# Petitioner Brief – Mini & Ahuja

**To be in the Supreme Court of the United States**

*April Term, 2017*

TRINITY LUTHERAN CHURCH, PETITIONER

V.

SARAH PARKER PAULEY, RESPONDENT

**PETITIONER'S OPENING BRIEF**

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Oral argument: https://www.youtube.com/watch?v=T-6kbbTscMs

**QUESTION PRESENTED**

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

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## Statement of Argument

The First Amendment's Establishment and Free Exercise Clauses do not allow the use of religion as the determining factor to deny funds for a secular purpose. The Missouri Department of Natural Resources is acting in violation of the aforementioned Constitutional provision due to its many contradictions, as precedent holds. *Lemon v. Kurtzman* created the Lemon Test as a way to outline whether a governmental action was to be considered an "establishment" of religion.[1] The respondents fail to outline the ways in which *The Learning Center* does not pass this test. Furthermore, as precedent holds in *Lynch v. Donnelly,*[2] the Court's use of endorsement as it pertains to a citizen's standing in the political community shall not be affected by governmental actions on the basis of religion. There is no reasonable argument to be made in which it can be proven that funds given to a playground, in which *The Learning Center* already qualified for, (see neutrality provision in the Court's decision of *Rosenberger v. Rector and Visitors of University of Virginia)*[3] could be used to promote a non-secular purpose in such a way as to violate the Lemon Test. In *Lamb's Chapel v. Center Moriches Union Free School District*,[4] it is important to note that *The Learning Center's* open admission policies would allow the playground to be open to a child of any religious denomination, making it open to the public. This inherently does not promote a religion, regardless of the fact that there is a non-secular aspect to the schooling. The respondent, Sarah Pauley of the Missouri Department of Natural Resources, is in direct violation of the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution.

## Argument

### I. This application of Article I, Section 7 of the Missouri Constitution[5] does not comply with the strict scrutiny standard for due process of law.[6]

Even before the United State of America was formed, the colonies were a place people went for religious freedom. As the colonies grew, the idea of a government not swayed by people's religious associations formed. Roger Williams founded Rhode Island as the first colony where religion would be separate from the state.[7] This idea of religious freedom and religion-blind government continued to grow, spreading into our Constitution and its Amendments. The First Amendment promises free exercise of religion and prohibits the government to establish religion,[8] and the Fourteenth Amendment's promise of due process has been expanded to specially protect from religious discrimination through strict scrutiny[9] [10].

"For a court to apply strict scrutiny, the legislature must either have significantly abridged a fundamental right with the law's enactment or have passed a law that involves a suspect classification. Suspect classifications have come to include race, national origin, religion, alienage, and poverty."[11] This decision over the grant *does* involve a suspect classification: religion. Therefore, this case must be viewed through the strict scrutiny standard. Strict scrutiny was established by the United States Supreme Court in Footnote 4 of the decision in *United States v. Carolene Products Co.*.[12] Strict scrutiny is "an approach in which a presumption of constitutionality is shed" in order to be have more exacting judicial review and better protect minorities, or those of suspect classification.

In order to pass strict scrutiny, the law must be narrowly tailored, and there are three tests for this: (1) "the government must prove to the Court's satisfaction that the law actually advances the interest," (2) "A law is not narrowly tailored if it restricts a significant amount of speech [or any other freedom] that doesn't implicate the government interest," and (3) "A law is not narrowly tailored if there are less speech-[freedom-]restrictive means available that would serve the interest essentially as well."[13]

In this case, *The Learning Center* is being targeted due to its association with religion, and as such, denying the grant violates the strict scrutiny standard. The religious association and certain religion-based classes are not being funded. Instead, the playground is. And so, not funding the playground due to some of the teaching being done at the school is unfair and does not follow strict scrutiny. Further, the strict scrutiny stand is used when determining if there if someone has been denied "life, liberty, or property, without [the] due process of law" promised by the Fourteenth Amendment.[14] And, as the school would have otherwise qualified for the grant were it not religiously associated, it is being denied its property without due process. And so, this denial of funds does not advance the governmental interest of keeping religion and state separate, because the playground itself is secular. Further, the restriction of funds to build this playground is a significant denial of the freedom of property, to no government end. And finally, the government could remain separate from the religious aspect of the school and still fund the playground, "which is a less [...] restrictive means [...] that would serve the interest essentially as well."[15]

