No. 17-218

In The
Supreme Court of the United States

FIRST BAPTIST CHURCH OF NORTH GREENE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondents.

On Writ of Certiorari to
The United States Court of Appeals for
The Fourteenth Circuit

BRIEF FOR PETITIONER

Team 34
Counsel for Petitioner

QUESTIONS PRESENTED

1. The United States Constitution prohibits state governments from inhibiting the free exercise of religion, such as singling out religions for disparate treatment without a compelling interest. The State of North Greene awarded 112 fertilizer grants and ranked First Baptist Church's community garden and soup kitchen, Caring Hands, twenty-second on the merits. Nevertheless, the State denied its presumptive grant award because of its religious affiliation without there being a valid Establishment Clause concern. Did the State of North Greene's denial of the grant thereby violate First Baptist Church's rights guaranteed by the Constitution?
2. The United States Constitution prohibits state governments from making any laws "abridging the freedom of speech." The State of North Greene has adopted an anti-discrimination policy, which prohibits granting state funds to individuals or organizations "engaging in conduct that…is harassment or discrimination." Did the State of North Greene's denial of the grant to Caring Hands based on Pastor Thomas' religious sermon thereby violate the Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED .... **i**

TABLE OF CONTENTS .... **ii**

TABLE OF AUTHORITIES .... **iv**

OPINIONS AND ORDER **1**

CONSTITUTIONAL PROVISIONS INVOLVED **1**

STATEMENT OF THE CASE **1**

SUMMARY OF ARGUMENT **4**

ARGUMENT **6**

I. IT IS UNCONSTITUTIONAL TO DISCRIMINATE IN A SECULAR BENEFITS PROGRAM AGAINST AN OTHERWISE ELIGIBLE ENTITY SOLELY BECAUSE OF ITS RELIGIOUS IDENTITY. BY DENYING PETITIONER FIRST BAPTIST CHURCH'S GRANT APPLICATION ON THE SOLE BASIS THAT IT IS A RELIGIOUS ORGANIZATION DESPITE ITS APPLICATION BEING IN THE TOP EIGHT PERCENT FOR GRANT ELIGIBILITY, RESPONDENT STATE TARGETED FIRST BAPTIST CHURCH FOR DISPARATE TREATMENT THEREBY VIOLATING ITS RIGHT TO THE FREE EXERCISE OF ITS RELIGION IN CONTRAVENTION TO THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION. 6

A. The State's Categorical Exclusion of Religious Organizations from the No Waste Fertilizer Grant Program Violates the Free Exercise Clause. 6

1. *The State's categorical exclusion of religious organizations is religious status discrimination. In the distribution of entirely secular benefits like grants for fertilizer, the government may not discriminate against otherwise eligible private entities solely on the basis of their religious identity.* 7

2. *The State's categorical exclusion of religious organizations is not neutral or generally applicable. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with requirement of facial neutrality, as the Free Exercise Clause protects against governmental hostility which is masked as well as overt* (Lukumi). 14

B. The State's Categorical Exclusion of Religious Organizations Cannot Withstand the Rigors of Strict Scrutiny. Excluding Churches from an Otherwise Neutral and Secular Grant Program Violates the Free Exercise Clause When the State Has No Valid Establishment Clause Concern and It Does Not Have a Compelling Governmental Interest or Did Not Use the Least Restrictive Means. 16

1. *The State has no compelling interest in categorically excluding religious organizations from the No Waste. Rather, the State has a compelling interest in ensuring the welfare of the community through feeding the needy, which is precisely what First Baptist*

Church does with its Caring Hands soup kitchen and why First Baptist Church applied for the No Waste grant. 16

2. *Any legitimate interest the State may have is not advanced by the least restrictive means available*. 19

C. *Locke v. Davey* Does Not Sanction Religious Status Discrimination. 21

1. *First Baptist Church does not seek funding for a fundamentally religious endeavor*. .. 22

2. *Article II, Section 8 of the State's constitution is suspiciously similar to the unconstitutional Blaine Amendment*. 26

II. A STATE GOVERNMENT'S USE OF VAGUE AND OVERBROAD LAWS TO PROHIBIT EXPRESSIVE CONDUCT IS UNCONSTITUTIONAL. BY USING A VAGUELY DRAWN ANTI-DISCRIMINATION POLICY TO DENY PETITIONER FIRST BAPTIST CHURCH'S GRANT APPLICATION BASED ON A SERMON DELIVERED AT THE CHURCH, RESPONDENT STATE IMPERMISSIBLY ENGAGED IN CONTENT-BASED RESTRICTION OF FIRST BAPTIST CHURCH'S FIRST AMENDMENT RIGHT TO FREE SPEECH. 27

A. The State's Anti-Discrimination Policy Violates the Free Speech Clause Because Its Reliance on Third-Party Interpretations of Expressive Conduct to Trigger its Prohibitions Makes It Unconstitutionally Vague and Overbroad. 28

1. *The State's anti-discrimination Policy is unconstitutionally vague because it fails to give notice of what speech it prohibits and impermissibly delegates basic policy decisions to third parties* 29

2. *The State's anti-discrimination Policy is unconstitutional because it empowers the State to prohibit expressive conduct based on its content*. 32

3. *The State's anti-discrimination Policy is unconstitutionally overbroad because its vague trigger terms have an "immediately chilling" effect on protected conduct* 33

B. The State Unconstitutionally Applied its Anti-Discrimination Policy to Reject Caring Hands' Grant Application Because Pastor Thomas' Sermon Was Core Messaging Protected by the First Amendment. 36

1. *Pastor Thomas' sermon constituted "pure speech" that enjoys unqualified First Amendment protections under the Free Speech Clause*. 36

2. *The State's use of the Policy to limit First Baptist Church's pure speech constitutes the sort of viewpoint discrimination that this Court has found unconstitutional.* 37

TABLE OF AUTHORITIES

Cases

Agostini v. Felton,
521 U.S. 203 (1997) ……………………….……………………………………26

American Commc'n Ass'n v. Douds,
339 U.S. 382 (1950) ………………………..……………………..……………37

Bd. of Airport Comm'rs v. Jews for Jesus,
483 U.S. 569 (1987) ……………………………………………………………34, 35

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994) ……………………………………………………………10, 11

Bd. of Educ. of Westside Cmty. Schs. v. Mergens,
496 U.S. 226 (1990) ……………………………………………………………11, 24

Broadrick v. Oklahoma,
413 U.S. 601 (1973) ……………………………………………………...…………29

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) …………………………………………………...…………13

Church of the Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) …………………………………………………..………*Passim*

Citizens United v. FEC,
558 U.S. 310 (2010) ……………………………………………………………12, 31

City of Boerne v. Flores,
521 U.S. 507 (1997) ……………………………………..……………………16

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) …………………………………………..…………….12

Comm. for Public Educ. & Religious Liberty v. Regan,
444 U.S. 646 (1980) ………………………………………..…………..24, 33

Emp't Div., Dep't. of Human Res. v. Smith,
494 U.S. 872 (1990) ………………………………..………………………*Passim*

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) ………………………………………………..……………7, 25

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992) ……………………………………………………..………33

Gitlow v. New York,
268 U.S. 652 (1925) …………………………..…………………………………37

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) ………………………………………………………………13

Grayned v. City of Rockford,
408 U.S. 104 (1972) ……………………………………………………………29, 30

Hobbie v. Unempl't Appeals Comm'n,
480 U.S. 136 (1987) ……………………………..………………………………11

Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston
515 U.S. 557 (1995) …………………………………………..……………………38

Hunt v. McNair,
413 U.S. 734 (1973) …………………………………………..……………………24

Keyishian v. Bd. of Regents,
385 U.S. 589 (1962) ……………………………………………………………29, 32

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) ……………………………………………..…………………12

