    ***Proposed by**: OLLS staff **Drafter:** Jery Payne*
    b. Removing references to the repealed "Proposition AA refund account" associated with the marijuana tax cash fund
    ***Proposed by**: OLLS staff **Drafter:** Jane Ritter*
    c. Adding a nonsubstantive cross-reference to the crime of failure to register as a sex offender
    ***Proposed by**: Attorneys in Judicial Branch **Drafter:** Michael Dohr*
    d. Repealing obsolete CDPHE statutes
    ***Proposed by:** Department of Public Health & Environment **Drafter:** Kristen Forrestal*
    e. Removing language that prohibits sectarian entities from applying for certain public grant programs
    ***Proposed by**: Senator Moreno, Chair **Drafter:** Brita Darling*
3. Other business?

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MEMORANDUM 2a[1]

TO: Statutory Revision Committee

FROM: Jery Payne, Office of Legislative Legal Services

DATE: March 19, 2018

SUBJECT: A statutory requirement forbidding powersports vehicle manufacturers from performing warrantees

Summary

Off-highway vehicles, snowmobiles, and personal watercraft are powersports vehicles, which are regulated by part 5 of article 6 of title 12, C.R.S. Section 12-6-523 (1)(a), C.R.S., forbids the manufacturers of these vehicles from performing warrantee work. During a committee hearing, a legislator proposed that the word "not" be inserted in the provision. The effect of this change is that manufacturers cannot legally perform warrantee work.

In addition, this provision arguably violates article 1, section 10 of the United States Constitution and article 2, section 11 of the Colorado Constitution.

This issue was brought to staff's attention by a legislative editor at the Office of Legislative Legal Services (OLLS).

Based on its research, OLLS staff recommends legislation to change the provision, in section 12-6-523 (1)(a), C.R.S., to allow manufacturers to honor warrantees.

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Analysis

Section 12-6-523 (1)(a), C.R.S., reads:

> **12-6-523. Unlawful acts.** (1) It is unlawful and a violation of this part 5 for any powersports vehicle manufacturer, distributor, or manufacturer representative:
>
> (a) To willfully fail to cause to not be performed any written warranties made with respect to a powersports vehicle or parts thereof;

Read literally, this provision forbids honoring written warrantees. This section is within part 5 of article 6 of title 12, C.R.S. Part 5 regulates the sale of powersports vehicles. A substantially similar part 1 regulates the sale of motor vehicles. Part 1 contains a similar provision to section 12-6-523 (1)(a), C.R.S.:

> **12-6-120. Unlawful acts.** (1) It is unlawful and a violation of this part 1 for any manufacturer, distributor, or manufacturer representative:
>
> (a) To willfully fail to perform or cause to be performed any written warranties made with respect to any motor vehicle or parts thereof;

This section requires a manufacturer to honor the written warrantee. This appears to be the purpose of both these provisions.

A written warrantee is a contractual obligation that accompanies the sale of a powersports vehicle. Arguably, forbidding a manufacturer from honoring written warrantees violates the contracts clauses of both the Colorado and United States Constitutions:

> **Section 11. Ex post facto laws.** No ex post facto law, nor law impairing the obligation of contracts, … shall be passed by the general assembly.[2]

> **Section 10. Powers denied individual states.** (1) No state shall … pass any … law impairing the obligation of contracts….[3]

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[2] Colo. Const. art. I, § 11.

[3] U.S. Const. art. I, § 10.

In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, the United States Supreme Court set out a three-level[4] analysis to determine if legislation violates the obligations-of-contracts clause. To prevail, the person seeking to overturn a statute must first show that the statute has caused a substantial impairment of a contractual relationship.[5] If the law constitutes a substantial impairment, then the state may justify the law by showing that the impairment serves a "significant and legitimate public purpose."[6]

Forbidding a manufacturer from performing its obligations under a written warrantee is a substantial impairment because it is a complete impairment of the obligation. Therefore, the first test is met.

Although it would be a fact-based analysis, it appears that forbidding a manufacturer from repairing the motor vehicles of the public would hurt the public. This is hard to reconcile with the state's need to show that the law serves a significant and legitimate public purpose. So it is likely that this provision, as it currently exists, would be held to violate the obligations-of-contracts clause.

Therefore, this provision arguably conflicts with the state and federal constitutions.

Statutory Charge[7]

The Statutory Revision Committee is tasked with recommending legislation necessary to modify defects in the law and modify or eliminate contradictory laws. The provision forbidding performing warrantees is probably an error and contradicts the state and federals constitutions.

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[4] This memo does not set out the third part of the analysis for the sake of brevity. The third level is not relevant because the statute would probably be found to violate the contracts clause on the second level of analysis.

[5] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411 (1983).

[6] *Id.* at 412.

[7] The Statutory Revision Committee is charged with "[making] an ongoing examination of the statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and recommending "legislation annually to effect such changes in the law as it deems necessary in order to modify or eliminate antiquated, redundant, or contradictory rules of law and to bring the law of this state into harmony with modern conditions." § 2-3-902 (1), C.R.S. In addition, the Committee "shall propose legislation only to streamline, reduce, or repeal provisions of the Colorado Revised Statutes." § 2-3-902 (3), C.R.S.

Proposed Bill

The attached bill draft would eliminate the conflict by changing the provision to match section 12-6-120 (1)(a), C.R.S.

Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

DRAFT
3.19.18

Bill 2a

LLS NO. 18-1130.01 Jery Payne x2157 **COMMITTEE BILL**

Statutory Revision Committee

BILL TOPIC: "Powersports Vehicle Written Warranties"

A BILL FOR AN ACT

CONCERNING A REQUIREMENT THAT WRITTEN WARRANTIES FOR POWERSPORTS VEHICLES BE HONORED.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Statutory Revision Committee. Current law appears to forbid a powersports vehicle manufacturer or distributor from honoring written warranties. The bill clarifies that the powersports dealer is required to honor written warranties.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The purpose of this legislation, enacted in 2018, is to clarify that it is unlawful for a powersports vehicle manufacturer or distributor to fail to perform written warranties on the powersports vehicle.

SECTION 2. In Colorado Revised Statutes, 44-20-423, **amend as enacted by Senate Bill 18-030** (1)(a) as follows:

44-20-423. Unlawful acts. (1) It is unlawful and a violation of this part 4 for any powersports vehicle manufacturer, distributor, or manufacturer representative:

(a) To willfully fail to PERFORM OR cause to ~~not~~ be performed any written warranties made with respect to a powersports vehicle or parts thereof;

SECTION 3. Act subject to petition - effective date. This act takes effect October 1, 2018; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within the ninety-day period after final adjournment of the general assembly, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

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MEMORANDUM 2b[1]

TO: Statutory Revision Committee

FROM: Jane M. Ritter, Office of Legislative Legal Services

DATE: March 19, 2018

SUBJECT: Removing statutory references to the repealed "Proposition AA refund account" associated with the marijuana tax cash fund

Summary and Analysis

House Bill 15-1367 created part 6 of article 28.8 of title 39, C.R.S., concerning the ballot issue related to Proposition AA refunds related to the marijuana tax cash fund.[2] Specifically, section 39-28.8-604, C.R.S., created Proposition AA refund account. Section 39-28.8-607, C.R.S., repealed this part 6 on July 1, 2017. However, several obsolete references remain in statute to the now-repealed section 39-28.8-604, C.R.S.

Statutory Charge[3]

Removing obsolete references to a previously repealed funding mechanism meets the Statutory Revision Committee's statutory charge to eliminate obsolete provisions of law.

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[2] § 39-28.8-501, C.R.S.

[3] The Statutory Revision Committee is charged with "[making] an ongoing examination of the statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and recommending "legislation annually to effect such changes in the law as it deems necessary in order to modify or eliminate antiquated, redundant, or contradictory

Proposed Bill

The attached bill draft makes the necessary changes to Colorado Revised Statutes to remove obsolete references to the previously repealed Proposition AA refund account.

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rules of law and to bring the law of this state into harmony with modern conditions." § 2-3-902 (1), C.R.S. In addition, the Committee "shall propose legislation only to streamline, reduce, or repeal provisions of the Colorado Revised Statutes." § 2-3-902 (3), C.R.S.

Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

DRAFT
3.15.18

Bill 2b

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LLS NO. 18-####.## Jane Ritter x4342 **COMMITTEE BILL**

Statutory Revision Committee

BILL TOPIC: "Obsolete References Proposition AA Refund Acct"

A BILL FOR AN ACT

CONCERNING REPEALING OBSOLETE STATUTORY REFERENCES TO THE REPEALED PROPOSITION AA REFUND ACCOUNT.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Statutory Revision Committee. The bill removes statutory references to section 39-28.8-604, Colorado Revised Statutes, the former proposition AA refund account, that was repealed on July 1, 2017.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The general assembly declares that the purpose of this legislation, enacted in 2018, is to repeal references in statute that refer to the proposition AA refund account, a fund that was repealed in 2017. The general assembly further declares that repealing these statutory references does not in any way alter the scope or applicability of the statutory sections in which the references appear.

SECTION 2. In Colorado Revised Statutes, 22-14-109, **amend** (4)(a) as follows:

22-14-109. Student re-engagement grant program - rules - application - grants - fund created - report. (4) (a) There is ~~hereby~~ created in the state treasury the student re-engagement grant program fund, referred to in this subsection (4) as the "fund", that ~~shall consist of any moneys~~ CONSISTS OF ANY MONEY credited to the fund pursuant to ~~paragraph (b) of this subsection (4)~~ SUBSECTION (4)(b) OF THIS SECTION and any additional ~~moneys~~ MONEY that the general assembly may appropriate to the fund, including ~~moneys~~ MONEY from the marijuana tax cash fund created in section 39-28.8-501. ~~C.R.S., or the proposition AA refund account created in section 39-28.8-604 (1), C.R.S. The moneys~~ THE MONEY in the fund ~~shall be~~ IS subject to annual appropriation by the general assembly to the department for the direct and indirect costs associated with the implementation of this section.

SECTION 3. In Colorado Revised Statutes, 22-93-105, **amend** (3)(a) as follows:

22-93-105. School bullying prevention and education cash fund - created. (3) (a) The general assembly may appropriate ~~moneys~~

MONEY to the bullying prevention and education cash fund from the marijuana tax cash fund created in section 39-28.8-501. ~~C.R.S., or from the proposition AA refund account created in section 39-28.8-604 (1), C.R.S.~~

SECTION 4. In Colorado Revised Statutes, 24-32-117, **amend** (3) as follows:

24-32-117. Retail marijuana impact grants - program - creation - definitions. (3) The general assembly may annually appropriate ~~moneys~~ MONEY from the marijuana tax cash fund created in section 39-28.8-501 ~~C.R.S., or the proposition AA refund account created in section 39-28.8-604 (1), C.R.S.,~~ to the division to make the grants described in subsection (2) of this section and for the division's reasonable administrative expenses related to the grants. Any unexpended and unencumbered ~~moneys~~ MONEY from an appropriation made pursuant to this subsection (3) ~~remain~~ REMAINS available for expenditure by the division in the next fiscal year without further appropriation.

SECTION 5. In Colorado Revised Statutes, 24-32-119, **amend** (2) as follows:

24-32-119. Gray and black market marijuana enforcement grant program - report - definition. (2) The general assembly may annually appropriate money from the marijuana tax cash fund created in section 39-28.8-501 ~~or the proposition AA refund account created in section 39-28.8-604 (1)~~ to the division to make the grants described in subsection (1) of this section and for the division's reasonable administrative expenses related to the grants. Any unexpended and unencumbered money from an appropriation made pursuant to this subsection (2) remains available for expenditure by the division in the

next fiscal year without further appropriation.

SECTION 6. In Colorado Revised Statutes, 25-32-105, **amend** (1) introductory portion and (1)(b)(II) as follows:

25-32-105. Department - poison control services - duties - contract. (1) The department has the following powers and duties with respect to the provision of poison control services on a statewide basis and for the dissemination of information as provided in this ~~article~~ ARTICLE 32:

(b) (II) On or after January 1, 2016, to contract with private, nonprofit, or public entities for the continuing provision of statewide poison control services and the continuing dissemination of poison control information to the citizens of the state by means other than a toll-free telephone network, such as text messaging, instant messaging, and e-mail. The entity or entities shall coordinate these services with the toll-free telephone network described in ~~subparagraph (I) of this paragraph (b)~~ SUBSECTION (1)(b)(I) OF THIS SECTION. The general assembly shall appropriate at least one million dollars for the fiscal year 2015-16 to the department for it to contract with an entity to build the infrastructure necessary for the services identified in this ~~subparagraph (II)~~ SUBSECTION (1)(b)(II), and any unexpended and unencumbered ~~moneys~~ MONEY from the appropriation ~~remain~~ REMAINS available for expenditure by the department in the next fiscal year without further appropriation. In addition, the general assembly may annually appropriate ~~moneys~~ MONEY from the marijuana tax cash fund created in section 39-28.8-501 ~~C.R.S., or the proposition AA refund account created in section 39-28.8-604 (1), C.R.S.,~~ to the department for the services identified in this ~~subparagraph (II)~~ SUBSECTION (1)(b)(II).

SECTION 7. In Colorado Revised Statutes, 26-6.8-104, **amend** (6) as follows:

26-6.8-104. Colorado Youth Mentoring Services Act. (6) **Youth mentoring services cash fund.** There is ~~hereby~~ created in the state treasury the youth mentoring services cash fund, REFERRED TO IN THIS SUBSECTION (6) AS THE "FUND". The ~~moneys in the youth mentoring services cash~~ MONEY IN THE fund ~~are~~ IS subject to annual appropriation by the general assembly for the direct and indirect costs of implementing this section. The executive director may accept on behalf of the state any grants, gifts, or donations from any private or public source for the purpose of this section. All private and public ~~funds~~ MONEY received through grants, gifts, or donations ~~shall~~ MUST be transmitted to the state treasurer, who shall credit the same to the ~~youth mentoring services cash~~ fund. The general assembly may appropriate ~~moneys~~ MONEY from the marijuana tax cash fund created in section 39-28.8-501. ~~C.R.S., or the proposition AA refund account created in section 39-28.8-604 (1), C.R.S.~~ All investment earnings derived from the deposit and investment of ~~moneys~~ MONEY in the fund ~~shall~~ MUST remain in the fund and ~~shall~~ MUST not be transferred or revert to the general fund of the state at the end of any fiscal year.

SECTION 8. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect

unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

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MEMORANDUM 2c[1]

TO: Statutory Revision Committee

FROM: Michael Dohr, Office of Legislative Legal Services

DATE: March 19, 2018

SUBJECT: Cross-reference in statute concerning failure to register crime

Summary

A person convicted of certain sex crimes is required to register as a sex offender. To enforce the registration requirement, there is a crime of failure to register as a sex offender. There are a number of different ways to commit the crime, including when a sex offender moves out of state and fails to file a cancellation form with the jurisdiction where he or she will no longer reside. The language in the crime referencing the requirement to file a cancellation form does not include a citation to the statutory requirement to file the cancellation form. The proposed change would add a cross-reference.

This issue was brought to staff's attention by attorneys in the judicial branch.

Analysis

Article 22 of title 16, C.R.S., creates the sex offender registration system for Colorado. In order to enforce the registration requirement, there is a crime of failure to register, section 18-3-412.5, C.R.S. A person can commit failure to register 10 different ways,

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including failing to file a cancellation form with the jurisdiction an offender is moving from when the offender moves out of state.[2] Section 18-3-412.5 (1)(i), C.R.S., does not contain a cross-reference from the sex offender registration act to the requirement to file the cancellation form. The proposed change would add that cross-reference, section 16-22-108 (4)(a)(II), C.R.S.

Statutory Charge[3]

The Statutory Revision Committee is specifically charged with discovering statutory defects. Thus, the Committee could add the cross-reference to address the statutory defect in section 18-3-412.5 (1)(i), C.R.S.

Proposed Bill

The attached bill draft adds a cross-reference to section 18-3-412.5 (1)(i).

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[2] § 18-3-412.5 (1)(i), C.R.S.

[3] The Statutory Revision Committee is charged with "[making] an ongoing examination of the statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and recommending "legislation annually to effect such changes in the law as it deems necessary in order to modify or eliminate antiquated, redundant, or contradictory rules of law and to bring the law of this state into harmony with modern conditions." § 2-3-902 (1), C.R.S. In addition, the Committee "shall propose legislation only to streamline, reduce, or repeal provisions of the Colorado Revised Statutes." § 2-3-902 (3), C.R.S.

