February Term, 2017

TRINITY LUTHERAN CHURCH, PETITIONER

V.

SARAH PARKER PAULEY, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITIONER'S OPENING BRIEF

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Oral Argument: https://www.youtube.com/watch?v=S9NFoVG3RvE&feature=youtu.be

QUESTION PRESENTED

DOES FUNDING A PLAYGROUND ASSOCIATED WITH A CHURCH VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT?

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QUESTION

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Statement of Argument

Trinity's playground is a secular structure despite being on church property. Trinity's playground grant would not violate the Establishment Clause because it would be used for a secular purpose, not to promote Lutheranism. Instead, by denying the aid, the state is discriminating against Trinity. Additionally, the state has no compelling interest to deny funding for The Learning Center's playground.

Argument

ARGUMENT I: EQUAL PROTECTION CLAUSE

The Equal Protection Clause is part of the Fourteenth Amendment, which states that no state shall deny to any person within its jurisdiction "equal protection of the laws". Under the Equal Protection Clause, denying The Learning Center the right to participate in the state Scrap Tire Program effectively means that the state is denying the children that attend this daycare the same safety protections guaranteed to other secular nonprofit organizations. According to Everson v. Bd. Of Educ., 330 U.S. 1, 16 (1947), the First Amendment does not permit states to deny religious schools state funded protections, such as "police and fire protection, connections for sewage disposal, [and] public highway and sidewalks". This case shows that state money can be granted to religious schools to ensure that the students are given the same level of protections granted to students attending public schools. This would include ensuring the safety of The Learning Center playground, and therefore granting state money to the daycare through the Scrap Tire Program should be permitted under the precedent set by Everson.

Although The Learning Center qualified for the Scrap Tire Program grant under the neutral standards set out by the program, they were denied the state funding solely because they were a religious organization. According to Justice Antonin Scalia regarding the First Amendment:

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

Locke v. Davey, 540 U.S. 712 (2004) (Scalia, A., joined by Thomas, dissenting). As safe playing spaces are guaranteed to all public institutions, and The Learning Center was denied access to these same safety precautions simply on the basis of religion, according to Scalia, this violates the Free Exercise Clause of the First Amendment. This is also supported by the rulings in McDaniel v. Paty, 435 U.S. 618 (1978), Employment Division v. Smith, 494 U.S. 872 (1990), and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), which all assert that the state cannot deny religious organizations the same benefits awarded to all other organizations in the state simply because of the organizations religious nature.

Despite being a religious organization, The Learning Center qualified for the grant program because it met the neutral criteria set out by the Scrap Tire Program. According to the Supreme Court in Agostini v. Felton, "both religious and secular beneficiaries should be included on a nondiscriminatory basis using neutral, secular criteria that neither favor nor disfavor religion" (Agostini v. Felton, 521 U.S. 203 (1997).) Therefore, not only does it violate the Free Exercise Clause of the First Amendment to deny The Learning Center the Scrap Tire grant, but to single out the daycare because it is a religious organization is unconstitutional under the Agostini v. Felton ruling. This is reaffirmed again in Mitchell v. Helms, 530 U.S. 793 (2000).

The opposition may try to argue that by providing funding to The Learning Center, even if for secular purposes, the state is ultimately supporting the church because it frees up money that would otherwise go to the playground, which can be used for the advancement of their religion. However, in Zobrest v. Catalina Foothills School District, 509 U.S. 1, 8 (1993), the court decided that awarding money to religious organizations under a neutral and impartial grant program, even if it provides the church the ability to streamline funds toward non-secular purposes, the state does not violate the Establishment Clause. Therefore, such funding would be constitutional.

While it is true that the Blaine Amendment of the Missouri constitution states that "That no money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion", "the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." .Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J) (alteration in original) (citation omitted) (quoting Locke, 540 U.S. at 725). Although it was ruled in Locke v. Davey that states can deny state funding to students choosing to study theology, this is only because the state would effectively be funding the training of clergy and other religious leaders—a clear violation of separation of church and state. It is very important to note though that funding a playground has no correlation to the training of religious leaders, and that the playground has a strictly secular purpose.

