IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 1935-Nite-Op

THE DUMONT CHURCH OF FREEDONIA, INC. **Appellant** **(Plaintiff Below)** **v.** **THE STATE OF FREEDONIA, and JULIUS HENRY MARCKS, in his capacity as Director of the Freedonia Department of Natural Resources** **Appellee** **(Defendant Below)**	**Appeal from the United States District Court for the Middle District of FREEDONIA**

OPINION OF THE COURT

Opinion of the Court by Otis B. Driftwood, Circuit Judge in which Circuit Judge Leonard Chico concurs.

The Dumont Church of Freedonia, Inc. ("Dumont Church" or "Church"), filed this action alleging that Julius Henry Marcks, acting in his official capacity as Director of the Freedonia Department of Natural Resources ("Department" or "DNR"), violated Dumont Church's rights under the United States and Freedonia Constitutions by denying its application for a grant of solid waste management funds to resurface a playground on church property. The district court dismissed the Complaint for failure to state a claim and denied Dumont Church's post-dismissal motion for leave to file an amended complaint. Dumont Church appeals. We affirm.

I. Facts and Background

Dumont is a church that operates a preschool and daycare called the Gummo Learning Center. The Gummo Learning Center is a ministry of the church and incorporates daily religious instruction. Through the Learning Center, Dumont teaches a Christian world view to the children enrolled in these programs, including the Gospel. The Learning Center's policy is to admit students

of any sex, race, color, religion, nationality, and ethnicity. Initially established as a non-profit corporation, the Learning Center merged into Dumont Church in 1985.

The Department of Natural Resources Solid Waste Management Program runs the Scrap Tire Program, which competitively awards grants to qualifying organizations for the purchase of recycled tires to resurface playgrounds. Due to the limited funds available for this program, the Department grades and ranks the applications it receives and only gives grants to those organizations that best serve the program's purposes. Both public and private nonprofit day care centers and other nonprofit entities are eligible to submit grant applications. However, the Department has a policy that prohibits organizations from participating if the applicant is owned or controlled by a church, sect or denomination of religion. It contends that this policy is consistent with Article I, Section 7, of the Freedonia Constitution which prohibits public money being used to aid religion.

Seeking to improve the safety of the surface area of its playground, Dumont, through the Learning Center, applied for a grant under the 2012 Scrap Tire Program. Dumont's grant application was graded and ranked fifth out of forty-four applications. Although a total of fourteen grants were awarded in 2012, Dumont's grant application was denied because of the Department's policy to not give grants to religious organizations.

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Freedonia Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion."

Dumont Church commenced this action, asserting that the denial of its Scrap Tire application violated (i) the First Amendment's Establishment Clause and (ii) the Equal Protection Clause of the Fourteenth Amendment. The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. CONST. amend. I. The Equal Protection Clause provides: "No state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. " U.S. CONST. amend. XIV, § 1.

One other state constitutional provision is involved, which is Freedonia's Constitution, Article I, Section 7. It states: "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." FR. CONST. art. I, § 7.

II. The State's decision not to subsidize Dumont Church does not violate the Free Exercise Clause of the First Amendment.

Dumont contends that the State has violated the Free Exercise Clause by categorically declaring religious organizations ineligible to compete for a playground-resurfacing subsidy. But Dumont's argument misinterprets the Free Exercise Clause, ignoring its text, history, and Supreme Court precedent. The Free Exercise Clause, by its plain language, prevents the government from "prohibiting" the free exercise of religion. It does not guarantee churches opportunities for public financing, nor does it require that the government act with strict neutrality toward religious and non-religious interests. The challenged policy places no meaningful restraint on Dumont's ability to freely exercise its religion. For that reason, Dumont's free exercise claim was properly dismissed.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. CONST. amend. I (emphasis added). It has been incorporated into the Fourteenth Amendment and is thus applicable to the states. *E.g. Emp 't Div., Dep 't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-77 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

By its plain terms, the Free Exercise Clause applies only to government action that "prohibits" the free exercise of religion. The Free Exercise Clause was adopted in reaction to the oppressive practices our Founders recognized in their former sovereign and similar governments throughout history. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). "In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." *Id.* at 9. By the time our Constitution was ratified, "there was a widespread awareness among many Americans of the dangers of a union of Church and State." *Engel v. Vitale,* 370 U.S. 421, 429 (1962). To protect against such dangers, the Founders included in the First Amendment the Establishment Clause and the Free Exercise Clause. *See id.* at 429-30. The former clause forbids the enactment of laws "which establish an official religion," whereas the latter "depends on a showing of governmental compulsion." *See Id.* at 430- 31.

Dumont's contention that the Free Exercise Clause requires the government to provide equal funding opportunities to religious and nonreligious groups alike ignores the text of the Clause. In interpreting the scope and application of a constitutional provision, the Supreme Court must begin by looking to the plain text of the Constitution itself; if the meaning is clear, it need look no further. *See Reid v. Covert*, 354 U.S. 1, 8 n. 7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning."). With respect to the Free Exercise Clause, "[t]he crucial word in the constitutional text

is 'prohibit'.'" *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (holding that government project disrupting forest sacred to Native American tribe did not violate tribe's free exercise rights because it did not prohibit the tribe from exercising its religion). "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963).

It is clear that where the government imposes a criminal penalty on particular religious activity, the affected individual or group may successfully pursue a free exercise claim. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinances criminalized ritual animal sacrifice, which was a central component of the Santeria religion practiced by the church that challenged the laws). "[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions," may raise free exercise concerns as well. *Lyng*, 485 U.S. at 450. This Court's precedent, however, "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs[,]" implicate the Free Exercise Clause. *Id.* at 450-51.

Our Supreme Court has explicitly rejected the proposition that the Free Exercise Clause is violated by any government action that merely "frustrates or inhibits religious practice" because, "the Constitution … says no such thing." *Id.* at 456. So, state policy declining to subsidize churches does not "prohibit" religious exercise. As the text of the First Amendment shows, the government must ensure that the exercise of religion remains unrestrained, but that does not mean the government must pay the church's bills. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng*, 485 U.S. at 451 (*quoting Sherbert v. Verner*, 374 U.S. 398, 412 (1963)). Recently, Justice Thomas observed, "[s]ince well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2631 (2015) (Thomas, J., dissenting). "Religious liberty is about freedom of action . . ., and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice." *Id.* at 2638. Liberty, however, does not create an entitlement to government benefit—it is a negative right, "and is only the absence of restraint." *Id.* at 2635.

Likewise, James Madison emphatically rejected the proposition that the free exercise of religion depends on government subsidy. See James Madison, Memorial and Remonstrance against Religious Assessments, June 20, 1785.[1] As Madison put it, "Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them [] . . . ." *Id.* Simply put, the law has long been that the government has no obligation to fund its citizens' exercise of their constitutional rights.