Lemon v. Kurtzman,
403 U.S. 602 (1971) ………………………………………..………………………25

Locke v. Davey,
540 U.S. 712 (2004) ……………………………………………………………. *Passim*

Lynch v. Donnelly,
465 U.S. 668 (1984) ……………………………………………………………………7

Marsh v. Chambers,
463 U.S. 783 (1983) ………………………………………..……………………11

McConnell v. FEC,
540 U.S. 93 (2003) ………………………………………………………………31

McDaniel v. Paty,
435 U.S. 618 (1978) ……………………………………………………………………8

Members of City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 34, 35

Mitchell v. Helms,
530 U.S. 793 (2000) 24, 25

Mueller v. Allen,
463 U.S. 388 (1983) 24

N.Y. State Club Ass'n v. City of New York,
487 U.S. 1 (1988) 39, 40

New York v. Ferber,
458 U.S. 747 (1982) 36

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 3

Regan v. Time, Inc.
468 U.S. 641 (1984) 32

Roemer v. Bd. of Pub. Works,
426 U.S. 736 (1976) 18, 24

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 12

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 11, 18

Sherbert v. Verner,
374 U.S. 396 (1963) 10, 11

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 33

Texas v. Johnson,
491 U.S. 397 (1989) 28

Thomas v. Review Bd. of Ind. Emp't Sec. Div.,
450 U.S. 707, (1981) 11, 18

Thornhill v. Alabama,
310 U.S. 88 (1940) 34

Torcaso v. Watkins,
367 U.S. 488 (1961) ……………………………………………………...………8, 9

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) …………………………………………………………12, 13

Trinity Lutheran Church of Columbia v. Pauley, Petitioner's Brief,
136 S. Ct. 891 (Mem) (2016) (No. 15-577), 2016 WL 1496879……………..…11, 19, 20

Virginia v. Black,
538 US. 343 (2003) ……………………….……………………………………28, 37

Walz v. Tax Comm'n.,
397 U.S. 664 (1970) …………………………..…………………………………11

Widmar v. Vincent,
454 U.S. 263 (1981) ……………………………...……………………17, 18, 21

Wisconsin v. Yoder,
406 U.S. 205 (1972) ……………………………...……………………………18

Wooley v. Maynard,
430 U.S. 705 (1977) ……………………………………..………………………28

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) ……………………………………………………………12, 24

Constitutional Provisions

U.S. CONST. amend. I……………………………………………………………………..6

U.S. CONST. amend. XIV ………………………………………………………………6

North Greene CONST. art. II, § 8..….6, 7, 16, 27

Other Authorities

Douglas Laycock, *Theology, Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,*
118 Harv. L. Rev. 155 (2004)..……………23

OPINIONS AND ORDER

The opinion and order of the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit") is reproduced in the Record on page 12. The opinion and order of the United States District Court for the Eastern District of North Greene ("the District Court") is discussed in the Record on page 6.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves questions relating to the First Amendment's religion and speech clauses. The Free Exercise and the Establishment clauses (the "religion clauses") provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Free Speech Clause of the First Amendment provides: "Congress shall make no law abridging the freedom of speech." *Id*. The religion and speech clauses have been incorporated into the Fourteenth Amendment and are thus applicable to the states. U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

First Baptist Church and Caring Hands

In March 2007, Petitioner First Baptist Church of North Greene ("First Baptist Church") partnered with a parishioner to work on his Eagle Scout project—creating a community soup kitchen to help feed the homeless and needy. R. at 3. The church cleared a large plot of land and began cultivating a variety of crops. *Id*. After the garden began producing vegetables, First Baptist Church opened its soup kitchen, "Caring Hands," to the public. *Id*. Caring Hands was licensed and owned by First Baptist Church and used its church facilities. *Id*. Caring Hands operated three times a week, providing meals to some of the community's most vulnerable residents. *Id*. Soup kitchen visitors also had the opportunity to take a free bible and other

literature, or to speak with a licensed on-hand volunteer counselor. *Id*. The soup kitchen was viewed by First Baptist Church and its parishioners as a way to give back to the community while also providing a way to "introduce Christ to the needy." *Id*.

Given the increased demand, the church garden was expanded to yield nearly four times the quantity of produce, enabling Caring Hands to provide more food to more mouths. *Id*. Though some of the produce was used for church events, over 75 percent was used for Caring Hands. *Id*. In years when the garden overproduced, the extra produce was sold in the church parking lot, with 100 percent of the proceeds going towards funding Caring Hands. *Id*. In addition to being the food source for feeding the needy, the church's expansive garden became a community educational resource, running agricultural classes and regularly engaging with local Boy Scout and Girl Scout troops to provide enjoyable volunteer opportunities. *Id*.

The "No Waste" Fertilizer Grant Program

The North Greene State Agriculture Department ("NGSAD") ran a grant program entitled "No Waste." R. at 3. No Waste was designed to reduce waste entering landfills by repurposing some of that waste into safe fertilizer for local farmers. *Id*. NGSAD allowed organizations to apply for grants that provided funds to purchase this fertilizer. R. at 4. No Waste ranked applications based on neutral, secular criteria, including whether the application provided a detailed description of its project and plans to use the fertilizer. *Id*. In 2015, No Waste received 273 applications, of which it could award 112 grants. *Id*. Caring Hands was ranked twenty-second (top eight percent) based on No Waste's neutral guidelines. *Id*.

Pastor Thomas' Sermon and Kyle Kalvert's Complaint

On Sunday, June 28, 2015, in response to the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584 (2015), Pastor John Thomas ("Pastor

Thomas") held a special sermon at First Baptist Church, of which he is the head pastor. R. at 4. The sermon focused on the religion's deep rooted biblical teachings regarding homosexuality, primarily emphasizing the longstanding traditional biblical definition of marriage as between one man and one woman. *Id*. Kyle Kalvert ("Mr. Kalvert"), a gay man, was visiting First Baptist Church during this sermon. *Id*. Mr. Kalvert was purportedly upset at the message of Pastor Thomas' sermon and filed a complaint against Pastor Thomas and First Baptist Church with the State of North Greene Human Relations Commission, a state agency tasked with enforcing the state's anti-discrimination policy. *Id*. The next day, *Greene News*, North Greene's largest daily newspaper, ran an article on the story. *Id*.

Grant Denied

Shortly after the complaint and newspaper article, Caring Hands received a letter from Todd Phillips, Director of No Waste, denying its grant application award. R. at 5. In this letter, Director Phillips acknowledged that Caring Hands had been ranked twenty-second—making Caring Hands a clear awardee—based on the program's neutral ranking system. But despite being in the top eight percent, he asserted that NGSAD was unable to approve Caring Hands' grant application for two reasons. NGSAD was unable to provide funds (1) to any *religious organization*, and (2) to "an organization that fail[ed] to abide by the State's *anti-discrimination policy*." *Id.* (emphasis added). The letter then asserted that the basis for NGSAD's belief that Caring Hands violated the state's anti-discrimination policy was the mere notice of Mr. Kalvert's recent complaint against Pastor Thomas' religious sermon. *Id*. Shocked at the denial of its grant application on these bases, First Baptist Church filed a complaint in the District Court, asserting that the State of North Greene's ("State") policies and exclusionary actions were unconstitutional. *Id*.

Proceedings Below

On July 23, 2015, First Baptist Church filed suit in the District Court challenging the State's denial of its application for fertilizer to be used to grow produce to feed the community's less fortunate. First Baptist Church sought declaratory and injunctive relief to allow Caring Hands, a non-profit community soup kitchen with its own garden, access to No Waste grants that it would have been awarded on the merits but for its religious affiliation. R. at 5. First Baptist Church challenged the constitutionality of this denial on two grounds: (1) denial of its grant application because of it being a religious organization and its deeply held religious beliefs violated the First Amendment's Free Exercise Clause; and (2) denial of its grant application because of Pastor Thomas' sermon violated the First Amendment's Free Speech Clause. R. at 5-6. The District Court granted the State's motion to dismiss the complaint for failure to state a claim. *Id*. First Baptist Church appealed this decision to the Fourteenth Circuit. R. at 2. The Fourteenth Circuit reversed, concluding that while the State did not violate the Free Exercise Clause, it may have violated the Free Speech Clause. R. at 2-3. This Court granted certiorari upon First Baptist Church's petition. R. at 17. Both parties have stipulated that the Respondent State is a proper party to this action and that First Baptist Church has standing. R. at 5, n. 1.