ADDENDUM A

18-3-412.5. Failure to register as a sex offender. (1) A person who is required to register pursuant to article 22 of title 16, C.R.S., and who fails to comply with any of the requirements placed on registrants by said article, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender:

(i) Failure to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which the person will no longer reside;

16-22-108. Registration - procedure - frequency - place - change of address - fee. (4) (a) (II) Any time a person who is required to register pursuant to section 16-22-103 ceases to reside at an address and moves to another state, the person shall notify the local law enforcement agency of the jurisdiction in which said address is located by completing a written registration cancellation form, available from the local law enforcement agency. At a minimum, the registration cancellation form shall indicate the address at which the person will no longer reside and all addresses at which the person will reside. The person shall file the registration cancellation form within five business days after ceasing to reside at an address. A local law enforcement agency that receives a registration cancellation form shall electronically notify the CBI of the registration cancellation. If the person moves to another state, the CBI shall promptly notify the agency responsible for registration in the other state.

DRAFT
3.16.18

Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

Bill 2c

Temporary storage location: S:\LLS\2018A\Bills\Pre-Draft\SRC failure to register.wpd

LLS NO. 18-####.## Michael Dohr x4347 **COMMITTEE BILL**

Statutory Revision Committee

BILL TOPIC: "Add Cross Reference To Failure To Register Crime"

A BILL FOR AN ACT

CONCERNING ADDING A NONSUBSTANTIVE CROSS REFERENCE TO THE CRIME OF FAILURE TO REGISTER AS A SEX OFFENDER.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Statutory Revision Committee. There is a crime of failure to register as a sex offender. There are a number of different ways to commit the crime, including when a sex offender moves out of state and fails to file a cancellation form with the jurisdiction where he or she will no longer reside. The language in the crime referencing the requirement to

file a cancellation form does not include a citation to the statutory requirement to file the cancellation form. The bill adds that cross reference.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The general assembly declares that the purpose of this legislation, enacted in 2018, is to effect a nonsubstantive change in statute to add a cross reference to section 18-3-412.5 (1)(i), Colorado Revised Statutes. The general assembly further declares that the addition of the cross reference to section 18-3-412.5 (1)(i), Colorado Revised Statutes, does not in any way alter the scope or applicability of the statutory section involved.

SECTION 2. In Colorado Revised Statutes, 18-3-412.5, **amend** (1) introductory portion and (1)(i) as follows:

18-3-412.5. Failure to register as a sex offender. (1) A person who is required to register pursuant to article 22 of title 16 ~~C.R.S.,~~ and who fails to comply with any of the requirements placed on registrants by said ~~article~~ ARTICLE 22, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender:

(i) Failure to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which the person will no longer reside PURSUANT TO SECTION 16-22-108 (4)(a)(III);

SECTION 3. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a

referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

DRAFT
3.19.18

Bill 2d

LLS NO. 18-1161.01 Kristen Forrestal x4217 **COMMITTEE BILL**

Statutory Revision Committee

BILL TOPIC: "Repeal Obsolete Statutes CDPHE"
DEADLINES: File by: 3/21/2018

A BILL FOR AN ACT

CONCERNING THE REPEAL OF OBSOLETE STATUTORY PROVISIONS WITHIN THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Statutory Revision Committee. Section 2 of the bill repeals antiquated statutory hiring requirements within the department of public health and environment (department).

Section 3 repeals the establishment of child care programs in nursing home facilities. The statute was enacted in 1988 and never

implemented.

Section 4 repeals a 1997 deadline for the state board of health to implement a statewide trauma system.

Sections 5, 6, and 7 change references to "mental retardation" to "intellectual or developmental disability".

Section 8 repeals a 1998 requirement that the department create a plan related to blood lead levels in children.

Section 9 repeals the Colorado cancer drug repository program, which is not utilized.

Section 10 repeals the cancer cure control program that was originally enacted in the 1960s. These functions are now performed by the federal food and drug administration.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The general assembly declares that the purpose of this act is to repeal obsolete statutory references within the Colorado department of public health and environment. The general assembly further declares that repealing these statutory references does not alter the scope or applicability of the remaining statutes.

SECTION 2. In Colorado Revised Statutes, **repeal** 25-1-106 as follows:

25-1-106. Division personnel. ~~The executive director of the department shall appoint the director of the division of administration, pursuant to the provisions of section 13 of article XII of the state constitution. Each subdivision (and section) of the division of administration shall be under the management of a head, and such heads and all other subordinate personnel of the division shall be appointed by the director of the division, subject to the constitution and state personnel system laws of the state, and shall possess qualifications approved by the board. All personnel shall receive such compensation as fixed by the executive director with the approval of the board, subject to the~~

~~constitution and state personnel system laws of the state and within the limits of funds made available to the department by appropriation of the general assembly or otherwise. With the approval of the executive director, employees shall also be allowed traveling and subsistence expenses actually and necessarily incurred in the performance of their official duties when absent from their places of residence.~~

SECTION 3. In Colorado Revised Statutes, **repeal** part 10 of article 1 of title 25.

SECTION 4. In Colorado Revised Statutes, 25-3.5-704, **amend** (1) as follows:

25-3.5-704. Statewide emergency medical and trauma care system - development and implementation - duties of department - rules adopted by board. (1) The department shall develop, implement, and monitor a statewide emergency medical and trauma care system in accordance with the provisions of this part 7 and with rules adopted by the state board. ~~The system shall be implemented statewide no later than July 1, 1997. In addition, the board shall cooperate with the department of personnel in adopting criteria for adequate communications systems that counties shall be required to identify in regional emergency medical and trauma system plans in accordance with subsection (2) of this section.~~ Pursuant to section 24-50-504 (2) ~~C.R.S.,~~ the department may contract with any public or private entity in performing any of its duties concerning education, the statewide trauma registry, and the verification process as set forth in this part 7.

SECTION 5. In Colorado Revised Statutes, 25-4-802, **amend** (2) as follows:

25-4-802. Tests for metabolic defects. (2) The state board of

health has the duty to prescribe from time to time effective tests and examinations designed to detect phenylketonuria and such other metabolic disorders or defects likely to cause ~~mental retardation~~ AN INTELLECTUAL OR DEVELOPMENTAL DISABILITY as accepted medical practice indicates.

SECTION 6. In Colorado Revised Statutes, **amend** 25-4-803 as follows:

25-4-803. Rules. (1) The state board of health shall promulgate rules ~~and regulations~~ concerning the obtaining of samples or specimens from newborn infants required for the tests prescribed by the state board of health for the handling and delivery of the ~~same~~ SAMPLES AND SPECIMENS and for the testing and examination thereof to detect phenylketonuria or other metabolic disorders found likely to cause ~~mental retardation~~ AN INTELLECTUAL OR DEVELOPMENTAL DISABILITY.

(2) The department of public health and environment shall furnish all physicians, public health nurses, hospitals, maternity homes, county departments of social services, and the state department of human services available medical information concerning the nature and effects of phenylketonuria and other metabolic disorders and defects found likely to cause ~~mental retardation~~ AN INTELLECTUAL OR DEVELOPMENTAL DISABILITY.

SECTION 7. In Colorado Revised Statutes, 25-4-1004.5, **amend** (1)(b) as follows:

25-4-1004.5. Follow-up testing and treatment - second screening - legislative declaration - fee - rules. (1) The general assembly finds that:

(b) Newborn testing is designed to identify metabolic disorders

that cause ~~mental retardation~~ INTELLECTUAL OR DEVELOPMENTAL DISABILITIES and other health problems unless they are diagnosed and treated early in life;

SECTION 8. In Colorado Revised Statutes, **repeal** 25-5-1104.

SECTION 9. In Colorado Revised Statutes, **repeal** article 35 of title 25.

SECTION 10. In Colorado Revised Statutes, **repeal** article 50 of title 25.

SECTION 11. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

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MEMORANDUM 2e[1]

TO: Statutory Revision Committee

FROM: Brita Darling, Office of Legislative Legal Services

DATE: March 19, 2018

SUBJECT: Removing language that prohibits sectarian private schools from applying to the Tony Grampsas Youth Services Program

Summary and Analysis

The United States Supreme Court recently decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[2] holding that the Free Exercise Clause of the First Amendment to the United States Constitution[3] prohibits Missouri from denying participation by an otherwise qualified church applicant in the state's playground resurfacing grant program (Missouri grant program). The Missouri grant program awards reimbursement vouchers for pour-in-ground rubber resurfacing materials, which the church intended to use to replace its preschool's existing pea gravel surface.

After finding that Missouri's grant program was a generally available public benefit, the Supreme Court applied a *status v. use* analysis and found that the religious school was denied a grant because of its religious *status*, not because of its intended secular *use* of the grant. The Supreme Court affirmed that express discrimination based on religious

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[1] This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS) in the course of its statutory duty to provide staff assistance to the Statutory Revision Committee (SRC). It does not represent an official legal position of the OLLS, SRC, General Assembly, or the state of Colorado, and is not binding on the members of the SRC. This memorandum is intended for use in the legislative process and as information to assist the SRC in the performance of its legislative duties.

