Lake Oswego High School Petitioner Brief Griffiths and Nolan

Petitioner Brief – Griffiths & Nolan

March 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=COKp9f4Uo0A

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 pertinent case to the case presented now before the court is *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), which is clarified in *Agostini v. Felton*, 521 US 203 (1997), 244, discusses the government's burden in the funding of parochial schools. Because the grant of recycled tire scrap material to *The Learning Center* passes the *Lemon* test, there is no violation of the Establishment Clause. Furthermore, the denial of grant funding on the sole basis of religious affiliation is a discriminatory act that violates both the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The policy of the Missouri Department of Natural Resources is neither religiously neutral nor generally applicable, violating the Free Exercise Clause under the precedent of *Smith v. Oregon*, 494 US 872 (1990), 887-888. In examining the Equal Protection violation and the compelling state interest standard, we submit that the Missouri Department of Natural Resources lacks a compelling state interest in denying public resources to religiously affiliated organizations, as there is no violation of the Establishment Clause in granting *The Learning Center* recycled tire scrap material. Additionally, we ask that the Court recognizes Missouri's viewpoint discrimination against *The Learning Center* violates their Free Exercise rights.

Arguments

I. The granting of playground scrap tire material to The Learning Center does not violate the Establishment Clause.

The Establishment Clause of the United States Constitution states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Court addressed in *Lemon v. Kurtzman* whether the Establishment Clause prohibits the use of public funding to support parochial schools. Furthermore, the Court established a three-pronged test to determine whether a given policy violates the Establishment Clause. This test was clarified in *Agostini v. Felton*, 521 US 203 (1997), 244, which stated that the two prongs of the test to examine a policy are purpose and effect. The entanglement prong of the *Lemon* test, excluded in the *Agostini* modification, was determined to be an aspect of the effects prong of the test.

Lemon discussed policies in both Rhode Island and Pennsylvania which used public resource to fund parochial school's textbooks, salaries, and instructional materials for secular subjects. In a unanimous decision, the Court held that the policies were unconstitutional as they did not satisfy the three-pronged test.

Under the *Lemon* test, *Id*, a given law or policy does not violate the Establishment Clause so long as there is a secular purpose, the law does not promote nor inhibit a religion in its

principal or primary effect, and the law does not "foster an excessive government entanglement with religion."

When considering the Missouri Department of Natural Resource's scrap tire material grant denial to Trinity Lutheran Church's *Learning Center*, the *Lemon* test, *Id*, is the applicable precedent.

Under the first prong of the *Lemon* test, the use of the grant for the playground has a secular purpose. When the Missouri Department of Natural Resources ranked its applications based on secular criteria, Trinity Lutheran Church was ranked fifth out of forty-four. Among this secular criteria, the playground is open to the public after school hours. The community surrounding Trinity Lutheran Church is predominantly below the poverty line, contributing to the playground's high rank based on secular criteria.

The case also meets the second prong of the *Lemo*n test, *Id*, which asks if a policy is a promotion or inhibition of a religion in its principal or primary effect. Providing scrap tire material to make a playground (used both by a parochial preschool as well as by local children) safer does not promote the Lutheran religion in its principal or primary effect.

Finally, we must examine whether the grant to the Trinity Lutheran Church would not "foster an excessive government entanglement with religion," *Id* at 602. This is a scrap tire material grant. There is no maintenance conducted by the Missouri Department of Natural Resources. The department states in its description that the grants are used in three ways. The first way in which the grant money is allocated is for enforcement, permitting, and inspection of the grounds in order to construct the scrap tire project. Such inspection does not create a continued relationship between the church and the government. Secondly,purchase of scrap tire material is a one time purchase, which does not entangle the government with the Trinity Lutheran Church. Lastly, the grant money may be used to purchase teaching materials for the secular subject of recycling education. The last purpose is simply a curriculum grant that is used for a secular purpose, without entanglement. Moreover, *The Learning Center* only requested the pour-in recycled scrap tire material grant, with no curriculum. Since no part of the grant constitutes a continued relationship between the Trinity Lutheran Church and the government of Missouri, a scrap tire material grant to *The Learning Center* passes the third and final prong of the Lemon test.