[1] *Available at http://press-pubs.uchicago.edu/founders/documents /amendI_religions43.html.*

In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Court found no constitutional infirmity in a federal tax policy that withheld tax-exempt status from non-profit organizations that "engage in substantial lobbying." *Id.* at 542-44. The Court noted that by merely refusing to pay for the organization's lobbying activity, the government had "not infringed any First Amendment rights or regulated any First Amendment activity." *Id.* at 546 (*citing Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). The Court "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.*

Similarly, in *Harris v. McRae*, 448 U.S. 297, 316 (1980), the Supreme Court held that the government had no obligation to fund medically necessary abortions, despite constitutional protection for abortion rights and federal subsidies for other medically necessary services. *Id.* at 301-06, 316-17. In that case, the challenging party argued that "when an abortion is 'medically necessary to safeguard the pregnant woman's health . . . the disentitlement to [M]edicaid assistance impinges directly on the woman's right to decide . . . to terminate her pregnancy in order to preserve her health.'" *Id.* at 305-06. For purposes of analysis, the Court assumed that women have a constitutionally-protected right to choose to have an abortion for health-related reasons, but held that, nevertheless, the government had no obligation to provide the resources needed to enable the woman to actually exercise that right. *Id.* at 316-17. As the Court pointed out, the government's decision not to fund medically necessary abortions left indigent women with "at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if [government] had chosen to subsidize no health care costs at all." *Id.* In other words, the government's refusal to provide funding for abortion services was not coercive in any constitutionally significant way.

The Court's reasoning in these cases echoes the principle expressed in *Lyng* and noted above: the First Amendment protects individuals from government interference, but it does not entitle individuals to government subsidy. *See Lyng*, 485 U.S. at 451. "[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation"; *Regan*, 461 U.S. at 549-50 (*quoting Harris*, 448 U.S. at 316) (bracketed language original). Although the organization seeking the subsidy in *Regan* "does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like," the Court reasoned, "the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" *Regan*, 461 U.S. at 550 (*quoting Harris*, 448 U.S. at 318).

Like the complaining parties in *Regan* and *Harris*, Dumont argues that its ability to fully realize a constitutional right has been frustrated by the government's decision to withhold public funding. But, as *Regan* and *Harris* teach, the Constitution does not create an entitlement to government funding simply by recognizing a right as fundamental or protected. *See Regan*, 461 U.S. at 550. And Dumont's free exercise claim is much weaker than the constitutional claims asserted in *Regan* and *Harris* because Dumont cannot even argue that its ability to exercise its

constitutional right depends on government support. Dumont concedes that its request for playground-resurfacing funding is "wholly secular."

If the government's refusal to provide indigent women with financial support for medically necessary abortions does not unconstitutionally burden affected women's abortion rights, the government's refusal to subsidize a church's "wholly secular" playground-resurfacing project likewise does not create an unconstitutional burden on the church's right to freely exercise religion.

Dumont's free exercise claim is most closely analogous to the claim rejected by the Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004). *Locke* involved a scholarship program administered by the State of Washington that provided financial aid to qualified students to use for postsecondary education expenses. 540 U.S. at 715-16. All students who met the program's qualifying criteria would receive funding, but students were ineligible for the scholarships if they chose to pursue a degree in theology. *Id.* That limitation was a consequence of a provision in the Washington Constitution that states, in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." *Id.* at 716, 719, n.2 (quoting WASH. CONST. art. I, § 11). The petitioner, Davey, qualified for the scholarship in all respects except that he wished to pursue a devotional theology degree, consistent with his interest in training for "a lifetime of ministry, specifically as a church pastor." *Locke*, 540 U.S. at 717. Because his intended course of study was theological, Davey was denied scholarship funding. *Id.* Davey sued, alleging that Washington's refusal to award him scholarship funds solely because he wished to pursue a theological degree violated, among other constitutional provisions, the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 718.

The Supreme Court found no constitutional violation in Washington's decision to make students who pursued theological degrees ineligible for scholarship funding. *Id.* at 718-25. Importantly, the Court did not hold that Washington was required by the Establishment Clause to withhold the funds from Davey and other devotional students. *Id.* at 719. Instead, the Court reasoned, this situation fell within the "play in the joints" between the Establishment and Free Exercise Clauses of the First Amendment, where certain state actions may be "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* In finding that Washington's funding restriction did not violate the Free Exercise Clause, the Court focused especially on the minimal burden the policy placed on Davey's right to freely exercise his religion. *Id.* at 720-21.

The Court contrasted Washington's scholarship policy with the city ordinances invalidated in *Lukumi*, noting that the ordinances at issue in that case "sought to suppress ritualistic animal sacrifices of the Santeria religion," going so far as to actually criminalize that particular religious rite, whereas "[i]n the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind." *Id.* at 720. Washington's scholarship program, the Court pointed out, "does not deny to ministers the right to participate in the political affairs of the community" (*contrasting*

McDaniel v. Paty, 435 U.S. 618 (1978)), nor does it "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21 (*contrasting Hobbie v. Unemployment Appeals Comm 'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Court concluded, "[t]he State has merely chosen not to fund a distinct category of instruction." *Id.* at 721.

The Court's holding and analysis in *Locke* applies squarely to the present case. Dumont, like Davey, applied for government funds but was denied funding because of its particular religious status. The State's funding policy here places no meaningful burden on Dumont's religious practice—certainly not such a burden that it could reasonably be called a "prohibition" on the free exercise of religion. Despite its ineligibility for the playground-resurfacing grant, there is not a single thing that Dumont is prohibited from or penalized for doing as a consequence of state action. It can still worship as it sees fit. It can teach as it sees fit. It can even resurface its playground as it sees fit. The State has merely chosen not to subsidize Dumont's activities.

Dumont argues that the categorical exclusion of religion from the playground resurfacing program makes the differential treatment here more egregious than that of the Washington program in *Locke*. But, in fact, the two government policies are alike in their exclusivity. By the terms of the playground-resurfacing grant, any entity "owned or controlled by a church, sect, or denomination of religion "is ineligible for funding. In *Locke*, any student who was "pursuing a degree in theology was ineligible for scholarship." *Id.* 540 U.S. at 716. Dumont argues that the State's policy here focuses on who receives funding, whereas the Court's concern in *Locke* focused only on how the funds would be used. But this is a difference in phrasing, not fact. In both cases, a definable class of funding applicants was deemed ineligible—here, applicants who choose to operate as part of a church; in *Locke*, students who choose to pursue theology degrees.

If the government can refuse a subsidy to the latter group without thereby prohibiting its members from freely exercising their religion, the same can be said of the State's policy toward the former. The State's refusal to make direct payments to churches, like the scholarship policy upheld in *Locke*, has strong historical roots. The Court in *Locke* emphasized that a state's traditional antiestablishment interest plainly includes a prohibition on funding religious training, and that Washington's policy to that effect "is scarcely novel." *Locke*, 540 U.S. at 722. The same can be said of the State's prohibition against making a direct money payment to a church. The Court has recognized, even in upholding public programs that support religious institutions in other ways, that "special Establishment Clause dangers" exist "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995) (citations omitted). Dumont 's insistence that its playground-resurfacing project is secular does not solve the problem—money is fungible, and a dollar saved on capital improvements is an extra dollar that can be spent for religious teaching, salaries for church staff, or other religious purposes.