[2] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017), majority and concurring opinions, attached as **Addendum D**.

[3] The First Amendment reads, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

identity in a generally available public benefit is subject to strict scrutiny. Therefore, state discrimination can only be justified by articulating a compelling state interest for the discrimination. In defense of the Missouri grant program, which included private schools but excluded religious school participation, Missouri cited to its constitutional provision, also referred to as a "Blaine Amendment," which prohibits aid to sectarian schools. Missouri's Blaine Amendment is similar to article IX, section 7 of the Colorado Constitution.[4] The Supreme Court held that Missouri's Blaine Amendment, alone, could not justify denying participation by the church in Missouri's neutral grant program. However, it is important to note that the Supreme Court did not declare Missouri's Blaine Amendment unconstitutional, and limited the holding of the case to express discrimination in playground resurfacing grants.

The Supreme Court's decision in *Trinity Lutheran* calls into question the extent to which Colorado may prohibit a private religious school from participating in the Tony Grampsas Youth Services (TGYS) program.[5] Section 26-6.8-101, C.R.S.,[6] limits participation in the TGYS grant program to nonsectarian (nonreligious) private schools, as well as other entities. In a related provision, section 26-1-111.3, C.R.S.,[7] the TGYS board is charged with identifying entities as community youth resources, and excludes private religious schools based on the definition in the TGYS grant program.

Based on the Supreme Court's holding and analysis in *Trinity Lutheran*, if the TGYS grant program is a generally available public benefit, then allowing a private nonreligious school to apply but denying applications from private religious schools based solely on the school's religious status probably violates the Free Exercise Clause of the First Amendment to the United States Constitution. Further, article IX, section 7 of the Colorado Constitution, which prohibits aid to sectarian schools, may not be sufficiently compelling to justify denying a private religious school the opportunity to apply for the neutral grant program. However, if the private religious school intended

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[4] Colo. Const. art. IX, § 7. **Aid to private schools, churches, sectarian purpose, forbidden.** 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.

[5] See attached legal opinion to Senator Moreno, dated March 19, 2018.

[6] See **Addendum A.**

[7] See **Addendum B.**

to use the grant for religious rather than secular purposes, Colorado could probably articulate a compelling state interest in denying the grant application under both the Establishment Clause of the First Amendment to the United States Constitution and article IX, section 7 of the Colorado Constitution.

Unrelated to the TGYS program, article 27.5 of title 22, C.R.S., creates a before- and after-school program in the Department of Education.[8] In that program, a "qualified community organization" includes nonprofit or not-for-profit *nonsectarian* community-based organizations. Qualified community organizations can partner with public schools to provide arts-based or vocational before- and after-school programs. Applying the same legal analysis that was applied to the TGYS grant program, the Committee may want to consider whether to remove the term "nonsectarian" from that grant program as well. If the religious community-based organization demonstrated a religious use of the funds, then Colorado could likely articulate a compelling state interest in denying a grant to the community-based organization. This section has also been included in the bill draft with a broader bill title.

Senator Moreno requested that staff prepare the attached legal opinion and draft bill for the Statutory Revision Committee relating to this issue.

Statutory Charge[9]

Pursuant to the analysis contained in this memo and the attached legal opinion, the Statutory Revision Committee shall make the determination as to whether the proposed bill fits within the charge of the Committee based on the recent United States Supreme Court's decision in *Trinity Lutheran*.

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[8] See **Addendum C**.

[9] The Statutory Revision Committee is charged with "[making] an ongoing examination of the statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and recommending "legislation annually to effect such changes in the law as it deems necessary in order to modify or eliminate antiquated, redundant, or contradictory rules of law and to bring the law of this state into harmony with modern conditions." § 2-3-902 (1), C.R.S. In addition, the Committee "shall propose legislation only to streamline, reduce, or repeal provisions of the Colorado Revised Statutes." § 2-3-902 (3), C.R.S.

Proposed Bill

The Statutory Revision Committee may wish to consider the attached bill draft relating to this issue.

ADDENDUM A

26-6.8-101. Definitions. As used in this article, unless the context otherwise requires:

(2) "Entity" means a local government, a Colorado public or nonsectarian secondary school, a group of public or nonsectarian secondary schools, a school district or group of school districts, a board of cooperative services, an institution of higher education, the Colorado National Guard, a state agency, a state-operated program, or a private nonprofit or not-for-profit community-based organization.

26-6.8-102. Tony Grampsas youth services program - creation - standards - applications. (1)(b) The Tony Grampsas youth services program is established to provide state funding for the following purposes:

(I) For community-based programs that target youth and their families for intervention services in an effort to reduce incidents of youth crime and violence;

(II) To promote prevention and education programs that are designed to reduce the occurrence and reoccurrence of child abuse and neglect and to reduce the need for state intervention in child abuse and neglect prevention and education; and

(III) For community-based programs specifically related to the prevention and intervention of adolescent and youth marijuana use.

(2)(a) The board shall choose those entities that will receive grants through the Tony Grampsas youth services program and the amount of each grant. The state department shall administer the grants awarded and monitor the effectiveness of programs that receive grants through the Tony Grampsas youth services program.

(b) For one grant cycle, up to three hundred thousand dollars of the appropriation made for the purpose set forth in this paragraph (b) may be used to award technical assistance grants for community-based prevention and intervention organizations that work with youth. Organizations that apply for moneys pursuant to this paragraph (b) must use the moneys to assist with independent certification as an evidence-based program. Evidence-based programs must demonstrate an ability to meet rigorous requirements for evaluation and effectiveness to reflect an ability to change targeted behaviors and promote positive youth development outcomes.

(c) Any grant awarded through the Tony Grampsas youth services program shall be paid from moneys appropriated pursuant to paragraph (d) of this subsection (2) or out of the general fund for the program. The board, in accordance with the timelines adopted pursuant to section 26-6.8-103 (3), shall submit a list of the entities chosen to receive grants to the governor for approval. The governor shall either approve or disapprove the entire list of entities by responding to the board within twenty days … .

***There are various other programs within article 6.8 of title 26, C.R.S.

ADDENDUM B

26-1-111.3. Activities of the state department under the supervision of the executive director - Colorado state youth development plan - creation - definitions. (1) (a) Subject to available funding, the state department, in collaboration with the Tony Grampsas youth services board, created in section 26-6.8-103, shall convene a group of interested parties to create a Colorado state youth development plan. The goals of the plan are to identify key issues affecting youth and align strategic efforts to achieve positive outcomes for all youth.

(b) The plan must:

(I) Identify initiatives and strategies, organizations, and gaps in coverage that impact youth development outcomes;

(II) Identify services, funding, and partnerships necessary to ensure that youth have the means and the social and emotional skills to successfully transition into adulthood;

(III) Determine what is necessary in terms of community involvement and development to ensure youth succeed;

(IV) Develop an outline of youth service organizations based on, but not limited to, demographics, current services and capacity, and community involvement;

(V) Identify successful youth development strategies nationally and in Colorado that could be replicated by community partners and entities across the state; and

(VI) Create a shared vision for how a strong youth development network would be shaped and measured.

(5) As used in this section, unless the context otherwise requires:

(a) "Entity" means any local government, state public or nonsectarian secondary school, charter school, group of public or nonsectarian secondary schools, school district or group of school districts, board of cooperative services, state institution of higher education, the Colorado National Guard, state agency, state-operated program, private nonprofit organization, or nonprofit community-based organization.

ADDENDUM C

22-27.5-101. Legislative declaration. (1) The general assembly hereby finds that:

(e) A grant program to provide additional funding for schools to sponsor before- and after-school programs in visual arts and performing arts and in career and technical education subjects will have the combined benefits of providing a wider range of visual arts, performing arts, and career and technical education, exposing students to a wide range of opportunities in visual arts and performing arts, assisting students in obtaining skills in a wide variety of vocations, enabling students to discover their artistic and vocation-related talents, and providing greater incentives for some students to stay in school.

22-27.5-102. Definitions. As used in this article, unless the context otherwise requires:

(6) "Qualified community organization" means a nonprofit or not-for-profit, nonsectarian, community-based organization that provides before- and after-school, arts-based or vocational activity programs to low-income youth enrolled in grades six through twelve.