SUMMARY OF ARGUMENT

This case presents serious questions about anti-religious discrimination and the extent to which the United States Constitution restrains the government from excluding religious organizations from participating in public benefit programs. In the name of Respondent State's constitution's anti-establishment principles, the State violated the supreme law of the land's free exercise guarantees. The State does so even though including religious entities in the No Waste program would equally further the State's goals of keeping waste out of North Greene's landfills and fostering community service through feeding the needy. First Baptist Church's Caring Hands

garden and soup kitchen accomplishes the State's secular goals, and yet the State discriminated against First Baptist Church solely because of its religious identity without a compelling interest.

The First Amendment also establishes strong protections for individual expression and free speech. These protections are fundamental to our nation's founding ideals of fostering a well-informed society based on the free exchange of ideas. While the right to free expression is not absolute, this Court has tolerated limiting that right only in narrow circumstances where expression may cause a serious and immediate threat to the peace.

The State's anti-discrimination policy ("Policy") restricts free expression well beyond what this Court has found permissible because its vague terms fail to indicate what expression it prohibits and unconstitutionally delegate to third parties evaluation of expressive content. Furthermore, the Policy's vague terms causes it to capture expressive conduct that the government has no authority to prohibit. The Policy's vagueness and overbreadth make it facially unconstitutional. Even if the Policy were facially constitutional, the State has applied it in a manner contrary to the Constitution to deny Caring Hands' grant application. Pastor Thomas' sermon was pure speech that did not otherwise manifest in violence or discriminatory acts and is therefore subject to unqualified First Amendment protections and outside the reach of the State's Police Power.

ARGUMENT

I. IT IS UNCONSTITUTIONAL TO DISCRIMINATE IN A SECULAR BENEFITS PROGRAM AGAINST AN OTHERWISE ELIGIBLE ENTITY SOLELY BECAUSE OF ITS RELIGIOUS IDENTITY. BY DENYING PETITIONER FIRST BAPTIST CHURCH'S GRANT APPLICATION ON THE SOLE BASIS THAT IT IS A RELIGIOUS ORGANIZATION DESPITE ITS APPLICATION BEING IN THE TOP EIGHT PERCENT FOR GRANT ELIGIBILITY, RESPONDENT STATE TARGETED FIRST BAPTIST CHURCH FOR DISPARATE TREATMENT THEREBY VIOLATING ITS RIGHT TO THE FREE EXERCISE OF ITS RELIGION IN CONTRAVENTION TO THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The First Amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof…*" U.S. CONST. amend. I (emphasis added). This Clause applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV. The State's categorical exclusion of religious organizations from the No Waste program violates the Free Exercise Clause because the exclusion is discrimination based on religious status. It is not neutral nor is it generally applicable for the State to impose special burdens on nonprofit organizations with a religious identity. Doing so cannot survive strict scrutiny. Moreover, the State's anti-establishment concerns in its state constitution cannot trump the United States Constitution's guarantee of the free exercise of religion. Excluding First Baptist Church from No Waste exhibits an undeniable hostility to religion that offends the Constitution's essential mandate of religious neutrality.

A. The State's Categorical Exclusion of Religious Organizations from the No Waste Fertilizer Grant Program Violates the Free Exercise Clause.

When pursuing a legitimate goal, like environmental safety, the government may, and often does, employ a grant program that reimburses private entities for their actions furthering the government's goal. What the government may *not* do is discriminatorily exclude otherwise qualified, eligible applicants solely because of their religious identity. This norm follows from

this Court's precedents. The State and the Fourteenth Circuit nevertheless declared that First Baptist Church could be disqualified from a secular fertilizer grant program, *solely because it is a church*. First Baptist Church respectfully requests that this Court reverse the decision below and uphold First Baptist Church's constitutional rights.

There is nothing remarkable about the proposition that express government discrimination in a secular benefits program against an otherwise qualified entity, solely because of that entity's religious identity, is unconstitutional. The Constitution "forbids hostility" toward "all religions." *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984). "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Bd. of Educ.,* 330 U.S. 1, 18 (1947). The Establishment Clause "commands that…[a state] cannot exclude…Baptists, Jews, Methodists, Non-believers…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.

The State's application of Article II, Section 8 of its constitution to categorically exclude religious sects from No Waste based solely on religious status violates the Free Exercise Clause. The State's policies and actions denying grants to applicants who are churches or connected to churches are hostile to religion because they single out and exclude these applicants merely because of who they are or what they believe. Accordingly, the policy is neither neutral nor generally applicable.

1. *The State's categorical exclusion of religious organizations is religious status discrimination. In the distribution of entirely secular benefits like grants for fertilizer, the government may not discriminate against otherwise eligible private entities solely on the basis of their religious identity.*

It is axiomatic that the Free Exercise Clause prevents government from "impos[ing] special disabilities on the basis of … religious status." *Emp't Div., Dep't. of Human Res. v. Smith,* 494 U.S. 872, 877 (1990). This Court has consistently invalidated exclusions based on

religious status or identity. For example, in *McDaniel v. Paty*, this Court invalidated a Tennessee statute that barred ministers of the Gospel or priests from serving as delegates to the state's constitutional convention. *McDaniel v. Paty,* 435 U.S. 618 (1978). Tennessee justified the exclusion the same as Respondent State attempts to do here as ensuring the "separation of church and state." *Id*. at 622. The plurality disagreed, and instead agreed with the minister that the exclusion of clergy was unconstitutional religious status discrimination because it directly targeted people because of their religious profession. *Id.* at 627.

The Court in *McDaniel* also held that the law interfered with free exercise because it conditioned a generally available public benefit—eligibility for public office—on the disavowal 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, reasoning 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.

Similarly, in *Torcaso v. Watkins,* this Court invalidated a state requirement that a notary public must profess a belief in the existence of God to hold office. *Torcaso v. Watkins*, 367 U.S. 488 (1961). This Court explained that "[t]he power and authority 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.

Later in *Smith*, this Court explained that *McDaniel* and *Torcaso* stood 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 … is never permissible." *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 533 (1993) (citing *McDaniel*).

In *McDaniel*, Tennessee barred public service to the minister solely because of who he was and what he believed. The State does the same thing here by excluding First Baptist Church from No Waste, even though its application came in the top eight percent—twenty-second on the merits out of 273 submitted—for the sole reason that it is a church. First Baptist Church's case is stronger than *McDaniel*. The State's statute directly targets, by preclusion, Caring Hands solely because it is affiliated with a church (First Baptist Church). However, unlike the minister in *McDaniel* who wanted to join public office, Pastor Thomas was not asking for the grant in his individual or pastoral capacity. First Baptist Church, through Caring Hands, was not trying to intermingle itself with the local government, and there is no rational threat that feeding the needy will somehow result in a marriage of church and state.

The State is doing something similar to what Maryland did in *Torcaso*—separating believers from nonbelievers. Whereas in *Torcaso*, Maryland conditioned being a notary public on professing a belief in God, the State here is conditioning receiving a fertilizer grant on not professing one's faith.

The State's categorical exclusion of religious organizations treats religion as a menace. That is precisely what the Free Exercise clause prohibits. Just as Tennessee did in *McDaniel* and Maryland in *Torcaso*, the State excluded First Baptist Church 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 State forecloses all churches from a program designed to minimize the amount of waste that ends up in the State's landfills and to assist local farmers by providing much needed fertilizer. The State forecloses churches even if their inclusion does not and would not threaten any legitimate state anti-establishment interest and instead would further the purely secular objectives of No Waste. This highlights the State's discrimination and lack of neutrality.

Prohibition against religious status discrimination permeates this Court's precedent. Justice O'Connor summed up that principle by noting that "the Religion Clauses … 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). Furthermore, the Court has described its precedent as following a general guiding principle of neutrality toward religion that forbids discrimination against or classification based on religious status. For example, in *Grumet,* 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." 512 U.S. at 698 (plurality opinion). The plurality in *Grumet* also asserted that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion…." *Id.* at 696. *See also Lukumi,* 508 U.S. at 542 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'") (quoting *Hobbie v. Unemp't Appeals Comm'n,* 480 U.S. 136, 148 (1987) (Stevens, J., concurring)); *Sherbert v. Verner,* 374 U.S. 396, 409 (1963) (noting 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."); *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.").