It does not necessarily follow, of course, that the State would violate the Establishment Clause if it broadened funding availability to include churches. It simply means that the First Amendment leaves the State room to make a policy choice—this is, as the Court put it, the "play in the joints." Dumont mistakes the State's adherence to traditional anti-establishment values for hostility to religion. In so arguing, the church claims that Article I, Section 7 of the Freedonia Constitution has a "credible connection to the religious bigotry exhibited by the Blaine Amendment." Dumont offers nothing to support this allegation, and the facts suggest otherwise.

The text of Freedonia's Article I, Section 7 shares little in common with the text of the Blaine Amendment. The Blaine Amendment, originally proposed in 1875, focused specifically on withholding state aid from funds devoted to public schools. See, e.g., Mark Edward DeForrest, An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns, 26 HARV. J.L. & PUB. POL. 551, 556-57 (2003). Article I, Section 7 of the Freedonia Constitution, in contrast, effected a broader "no-aid" provision much more like the State of Washington's, with which the Supreme Court found no fault in *Locke*. 540 U.S. at 719 n.2, 723-24.

More significantly, Dumont confuses potential Establishment Clause issues with the free exercise question presented. Dumont cites a series of cases in which the Supreme Court held that government grants to religious institutions for secular purposes did not violate the Establishment Clause, but Freedonia does not argue that giving Dumont funds for playground resurfacing would violate the Establishment Clause. Instead, the State merely contends that its decision not to subsidize playground improvements does not "prohibit" Dumont from freely exercising its religion. It is difficult to conceive of a less oppressive burden on the exercise of religion than the State's decision not to pay for an elective upgrade to a church's physical property that the church insists is "not remotely religious."

Finally, Dumont attempts to distinguish *Locke* by referring to the State's playground resurfacing grant program as a "generally available public benefit" that, Dumont claims, the State cannot withhold from religious groups. But, in fact, the grant program is one of limited availability. The program is funded by a fee assessed on the retail sale of new tires, and only five percent of that fund, at most, may be spent on the scrap-tire grants. Because resources are limited, the State developed a process by which interested applicants compete for funding. As Dumont acknowledges, only fourteen of the forty-four applicants in 2012 received funding. In other words, more than two-thirds of the applicants, each of whom may well have met the minimum qualifications to receive money under the grant program, nevertheless were rejected. While the State applies a point-based scoring system to provide some structure and consistency to its decision-making, ultimately the program administrators must make subjective, discretionary decisions regarding who will receive funds and who will not.

Dumont's position appears to be that because non-religious daycares may all receive playground-resurfacing grants, the refusal to provide religious daycares with similar funding

"violates the Free Exercise clause no less than if [the State] had imposed a special tax." *See Locke*, 540 U.S. at 726 (Scalia, J., dissenting). But not all non-religious daycares receive the funding—as noted above, just over thirty percent of those that applied for funding in 2012 received it.

Dumont does not attempt to argue that its right to freely exercise its religion would have been violated had it been denied funding simply because its application failed to achieve a sufficiently high score to prevail over other more competitive applicants. Nor does it argue that its ability to freely exercise its religion was impaired prior to its application for funding, when its playground was surfaced with pea gravel. But if Dumont's freedom to exercise religion is unaffected by whether it actually receives any money or actually resurfaces its playground, the State's refusal to provide funding here cannot possibly have burdened the church's religious practice. Dumont's ability to freely practice its religion, having been deemed ineligible for grant funding here, is no different than had it been denied funding simply because its application was uncompetitive, or had the grant program never been created at all. This distinction differentiates the present case from the authorities relied upon by the dissenting opinion.

It is undisputed that the policy at issue in this case is not facially neutral—churches are, by virtue of their religious character, ineligible for playground resurfacing grant funding. But the Supreme Court examined a similarly non-neutral policy in *Locke* and found it constitutionally sound, emphasizing the lack of coercive effect on the disadvantaged students' religious practice. *See Locke*, 540 U.S. at 720-21. While neutrality toward religion may be, in many instances, powerful evidence that a state policy is compliant with the Free Exercise Clause, it is neither a necessary nor a sufficient factor. The Free Exercise Clause protects religious liberty by demanding government non-interference, not neutrality. Because the State's refusal to provide funding for a "wholly secular" playground-resurfacing project in no way prohibits Dumont from fully and freely exercising its religion, the church's Free Exercise Clause claim fails.

III. The State's decision not to subsidize Dumont 's playground resurfacing project does not violate the Equal Protection Clause of the Fourteenth Amendment.

Dumont next argues that the State's unequal treatment of religious groups in determining eligibility for the playground-resurfacing subsidy program violates the Equal Protection Clause of the Fourteenth Amendment. But Dumont's argument overlooks the legitimate, rational bases underlying the State's policy choice. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, [] and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citations omitted).

When evaluating the constitutionality of a government policy that treats similarly situated groups differently, federal courts apply the highest level of scrutiny only if the distinction interferes with the exercise of a fundamental right or if it differentiates based on a suspect classification. *E.g. Vacco v. Quill*, 521 U.S. 793, 799 (1997). Absent such circumstances, the Court will uphold the policy "so long as it bears a rational relation to some legitimate end." *Id.* Dumont contends that the Court should apply strict scrutiny to the State's exclusion of religious organizations from the playground resurfacing grant program because the State's policy "employs a suspect classification." But the argument fails because there is no reason to conclude that the class of "all religious groups," as opposed to "all non-religious groups," constitutes a suspect classification.

Instead, the law is that rational-basis review is applicable to policies that treat "all religious groups" differently from similarly situated non-religious groups. In *Locke* the Supreme Court applied rational basis review in summarily upholding Washington's policy withholding scholarship funds from theology students. 540 U.S. at 720 n.3. The Court explained that because it found no violation of the Free Exercise Clause in the state's program, equal protection analysis required only the rational basis test, which the program passed. *Id.*

Likewise, in *Johnson v. Robison*, 415 U.S. 361 (1974), the Court declined to apply any form of heightened scrutiny to a law purportedly burdening religious individuals who declined military service as conscientious objectors. *Id.* at 375 n. 14. The Court held that denial of certain veteran's educational benefits to these individuals did not violate their fundamental right to free exercise of religion, and then addressed their Equal Protection claim, stating, "since we hold . . . that the [challenged] Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational basis test." *Id.*

Dumont appears to concede that, in the absence of a First Amendment violation, a policy differentiating on the basis of religion does not call for strict scrutiny on the theory that the free exercise of religion is a fundamental right. But Dumont argues instead that strict scrutiny is required because "religion" creates "an inherently suspect classification." To support this argument, Dumont cites a handful of cases in which the Supreme Court has listed "religion" among those distinctions deemed "inherently suspect." But none of the cited cases actually apply strict scrutiny to a law differentiating between "all religious groups" and "non-religious groups." In fact, none involve religious classifications at all. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (evaluating city's economic regulation exempting long-established vendors, but not newly established vendors, from certain requirements); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 649-51 (1992) (reviewing state law establishing venue differently depending on whether a corporate defendant was based in-state or out-of-state); *Plyler v. Doe*, 457 U.S. 202, 205, 223-30 (1982) (analyzing state law denying undocumented schoolchildren a free public education); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (considering federal program advantaging minority applicants for new broadcast licenses).