22-27.5-103. Dropout prevention activity grant program - created - applications. (1) There is hereby created a grant program to fund before- and after-school arts-based and vocational activity programs for students enrolled in grades six through twelve. The goal in funding arts-based and vocational activity programs is to reduce the number of students who choose to drop out of school prior to graduation. A facility school, a qualified school, with the approval of its district board, or a qualified community organization in partnership with a qualified school may apply to the department, in accordance with procedures and time lines adopted by rule of the state board, to receive moneys through the dropout prevention activity grant program. The department shall administer the grant program as provided in this article and pursuant to rules adopted by the state board.

***There are various other programs within article 27.5 of title 22, C.R.S. Section 22-27.5-103, C.R.S., is included here as an example.

ADDENDUM D

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. *v.* COMER, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15–577. Argued April 19, 2017—Decided June 26, 2017

The Trinity Lutheran Church Child Learning Center is a Missouri preschool and daycare center. Originally established as a nonprofit organization, the Center later merged with Trinity Lutheran Church and now operates under its auspices on church property. Among the facilities at the Center is a playground, which has a coarse pea gravel surface beneath much of the play equipment. In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. The program, run by the State's Department of Natural Resources, offers reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. Pursuant to that policy, the Department denied the Center's application. In a letter rejecting that application, the Department explained that under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The Department ultimately awarded 14 grants as part of the 2012 program. Although the Center ranked fifth out of the 44 applicants, it did not receive a grant because it is a church.

Trinity Lutheran sued in Federal District Court, alleging that the Department's failure to approve its application violated the Free Exercise Clause of the First Amendment. The District Court dismissed the suit. The Free Exercise Clause, the court stated, prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit withholding an affirmative

benefit on account of religion. The District Court likened the case before it to *Locke* v. *Davey*, 540 U. S. 712, where this Court upheld against a free exercise challenge a State's decision not to fund degrees in devotional theology as part of a scholarship program. The District Court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to Trinity Lutheran. A divided panel of the Eighth Circuit affirmed. The fact that the State could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the Federal Constitution, the court ruled, did not mean that the Free Exercise Clause compelled the State to disregard the broader antiestablishment principle reflected in its own Constitution.

Held: The Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment by denying the Church an otherwise available public benefit on account of its religious status. Pp. 6–15.

(a) This Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. Thus, in *McDaniel* v. *Paty*, 435 U. S. 618, the Court struck down a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. A plurality recognized that such a law discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" *Id.*, at 627. In recent years, when rejecting free exercise challenges to neutral laws of general applicability, the Court has been careful to distinguish such laws from those that single out the religious for disfavored treatment. See, *e.g.*, *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439; *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872; and *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520. It has remained a fundamental principle of this Court's free exercise jurisprudence that laws imposing "special disabilities on the basis of . . . religious status" trigger the strictest scrutiny. *Id.*, at 533. Pp. 6–9.

(b) The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Like the disqualification statute in *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. When the State conditions a benefit in this way, *McDaniel* says plainly that the State has imposed a penalty on the free exercise of religion that must withstand the most exacting scrutiny. 435 U. S., at 626, 628.

The Department contends that simply declining to allocate to Trinity Lutheran a subsidy the State had no obligation to provide does

not meaningfully burden the Church's free exercise rights. Absent any such burden, the argument continues, the Department is free to follow the State's antiestablishment objection to providing funds directly to a church. But, as even the Department acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng*, 485 U. S., at 450. Trinity Lutheran is not claiming any entitlement to a subsidy. It is asserting a right to participate in a government benefit program without having to disavow its religious character. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Pp. 9–11.

(c) The Department tries to sidestep this Court's precedents by arguing that this case is instead controlled by *Locke* v. *Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. Scholarship recipients were free to use state funds at accredited religious and non-religious schools alike, but they could not use the funds to pursue a devotional theology degree. At the outset, the Court made clear that *Locke* was not like the cases in which the Court struck down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." 540 U. S., at 720–721. Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's restriction on the use of its funds was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy, an "essentially religious endeavor," *id.*, at 721. Here, nothing of the sort can be said about a program to use recycled tires to resurface playgrounds. At any rate, the Court took account of Washington's antiestablishment interest only after determining that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." *Id.*, at 720–721. There is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. Pp. 11–14.

(d) The Department's discriminatory policy does not survive the "most rigorous" scrutiny that this Court applies to laws imposing special disabilities on account of religious status. *Lukumi*, 508 U. S., at 546. That standard demands a state interest "of the highest order" to justify the policy at issue. *McDaniel*, 435 U. S., at 628 (internal quotation marks omitted). Yet the Department offers nothing more

than Missouri's preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before the Court, that interest cannot qualify as compelling. Pp. 14–15.

788 F. 3d 779, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, except as to footnote 3. KENNEDY, ALITO, and KAGAN, JJ., joined that opinion in full, and THOMAS and GORSUCH, JJ., joined except as to footnote 3. THOMAS, J., filed an opinion concurring in part, in which GORSUCH, J., joined. GORSUCH, J., filed an opinion concurring in part, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 15–577

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., PETITIONER *v.* CAROL S. COMER, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2017]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I

A

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year

to serve working families in Boone County, Missouri, and the surrounding area. Established as a nonprofit organization in 1980, the Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

"That no money shall ever be taken from the public

> treasury, directly or indirectly, in aid of any church, sect or denomination of religion, 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 of religion, or any form of religious faith or worship."

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." App. to Pet. for Cert. 131a. After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant. In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.

The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.

B

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment. Trinity Lutheran sought declaratory and injunctive relief prohibiting the Department from discriminating against the Church on that basis in future grant applications.

The District Court granted the Department's motion to dismiss. The Free Exercise Clause, the District Court stated, prohibits the government from outlawing or restricting the exercise of a religious practice; it generally does not prohibit withholding an affirmative benefit on account of religion. The District Court likened the Department's denial of the scrap tire grant to the situation this Court encountered in *Locke* v. *Davey*, 540 U. S. 712 (2004). In that case, we upheld against a free exercise challenge the State of Washington's decision not to fund degrees in devotional theology as part of a state scholarship program. Finding the present case "nearly indistinguishable from *Locke*," the District Court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran. *Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 976 F. Supp. 2d 1137, 1151 (WD Mo. 2013).

The Court of Appeals for the Eighth Circuit affirmed. The court recognized that it was "rather clear" that Missouri *could* award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the United States Constitution. *Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 788 F. 3d 779, 784 (2015). But, the Court of Appeals explained, that did not mean the Free Exercise Clause compelled the State to disregard the

antiestablishment principle reflected in its own Constitution. Viewing a monetary grant to a religious institution as a "'hallmark[] of an established religion,'" the court concluded that the State could rely on an applicant's religious status to deny its application. *Id.*, at 785 (quoting *Locke*, 540 U. S., at 722; some internal quotation marks omitted).

Judge Gruender dissented. He distinguished *Locke* on the ground that it concerned the narrow issue of funding for the religious training of clergy, and "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." 788 F. 3d, at 791 (opinion concurring in part and dissenting in part).

Rehearing en banc was denied by an equally divided court.

We granted certiorari *sub nom. Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 577 U. S. ___ (2016), and now reverse.[1]

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[1]In April 2017, the Governor of Missouri announced that he had directed the Department to begin allowing religious organizations to compete for and receive Department grants on the same terms as secular organizations. That announcement does not moot this case. We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000) (internal quotation marks omitted). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert to its policy of excluding religious organizations. *Ibid.* The parties agree. See Letter from James R. Layton, Counsel for Respondent, to Scott S. Harris, Clerk of Court (Apr. 18, 2017) (adopting the position of the Missouri Attorney General's Office that "there is no clearly effective barrier that would prevent the [Department] from reinstating [its] policy in the future"); Letter from David A. Cortman, Counsel for Petitioner, to Scott S. Harris, Clerk of Court (Apr. 18, 2017) ("[T]he policy change does nothing to remedy the source of the [Department's] original policy—the Missouri Supreme Court's interpretation of Article 1, §7 of the Missouri Constitution").

II

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Locke*, 540 U. S., at 718 (internal quotation marks omitted).

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533, 542 (1993) (internal quotation marks omitted). Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel* v. *Paty*, 435 U. S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972)).

In *Everson* v. *Board of Education of Ewing*, 330 U. S. 1 (1947), for example, we upheld against an Establishment Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. In the course of ruling that the Establishment Clause allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief, we explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catho-

lics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id.*, at 16.

Three decades later, in *McDaniel* v. *Paty*, the Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since the adoption of its first Constitution in 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition, however, did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" 435 U. S., at 627. McDaniel could not seek to participate in the convention while also maintaining his role as a minister; to pursue the one, he would have to give up the other. In this way, said Chief Justice Burger, the Tennessee law "effectively penalizes the free exercise of [McDaniel's] constitutional liberties." *Id.*, at 626 (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); internal quotation marks omitted). Joined by Justice Marshall in concurrence, Justice Brennan added that "because the challenged provision requires [McDaniel] to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion." *McDaniel*, 435 U. S., at 634.