## II. This denial of funds violates the Establishment Clause by prohibiting the free exercise of Religion.

Madison's original proposal for a Bill of Rights provision concerning religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[16] Though later amended, the point still stands. Madison and the other Founding Fathers felt it essential to build a nation where each citizen had the inherent freedom to worship. This developed into the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution.[17]

The First Amendment jurisprudence has been marred in controversy since the Warren Court's analysis of "the wall" of separation of Church and State was deemed to be contentious.[18] From 1963 to 1970, the Court was to reach a consensus on how to stem the controversy that came with litigating this issue of Establishment. A three prong test came to fruition in 1971 in *Lemon v. Kurtzman*.[19] The three prongs used to determine whether a case withstands scrutiny are that it must: (1)have a secular purpose, (2) neither advance nor inhibit religion in its principal or primary effect, and (3) not foster an excessive entanglement with religion. As with any body, the Supreme Court's membership has evolved over time and so has the landscape in which this test is implemented. This led to a substantial revision of The Lemon Test as the newer Justices, particularly Justice O'Connor, became more concerned with the feelings of religious minorities.[20] Rather than keep government and religion so strictly separate that you end up harming any person or organization with a religious affiliation, the implementation of the law has evolved to accommodate those who have a religious affiliation without becoming excessively entangled.[21] The counsel for the Petitioner feels it is imperative that this scenario's compliance with all of these precedents is outlined.

It was the Founders hope that Religion would be a completely altruistic decision. James Madison so eloquently proclaims, "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[22] In *Lemon v. Kurtzman,*[23] a case brought to the Supreme Court, the case began because the state of Pennsylvania passed a law that allowed the local government to use money to fund educational programs that taught religious-based lessons, activities and studies. This law was passed through the Nonpublic Elementary and Secondary Education Act of 1968. The case would be groundbreaking due to its formation of the aforementioned Lemon Test. *Lemon v. Kurtzman* did not pass its strict mandate due to the excessive entanglement with religion, or prong three.[24] The counsel for the petitioners argue that *Trinity Lutheran Church v. Sarah Parker Pauley* fits this precedent but to a different degree. Prong 1 of the test outlines that the governmental motive, in this case allocation of funds, must have a secular purpose. The playground, in no reasonable way, may be seen as a religious component. It is being used by the children of the daycare for recreational purposes, thus making it secular in nature. As for the second prong, "neither advance nor inhibit religion in its principal or primary effect". This again, in the argument aforementioned, does meet the standard outlined in Lemon. The playground within itself has no Religious properties, and its primary or principal effect is for play, so the government grant allocating them funds to build it is not advancing non-secular actions.

Finally, the granting of funds passes the third prong because, as we mentioned above, the playground is secular in purpose, and further, the school is open to all denominations, and therefore is no excessively entangled in one. In *Lamb's Chapel v. Center Moriches Union Free School Dist.,*[25] the Court held that evangelical groups claiming to present a series of religious films on district property after hours would not be an establishment of religion under the three pronged test outlined in *Lemon v. Kurtzman* [26]. The Court's reasoning for this included that this showing would be held after hours and would be open to the public. (emphasis added) We see the same parallels in *Trinity v. Pauley*. *The Learning Center*'s admissions policy is open to any child of any religious denomination. Thus, the school is open to the public, making the playground open to the public. Under the precedent held in 1993, the The Missouri Department of Natural Resources is violating the Establishment Clause of the First Amendment [27] when denying this grant due to *The Learning Center's* open admissions policies and secular aspect of the matter at hand, in this case, the playground.

In *Everson v. Board of Education*,[28] the United States Supreme Court incorporated (made applicable to the states by the Fourteenth Amendment Due Process Clause [29]) the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion."[30] Through this incorporation, all states must adhere to this law, as well as the national government.