When the Supreme Court has described "religion" as an inherently suspect classification, it has done so in reference to laws drawing distinctions among religious denominations, advantaging one over another. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987) (noting that "laws discriminating among religions are subject to strict scrutiny . . . .") (*citing Larson v. Valente*, 456 U.S. 228, 246 (1982)).

State law matters here, too. The Freedonia Constitution does not discriminate among religious sects or denominations—indeed, it expressly forbids such discrimination. See FR. CONST. art. I, § 7 (". . . 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."). *Amos* is instructive. In *Amos*, a former employee of a secular, non-profit facility owned and operated by the Church of Jesus Christ of Latter-Day Saints sued for wrongful termination. 483 U.S. at 329-34. He alleged that the provision of Title VII of the Civil Rights Act of 1964 that permits religious employers to discriminate on the basis of religion against employees who have nonreligious jobs violated the Establishment Clause and the Equal Protection Clause. *Id.* The Court first found no Establishment Clause violation in Title VII, and then turned to Equal Protection. *Id.* at 334-39. The employee argued that the law "offend[ed] equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers." *Id.* at 338.

The Court agreed that Title VII treated religious and nonreligious employers differently, but required only a rational basis for the policy, noting that where a law treats all religious denominations equally, there is no justification for applying strict scrutiny if the law does not violate the Establishment Clause. *Id.* 2. The class of "all religious groups," as opposed to individual religious sects, does not meet the traditional criteria considered in identifying suspect classes.

Further weighing against Dumont's request that the Court characterize "all religious groups" as a singular, suspect class is that the indicia typically considered by the Supreme Court in identifying suspect classes are absent. When determining whether a classification qualifies as "suspect," the Supreme Court historically has declined to designate it as such if "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to characterize as suspect a classification based on relative poverty). Individual religious denominations may certainly qualify as suspect classes under this definition. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (suggesting that a "more searching judicial inquiry" would be required for statutes directed at "particular religious . . . minorities.").

A class comprising "all religious groups," however, does not. Any suggestion that "religion," generally speaking, confers upon a person or group "political powerlessness" in the

United States ignores the extent to which religion is deeply intertwined with our political and cultural history. As the Supreme Court has observed,

> [R]eligion has been closely identified with our history and government . . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself . . . . It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]'
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> *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (*quoting Schempp*, 374 U.S. at 212-13).

Further, even if "all religious groups" can be characterized as a discrete and insular class, that class has two unique and powerful protections against governmental meddling—the Establishment and Free Exercise Clauses of the First Amendment. *See e.g. Walz v. Tax Comm 'n of City of New York*, 397 U.S. 664, 669 (1970) (the Court, applying the First Amendment, "will not tolerate either governmentally established religion or governmental interference with religion."); U.S. CONST. amend. I. Armed with the First Amendment, the class of "all religious groups" enjoys greater freedom from the burden of government than does virtually any other class in the nation. And history shows that when the class of "all religious groups" has been unable to achieve its desired results by relying on the First Amendment, it is able to drive policy through the political process. For example, the enactment of the Religious Freedom Restoration Act ("RFRA") and subsequent enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") demonstrate the political power of religious interests.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79 (1990), the Supreme Court held that "an individual's religious beliefs" do not "excuse him from compliance" with generally applicable, otherwise valid state laws. In so holding, the Court acknowledged that the Free Exercise Clause confers broad protections upon religious practice, but reasoned that to permit an individual to excuse himself from compliance with the law based solely on his religious beliefs "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 877, 879 (*quoting Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

In concluding its opinion, however, the Court gave advocates for broad religious power reason to hope, noting that a society so committed to religious freedom that it would enshrine the Free Exercise Clause into its Constitution "can be expected to be solicitous of that value in its legislation as well." *Smith*, 494 U.S. at 890. Just three years later, Congress displayed the extent of its solicitousness by enacting RFRA, which, by its express terms, sought to abrogate the Court's ruling in *Smith. See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2761 (2014); 42 U.S.C. § 2000bb (a)(4) (1993). Under RFRA, the government "shall not substantially burden a person's

exercise of religion even if the burden results from a rule of general applicability." See 42 U.S.C. § 2000bb-1(a) (1993). The government could persist in its regulation only if it could demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. 42 U.S.C. § 2000bb (1993). This legislation did not just codify free exercise jurisprudence that pre-existed *Smith*, it imposed a new, more demanding standard such that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The Court held in *City of Boerne* that in enacting RFRA, Congress had overstepped its authority under Section 5 of the Fourteenth Amendment to regulate the states. *Id.* at 534-36. As a result, RFRA could apply only to action by the federal government. See *Hobby Lobby*, 134 S.Ct. at 2761. Again, Congress responded. *Id.* Three years later, it enacted RLUIPA, which "imposes the same general test as RFRA but on a more limited category of government actions." *Id.* (*citing Cutter v. Wilkinson*, 544 U.S. 709, 715-16 (2005)). Congress applied RLUIPA to programs or activities that receive federal financial assistance, thereby extending its reach to the states. See 42 U.S.C. § 2000cc(a)-2000cc-1 (2000). Simply put, the class of "all religious groups" has proven effective not just in moving federal policy, but also in achieving favorable results in multiple states.

Dumont's suggestion that the State of Freedonia is hostile to religion or seeks to deny religious organizations "the right to establish their religious self-definition in the political, civic, and economic life of [the] larger community" has no basis in fact. While individual religious denominations may enjoy greater or lesser political influence at any particular time, the single class of "religious groups" has a history not of political powerlessness, but of almost singular political potency. By any traditional measure, the class of "all religious groups" cannot be characterized as suspect.

With no suspect classification before it, the task this Court must determine, then, is whether there is a rational basis for the law. We do not have to tarry long to decide that the exclusion of religious organizations from eligibility from the State's playground-resurfacing subsidy program is supported by a rational basis. In conducting rational-basis review, the Court will overturn a government policy only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the [government's] actions were irrational." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000). The challenged policy carries with it "a strong presumption of validity,[. . .] and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *FCC v. Beach Commc 'ns, Inc.*, 508 U.S. 307, 314-15 (1993); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

Here, the State's policy prohibiting expenditures from the State's treasury to a church is amply supported by a rational basis. Like the Establishment Clause itself, the State's policy protects against governmental favoritism, actual or perceived, toward particular religious

denominations, respects taxpayers' freedom of religion and conscience, and protects religious organizations from creeping government influence. See, e.g., Nelson Tebbe, Excluding Religion, 156 U. PA. L. REV. 1263, 1272-74 (2008). First, the State's policy categorically excluding all churches and religious organizations from receiving state funds prevents politicians and program administrators from exhibiting, or appearing to exhibit, favoritism toward particular religious denominations. As the Supreme Court has observed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And in a competitive grant program like the State's playground-resurfacing grant, preferential treatment is inherent in the process— some applicants will receive funding and others will not, even if all are "qualified." By categorically excluding churches from eligibility, the government avoids the problem of funding Catholics but not Jews, or Methodists but not Muslims. *See Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (noting that where state funding program benefitted "relatively few religious groups," "[p]olitical fragmentation and divisiveness on religious lines are . . . likely to be intensified"); *cf. Town of Greece v. Galloway*, 134 S.Ct. 1811, 1841-42 (2014) (Kagan, J., dissenting) (arguing that town's practice of opening board meetings with a prayer, most of which were Christian in nature, diminished the "First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.").