Thus, this Court has 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,* at 641 (Brennan, J., concurring)).

The State's religious status discrimination here conjures up all the evils this Court has condemned and invalidated in the past. *See* Brief for Petitioner, *Trinity Lutheran Church of Columbia v. Pauley*, 136 S. Ct. 891 (Mem) (2016) (No. 15-577), 2016 WL 1496879. The State not only imposes special disabilities because of religious status, *see Smith,* 494 U.S. at 877, but also unconstitutionally conditions efficiently serving the community's less fortunate on relinquishing a religious practice, *see McDaniel,* 435 U.S. at 626. The State thus requires religious adherents to choose between their religious beliefs and receiving a generally available public benefit. For example, in *Hobbie*, this Court held that "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." 480 U.S. at 141 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 717-18 (1981)) (emphasis added); *accord Sherbert,* 374 U.S. at 398. Here, the State

"imposes … religious tests on [North Greene's] citizens, sorts … them by faith, and permits … exclusion based on belief." *See Town of Greece v. Galloway,* 134 S. Ct. 1811, 1845 (2014) (Kagan, J., dissenting).

This 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 (amassing 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. FEC*, 558 U.S. 310, 350 (2010) (holding that the 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) (holding that the Equal Protection Clause commands that "all persons similarly situated should be treated alike").

This Court's free speech precedents regarding public fora is particularly analogous. For example, in *Rosenberger v. Rector & Visitors of University of Virginia,* this Court invalidated the university's exclusion of a religious student group from a student activity fee program. *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 846 (1995). The only reason the university prohibited the student group from receiving funding was because of its religious viewpoint. *Id.* at 830. This Court held that exclusions from a neutral public forum based on the religious viewpoint of the speaker violate the Free Speech Clause. *Id.* at 837; *see also Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 114 (2001) (requiring the school to allow religious groups access to school facilities on equal terms with other groups); *Lamb's Chapel v. Ctr.*

Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (requiring use of school facilities on neutral basis as to a religious group). This equal access principle in the free speech arena correlates to the neutrality principle under the Free Exercise Clause.

Free exercise means the right to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. *See Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). The State foreclosed First Baptist Church's self-definition. Consequently, the State violated First Baptist Church's free exercise right by excluding Caring Hands from serving the community solely based on its religious status. Interestingly, First Baptist Church does not discriminate against who may receive the food from its garden—Christian, Jew, Muslim, whoever, is provided a plate of much needed food. Nevertheless, the State chose to discriminate against First Baptist Church.

Relatedly, four members of this 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. Nevertheless, the State did not consider First Baptist Church's application to receive a neutral benefit of citizenship on an evenhanded basis. It rejected First Baptist Church's application outright despite its application's undeniable secular merits merely because Caring Hand's is on church property.

The State's hostility towards religion in the form of religious status discrimination violates the Free Exercise Clause.

2. *The State's categorical exclusion of religious organizations is not neutral or generally applicable. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with requirement of facial neutrality, as the Free Exercise Clause protects against governmental hostility which is masked as well as overt (*Lukumi*).*

Smith provides space for neutral, generally applicable restrictions under the Free Exercise Clause, but such space does not exist here. Instead, the State's categorical exclusion is discriminatory as it specifically targeted religion. 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 adherents. A law that is either not neutral or not generally applicable must pass the strict scrutiny test. *See Lukumi,* 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.

i. The State's exclusion is not neutral.

This case parallels *Lukumi* where this Court struck down the City of Hialeah's ordinances on animal killing because they were not religiously neutral. Instead, the ordinances were essentially a subterfuge to specifically target the Santeria religion's religious practice of animal sacrifice but left virtually all other animal killing unregulated. *Id*. at 535-36. After discussing the law's real operation, this Court held that the ordinances were not neutral because the City "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." *Id.* at 543.

No such subterfuge exists here. Rather, the State unabashedly admitted it denied Caring Hands the grant solely because First Baptist Church ran it. The Court need not look any further than the State's denial letter, in which it openly admitted that regardless of Caring Hands' high

score on the merits, that it would not award the grant because Caring Hands was affiliated with First Baptist Church.

The Fourteenth Circuit argued that *Lukumi* is irrelevant to the present case because the State's "*disfavor of religion* does not impose criminal or civil sanctions on any type of religious service or rite." R. at 7 (emphasis added). First, the Fourteenth Circuit's glaring acknowledgment of the State's disfavor of religion should be a cause for alarm. Secondly, just because a statute does not have sanctions does not mean it is neutral. A statute could have no punishments for its violation and yet violate the Free Exercise Clause.

ii. The State's exclusion is not generally applicable.

The State's exclusion is also not generally applicable. It applies only to religious institutions. Every secular organization, whether a school, farm, or agricultural institute can participate in No Waste. There is not even a restriction that the entity has not committed fraud in the past. A bar *only* against religious entities is a far cry from the "across-the-board criminal prohibition" against drugs in *Smith*. 494 U.S. at 884. The State excludes religious organizations, but will (and did) award the grant to lower-ranked secular organizations, even though the secular programs may be functionally identical to those operated by a church.

The State's categorical exclusion of religion from No Waste is neither neutral nor generally applicable. Removing the unconstitutional barrier to First Baptist Church's equal participation in the community will not result in a constitutional anomaly like the one this Court rejected in *Smith,* where removing a general criminal prohibition on drug use would have given believers preferential treatment. *See Smith,* at 886. Rather, it will simply re-establish the constitutional norm of equal treatment that the Free Exercise Clause guarantees to *all* citizens, regardless of creed.

B. The State's Categorical Exclusion of Religious Organizations Cannot Withstand the Rigors of Strict Scrutiny. Excluding Churches from an Otherwise Neutral and Secular Grant Program Violates the Free Exercise Clause When the State Has No Valid Establishment Clause Concern and It Does Not Have a Compelling Governmental Interest or Did Not Use the Least Restrictive Means.

The Free Exercise Clause requires the government to demonstrate that a law which is either not neutral or generally applicable is justified by a (1) compelling governmental interest, and (2) is narrowly tailored to advance that interest. *See Lukumi,* at 531-32; *see also Smith,* at 886 n.3. This strict scrutiny test is "the most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997). Respondent State fails this test.

1. The State has no compelling interest in categorically excluding religious organizations from No Waste. Rather, the State has a compelling interest in ensuring the welfare of the community through feeding the needy, which is precisely what First Baptist Church does with its Caring Hands soup kitchen and why First Baptist Church applied for the No Waste grant.

Despite First Baptist Church ranking in the *top eight percent* based on the secular merits of its application, the State rejected it based on the State's purported anti-establishment interest. As memorialized in Article II, Section 8 of its constitution, the State further alleged that it has the right to provide for a greater separation of church and state without violating the Free Exercise Clause. This they may not do. Categorical exclusion from No Waste merely because an applicant is a church does not serve a compelling interest. Rather, the State has a compelling interest in ensuring its citizens' wellbeing. This is what First Baptist Church does through Caring Hands by feeding the community's hungry. And yet, the State denied it the grant, which would enable First Baptist Church to serve that compelling interest.

This Court has already rejected the State's alleged categorical compelling interest. In *Widmar v. Vincent*, a university 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." *Widmar v. Vincent,* 454 U.S. 263, 265, 278 (1981). This Court invalidated the state's religious exclusion under the First Amendment, holding that the university had created an open forum for student groups and its "exclusionary policy violate[d] 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 State here, tried justifying its exclusion of a religious group by arguing that it was avoiding an Establishment Clause violation and that it was attempting to achieve the greater degree of separation of church and state required by the Missouri Constitution. This Court rejected both arguments. It first noted, under the 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 Court also 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. Further underscoring the perplexing nature of the university's argument, the Court highlighted that "if the Establishment Clause barred the extension of general benefits to religious groups" then "'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)).

The Court also rejected the university's anti-establishment interest under its state constitution. It explained that the state's asserted interest 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, this Court has already declared that a state cannot further its state constitutional anti-establishment interest by violating the Constitution's free exercise rights of its citizens. Therefore, the State's attempt to invoke its constitution to justify violating First Baptist Church's First Amendment rights must fail.