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

For example, in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U. S. 439 (1988), we held that the Free Exercise Clause did not prohibit the Government

from timber harvesting or road construction on a particular tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred. Accepting that "[t]he building of a road or the harvesting of timber . . . would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," we nonetheless found no free exercise violation, because the affected individuals were not being "coerced by the Government's action into violating their religious beliefs." *Id.,* at 449. The Court specifically noted, however, that the Government action did not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Ibid.*

In *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U. S. 872 (1990), we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. Along the same lines as our decision in *Lyng*, we held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status." 494 U. S., at 877 (citing *McDaniel*, 435 U. S. 618).[2]

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[2]This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause. Recently, in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012), this Court held that the Religion Clauses required a ministerial exception to the neutral prohibition on employment retaliation contained in the Americans with Disabilities Act. Distinguishing *Smith*, we explained that while that

Finally, in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, we struck down three facially neutral city ordinances that outlawed certain forms of animal slaughter. Members of the Santeria religion challenged the ordinances under the Free Exercise Clause, alleging that despite their facial neutrality, the ordinances had a discriminatory purpose easy to ferret out: prohibiting sacrificial rituals integral to Santeria but distasteful to local residents. We agreed. Before explaining why the challenged ordinances were not, in fact, neutral or generally applicable, the Court recounted the fundamentals of our free exercise jurisprudence. A law, we said, may not discriminate against "some or all religious beliefs." 508 U. S., at 532. Nor may a law regulate or outlaw conduct because it is religiously motivated. And, citing *McDaniel* and *Smith*, we restated the now-familiar refrain: The Free Exercise Clause protects against laws that "'impose[] special disabilities on the basis of . . . religious status.'" 508 U. S., at 533 (quoting *Smith*, 494 U. S., at 877); see also *Mitchell* v. *Helms*, 530 U. S. 793, 828 (2000) (plurality opinion) (noting "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity" (citing *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Widmar* v. *Vincent*, 454 U. S. 263 (1981))).

III

A

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a

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case concerned government regulation of physical acts, "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." 565 U. S., at 190.

public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi*, 508 U. S., at 546. This conclusion is unremarkable in light of our prior decisions.

Like the disqualification statute in *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion: "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." 435 U. S., at 626 (plurality opinion) (alterations omitted).

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*, which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church. Brief for Respondent 7–12, 14–16.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng*, 485 U. S., at 450. As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U. S., at 404; see also *McDaniel*, 435 U. S., at 633 (Brennan, J., concurring in judgment) (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent").

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*, 374 U. S., at 405. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"). Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

B

The Department attempts to get out from under the

weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke* v. *Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree—one "devotional in nature or designed to induce religious faith." 540 U. S., at 716 (internal quotation marks omitted). Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." *Id.*, at 720–721. At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." *Id.*, at 721. Davey 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. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." *Id.*, at 722. The claimant in *Locke* sought funding for 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. *Id.*, at 721–722. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. Brief for Respondent 15–16. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." 540 U. S., at 720–721 (citing *McDaniel*, 435 U. S. 618). As the Court put it, Washington's scholarship program went "a long way toward including religion in its benefits." *Locke*, 540 U. S., at 724. Students in the program were free to use their scholarships at "pervasively religious schools." *Ibid.* Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. *Id.*, at 721, n. 4. He could also use his scholarship money to attend a religious college and take devotional theology courses there. *Id.*, at 725. The only thing he could not do was use the scholarship to pursue a degree in that subject.

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need

apply.[3]

C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi*, 508 U. S., at 546.[4]

Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. *McDaniel*, 435 U. S., at 628 (internal quotation marks omitted). Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. Brief for Respondent 15–16. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Widmar*, 454 U. S., at 276.

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy

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[3] 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.

[4] We have held that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U. S., at 533; see also *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion). We do not need to decide whether the condition Missouri imposes in this case falls within the scope of that rule, because it cannot survive strict scrutiny in any event.

violates the Free Exercise Clause.[5]

* * *

Nearly 200 years ago, a legislator urged the Maryland Assembly to adopt a bill that would end the State's disqualification of Jews from public office:

> "If, on account of my religious faith, I am subjected to disqualifications, from which others are free, . . . I cannot but consider myself a persecuted man. . . . An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." Speech by H. M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland, 64 (1829).

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[5] Based on this holding, we need not reach the Church's claim that the policy also violates the Equal Protection Clause.

SUPREME COURT OF THE UNITED STATES

No. 15–577

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., PETITIONER *v.* CAROL S. COMER, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2017]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part.

The Court today reaffirms that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified," if at all, "only by a state interest 'of the highest order.'" *Ante*, at 6. The Free Exercise Clause, which generally prohibits laws that facially discriminate against religion, compels this conclusion. See *Locke* v. *Davey*, 540 U. S. 712, 726–727 (2004) (Scalia, J., dissenting).

Despite this prohibition, the Court in *Locke* permitted a State to "disfavor . . . religion" by imposing what it deemed a "relatively minor" burden on religious exercise to advance the State's antiestablishment "interest in not funding the religious training of clergy." *Id.*, at 720, 722, n. 5, 725. The Court justified this law based on its view that there is "'play in the joints'" between the Free Exercise Clause and the Establishment Clause—that is, that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.*, at 719. Accordingly, *Locke* did not subject the law at issue to any form of heightened scrutiny. But it also did not suggest that discrimination against religion outside the

limited context of support for ministerial training would be similarly exempt from exacting review.

This Court's endorsement in *Locke* of even a "mil[d] kind," *id.*, at 720, of discrimination against religion remains troubling. See generally *id.*, at 726–734 (Scalia, J., dissenting). But because the Court today appropriately construes *Locke* narrowly, see Part III–B, *ante*, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. I do not, however, join footnote 3, for the reasons expressed by JUSTICE GORSUCH, *post*, p. 1 (opinion concurring in part).

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[June 26, 2017]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part.

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment and I am pleased to join nearly all of the Court's opinion. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. See *ante*, at 12. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). See *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 296 (1990) (Scalia, J., dissenting). Often enough the same facts can

be described both ways.

Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990). And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993). Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. See *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 716 (1981); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947). I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke* v. *Davey*, 540 U. S. 712 (2004). See *ante*, at 12. In that case, this Court upheld a funding restriction barring a student from using a scholarship to pursue a degree in devotional theology. But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here. *Ante*, at 13.

Second and for similar reasons, I am unable to join the footnoted observation, *ante*, at 14, n. 3, that "[t]his case involves express discrimination based on religious identity

with respect to playground resurfacing." Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 25 (2004) (Rehnquist, C. J., concurring in judgment). And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2017]

JUSTICE BREYER, concurring in the judgment.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue. Cf. *ante,* at 11 ("Trinity Lutheran . . . asserts a right to participate in a government benefit program"); *ante*, at 12 (referring to precedent "striking down laws requiring individuals to choose between their religious beliefs and receiving a government benefit" (internal quotation marks omitted)); *ante*, at 10 (referring to Trinity Lutheran's "automatic and absolute exclusion from the benefits of a public program"); *ante*, at 9–10 (the State's policy disqualifies "otherwise eligible recipients . . . from a public benefit solely because of their religious character"); *ante*, at 6–7 (quoting the statement in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947), that the State "cannot exclude" individuals "*because of their faith*" from "receiving the benefits of public welfare legislation").

The Court stated in *Everson* that "cutting off church schools from" such "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment." 330 U. S., at 17–18. Here, the State would cut Trinity Lutheran off from par-

ticipation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. The fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

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LEGAL OPINION

TO: Senator Dominick Moreno

FROM: The Office of Legislative Legal Services

DATE: March 19, 2018

SUBJECT: Concerning participation in the Tony Grampsas Youth Services Program by sectarian secondary schools[1, 2]

Legal Questions

1. The Tony Grampsas Youth Services Program awards grants (Tony Grampsas grants) to qualified entities for programs that target youth crime and violence, child abuse and neglect, and adolescent marijuana use. A private non-religious school may apply for a Tony Grampsas grant, but a private religious school may not. Does excluding a religious school from the Tony Grampsas grant program violate the Free Exercise Clause of the First Amendment?

2. If a religious school applies for a Tony Grampsas grant, can the state deny the grant if the religious school's use of the money is for a religious purpose rather than a secular purpose?