Second, the State may rationally decide that, to avoid requiring taxpayers to contribute funds to religious denominations whose values are different from their own, no public funds may be directed toward any churches or religious organizations whatsoever. By shaping policy consistent with the separation of church and state contemplated by the Establishment Clause, states can avoid the "divisive political potential" that follows when states make direct payments to religious groups. *See Lemon*, 403 U.S. at 622-23. The State may wish to respect the individual religious consciences of taxpayers and relieve them of the obligation to fund religious groups with beliefs or practices they find repellent. To do so without discriminating on the basis of religious viewpoint requires the State to withhold funding from all religious organizations alike. The State's interest in accommodating taxpayers' freedom of conscience serves more than the individual interests of those taxpayers—it is vital to the success of state programs. States develop grant programs because they want to motivate positive action. If taxpayers protest a particular program because religious groups they oppose are getting tax dollars, the state objective advanced by that program is jeopardized. States thus have an interest in minimizing controversy over functional grant programs. Limiting eligibility to non-religious groups helps to advance that interest.

IV. Conclusion

We hold there is no violation of the First Amendment by Freedonia's rejection of Dumont's application. We hold there is no violation of the Equal Protection Clause by virtue of Freedonia's refusal to award a grant to Dumont or any religious group. We therefore AFFIRM the District Court's dismissal of the complaint.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 1935-Nite-Op

THE DUMONT CHURCH OF FREEDONIA, INC. **Appellant** **(Plaintiff Below)** **v.** **THE STATE OF FREEDONIA, and JULIUS HENRY MARCKS, in his capacity as Director of the Freedonia Department of Natural Resources** **Appellee** **(Defendant Below)**	**Appeal from the United States District Court for the Middle District of FREEDONIA**

DISSENTING OPINION

Circuit Judge Hugo Z. Hackenbush, dissenting.

I believe the majority has erred on its analysis of the First Amendment and Fourteenth Amendment issues in this case. Accordingly, I dissent.

I. The Freedonia Program Violates the First Amendment

It is well-established that the Free Exercise Clause prevents government from "impos[ing] special disabilities on the basis of … religious status." *Employment Div., Dep 't. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990). The Supreme Court has consistently invalidated exclusions based on religious status or identity. *McDaniel v. Paty*, 435 U.S. 618 (1978), for instance, invalidated a Tennessee statute that barred ministers of the Gospel and priests from serving as delegates to the state's constitutional convention. Tennessee justified the exclusion the same as Freedonia does here as ensuring the "separation of church and state." *Id.* at 622.

In *McDaniel*, the Supreme Court agreed that the exclusion of clergy was unconstitutional religious status discrimination. The plurality opinion, for example, reasoned that "[t]he Tennessee disqualification operates against *McDaniel* because of his status as a 'minister' or a 'priest.'" *Id.*

at 627. And Justices Brennan and Marshall agreed that "the provision … establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is absolutely prohibited." *Id.* at 631- 32. (Brennan, J., concurring).

The law at issue in *McDaniel* interfered with free exercise because it conditioned a generally available public benefit, eligibility for office, on the forswearing of certain religious status. *Id.* at 633. Justice Brennan concluded that such an "exclusion manifest[ed] patent hostility toward, not neutrality respecting, religion." *Id.* at 636. He explained that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639. Justice Stewart agreed because he reasoned that "Tennessee … penalized an individual for his religious status—for what he is and believes in—rather than for any particular act generally deemed harmful to society." *Id.* at 643. Tennessee closed the door of public service to *McDaniel* solely based on who he was and what he believed. He was barred from full participation in the political life of the community because of his religious identity. Freedonia does the same thing here by excluding Dumont from the Scrap Tire Program, even though its application ranked fifth on the merits out of forty-four submitted, simply because it is a church.

Similarly, in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Supreme Court invalidated a state requirement that a notary public must profess a belief in the existence of God to hold office. Such a requirement "set [] up a religious test which … bar[red] every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland." *Id.* at 489-90. The Court explained that: "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God.'" *Id.* at 490. The requirement to profess a belief in God was discrimination based on religious status: those who believed in the existence of God could hold office while those who did not were prohibited. The Court invalidated this religious classification as an unconstitutional invasion of *Torcaso*'s "freedom of belief and religion." *Id.* at 496.

More recently, the Supreme Court explained that *McDaniel* and *Torcaso* stand for the proposition that "[t]he government may not … impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877. It has thus been clear for decades that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533 (citing *McDaniel*). Here, the DNR imposes a special disability on religious status by categorically excluding religious organizations from a program intended to provide recycled rubber playground flooring that protects children as they play. Just as states did in *McDaniel* and *Torcaso*, the DNR here excludes Dumont solely because of who it is. This kind of status-based discrimination is particularly odious because it disadvantages an entire group of citizens based solely on their identity regardless of the merits, thereby penalizing their religious faith.

Here, the DNR closes the door to all religious daycares even if their inclusion would not threaten any legitimate state antiestablishment interest and instead would further the purely secular objectives of the program. This highlights the discrimination and lack of neutrality perpetrated in

this case. The prohibition against religious status discrimination is a constant theme found throughout the Court's precedent.

Justice O'Connor summed up that principle by noting that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring). At other points, the Court has described its precedent as following a general guiding principle of neutrality toward religion that does not allow for discrimination against or classification based on religious status.

In *Grumet*, 512 U.S. at 698 (plurality opinion), the Court explained that "religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *See also Id.* at 696 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion…."); *Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'") (*quoting Hobbie v. Unemployment Appeals Comm 'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)); *Sherbert v. Verner*, 374 U.S. 396, 409 (1963) (noting that the holding in that case reflected the "governmental obligation of neutrality in the face of religious differences."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); *see also Walz v. Tax Comm 'n.*, 397 U.S. 664, 669 (1970) (describing the Religion Clauses as pursuing a governmental course of "benevolent neutrality" toward religion); *Marsh v. Chambers*, 463 U.S. 783, 802 (1983) ("The First Amendment mandates governmental neutrality between religion and nonreligion.").

The Court has consequently rejected all government attempts "to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (*quoting McDaniel*, 435 U.S. at 641 (Brennan, J., concurring)). The DNR's religious status discrimination here conjures up all the evils the Supreme Court has condemned and invalidated in the past. It not only imposes special disabilities on the basis of religious status, *see Smith*, 494 U.S. at 877, but also unconstitutionally conditions participation in the life of the community on giving up a religious practice, *see McDaniel*, 435 U.S. at 626.