Like the university in *Widmar,* which excluded a religious group from an open forum accessible to all, the State excluded First Baptist Church from a neutral and generally available public benefit program. Also like the university in *Widmar*, the State attempted to justify its exclusionary behavior by flashing an anti-establishment sign. However, *Widmar* commands that including religious organizations in a neutral benefit program equally available to all does not threaten any anti-establishment 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)).

Consequently, 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. This is plainly true where (1) the criteria for inclusion in No Waste is entirely secular; (2) the factors used to select grant recipients are wholly secular; (3) the aid itself—waste and fertilizer—is devoid of any religious content; and (4) the fertilizer cannot possibly be diverted to a religious use. It is nearly impossible to imagine a more secular program than using waste to fertilize a garden that feed men, women, and children regardless of race, religion, creed, or financial status.

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 businesses alike to facilitate transportation, commerce,

and community. Although 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. *See* Pet'r's Br. *Trinity Church*.

It is irrational for the State to exclude religion in this No Waste context in the name of achieving a separation of church and state at the zenith. All the State is accomplishing by excluding religious organizations from a neutral benefit program available to all is treating religious entities worse than everyone else—and arguably worse than those less deserving on the merits of the grant. The State is also accomplishing quite the unintended consequence: decreasing the likelihood that the needy will get the plate of food they so desperately need. The State's exclusion accordingly 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 State has no compelling interest in excluding all religious organizations from participating in No Waste, which First Baptist Church would use to feed the needy—a true compelling interest.

2. Any legitimate interest the State may have is not advanced by the least restrictive means available.

There is no way the State can prove that a blanket exclusion of religion advances any compelling interest it may possess by the least restrictive means available. If the government's interest can be "achieved by narrower [laws] that burden[] religion to a far lesser degree," then a law is not narrowly tailored. *Lukumi,* at 546. Laws that, for instance, sweep too much protected conduct into their prohibitory reach are not narrowly tailored. *See* Pet'r's Br. *Trinity Church*.

In *Lukumi,* this Court held that the ordinances at issue were overbroad, and therefore, were not the least restrictive means for furthering the city's governmental interest in preventing

improper disposal of animals. *Id.* at 546. The Court reasoned that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Id*.

The over-inclusiveness of the State's exclusion is apparent because it extends to all religious organizations regardless of any plausible impact on the State's asserted interest. Such a blanket restriction bears no connection to any conceivable interest other than denying the religious organization access to programs designed to further basic public welfare. Yet the State wields an axe when a scalpel would suffice. *See* Pet'r's Br. *Trinity Church*. 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. It is assumed that the State requires strict record-keeping and reporting requirements. Grants are used to purchase fertilizer and fertilizer only—not what is planted in the fertilizer, no equipment, no marketing materials, no labor, etc. There is no rational reason to think that fertilizer grant funds will somehow be converted to funds to purchase bibles. The State should know full well how to ensure its programmatic goals are fulfilled while preserving any anti-establishment interest it may have in providing generally available public benefits to religious organizations. A categorical ban on religion is an unconstitutional restriction on the ability of the faithful to participate on equal terms in the community.

The State's categorical exclusion of churches violates the Free Exercise Clause because it is status-based discrimination that does not serve a compelling interest by the least restrictive means available to the State. Accordingly, this Court should reverse the judgment of the Fourteenth Circuit.

C. *Locke v. Davey* Does Not Sanction Religious Status Discrimination.

This Court's decision in *Locke v. Davey* does not establish that states can engage in religious status discrimination as they please. *Locke v. Davey*, 540 U.S. 712 (2004). Accordingly, the Fourteenth Circuit's heavy reliance on *Locke* is misplaced.

In *Locke,* this Court held that Washington State 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, established the general rule that anti-establishment interests under a state constitution cannot violate the rights guaranteed by the United States Constitution. *Widmar,* 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 using fertilizer to grow food for the hungry and less fortunate members of the community. In *Locke,* this Court was concerned by *what* the scholarship funds were going to be used for (i.e., the devotional training of clergy) and not the identity of *who* was using the money.

Nevertheless, the State cites *Locke* as justification to bar First Baptist Church from receiving the grant. However, First Baptist Church's religious identity was the sole basis for the State's exclusion here—the "who." *Locke* simply has no application in this context, because it is not about the "what."

1. *First Baptist Church does not seek funding for a fundamentally religious endeavor.*

The central fact in *Locke* was that Davey was seeking funding for an "essentially religious endeavor": the devotional training of clergy. *Id.* at 721. The Court could "think of few areas in which a state's anti-establishment interests come more into play" because "procuring taxpayer funds to support church leaders … was one of the hallmarks of an 'established' religion." *Id.* at 722. The unique historical concerns related to funding the devotional training of clergy formed the backbone of the *Locke* decision and are inapplicable to the present case.

Significantly, the Court in *Locke* explicitly warned that "the only interest at issue" was "the State's interest in not funding the religious training of clergy. Nothing in [the Court's] opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5. Thus, *Locke,* "[a]s written, applies only to funding the training of clergy" and nothing more. *See* Douglas Laycock, *Theology, Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,* 118 Harv. L. Rev. 155, 161-62 (2004).

Here, First Baptist Church did not seek funding for a fundamentally religious endeavor. It simply wants to participate in a generally available reimbursement program to obtain fertilizer to grow food for the community's less fortunate that depend on Caring Hands for their daily source of nourishment. The fact that dinner occurs on church property is far attenuated from devotional training of clergy. Furthermore, fertilizer is not, and cannot be, transformed into anything remotely religious. Rather, it is used to plant vegetables that are then in turn picked and prepared for the sole purpose of filling the stomachs of men, women, and children that do not have enough money to purchase a meal on their own. Importantly, too, the soup kitchen is open to all. There is no requirement that one be Baptist or join the church to receive a meal.

Despite the nonreligious purpose described above, the Fourteenth Circuit attempted to fit a square peg in a round hole by characterizing First Baptist's Complaint as "seek[ing] to compel the direct grant of public funds to churches [which is] another of the 'hallmarks of an 'established' religion.'" However, this Court has never laid down such a rule that all generally available public benefits that flow to a church spawn an anti-establishment problem. Providing police, fire, and rescue service to churches on equal terms with other buildings is no "hallmark" of an established religion. *Locke,* at 722. The selective denial of such services would be inconceivable and a patent violation of the Constitution.

Instead, programs, like No Waste here, that allocate a secular benefit for secular use to a broad class of recipients, generally do not implicate a religious establishment even if they flow directly to a religious organization. For instance, in *Committee for Public Education and Religious Liberty v. Regan,* this Court upheld a program in which aid flowed directly to a religious school because "there d[id] not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with state-furnished materials have no such effect." *Comm. for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 656-59 (1980); *see also Roemer,* 426 U.S. at 736 (upholding direct grants to religious institutions); *Hunt v. McNair,* 413 U.S. 734, 736, 744-45 (1973) (upholding issuance of revenue bonds for benefit of religious college where there was a prohibition on use of funds for buildings or facilities used for religious purposes); *Zelman*, 536 U.S. at 639 (upholding a government program providing tuition vouchers for Cleveland schoolchildren to attend a private school of their parents' choosing because the vouchers were neutral towards religion and did not violate the Establishment Clause); *Mitchell v. Helms*, 530

U.S. 793 (2000) (holding that the federal government could provide computer equipment to all schools—public, private, and parochial—because the aid was religiously neutral and did not violate the Establishment Clause); *Mergens*, 496 U.S. at 226 (holding that the Equal Access Act, which required that public schools give religious groups the same access to facilities that other extracurricular groups have, did not violate the Establishment Clause).

Similarly, in *Mueller v. Allen*, the Court upheld Minnesota's tax credits to parents for money spent on tuition, books, transportation, and other costs associated with both private and religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983). The Court reasoned that because the tax credits did not have the effect of advancing religion, and government and religion were not excessively entangled, there was no Establishment Clause violation. Like *Mueller*, providing Caring Hands with the much-needed fertilizer to assist with the much-needed activity of feeding the needy, there is no "excessive entanglement" between government and religion.