Furthermore, the case *Mitchell v. Helms* 530 US 793 (2000), 809, discusses the use of public funding for library and computer supplies to both public and private schools, under the Education Consolidation and Improvement Act of 1981. In the plurality opinion, finding that the program was not a violation of the Establishment Clause on the standard of neutrality, Justice Clarence Thomas wrote: "[i]f the religious, irreligious, and areligious are

all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."

A grant to The Learning Center from Missouri's Department of Natural Resources would not violate the Establishment Clause, as affirmed in *Mitchell*, *Id* at 809. The precedent that controls public funds going to parochial schools, *Lemon v. Kurtzman* sets a clear and applicable standard. Under the standard, as well as its modification in *Agostini*, it is clear that a scrap tire material grant to The Learning Center would not only avoid violation of the Establishment Clause, but would also better the community as a whole.

II. Denial of scrap tire material grants to The Learning Center solely on the basis of religious affiliation fails the application of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

Due to the school's religious affiliation, the standard of review for this Court is strict scrutiny. Trinity Lutheran Church does not fit within the "discrete and insular minorities" standard for application of strict scrutiny established by *United States v. Carolene Products Company*, 304 US 144 (1938), 152. However, following the logic of Equal Protection Cases, that of preventing discrimination against classes, we ask the Court to definitively extend suspect classification to protect religious groups.

Overly extensive application of the Establishment Clause discriminates against religious groups. A fear of the state towards any allocation of public resources towards a religious organization based on secular need ultimately excludes such organizations. Henceforth, when a state gives only the justification of religious affiliation for the denial of public resources for a secular purpose, we ask that the Court recognizes the encroachment upon *The Learning Center's* Equal Protection rights.

Strict scrutiny requires that the government show a compelling state interest in violating individual rights. *Grutter v. Bollinger*, 539 U.S. 306 (2003), 326, clarifies the compelling state interest standard by stating that policies that violate individual rights must be "narrowly tailored to further compelling governmental interests."

When applying strict scrutiny to the religious discrimination presented in this case, there is ultimately a lack of a compelling state interest. Though the respondent may argue that the state interest is not violating the Establishment Clause, granting recycled tire scrap material to religiously affiliated organizations would not equate to an establishment of religion, as previously discussed. However, granting recycled tire scrap material to religiously affiliated organizations would not equate to a preferential treatment to religious denominations, nor an establishment of religion, as previously discussed. Additionally, the Constitution of the

State of Missouri Article I, Section 7 shows that this case does not amount to a compelling state interest:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.

Any compelling state interest derived from Article I, Section 7 of Missouri's Constitution is faulty. A recycled tire scrap material grant would not be aiding Trinity Lutheran Church, but rather *The Learning Center*, an established nonprofit organization, as well as the surrounding neighborhood. Meanwhile, the second clause of the sentence states that there should be no discrimination made against "any form of religious faith or worship." In the case here before the Court, Missouri has discriminated against *The Learning Center* on the organization's religious affiliation. Due to the contradiction within Article I, Section 7, and no threat of violation of the Establishment Clause, there is no compelling state interest in denying a recycled scrap tire material grant to organizations off of the basis of religious affiliation.

Furthermore, denial of a scrap tire material grant is discrimination against *The Learning Center* on the sole basis of religion. Therefore, we ask the Court to recognize this violation of the Equal Protection Clause.

III. Denial of scrap tire material grants to The Learning Center solely on the basis of religious affiliation violates The Learning Center's Free Exercise Rights.

When looking at the Department of Natural Resource's reason for denial of scrap tire material grants to *The Learning Center*, the sole reason for denial was that the school was religiously affiliated. As previously mentioned, *The Learning Center* ranked fifth out of forty-four applications for scrap tire material grants based on entirely secular criteria. The school would have received the grant except it is religiously affiliated.