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[1] This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly, in the course of its performance of bill drafting functions for the general assembly. OLLS legal memoranda do not represent an official legal position of the general assembly or the State of Colorado and do not bind the members of the general assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

[2] For ease in reading, "sectarian" is referred to in this legal opinion as "religious," and "nonsectarian" as "non-religious."

Short Answers

1. Probably. In the recent case of *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[3] the United States Supreme Court held that under the Free Exercise Clause of the First Amendment to the United States Constitution,[4] Missouri cannot prohibit a qualified church applicant from participating in a generally available public benefit program based solely on the applicant's identity as a church. Express discrimination based on religious identity is subject to strict scrutiny; the state must show that its law, in this case denying participation by a religious school in Tony Grampsas grants, is narrowly tailored to meet a compelling state interest. The state's interest arguably lies in complying with article IX, section 7 of the Colorado Constitution,[5] which prohibits state aid to churches and religious schools. However, this interest may not be sufficiently compelling. In *Trinity Lutheran*, the Supreme Court held that Missouri's similar constitutional provision could not, alone, justify express discrimination in Missouri's grant program. Tony Grampsas grants serve a secular purpose and are widely available and would, therefore, likely be considered a "generally available public benefit" under the *Trinity Lutheran* analysis. Further, there are myriad secular uses for which Tony Grampsas grants may be awarded. Therefore, denying a private religious school the opportunity to apply for a Tony Grampsas grant simply because of its religious identity probably violates the First Amendment to the United States Constitution.

2. Probably. If a religious school's proposed use of a Tony Grampsas grant does not conform to the grant program's secular purposes, but would instead be used for religious purposes, then Colorado could likely articulate a compelling state interest for denying the grant based on the Establishment Clause of the First Amendment to the

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[3] *Trinity Lutheran Church of Columbia Inc., v. Comer,* 137 S. Ct. 2012 (2017).

[4] U.S. Const. amend. I, states in pertinent part: "Congress shall make no law respecting an establishment of religion, **or prohibiting the free exercise thereof**; . . . ."

[5] Colo. Const. art. IX, § 7. **Aid to private schools, churches, sectarian purpose, forbidden.** 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.

United States Constitution,[6] which prohibits laws respecting an establishment of religion, and article IX, section 7 of the Colorado Constitution.

Discussion

1. Background

1.1. The Tony Grampsas Youth Services Program awards grants for secular purposes to many different types of entities, including private schools, but not to private religious schools.

The Tony Grampsas grant program (grant program) is created in the department of human services in article 6.8 of title 26, Colorado Revised Statutes. The grant program provides funding to community-based organizations that serve children and youth and their families with programs designed to 1) reduce youth crime and violence; 2) promote prevention and education programs that reduce the occurrence and reoccurrence of child abuse and neglect; and 3) prevent youth marijuana use.[7] Programs funded through the grant program include tutoring, prevention education, mentoring, restorative justice, and before- and after-school programs. The Tony Grampsas Youth Services Board (board) establishes guidelines for grant program participation and the award of grants.[8] The board reviews grant applications to determine the likelihood that the grant proposal will meet the state's objectives for the grant program and submits a list of entities chosen to receive grants to the governor, who approves or rejects the list of grant recipients. A Tony Grampsas grant may be awarded to an entity, which is defined for the grant program as follows:

> **26-6.8-101. Definitions.** As used in this article, unless the context otherwise requires:
>
> (2) "Entity" means a local government, a **Colorado public or nonsectarian secondary school**, a group of public or nonsectarian secondary schools, a school district or group of school districts, a board of cooperative services, an institution of higher education, the Colorado National Guard, a state agency, a state-operated program, or a private nonprofit or not-for-profit community-based organization.

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[6] U.S. Const. amend. I, reads in pertinent part: "Congress shall make no law **respecting an establishment of religion**, or prohibiting the free exercise thereof; . . . ."

[7] § 26-6.8-102 (1)(b), C.R.S.

[8] § 26-6.8-103 (2), C.R.S.

Because sectarian schools are not included in the definition of an "entity," a religious school cannot apply for a grant under the grant program.

1.2. The United States Supreme Court in *Trinity Lutheran* held that the First Amendment to the United States Constitution prohibits Missouri from discriminating against a church by denying a playground resurfacing grant simply because of its status as a church and without a compelling state interest to justify denial of the grant.

The United States Supreme Court's recent decision in *Trinity Lutheran* involved the Missouri Playground Scrap Tire Surface Material Grant Program, which awards grants to nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. The grants are funded by a state tax on the purchase of new tires. Trinity Lutheran Church of Missouri operates a preschool and applied for a grant to replace the preschool playground's existing pea gravel surface. The church was highly qualified for the grant based on the grant program's neutral criteria but was denied a grant in favor of less-qualified applicants based on a Missouri constitutional provision, often referred to as a Blaine Amendment,[9] that prohibits aid to churches. The church sued in federal court. The case was ultimately appealed to the United States Supreme Court, which held that Missouri's policy violated the Free Exercise Clause of the First Amendment to the United States Constitution.

The Supreme Court found that Missouri "expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified."[10] In the case of the Missouri grant program, the Supreme Court states, "The rule is simple: No churches need apply."[11] With respect to express discrimination based on religious identity, the Supreme Court affirmed that strict scrutiny is the appropriate legal standard. Prohibiting an otherwise qualified church from applying "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous scrutiny.'"[12]

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[9] "Blaine Amendments" in state constitutions are named after James Blaine, a United States Congressman in the 19th century, who proposed a similar unsuccessful amendment to the United States Constitution.

[10] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2024 (2017).

[11] *Id.*

[12] *Id.*, citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 546 (1993).

In its decision, the Supreme Court applied a "status v. use" analysis and distinguished its holding in *Locke v. Davey*,[13] in which the Court upheld a Washington scholarship program that prohibited Mr. Davey from using the scholarship to pursue a devotional theology degree. In that case, the Supreme Court stated, "Davey 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."[14] The Supreme Court found that Washington's choice to deny scholarship funds for a devotional theology degree was consistent with historic state antiestablishment interests in not using taxpayer money to pay for the training of clergy.

In defense of its policy denying a grant to the church preschool, Missouri pointed to its state constitution's Blaine Amendment, which prohibits state aid to churches. The Supreme Court described Missouri's constitutional provision as nothing more than the state's "policy preference for skating as far as possible from religious establishment concerns. . . . In the face of the clear infringement on the free exercise before us, that interest cannot qualify as compelling."[15] The church satisfied the neutral grant program criteria, and the church's *use* of the money was in keeping with the grant program's secular purposes. Unlike the Washington scholarship program in *Locke v. Davey*, where Davey was denied state money to pursue a devotional theology degree, Missouri could make no argument that providing safe playground surfaces promoted any religious purpose or raised any religious establishment concerns. To the contrary, Missouri's secular policy goals of improving child safety and reducing waste tires in landfills were fully realized by giving a grant to the church.

However, despite having the opportunity to do so, the Supreme Court did not declare Missouri's Blaine Amendment—or, by extension, other states' Blaine Amendments—unconstitutional. Instead the Court clarified that "the state's interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause."[16]

Therefore, although the Supreme Court specifically limited the holding of *Trinity Lutheran* to "express discrimination based on religious identity with respect to

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[13] *Locke v. Davey,* 540 U.S. 712 (2004).

[14] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2023 (2017).

[15] *Id.* at 2024.

[16] *Id.,* quoting *Widmar v. Vincent,* 454 U.S. 263, 276 (1981).

playground resurfacing" and did not address "religious uses of funding or other forms of discrimination,"[17] the *Trinity Lutheran* decision appears to stand for the general proposition that, while a state constitution may protect against religious establishment concerns beyond what is ensured under the United States Constitution, it cannot impermissibly infringe upon free exercise rights as a condition of participation in a generally available public benefit without articulating a compelling state interest for doing so.

2. The Tony Grampsas grant program is probably a generally available public benefit program, and discriminating against a religious school by prohibiting its application for such a benefit solely because of its religious identity is express discrimination that is subject to strict scrutiny, requiring the state to show a compelling state interest for the discrimination.

2.1. A court would likely consider the Tony Grampsas grant program to be a "generally available public benefit."

As discussed in section 1.2 of this legal opinion, the Supreme Court's holding in *Trinity Lutheran* is limited to express discrimination based on religious identity in awarding playground resurfacing grants. However, the analysis and legal reasoning in *Trinity Lutheran* is instructive in determining how a court might evaluate the constitutionality of the prohibition against religious school applicants in the Tony Grampsas grant program.