In *Everson*, the Court held that New Jersey's reimbursement to parents of parochial and private school students for the costs of busing their children to school was constitutional because the assistance went to the child, not the church. *Everson,* 330 U.S. at 18. Like the children in *Everson*, the No Waste grant would effectively be going to feed the community's needy, and not First Baptist Church to run church business.

In *Lemon v. Kurtzman*, although the Court struck down a Pennsylvania law reimbursing religious schools for textbooks and teacher salaries, the Court developed a three-part test, which is applicable to the present case. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). The Court held that a program does not violate the Constitution if: (1) it has a primarily secular purpose; (2) its principal effect neither aids nor inhibits religion; and (3) government and religion are not excessively entangled. Caring Hands' activity is primarily secular in purpose—feeding the

community's needy, satisfying prong one. While there are some religious undertones (the soup kitchen is located on church property), Caring Hands' principle effect is to feed the needy, satisfying prong two. The religious undertones are best understood as passive in nature. Granting Caring Hands the fertilizer funds would not excessively entangle government and religion, in part, because all are welcome, satisfying prong three.

Fertilizer is secular, and First Baptist Church's intended use is secular. There is no way for First Baptist to convert fertilizer into the advancement of religious doctrines. As the plurality noted in *Mitchell*, "[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." Simply put, fertilizer cannot be converted to bibles. 530 U.S. at 824. If the provision of government-paid teachers to religious schools was upheld in *Agostini v. Felton*, surely this Court can uphold fertilizer which cannot speak or teach anyone anything. *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997).

Despite the Fourteenth Circuit's and the State's contentions, the direct flow of aid to a religious entity was not the issue in *Locke*. *Locke* addressed only state funding of "a degree in devotional theology," which "[t]rain[s] someone to lead a congregation," "an essentially religious endeavor." 540 U.S. at 719, 721. This Court was simply concerned about *what* the aid was being used for—the devotional training of clergy—not *who* was using the aid and how that aid flowed. The State, however, justifies a categorical exclusion from No Waste solely based on *who* obtains the benefit—a church. Such discrimination based on religious identity violates the Free Exercise Clause.

None of the factors this Court relied upon in *Locke* are present here. Unlike *Locke,* this case involves a generally available public benefit that is completely secular and that does not

involve an inherently religious activity. *Locke* never sanctioned such a categorical exclusion of religion from an otherwise secular, neutral, and generally available public benefit program that raises no valid anti-establishment concern.

It is imperative to limit *Locke* as closely as possible to its historical basis in the denial of government funds for training ministers. A broad reading of *Locke* could have severely negative consequences for the ability of religious institutions and persons to participate in public benefit programs. For instance, a broad reading could justify restrictions barring sectarian schools from participating in student aid programs, or restrictions on bond financing for religious organizations. It could be used as a pretext for excluding religious persons from competing for government contracts, from tax exemptions, or from student loans. None of these exclusions would be justified by any rigid principle of "separation of church and state" in the Establishment Clause. Such restrictions are not what our Founding Fathers would have envisioned. It would be profoundly unfortunate if states or the federal government could broaden *Locke's* holding to justify religion-based restrictions on participation in public programs. This Court has the opportunity to clarify that such restrictions are repugnant to the Free Exercise Clause.

2. *Article II, Section 8 of the State's constitution is suspiciously similar to the unconstitutional Blaine Amendment.*

The Court should also consider whether the State's constitution is a "Blaine Amendment" remnant. These provisions crept into many state constitutions in the late nineteenth and early twentieth centuries. The terms of these provisions were designed to seal off all public funds from Catholic schools, which were commonly referred to at that time as "sectarian" or "denominational." Article II, Section 8 of the State's constitution uses such language. Today, the Establishment Clause allows fairly broad funding of private religious schools, provided those funds are part of a "neutral" program and end up at religious schools through private individuals'

choices. But the state Blaine Amendments, which persist today in numerous state constitutions, erect a far more formidable barrier to public money flowing to any religious organization. Therein lies an issue in the present case: the Establishment Clause poses no obstacle to First Baptist Church participating in the No Waste program, but the State's constitution categorically bars participation of any grant applicant who is a "religious sect or denomination."

First Baptist Church "is not asking for a special benefit to which others are not entitled. … [It] seeks only equal treatment." *Locke*, 540 U.S. at 727 (Scalia, J., dissenting). First Baptist Church respectfully requests that this Court not allow the State to use an overbroad state constitutional provision to dismantle churches' First Amendment right to participate equally in the community. Therefore, the Court should reverse the Fourteenth Circuit's decision.

Excluding Petitioner First Baptist Church from the grant program on the basis of a blanket denial of funds to religious institutions was a pretext for the real reason, which was fear of bad press after Pastor Thomas' protected speech.

II. A STATE GOVERNMENT'S USE OF VAGUE AND OVERBROAD LAWS TO PROHIBIT EXPRESSIVE CONDUCT IS UNCONSTITUTIONAL. BY USING A VAGUELY DRAWN ANTI-DISCRIMINATION POLICY TO DENY PETITIONER FIRST BAPTIST CHURCH'S GRANT APPLICATION BASED ON A SERMON DELIVERED AT THE CHURCH, RESPONDENT STATE IMPERMISSIBLY ENGAGED IN CONTENT-BASED RESTRICTION OF FIRST BAPTIST CHURCH'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

The Free Speech Clause of the First Amendment to the United States Constitution prevents the government from prohibiting expressive conduct merely because some members of society may find it offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This fundamental protection exists primarily to foster a well-informed society with diverse points of view and is of particular importance when considering pure speech. *Wooley v. Maynard*, 430 U.S. 705, 718 (1977). While the government may limit speech in specific circumstances to serve

its compelling interests, the courts ultimately act as a safeguard to balance a government's compelling interest and our founding ideals. *Virginia v. Black*, 638 U.S. 343, 361-368 (2003) (affirming that the government may not limit speech outside of recognized categories where state concerns are particularly prevalent).

While the State's denial of First Baptist Church's application for the fertilizer grant violated the Free Exercise clause, the anti-discrimination policy ("Policy") that the State used to corroborate its decision violates the Free Speech clause of the First Amendment. This Court should affirm the Fourteenth Circuit's ruling that the Policy is unconstitutional because it impermissibly limits speech protected by the First Amendment to the United States Constitution.

Under the Free Speech Clause, a law limiting speech is unconstitutional if it is impermissibly vague. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1962). A law limiting speech is impermissibly vague if it fails to provide a reasonable person the opportunity to know what speech the policy prohibits or if it impermissibly delegates to third parties basic policy decisions regarding speech prohibitions. *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972). A corollary reason a law is unconstitutional is if it is impermissibly overbroad. A law is impermissibly overbroad if it captures in its prohibitions speech that is otherwise subject to the First Amendment's broad protections. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

A. The State's Anti-Discrimination Policy Violates the Free Speech Clause Because Its Reliance on Third-Party Interpretations of Expressive Conduct to Trigger its Prohibitions Makes It Unconstitutionally Vague and Overbroad.

This Court has highlighted that the evil of a vaguely drafted law restricting expressive conduct is that it "impermissible delegates" policy decisions to third parties by failing to indicate exactly what conduct it prohibits. *Grayned*, 408 U.S. at 108-109. According to this Court, the lack of up front notice that results from a vague law also impermissibly removes an individual's opportunity to adjust his expressive conduct to avoid violating the law. *Id*. Taken together, a law

is impermissibly vague if it aims to restrict some expressive conduct but threatens to limit all expressive conduct and thereby sweeps in conduct that is subject to the First Amendment's broad protection of free speech.

Similar concerns arise where a law prohibiting certain expressive conduct is overbroad. Overbroad laws fail to narrowly tailor the government's prohibition on expressive conduct and thereby have the effect of extinguishing speech that is beyond the government's right to prohibit. The deterrent effect of vague and overbroad laws, when used to limit speech, goes beyond what is permissible under the First Amendment.

1. *The State's anti-discrimination Policy is unconstitutionally vague because it fails to give notice of what speech it prohibits and impermissibly delegates basic policy decisions to third parties.*

This Court's seminal decision in *Grayned v. City of Rockford* outlined how even a flexible law may overcome vagueness challenges while restricting expressive conduct. 408 U.S. at 105. In *Grayned*, this Court held that an anti-picketing ordinance prohibiting any "noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof" was not unconstitutionally vague but merely permissibly flexible. *Id.* at 108.