Practically speaking, it requires religious adherents to choose between their religious beliefs and receiving a generally available public benefit. *See Hobbie*, 480 U.S. at 136 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon

religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.") (*quoting Thomas v. Review Bd. of Ind. Emp 't Sec. Div.*, 450 U.S. 707, 717-18 (1981)); *accord Sherbert*, 374 U.S. at 398. The DNR, quite simply, "imposes … religious tests on [Freedonia's] citizens, sorts … them by faith, and permits … exclusion based on belief." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1845 (2014) (Kagan, J. dissenting).

This principle is so important that the Supreme Court has been quick to invalidate measures that engage in status-based discrimination not just under the Free Exercise Clause but also in other constitutional contexts. *See Lukumi*, 508 U.S. at 543 (collecting parallel First Amendment cases); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015) (questioning the validity of "[s]peech restrictions based on the identity of the speaker"); *Citizens United v. Fed. Election Comm 'n*, 558 U.S. 310, 350 (2010) ("[T]he First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 654 n.3 (2002) (describing programs that differentiate "based on the religious status of beneficiaries " as violating "the touchstone of neutrality under the Establishment Clause"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands … that all persons similarly situated should be treated alike."); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.").

Four members of the Supreme Court recently underscored the importance of the government maintaining religious neutrality. They explained that "[a] Christian, a Jew, a Muslim (and so forth) — each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person … seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting).

But the DNR did not consider Dumont's application to receive a neutral benefit of citizenship on an evenhanded basis. It rejected Dumont's application outright—despite that request's undeniable secular merits—because of the daycare's religious identity. Such religious status discrimination eschews a course of neutrality in favor of rank hostility to religion. In this case, that hostility is even more pronounced because, as discussed *infra*, the Scrap Tire Grant Program does not implicate any valid state establishment concern.

The *Smith* decision provides space for neutral, generally applicable restrictions under the Free Exercise Clause, but discrimination based on religious status is not neutral in any sense of the word. Nor is such an exclusion generally applicable since it only excludes religious actors. A law that is either not neutral or not generally applicable must satisfy strict scrutiny. See *Lukumi*, 508 U.S. at 531. "Neutrality and general applicability are interrelated, and … failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* That is the case here. Indeed, this case is akin to *Lukumi* where the Supreme Court struck down the City of Hialeah's

ordinances on animal killing because they were not religiously neutral. The ordinances specifically targeted the Santeria religion's practice of animal sacrifice but left virtually all other animal killing unregulated. *See Lukumi*, 508 U.S. at 536 ("The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice…"). After discussing the law's real operation, the Supreme Court concluded that the Hialeah ordinances were not neutral because it "in a selective manner impose[d] burdens only on conduct motivated by religious belief " and thus violated the "rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543.

There is no such pretense or gerrymander here. In fact, the Court does not have to look beyond the DNR's letter denying Dumont's application to participate in the Scrap Tire Grant Program, regardless of its high score on the merits, to decide that the program is not being administered in a neutral manner. Quite to the contrary, the DNR applied an express categorical exclusion based solely on Dumont's religious status. Nor is the DNR's exclusion generally applicable. It applies only to religious institutions. Every secular daycare and other eligible nonprofit organization can participate in the program. A bar only against religious entities is a far cry from the "across-the-board criminal prohibition" in *Smith*, 494 U.S. at 884.

It cannot be stated any more plainly: the DNR's exclusion applies only to daycares and preschools owned and operated by a religious entity. It has no application to daycares motivated by any other philosophy, despite the fact that their programs may be functionally identical to those operated by a church. In short, there is no plausible argument that the DNR's exclusion of Dumont is neutral or generally applicable.

Therefore, I conclude that removing the barrier to the church's equal participation in the political community will not result in a constitutional anomaly like the one the Court rejected in *Smith*, where removing a general criminal prohibition on drug use would have granted believers preferential treatment. *See Smith*, 494 U.S. at 886. It will simply reestablish the constitutional norm of equal treatment that the Free Exercise Clause guarantees to all citizens.

The Free Exercise Clause requires no less here.

II. Freedonia Violated the Equal Protection Clause of the Fourteenth Amendment

Having determined that the DNR's refusal to make an otherwise meritorious grant to Dumont is a violation of the Free Exercise Clause, I must likewise conclude there is a violation of the Fourteenth Amendment here as well. Categorically excluding religious institutions from the Scrap Tire Grant Program also violates the Equal Protection Clause because it employs a suspect classification that cannot satisfy strict scrutiny.

The DNR undeniably classifies applicants to the Scrap Tire Grant Program by religion. In fact, it explicitly rejected Dumont's grant application solely because it is a "church." There is thus no question that DNR applies Article I, § 7, of the Freedonia Constitution to categorically exclude all "church[es], sect[s] or denomination[s] of religion" from the Scrap Tire Grant Program, which

is a religious classification that is inherently suspect. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that a law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as … religion"). Moreover, Dumont is undoubtedly similarly-situated to other recipients of scrap tire grants. The DNR scored Dumont's application fifth out of forty-four applications submitted in 2012 and would have granted the application but for the fact that Dumont is a church. Because the DNR was poised to give Dumont a grant absent its religious identity, there is no question that the church is similarly-situated to other applicants who the DNR allowed to participate in the Scrap Tire Grant Program on a neutral basis. In fact, on the merits, the DNR scored Dumont's application higher than thirty-nine other would-be grant recipients. Yet it turned Dumont away based solely on its religious status.

This flies in the face of the Equal Protection Clause's "direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439. Yet the DNR treats religious organizations differently on the basis of an inherently suspect classification—religion. When the government treats similarly situated entities differently solely because of their religious status, it must satisfy the rigors of strict scrutiny. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (recognizing that laws that "classify along suspect lines like … religion" are subject to strict scrutiny). Indeed, the Supreme Court generally treats religious classifications as "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). This is so because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Metro Broad, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O 'Connor, J., dissenting) (internal marks omitted), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

The Supreme Court's decision in *Locke* is not to the contrary. The majority's reliance on it is misplaced. To the contrary, *Locke*'s brief discussion of equal protection was limited to a few sentences in a footnote and applies only to one type of equal protection claim—those based on interference with a fundamental right. And it is completely unsurprising that the *Locke* Court would judge a fundamental-right claim under rational basis scrutiny after concluding the law did not violate the fundamental right in question. Again, I dissent on both grounds here.

Importantly, *Locke* cited two cases in support of its holding that because Davey did not establish a free exercise violation, his equal protection claim was subject to only rational basis review. The first case was *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). Robison brought a two-pronged challenge under the Equal Protection Clause. He contended that denying educational benefits to conscientious objectors interfered with his fundamental right to the free exercise of religion. *Id.* Robison also argued that conscientious objectors were a suspect class that subjected the classification to strict scrutiny. *Id.* In regard to this fundamental rights claim, the Court stated: "Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold in Part III, infra, that the Act does not violate appellee's right of free exercise of religion,

we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test." *Id.*

The Court also rejected Robison's suspect classification claim because conscientious objectors do not constitute a suspect class that triggers strict scrutiny. *Id.* Robison thus merely stands for the "obvious principle that if state action does not trigger strict scrutiny under the Free Exercise Clause, it will not trigger strict scrutiny under the fundamental right prong of the Equal Protection Clause, either—but the opinion says nothing at all with regard to a challenge under the suspect classification prong." Susan Gellman, Susan Looper-Friedman, Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause), 10 U. PA. J. CONST. L. 665, 733-36 (2008). Certainly, Robison did not hold that laws employing a suspect classification or actually implicating a fundamental right are subject only to rational basis review.