Under *Everson v. Board of Education,*[31] the Court holds that they are not promoting a Religion by reimbursing parents of children who attend non-secular institutions of learning. In turn, they hold that the means of public transportation are inherently separate from the non-secular aspects of the school. We argue that the playground is also inherently separate from the non-secular aspects of the daycare. The playground itself has nothing to do with religion, thus being a "general program" just as reimbursement for public transportation was a "general program" as ruled in 1947. This directly translates into the argument in which the Respondent, Sarah Parker Pauley, Director of the Missouri Department of Natural Resources, is making when she denies funds to Trinity Lutheran Church. She attempts to officially erect the renowned "wall of separation" between Church and State, through Justice Hugo Black's dissenting opinion.[32] However, this violates the precedent of the Establishment and Free Exercise clause to due to the Court's "strict separationist" standard of the First Amendment.

In *Rosenberger v. Rector and Visitors of University of Virginia,*[33] The University of Virginia uses a Student Activity Fund (SAF) to fund a variety of publications on campus through a private contractor. The University withheld payment to said third party due solely to a religious group called, "*Wide Awake: A Christian Perspective at the University of Virginia.*" The Court held that this decision by the University of Virginia, a state entity, was in violation of the First Amendment's Establishment and Free Exercise clause [34] due to its non-neutrality. The governmental program in *Rosenberger* is neutral towards religion, we see the same adjacencies in *Trinity v. Pauley* as the Playground Scrap Tire Surface Material Grants was given to organizations that purchase recycled tires to resurface their playground, which *The Learning Center* did. The denial of funds, regardless of the fact that *The Learning Center* complied with even handed standards set forth by the Department of Natural Resources, is a violation of the First Amendment. *The Learning Center* would have received the funds if it had not identified as a religious institution, thus making religion a pivotal factor in the decision to deny funds. As

noted in *Rosenberger*,[35] "There is no suggestion that the University created its program to advance religion or aid a religious cause," noting that the intent was neutral. This standard holds in *Trinity v. Pauley* due to the fact that the Department of Natural Resources intent was to provide an incentive for institutions to use recycled material, thus not making it an Establishment of a religion but rather a hindrance of Free Exercise through denial of funds.

Finally, the most recent interpretation of the Court in relation to Establishment and Free Exercise is *Lynch v. Donnelly*. This case considered the Constitutionality of a Christmas Display, nativity scene included, owned by a non-profit organization, and debated if it was violating the Establishment Clause.[36] The Court ended "the wall" of separation of church and state by stating, "The concept of a 'wall' of separation between church and state is a useful metaphor but is not an accurate description of the practical aspects of the relationship that in fact exists."[37] Justice O'Connor stated that we must look at governmental adherence to religion not as black and white, as the Court has done in the past under the test originated by *Lemon v. Kurtzman*,[38] but rather look at it from the viewpoint of endorsement. She writes in her *separate* majority opinion, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community [...Governmental endorsement of religion] sends a message to non adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[39] This clarification showed that the direction of the Court is not to build a wall, but rather judge Constitutionality on the effects governmental actions may or may not have on an individual's standing within the political community. This precedent is applied in today's case due to its direct contradiction with the Missouri Department of Natural Resources' reasoning for denying funds. They are following the standard of "the wall" of separation of church and state rather than looking at the possible ramifications. *The Learning Center's* inclusive admissions policy and the fact that the money is not going towards funding non-secular activities only goes to show that this case does not blueprint Justice O'Connor's fear that a governmental establishment of religion would send non-adherents the message of being an outsider but rather proves the violation of the Establishment Clause by the respondent.

## Conclusion

This denial of funds also violates the Establishment Clause of the First Amendment,[40] and fails the strict scrutiny standard. In laws concerning "suspect classifications," including religion," strict scrutiny is applied to see if the government is violating the due process of law promised by the Fourteenth Amendment [41] by discriminating against a person or organization due to its religious association. *The Learning Center* has qualified in all other means for the grant, and as such, this denial of the funds is a denial of property, and without due process. The action does not further the government interest of separation of church and state because the playground is not religious in its primary purpose. Further, denying the funds to this school for building a playground is discrimination against the school for its religious association. Due process and strict scrutiny is meant to ensure against government discrimination, which this denial of the grant is.