As established in the cases *Smith v. Oregon*, 494 US 872 (1990), 887-888, and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 US 520 (1993), 546-547, policies that not religiously neutral or generally applicable violate the the Free Exercise Clause.

In this case, the state violates the religious neutrality standard, *Id* at 872. Being equally discriminatory to all religions is not a fulfillment of the standard. Rather, we ask the Court to recognize that the blanket ban on all funding to religious organizations amounts to a lack

of neutrality between religious and nonreligious organizations, therefore violating the standard of neutrality under the Free Exercise Clause.

In *Rosenberg v. University of Virginia*, 515 US 819, 835 (1995), it was affirmed that state resources must be allocated in a way that is religiously neutral and not discriminatory on the basis of viewpoint. Additionally, *Good News Club v. Milford*, 533 US 98, 107 (2001), a denial of use of school facilities to the Good News Club due to their religious affiliation amounted to unconstitutional viewpoint discrimination, and a violation of the club's First Amendment rights.

This would also follow the decision made in *Lamb's Chapel v. Center Moriches Union Free School District* 508 U.S. 384 (1993), 390, in which a denial of access to materials on the sole reason of religious affiliation and implicating the "Viewpoint Neutral" decision, *Id*, would be ruled unconstitutional under free speech of the first amendment.

Though the case at hand does not involve a Free Speech violation, the logic shown in *Rosenberg*, *Lambs Chapel*, and *Good News Club* can be applied to the Free Exercise violation against Trinity. *The Learning Center* is a registered non-profit organization, yet was deemed ineligible to receive the grant by the Missouri Department of Natural Resources on the sole basis of its religious affiliation. Similar to these cases, *The Learning Center* is facing discrimination based on religious belief and affiliation. The rationale of these cases, that discrimination between religious and nonreligious organizations in access to public resources is unconstitutional, is applicable to the Free Exercise question presented now before the Court.

The case of *Locke v. Davey*, 540 US 712 (2004), 724, does not change what the result should be in the case now presented to the Court. The question in that case was not that of Davey's right to exercise of his religious beliefs; rather, the question was his right to study his chosen major. He was not denied the Washington State Promise Scholarship off of the basis of his religion, but rather his chosen course of study in theology. In fact, the Washington State Promise Scholarship was awarded to students who wanted to further their education at religiously affiliated colleges, and "are still eligible to take devotional theology courses," *Id* at 712, 724. This is crucial in understanding *Locke*, as students are still able to exercise their religious beliefs, and are simply not allowed to use the scholarship in order to obtain an non secular degree that is "'devotional in nature or designed to induce religious faith,'" *Id* at 712, 712. Therefore, the question presented in *Locke* is vastly different from the religious discrimination of this case. In our case, *The Learning Center* satisfied a secular standard but was solely rejected for their religious affiliation.

Ultimately, *The Learning Center* ranked fifth out of forty-four applications based on solely secular requirements. Missouri's Department of Natural Resources denial of recycled tire scrap material grants on the basis of religion is blatant religious discrimination, and a violation of *The Learning Center's* Free Exercise rights.

Conclusion

In the case presented here, *Trinity Lutheran Church v. Pauley*, the Supreme Court should rule that the denial of a recycled tire scrap material grant to The Learning Center off the basis of religious affiliation is unconstitutional. A grant to The *Learning Center* would not violate the Establishment Clause, as it fulfills all three prongs of the Lemon test. We ask the Court to recognize that the blanket ban on grants to any religious organizations exhibit religious discrimination under the Free Exercise Clause and neutrality standards of *Smith* and *Lukumi*, and that the Missouri Department of Natural Resources policy amounts to viewpoint discrimination, under the precedents of *Rosenberg,* Lamb's Chapel, and *The Good News Club*. We ask that the Court, finding that Missouri lacks a compelling state interest in denial of the grant to religious organizations, rules that the denial of the grant to *The Learning Center* on the basis of religious affiliation is religious discrimination, and a violation of *The Learning Center's* Equal Protection Rights.