In Meek v. Pittinger, 421 U.S. 349 (1975), the Supreme Court ruled that religious organizations are allowed to participate in state grant programs, so long as they are providing "secular and nonideological services unrelated to the primary, religion-oriented function of the sectarian school". As the playground is both secular, and unrelated to any religious function of the school, it is constitutional to grant money to The Learning Center through the Scrap Tire Program grant.

In addition to the secular purpose of the playground, it is also important to note that the daycare is an important community organization. 90% of the students that attend The Learning Center do not attend Trinity Lutheran Church, which goes to show that the daycare serves the community first. In addition, the daycare has open enrollment. Just because the state funds the daycare, does not mean it is funding the church, as the money will go directly to the playground. In addition, even if the argument is that it will allow the church to redirect its resources, the Supreme Court has ruled that it will "not accept the argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 658 (1980) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

Under strict scrutiny, the state must have a compelling state interest to have withheld the Scrap Tire grant. However, the state of Missouri has not shown a compelling state interest to withhold funds for improving the safety of The Learning Center's playground, as the money would be going to a secular purpose, and the daycare met the neutral criteria prior to being the denied the grant.

ARGUMENT II: FREEDOM OF RELIGIOUS EXERCISE AND SPEECH

Unlike England, the newly created United States of America was religiously diverse. Considering the many European wars, as well as political and social turmoil born from governments working with the church, the Founding Fathers believed that separation between Church and State was necessary. The United States Constitution does not reference God or Christianity, which concerned the leaders of the Presbyterian Church in Northern New England. George Washington answered their concerns, noting that the "path of true piety is so plain, as to require but little political direction" (Letter from George Washington to the leaders of the Presbyterian Church). Thomas Jefferson viewed the First Amendment's Establishment Clause as effective at "building a wall of separation between Church & State" (Jefferson's Letter to the Danbury Baptists). Nevertheless, this wall was not intended to leave the church and state in contention with each other.

The current standard with regards to government and religion stems from the First Amendment's Establishment Clause, which states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (First Amendment to the Constitution). Trinity Lutheran Church (Trinity) manages a daycare and preschool named *The Learning Center*. The Learning Center allows anyone to enroll, regardless of whether they are Lutheran. When Trinity applied for a Playground Scrap Tire Surface Material grant from the Missouri Department of Natural Resources (DNR), Trinity disclosed that the school and daycare were part of the church. The respondent denied said application since Article I, § 7 of the Missouri Constitution declares

that “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion.” Granting aid to resurface the playground is not establishing Lutheranism as a preferred religion. The Supreme Court established in *Mitchell v. Helms 530 US 793* that loans could be made to religious schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981 to implement “secular, neutral, and nonideological” programs. The playground should be viewed akin to a textbook (such as those from *Mitchell v. Helms 530 US 793)*, for both are essential to learning. By playing on a playground, children develop their motor skills, problem solving skills, and socialize. This playground is available after-hours and on weekends to children within the area.

Despite being on church property, the playground is not aiding a religion. It passes the Lemon Test, established in *Lemon v. Kurtzman 403 U.S. 602*, since the playground has a secular purpose, neither advances nor inhibits Lutheranism, and does not foster an excessive government entanglement with Lutheranism. By denying aid since the playground is part of Trinity, the Missouri Department of Natural Resources denies children the right to freely exercise.

Proposed Standard

Under the standard of equal protection and freedom of religious exercise and speech, all policies set by government regarding aid to parochial schools must pass the Lemon Test or show a compelling state interest against providing aid.

Conclusion

The Missouri Department of Natural Resources’ refusal to grant Trinity Lutheran Church a Playground Scrap Tire Surface Material Grant, violates the First Amendment’s Freedom of Religious Exercise and Speech as well as the Fourteenth Amendment’s Equal Protection Clause. The playground does not violate the Lemon Test from *Lemon v. Kurtzman 403 U.S. 602,* nor does the state show a compelling interest against the grant.