This discrimination by the State of Missouri also violates the Free Exercise and Establishment Clauses of the First Amendment.[42] By treating this school differently because of its religious association, the government is not truly allowing free exercise of religion, but instead punishing it. Further, there is not legal backing to deny the funds. Giving the grant does not violate any of the three prongs of The Lemon Test established in *Lemon v. Kurtzman*.[43] Further, the school has open admission to people of any denomination, and as such, is open to the pubic, making the playground open to the public. And so, following the precedent of *Lamb's Chapel v. Center Moriches Union Free School Dist.*,[44] where the viewing of religious films was allowed on government property because they were open to the public. As this school, and therefore its playground, is open to all people of any denomination, and is therefore public, it should be treated in the same regard.

Following the tests and precedents established by the Supreme Court, the State of Missouri has no legal grounds to deny *The Learning Center* the grant for its playground, and such a denial would actually discriminate and violate First and Fourteenth Amendments of the U.S. Constitution.

## Endnotes


1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
2. *Lynch v. Donnelly*, 465 U.S. 668 (1984)
3. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)
4. *Lamb's Chapel v. Center Moriches Union Free School Dist.* 508 U.S. 384 (1993)
5. MO Const. art. I, § 7.
6. U.S. Const. amend. XIV, § 1.
7. Roger Williams, Rhode Island, and Birthplace of Religious Freedom," George Washington Institute for Religious Freedom, , accessed February 25, 2017, http://www.gwirf.org/roger-williams-rhode-island-birthplace-of-religious-freedom/.
8. U.S. Const. amend. I.
9. U.S. Const. amend. XIV, § 1.
10. *United States v. Carolene Products Co.* 304 U.S. 144 (1938)
11. Mr. Ryan Strasser, "Strict scrutiny," LII / Legal Information Institute, July 21, 2008, , accessed February 25, 2017, https://www.law.cornell.edu/wex/strict_scrutiny.
12. *United States v. Carolene Products Co.* 304 U.S. 144 (1938)
13. Eugene Volokh, F*reedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997).
14. U.S. Const. amend. XIV, § 1.
15. Eugene Volokh, F*reedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997).
16. Annals of Congress 434 (June 8, 1789).
17. U.S. Const. amend. I.
18. James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: the Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).
19. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
20. James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: v. Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).
21. Finn, John E. "The First Amendment and You: What Everyone Should Know." Lecture, Wesleyan University, February 17, 2017.
22. "Amendment I (Religion): James Madison, Memorial and Remonstrance against Religious Assessments." Amendment I (Religion): James Madison, Memorial and Remonstrance against Religious Assessments. Accessed February 26, 2017.
23. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
24. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
25. *Lamb's Chapel v. Center Moriches Union Free School Dist.* 508 U.S. 384 (1993)
26. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
27. U.S. Const. amend. I.
28. *Everson v. Board of Education*, 330 U.S. 1 (1947)
29. U.S. Const. amend. XIV, § 1.
30. U.S. Const. amend. I.
31. *Everson v. Board of Education*, 330 U.S. 1 (1947)
32. *Everson v. Board of Education*, 330 U.S. 1 (1947)
33. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)
34. U.S. Const. amend. I.
35. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)
36. *Lynch v. Donnelly,* 465 U.S. 668 (1984)
37. *Lynch v. Donnelly,* 465 U.S. 668 (1984)
38. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
39. *Lynch v. Donnelly,* 465 U.S. 668 (1984)
40. U.S. Const. amend. I.
41. U.S. Const. amend. XIV, § 1.
42. U.S. Const. amend. I.
43. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
44. *Lamb's Chapel v. Center Moriches Union Free School Dist.* 508 U.S. 384 (1993)

## **Bibliography**


Eugene Volokh, F*reedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997).

*Everson v. Board of Education*, 330 U.S. 1 (1947)

Finn, John E . "The First Amendment and You: What Everyone Should Know." Wesleyan University. 27 Feb. 2017. Lecture.

James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: the Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).

*Lamb's Chapel v. Center Moriches Union Free School Dist.* 508 U.S. 384 (1993)

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

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

MO Const. art. I, § 7.

"Roger Williams, Rhode Island, and Birthplace of Religious Freedom." George Washington Institute for Religious Freedom. Accessed February 25, 2017. http://www.gwirf.org/roger-williams-rhode-island-birthplace-of-religious-freedom/.

*Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)

Strasser, Mr. Ryan. "Strict scrutiny." LII / Legal Information Institute. July 21, 2008. Accessed February 25, 2017. https://www.law.cornell.edu/wex/strict_scrutiny.

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