The *Locke* Court also cited *McDaniel v. Paty* for its equal protection holding. But the *McDaniel* plurality opinion said nothing about religion as a suspect class and never evaluated *McDaniel*'s equal protection claim. The sole reference to equal protection in *McDaniel* appears in Justice White's concurrence. 435 U.S. at 643-46. Justice White evaluated that case under the Equal Protection Clause because he believed that seeking elective office was an important right that should subject the statute to careful scrutiny. *Id.* at 644. But his concurring opinion did not address an equal protection claim based on a suspect classification.

Simply put, the Supreme Court has never held that a religious suspect classification claim under the Equal Protection Clause rises or falls based on the success of a companion free exercise claim. Instead, the Supreme Court has consistently held that suspect classifications based on religious status are "inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class'….." *Plyler*, 457 U.S. at 216.

The religious difference between Dumont's daycare and secular daycare operators is the only basis for the exclusion here, although they both seek scrap tire funds to fulfill the state's recycling goals and to provide children a safer area to play. Because the DNR employs a suspect classification, it must satisfy strict scrutiny.

The DNR's categorical exclusion cannot withstand the rigors of strict scrutiny. Under the Free Exercise Clause, the government must show that a law which is either not neutral or generally applicable is justified by a compelling governmental interest and is narrowly tailored to advance that interest. *See Lukumi*, 508 U.S. at 531-32; *see also Smith*, 494 U.S. at 886 n.3 ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion"). Likewise, a suspect classification under the Equal Protection Clause must satisfy strict scrutiny. *See Dukes*, 427 U.S. at 303 (holding that a law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as … religion.").

The DNR's religious exclusion here fails both prongs of the strict scrutiny analysis, which together comprise "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The DNR asserts that it has a heightened interest in the separation of church and state that is memorialized in Article I, § 7.

But the Supreme Court has already rejected the DNR's asserted categorical compelling interest. In *Widmar v. Vincent*, 454 U.S. 263, 278 (1981), the University of Missouri at Kansas City opened its facilities for the activities of registered student groups but excluded one religious student group who wanted to use the facilities for "religious worship and religious discussion." *Id.* at 265. The Court invalidated the state's religious exclusion under the Free Speech Clause, holding that the university had created an open forum for student groups and its "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the university is unable to justify this violation under applicable constitutional standards." *Id.* at 277.

In *Widmar*, the university, like the DNR here, attempted to justify its exclusion of a religious group by arguing that it was avoiding a federal Establishment Clause violation and also that it was attempting to achieve the greater degree of separation of church and state required by its state constitution, which contains the same language as the provision the DNR cites here—Article I, § 7. The Supreme Court rejected both arguments. It first noted, under the federal Establishment Clause, that an open forum policy "including nondiscrimination against religious speech" had a secular purpose and avoided entanglement with religion. *Id.* at 271-72.

The *Widmar* Court then rejected the argument that opening the speech forum to the religious student group would have the primary effect of advancing religion. *Id.* at 272. It noted that the forum was available to "a broad class of nonreligious as well as religious speakers" and that the "provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 274. "If the Establishment Clause barred the extension of general benefits to religious groups," the Court explained that "'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Id.* at 274-75 (*quoting Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion)).

Just as importantly, the *Widmar* Court rejected the university's antiestablishment interest under the provisions of the Missouri Constitution—containing the exact same language at issue in this case. It explained that "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." *Id.* at 276. Hence, the Court has already effectively determined that Freedonia cannot further its state constitutional antiestablishment interest by violating the free exercise rights of its citizens. The DNR's attempt to invoke the Freedonia state constitution to justify violating Dumont's First Amendment rights must therefore fail. Like the University in *Widmar*, which tried to exclude a religious group from an open forum accessible to all, the DNR attempts to exclude Dumont from a neutral and generally available

public benefit program. But, as the Court concluded in *Widmar*, including religious citizens in a neutral benefit program equally available to all does not compromise any antiestablishment principle and cannot constitute a government interest "of the highest order." *Thomas*, 450 U.S. at 718 (*quoting Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

In short, there cannot be a compelling interest in the "separation of church and state" if there is no possibility of a breach by treating religious citizens the same as everyone else. Where (1) the criteria for inclusion in the Scrap Tire Grant Program is entirely secular, (2) the factors used to select grant recipients are wholly secular and, perhaps most importantly, (3) the aid itself—rubber playground surfacing material—is devoid of any religious content and (4) cannot possibly be diverted to a religious use, that is plainly true. It is certainly difficult to imagine a more secular program than using recycled tire material to prevent children from getting hurt as they run, climb, and swing on the monkey bars.

Moreover, it is not rational to categorically exclude churches from neutral and otherwise generally available public benefit programs when their objectives and practical impact are entirely secular. Police and fire departments, for instance, protect churches as well as secular businesses to promote public safety and the general welfare. Cities build and repair streets and sidewalks in front of churches and secular organizations alike to facilitate transportation, commerce, and community. Even though churches are undeniably "aided" to some degree by these government programs, these benefits have nothing to do with religion and "aid" all citizens equally no matter what philosophy (secular or religious) animates their lives.

It is simply irrational for the DNR to exclude religion in the name of achieving a pinnacle degree of church-state separation in these circumstances. All the DNR is really accomplishing by excluding religious institutions from a neutral benefit program available to all is treating religious entities worse than everyone else. The DNR's exclusion thus represents "a brooding and pervasive devotion to the secular and … [an] active hostility to the religious," which is "prohibited by [the Constitution]." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring) (internal marks omitted); *see also Rosenberger*, 515 U.S. at 846 (cautioning against "fostering a pervasive bias or hostility to religion.").

The DNR simply has no legitimate, let alone compelling, interest in excluding all religious organizations from participating in the Scrap Tire Grant Program, and the DNR certainly cannot prove that a categorical exclusion of religion advances any legitimate interest it may possess in the least restrictive manner available. If the government's interest can be "achieved by narrower [laws] that burden [] religion to a far lesser degree," *Lukumi*, 508 U.S. at 546, then a law is not narrowly tailored. Laws that, for instance, sweep too much protected conduct into their prohibitory reach are not narrowly tailored.

In *Lukumi*, the Supreme Court found the ordinances at issue not to be narrowly tailored because they were overbroad. *See Id.* at 546 (holding that the city's interests "could be achieved

by narrower ordinances that burdened religion to a far lesser degree."). The City, for example, raised a legitimate governmental interest in preventing improper disposal of animals that had been killed. But the Supreme Court noted that "[i]f improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage." *Id.* at 538.