According to the *Grayned*, though the ordinance's trigger words—"noise or diversion"—did not themselves provide constitutionally mandated clarity, the ordinance's qualifying language requiring that the prohibited noisy or divertive conduct actually disrupt a school session served to provide that clarity. *Id.* at 109. The requirement that conduct actually disrupt a school session before triggering the Ordinance's prohibition was an objective standard sufficiently discernable to a person of reasonable of intelligence to overcome vagueness challenges. *Id.*

The key principle underlying *Grayned*'s holding is that flexible prohibitions on expressive conduct are sufficiently clear when measured by objective criteria. Unlike the

ordinance in *Grayned*, the State's Policy fails to provide objective criteria for measuring potentially harassing or discriminatory conduct. Specifically, the Policy's flexible trigger terms of "harassment" and "discrimination" are ultimately measured by the similarly vague measuring criteria of what a third party may find "intimidating," "hostile," or "offensive." The Policy's measuring criteria are activated only through the personal reaction of an individual experiencing the expressive conduct and thereby fail to give a speaker fair up-front notice of what conduct the Policy prohibits.

A similar test for determining whether a law restricting expressive conduct is unconstitutionally vague focuses on how the trigger terms may be interpreted in isolation. This Court has applied this test when a law does not itself include additional qualifiers for its trigger terms. *See McConnell v. FEC*, 540 U.S. 93, 103 (2003), *overruled on separate grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

In *McConnell v. FEC*, this Court found that the terms—"promote," "oppose," "attack," and "support"—used to trigger instances of impermissible political donations in a law restricting campaign-finance behavior provided sufficient clarity to overcome vagueness challenges. *Id* at note 64. This Court's finding relied on the limited application of that law only to campaign finance, where each of those terms already were tied to specific and readily identifiable behavior within the political sphere. *Id.* at 169.

The key principle underlying the *McConnell* Court's reasoning while applying the isolated trigger-terms test is that the trigger terms used by the campaign finance law were terms of art assigned a particular meaning that was readily discernable by a person of ordinary intelligence without additional qualifying language.

The Policy's use of trigger terms "harassment" and "discrimination" fails to provide the clarity of the campaign-finance law in *McConnell* because those trigger terms are tied to the qualifier that a third-party find the speech "intimidating," "hostile," "offensive." In addition, the Policy's broad application to any organization seeking funding from the State removes the limiting framework that the *McConnell* court found in the political sphere. Without any meaningful bookends to limit application of the Policy's trigger words, any speech could potentially fall within its purview.

This Court applied First Amendment principles to find a state regulation unconstitutionally vague in the landmark case *Keyishian v. Bd. of Regents*. *Keyishian*, 385 U.S. at 591. In *Keyishian*, faculty members of the State University of New York challenged a statutory scheme that allowed dismissal of state employees for "treasonable or seditious" behavior. *Id*. at 591. Because the statute did not provide any definitions for its trigger terms, the State University of New York interpreted them to include membership in the communist party. *Id.* at 593. The University attempted to remove faculty members who refused to sign a certificate affirming that they were not members of the Communist Party. *Id*. at 595.

In reversing the lower court, this Court held that the statutory scheme's use of the trigger terms "treasonable or seditious" without any definition was unconstitutionally vague. *Id.* at 610. This Court reasoned that the scheme failed to provide objective measurement tools for interpreting application of the trigger terms and thereby failed to "clearly inform teachers what [was] being proscribed." *Id.* at 603.

In *Keyishian*, this Court further highlighted that precision in regulation of expressive conduct is of paramount concern and that governments must regulate narrowly in situations where First Amendment rights may be concerned. *Id*. Ultimately, this Court clearly articulated

the principle underlying vagueness review that a law cannot force an individual to "guess what conduct or utterance" may trigger its prohibitions. *Id.*

Applying the principles of the *Keyishian* Court to the State's Policy further highlights its constitutional shortcomings because it forces individuals to guess what a third-party may find offensive. Like the state statutory scheme in *Keyishian*, the Policy does not adequately define its trigger terms. Even more dubiously, the Policy purports to establish tools for measuring the application of its trigger terms despite the inability of those measuring tools to provide the certainty required to overcome a vagueness challenge.

2. *The State's anti-discrimination Policy is unconstitutional because it empowers the State to prohibit expressive conduct based on its content.*

The most constitutionally offensive consequence of the Policy's vague measuring criteria is that it empowers the State to impermissibly limit expressive conduct based on its content. This constitutional violation arises in the Policy's failure to set objective criteria for evaluating expressive conduct. Constitutional case law is clear that, in most circumstances, content-based assessments of expressive content contradict First Amendment protections. *Regan v. Time, Inc.* 468 U.S. 641, 643 (1984); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 124 (1992).

In *Forsyth County v. Nationalist Movement*, this Court found facially unconstitutional a county ordinance that allowed government administrators to vary public-demonstration-permit fees in accordance with the anticipated cost of maintaining public order. *Nationalist Movement*, 505 U.S. at 137. This Court reasoned that the ordinance's flexibility in assessing permit fees forced administrators to evaluate the content of speech and empowered them to discourage some views while limiting others. *Id.* at 132. This Court refused to allow leave prohibition of

expressive conduct up to the “whim of an administrator” and noted that an assessor’s own testimony evidenced that the ordinance was applied inconsistently. *Id.*

The Policy’s use of subjective criteria to trigger its prohibitions is like the unconstitutional county ordinance in *Nationalist Movement* because it empowers the State to determine whether to prohibit expressive conduct based on its content. This is evident from the State’s use of the Policy to deny Caring Hands’ grant application because it would have had to assess whether the content of Pastor Thomas’ sermon actually was intimidating, hostile, or offensive to Mr. Kalvert.

3. *The State’s anti-discrimination Policy is unconstitutionally overbroad because its vague trigger terms have an “immediately chilling” effect on protected conduct.*

The State’s Policy is facially unconstitutional because its trigger terms are too vague to inform a person of ordinary intelligence what conduct it prohibits and because it delegates policy decisions to third parties. A closely related consequence of vague trigger terms that also makes the Policy unconstitutional is that the Policy is overbroad. A law is unconstitutionally overbroad for First Amendment purposes when its lack of clarity means that constitutionally protected conduct may be swept into its prohibitions. *Thornhill v. Alabama*, 310 U.S. 88, 91 (1940).

In *Board of Airport Commissioners v. Jews for Jesus*, this Court found unconstitutionally overbroad a resolution barring First Amendment activities in Los Angeles International Airport. *Bd. of Airport Comm’rs v. Jews for Jesus*, 483 U.S. 569, 574 (1987). This Court reasoned that by broadly banning expressive conduct without any qualifying criteria, the resolution would either outright prohibit expressive conduct otherwise protected by the First Amendment or have the effect of limiting protected conduct through uncertainty over how Commissioners may apply the resolution. *Id.*

While the Policy's language is not as expansive as the Airport Commissioner's Resolution in *Jews for Jesus*, its impact on protected conduct is the same because of its hollow measuring terms. The Policy's reliance on what a third party may find "intimidating," "hostile," or "offensive" as measuring tools for what constitutes harassment or discrimination opens the door for any conduct to become prohibited by the Policy. This means that, though the Policy is not written as an outright ban on expressive conduct, individuals seeking to engage in expressive conduct may be deterred by a reasonable assumption that the Policy could prohibit their conduct. This precisely is the "chilling effect" that this Court repelled in *Jew for Jesus. Id.* at 576.

Importantly, because the Policy could have a chilling effect on some conduct that is protected by the First Amendment, the Policy is impermissibly overbroad even if this Court finds that Pastor Thomas' sermon is not itself protected under the First Amendment. This is because a law is unconstitutionally overbroad even if it may chill the protected conduct of a party not before the court. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). In some cases, this Court has even required that an overbroad law impermissibly limit the expressive conduct of parties not before the court to qualify as overbroad. *Broadrick*, 413 U.S. at 612; *Taxpayers for Vincent*, 466 U.S. at 799.