Like Missouri's playground resurfacing grant program, participation in the Tony Grampsas grant program is open to a wide range of entities including, but not limited to, local governments, public and private nonsectarian secondary schools, school districts, institutions of higher education, state agencies, and private nonprofit community-based organizations.[18] Also, like Missouri's grant program, the Tony Grampsas grant program is a competitive grant program with limited funding that is not available to the public in the same way, for example, that police and fire protection and public assistance or public welfare benefits are available. However, despite the competitive nature of Missouri's grant program and the fact that Missouri's grant program was for playground resurfacing materials and not traditional public benefits available to all, the Supreme Court found that Missouri's grant program was a

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[17] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2024, n.3 (2017).

[18] § 26-6.8-101 (2), C.R.S.

"generally available public benefit." Therefore, based on the analysis in the *Trinity Lutheran* case, a Tony Grampsas grant would also likely be considered a "generally available public benefit."

2.2. Denying a religious school the opportunity to apply for a Tony Grampsas grant solely because it is a religious school is express discrimination based on religious identity and is subject to strict scrutiny.

The Tony Grampsas grant program specifically permits a private non-religious school or a group of private non-religious schools to apply for a grant but does not permit a private religious school or group of private religious schools to apply.[19] The prohibition was probably included in the statute to comply with article IX, section 7 of the Colorado Constitution, which prohibits aid to religious schools. If a Tony Grampsas grant is a generally available public benefit pursuant to the Supreme Court's reasoning in *Trinity Lutheran,* then the Tony Grampsas grant program expressly discriminates against a private religious school, based on the school's religious identity, for purposes of participating in a generally available public benefit. As affirmed by the Supreme Court in *Trinity Lutheran*, express discrimination based on religious identity is subject to strict scrutiny.[20]

2.3. Upholding article IX, section 7 of the Colorado Constitution is arguably not a sufficiently compelling justification for preventing a religious school from submitting a Tony Grampsas grant application.

To satisfy strict scrutiny, Colorado must articulate a compelling state interest that justifies denying a religious school the opportunity to apply for a Tony Grampsas grant. Article IX, section 7 of the Colorado Constitution, Colorado's Blaine Amendment, prohibits aid to religious schools and for religious purposes. As discussed in section 1.2 of this legal opinion, in *Trinity Lutheran,* the Supreme Court found that Missouri's reliance on its Blaine Amendment was not compelling enough to justify express discrimination against the church in applying for and receiving a playground resurfacing grant or to prevent the flow of state money to the church for the grant program's secular purpose.

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[19] § 26-6.8-101 (2), C.R.S.

[20] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2024 (2017), citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 546 (1993).

However, there are clearly differences between a grant program like Missouri's, which involved a single, physical item, inert playground resurfacing materials, and programs funded through the Tony Grampsas grant program, which provides drug and child abuse prevention education, tutoring, and adult mentoring to school-aged children. Further, the Tony Grampsas grant program does not fund a specific curriculum or method for achieving the state's secular objectives but instead allows applicants to submit unique grant proposals that satisfy the grant program's criteria. While a religious school could request grant funding for a secular purpose, a religious school, or any other applicant, could also request grant funding for a program based in religion or promulgating a religious purpose, which would likely raise state religious establishment concerns and violate article IX, section 7 of the Colorado Constitution.

However, potential state religious establishment concerns likely relate to the applicant's intended *use* of the grant money and not the opportunity for a religious school to apply for a grant and have the grant application evaluated against the grant program's neutral criteria. Because the state's interest in prohibiting a religious school from *applying* for a Tony Grampsas grant is probably not sufficiently compelling to satisfy strict scrutiny, the statutory prohibition against religious school applicants likely violates the Free Exercise Clause of the First Amendment to the United States Constitution.

3. The state can probably articulate a compelling state interest in denying a Tony Grampsas grant if the grant application demonstrates a religious use.

In Missouri's playground resurfacing grant program, there was no question or discernment about a grantee's use of the state funds. A grant could only be used to reimburse certain vendors for pour-in-place rubber material. While the Supreme Court in *Trinity Lutheran* agreed that the benefit provided through Missouri's grant program raised few, if any, religious establishment concerns, arguably the same cannot be said of the Tony Grampsas grant program.

As discussed in section 2.3 of this legal opinion, the Tony Grampsas grant program is much broader than Missouri's grant program. Applicants can submit unique grant proposals that accomplish the grant program's secular objectives, with no specific curriculum or method for achieving those objectives. A religious school, or any other applicant, could submit a request for a Tony Grampsas grant that demonstrates a religious use of the grant. In that case, the state's interest in preventing the *use* of state aid for religious purposes may be sufficiently compelling to justify denying a Tony Grampsas grant based on the Establishment Clause of the First Amendment to the United States Constitution, which prohibits laws respecting an establishment of

religion, and article IX, section 7 of the Colorado Constitution, which prohibits state aid for religious purposes.

Therefore, while the Tony Grampsas grant program probably cannot discriminate based on religious status with respect to who can *apply* for a Tony Grampsas grant, it can probably deny applications that demonstrate religious *use* of the grant.

Conclusion

The Tony Grampsas grant program prohibits a religious school from applying for a Tony Grampsas grant. While the United States Supreme Court's decision in *Trinity Lutheran* applies only to express discrimination with respect to playground resurfacing grants, a court would probably find that a Tony Grampsas grant is a generally available public benefit like the grants at issue in the *Trinity Lutheran* case. Prohibiting a religious school from applying for a grant is express discrimination based on religious identity. Because the state probably cannot show a compelling state interest to deny a private religious school the opportunity to apply for the neutral grant program, the prohibition against participation by a private religious school in the Tony Grampsas grant program is probably an unconstitutional violation of the Free Exercise Clause of the United States Constitution. However, if a private religious school applies for a Tony Grampsas grant and intends to use the grant for religious purposes rather than secular purposes, then the state can probably show a compelling state interest that justifies denying the grant to the religious school pursuant to the Establishment Clause of the First Amendment to the United States Constitution, and article IX, section 7 of the Colorado Constitution.

DRAFT
3.19.18

Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

BILL 2e

Temporary storage location: S:\LLS\2018A\Bills\Pre-Draft\18-SRC Tony Grampsas grant program.wpd

LLS NO. 18-####.## Brita Darling x2241 **COMMITTEE BILL**

Statutory Revision Committee

BILL TOPIC: "Grant Program Participation Sectarian Entities"

A BILL FOR AN ACT

CONCERNING THE REMOVAL OF LANGUAGE THAT PROHIBITS SECTARIAN ENTITIES FROM APPLYING FOR CERTAIN PUBLIC GRANT PROGRAMS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Statutory Revision Committee. The bill removes the term "nonsectarian" from:

- The Tony Grampsas youth services program;

Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

- The statute relating to the Colorado state youth development plan created by the Tony Grampsas youth services program board; and
- Article 27.5 of title 22, Colorado Revised Statutes, relating to before- and after-school dropout prevention programs.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 26-6.8-101, **amend** the introductory portion and (2) as follows:

26-6.8-101. Definitions. As used in this ~~article~~ ARTICLE 6.8, unless the context otherwise requires:

(2) "Entity" means a local government, a Colorado public or ~~nonsectarian~~ NONPUBLIC secondary school, a group of public or ~~nonsectarian~~ NONPUBLIC secondary schools, a school district or group of school districts, a board of cooperative services, an institution of higher education, the Colorado National Guard, a state agency, a state-operated program, or a private nonprofit or not-for-profit community-based organization.

SECTION 2. In Colorado Revised Statutes, 26-1-111.3, **amend** (5)(a) as follows:

26-1-111.3. Activities of the state department under the supervision of the executive director - Colorado state youth development plan - creation - definitions. (5) As used in this section, unless the context otherwise requires:

(a) "Entity" means any local government, state public or ~~nonsectarian~~ NONPUBLIC secondary school, charter school, group of public or ~~nonsectarian~~ NONPUBLIC secondary schools, school district or group of school districts, board of cooperative services, state institution of higher education, the Colorado National Guard, state agency,

state-operated program, private nonprofit organization, or nonprofit community-based organization.

SECTION 3. In Colorado Revised Statutes, 22-27.5-102, **amend** the introductory portion and (6) as follows:

22-27.5-102. Definitions. As used in this ~~article~~ ARTICLE 27.5, unless the context otherwise requires:

(6) "Qualified community organization" means a nonprofit or not-for-profit, ~~nonsectarian,~~ community-based organization that provides before- and after-school, arts-based or vocational activity programs to low-income youth enrolled in grades six through twelve.

SECTION 4. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.