Similarly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991), the Supreme Court held that the "Son of Sam" statute was not narrowly tailored in light of the state's asserted interest in compensating crime victims because it applied to a "wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." *Id.* at 122-23; *see also First Nat. Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978) (holding that a statute prohibiting corporations from making contributions or expenditures to influence the vote on referendum proposals was not narrowly tailored to advance the asserted interest in protecting shareholders because it prohibited contributions or expenditures made even with the unanimous consent of shareholders).

The over-inclusiveness of the DNR's exclusion is apparent because it extends to all religious organizations regardless of any conceivable impact on the state's asserted interest. Indeed, such a blanket restriction bears no connection to any imaginable interest other than denying the religious access to programs designed to further basic public safety. Given that the Scrap Tire Grant program (absent the religious exclusion) is entirely neutral and that Dumont 's participation in that program would serve the State's recycling and safety goals equally well, the DNR simply has no legitimate basis for excluding the church. Yet the DNR wields an axe when a scalpel would suffice. This is not a case in which the state allows money to flow to recipients to use as they wish with minimal oversight or restrictions. The DNR, for instance, utilizes strict record-keeping and reporting requirements. Grant payments are only reimbursements for payments already made by the recipient and they do not cover the total cost of the project. And the DNR specifies that "[g]rant recipients will be reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved by the department project manager."

Furthermore, the DNR has strict accountability requirements for grant funds. The DNR thus knows full well how to ensure the fulfillment of its programmatic goals while preserving any antiestablishment interest it may have in providing generally available public benefits to religious organizations. A categorical ban on religion is merely an overbroad and unconstitutional restriction on the ability of the faithful to participate on equal terms in public life.

Further, *Locke v. Davey* does not sanction religious status discrimination and cannot be used to justify the Fourteenth Amendment violation here. This Court's decision in *Locke v. Davey* does not establish that states can engage in religious status discrimination as they please. In *Locke*, the Supreme Court held that the State of Washington did not violate the Free Exercise Clause when it denied scholarship funds for students pursuing a degree in devotional theology. 540 U.S. at 715.

The Court held that excluding "training for religious professions" fell within the "play in the joints" between state actions "permitted by the Establishment Clause but not required by the Free Exercise Clause" based on unique historical concerns related to "procuring taxpayer funds to support church leaders." *Id.* at 718-19, 721-22.

This Court's decision in *Widmar*, however, establishes the general rule that antiestablishment interests under a state constitution cannot violate the rights guaranteed by the United States Constitution. 454 U.S. at 276. The *Locke* decision must therefore be read in concert with *Widmar*. If anything, *Locke* is a narrow exception to *Widmar*'s general rule based on a unique historical concern— state funding for the religious training of clergy— that has no application in a case like this that deals with installing rubber playground flooring to protect children as they play. In *Locke*, the Supreme Court was concerned by what the scholarship funds were going to be used for—the devotional training of clergy—not the identity of those who were using the money. But Dumont's religious identity was the sole basis for the DNR's exclusion here. *Locke* simply has no application in that context.

In this case, Dumont does not seek funding for an essentially religious endeavor. It merely wishes to participate in a generally available reimbursement program to obtain recycled scrap tires that are transformed into a pour-in-place rubber playground surface that protects children's physical safety. The surface that children play on as they enjoy recess is about as far as one can get from the devotional training of clergy. Indeed, the Scrap Tire Program is entirely secular from top to bottom. The criteria used to judge grant applications are completely secular.

As the plurality noted in *Mitchell v. Helms*, 530 U.S. 793, 824 (2000), "[t]he risk of [an Establishment Clause violation] is less when the aid lacks content, for there is no risk (as there is with books) of the government inadvertently providing improper content." Scrap tire material has no content and is a far cry from even the aid for instructional materials approved in Mitchell, or the provision of government-paid teachers to religious schools upheld in *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997). In short, there are simply no legitimate antiestablishment concerns that could place this case within *Locke*'s bounds.

The DNR, though, justifies a categorical exclusion from the Scrap Tire Grant Program solely based on who obtains the benefit—a church. Such discrimination based on religious identity violates both the Free Exercise and Equal Protection Clauses.

In this regard, it is worth noting that there is – at least at this preliminary stage of the proceedings – the prospect, as advanced by Dumont and discounted by the majority here, that Freedonia's Article I, § 7, has a "credible connection" to the religious bigotry exhibited by the Blaine Amendment. In contrast, Article I, § 7, of the Freedonia Constitution, to which the DNR pointed in denying Dumont's application, has a credible connection to the bigotry of the federal Blaine Amendment. It was enacted in 1875—the exact same year the federal Blaine Amendment was proposed and debated. See Mark Edward DeForrest, *An Overview and Evaluation of State*

Blaine Amendments: Origins, Scope, and First Amendment Concerns, 26 HARV. J.L. & PUB. POL. 551, 626 n.149 (2003) ("[O]vert anti-Catholic bigotry … was widespread in late nineteenth century America."). Notably, Article I, § 7, is a strict no aid provision that shares the same grounding in "hostility to the Catholic Church and to Catholics in general" that the Court recognized in *Mitchell*, 530 U.S. at 828 (plurality opinion).

And, Article I, § 7's past connection to religious bigotry carries over to the present in the DNR's application of that provision to categorically exclude religious preschools and daycares from the Scrap Tire Program, which constitutes religious status discrimination of the worst kind. In sum, none of the factors the Supreme Court relied upon in *Locke* are present here. This case is different in all relevant respects. Unlike *Locke*, it involves: (1) a generally available public benefit that is completely secular and that does not involve an inherently religious activity, such as the training of clergy; (2) an unmistakable hostility to religion that is not a mild disfavor of religion; (3) a categorical exclusion of religion that bars religious organizations completely from the program; and (4) a constitutional provision, Article I, § 7, that reflects the bigotry of the Blaine Amendment.

Locke never sanctioned such a categorical exclusion of religion from an otherwise secular, neutral, and generally available public benefit program that raises no valid antiestablishment concern. The Court should not allow the DNR to use a state constitutional provision to eviscerate a church daycare's First and Fourteenth Amendment right to participate equally in society without first surrendering its religious character.

I dissent.

IN THE UNITED STATES SUPREME COURT

NO. DAY-RACE-1937

THE DUMONT CHURCH OF FREEDONIA, INC. **PETITIONER** **(Appellant and Plaintiff below)** **v.** **THE STATE OF FREEDONIA, and JULIUS HENRY MARCKS, in his capacity as Director of the Freedonia Department of Natural Resources** **RESPONDENTS** **(Appellees and Defendants Below)**	**Appeal from the United States Court of Appeals For the Fourteenth Circuit**

ORDER GRANTING CERTIORARI

The petition of the Plaintiff – Appellant Dumont Church of Freedonia, Inc. for an order of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED. Oral argument shall be conducted on October 22, 2016, in Crawfordsville, Indiana. The argument shall be confined to the following issues:

> *Whether the exclusion of churches from an otherwise neutral and secular aid program violates: (a) the Free Exercise Clause and (b) the Equal Protection Clause when the state has no valid Establishment Clause concern?*

Petitioner shall be entitled to open and close the argument.

FOR THE COURT

Arthur Harpo

Arthur Harpo, Clerk of the Court