In *Taxpayers of Vincent*, this Court upheld the constitutionality of a municipal code prohibiting the posting of political signs on public property. *Id.* at 816. In overturning overbreadth claims, this Court analyzed how the city could use the ordinance to limit expressive conduct and found that any potential application would be satisfactorily tailored to a valid exercise of governmental interests. *Id*. at 798. This Court further found that the city's permissible use of its ordinance to limit the claimant's posting of political signs was likely the only valid

application of that ordinance. The limited potential application of the ordinance was key to this Courts finding that the Ordinance was not unconstitutionally overbroad.

The Policy's potential to prohibit a wide array of expressive conduct extends far beyond the reach of city ordinance in *Taxpayers of Vincent*. Unlike that ordinance, the Policy enjoys a reach limited only by a third party's own interpretation of expressive conduct. This Court easily could imagine circumstances in which conduct, such as speech meant to foster an exchange of ideas among the public, could be interpreted as "intimidating," "hostile," or "offensive" by some party who disagrees with the views expressed. This outcome plainly manifested itself in the complaint filed by Mr. Kalvert with the State's Human Relations Commission. The Policy's reliance on interpretations of conduct by third-parties make it impermissibly overbroad.

The Policy's self-limiting provision that prohibited conduct occurs only if the speaker "knows or reasonably should know" constitutes harassment or discrimination does not effectively mitigate its overbreadth. This again is because, in broadly basing the Policy's prohibition on what a third party may find "intimidating," "hostile," or "offensive" extinguishes any potential narrowing of its terms. The lack of objective bases for determining whether expressive conduct constitutes harassment or discrimination in the North Greene carries with it an impermissible deterrent effect on expressive conduct.

Another important principle of the unconstitutional overbreadth analysis is that the overbreadth of an unconstitutional law must be "substantial." *Taxpayers for Vincent*, 466 U.S. at 800. This approach was adopted explicitly to ensure that overbreadth doctrine would only serve to protect expressive conduct only from regulations that "significantly compromise" recognized First Amendment protections. *Id.* at 801.

In line with the substantiality requirement, this Court has refrained from finding broadly-written laws unconstitutionally overbroad where case-by-case adjudication could limit the law's scope. *New York v. Ferber*, 458 U.S. 747, 774 (1982). This restricted application of the overbreadth doctrine is premised on this Court's conviction that laws limited in their application fail to substantially deter protected conduct. *Id.* at 773 ("[T]he extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation"). This rationale cannot apply to the Policy because it lacks the objective measuring tools for evaluating harassing or discriminatory conduct through case-by-case adjudication prevent the possibility of limiting its overreach. More precisely, adjudicators in the State have no basis for determining that conduct is not intimidating, hostile, or offensive against a claimant because those measuring tools are purely subjective.

Neither the substantiality requirement for overbreadth nor any expectation of limited application save the Policy from its unconstitutional overbreadth. This is because of the Policy's vague reliance on a third party's reaction to expressive conduct as a measuring tool for determining whether that conduct is harassing or discriminatory. The Policy's overbreadth is evident in the wide-ranging possibilities for its application.

B. The State Unconstitutionally Applied its Anti-Discrimination Policy to Reject Caring Hands' Grant Application Because Pastor Thomas' Sermon Was Core Messaging Protected by the First Amendment.

1. Pastor Thomas' sermon constituted "pure speech" that enjoys unqualified First Amendment protections under the Free Speech Clause.

A state government may constitutionally apply its police power to limit expressive conduct where it has a compelling interest to do so. *Gitlow v. New York*, 268 U.S. 652, 654 (1925). However, a government's compelling interest may limit expressive conduct only where the expressive conduct causes a threat to the public that is "substantial" and "relatively serious."

American Commc'n Ass'n v. Douds, 339 U.S. 382, 397 (1950). Furthermore, this Court has held that the conduct prohibited by laws limiting expressive conduct must do so to prevent violence or a threat of violence. *Black*, 538 US. at 343.

In applying the Policy to limit First Baptist Church's expression of its traditional message supporting traditional marriage, the State went far beyond what this Court finds permissible. First, Pastor Thomas' sermon did not threaten or otherwise incite violence. Second, the content that Mr. Kalvert found offensive did not manifest in any form of discrimination as he was not excluded from attending First Baptist Church's services.

Because Pastor Thomas' sermon fails give rise to the violence-based serious threat to public welfare that this Court has recognized as a fundamental qualifier for a state's exercise of its police power in First Amendment cases, the State's use of the Policy to limit First Baptist Church's message is unconstitutional.

2. *The State's use of the Policy to limit First Baptist Church's pure speech constitutes the sort of viewpoint discrimination that this Court has found unconstitutional.*

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, this Court rejected Massachusetts state courts' holding that a public accommodations statute could force Irish-heritage-parade organizers to admit a gay, lesbian, bisexual group ("GLIB") to march in their parade. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 581 (1995). In upholding the organizers' decision to exclude GLIB, this Court recognized that the parade itself voiced a "message" that constituted expressive content protected by the First Amendment. *Id.* at 569. This Court further recognized that including GLIB's message of inclusion, though it also was protected by the First Amendment, could have the effect of impermissibly altering the organizers' heritage-focused message.

The principles outlined by this Court in *Hurley* highlight that a law is applied in contravention to the First Amendment when it has the effect of forcing a group to alter its protected expressive content. *Id.* at 573 ("[T]he fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message."). The State's application of the Policy as an excuse to reject Caring Hands' application for the state fertilizer grant is like Massachusetts courts' impermissible use of the public accommodations law to force parade organizers to alter their expressive content. This is because each instance of government intervention against dissemination of expressive conduct impermissibly limits the speaker's ability to express views that are protected by the First Amendment.

Hurley also highlights the degree to which a speaker's expressive conduct is protected under the First Amendment. In *Hurley*, this Court overturned Massachusetts courts' attempts to limit expressive conduct delivered in a public forum along a parade route. Even more closely held than the parade route in *Hurley*, Pastor Thomas' sermon was delivered within the confines of First Baptist Church to its parishioners. If this Court was unwilling to limit First Amendment protections of expressive conduct carried out in the public sphere, it should be unwilling to limit those protections when expressive conduct is delivered through a private sermon.

This Court's separate holding in *New York State Club Association v. City of New York* clarifies when government action to correct discriminatory effects of a group's conduct is permissible. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 4 (1988). In *New York State Club Association,* this Court upheld a city council ruling that a New York law forbidding discrimination in social-club membership prevented exclusion of certain individuals. *Id.* at 18. In its decision, this Court distinguished expressive conduct from mere club membership. *Id.* at 13. While the club in question also engaged in expressive conduct protected by the First

Amendment, the club's membership composition did not affect the club's ability to pursue that expressive conduct. *Id.* Because the expressive conduct was unaffected by the club's membership composition, the membership issue did not implicate the First Amendment or enjoy its strong protections. *Id.*

Pastor Thomas' sermon stands in sharp contrast to club membership-composition policies in *New York State Club Association* because it embodied expressive conduct—a particular message—protected by the First Amendment. Furthermore, because the sermon embodied a core message expressed by First Baptist Church, the sermon cannot be separated from First Amendment protections like mere club membership. Simply put, First Baptist Church would need to alter its core message to accommodate Mr. Kalvert and the Policy. Such alteration of expressive conduct would trespass against First Baptist Church's First Amendment rights.

A well-established corollary to the First Amendment principle underlying *Hurley* and *New York State Club Association* that a law may not force individuals to alter their core messages is that the government may not limit a speaker's expressive conduct merely because it disapproves of the message it conveys. *Id.* at 581 ("Disapproval of a private speaker's statement does not legitimize use of [] power to compel the speaker to alter the message by including one more acceptable to others."). The State's application of the Policy to limit First Baptist Church's constitutionally protected message manifests a form of viewpoint discrimination that this Court has consistently found unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner First Baptist Church respectfully requests this Court affirm the judgment of the Fourteenth Circuit as to the Free Speech issue, and reverse the judgment as to the Free Exercise issue because the actions taken by the Respondent State were unconstitutional.

Respectfully submitted,

Counsel for Petitioner

March 17, 2017