Smitherman/Boyer Brief

## WORKS CITED

*Agostini v. Felton, 521 U.S. 203*
*Lemon v. Kurtzman, 403 U.S. 602*
*Cutter* v. *Wilkinson,* 544 U. S. 709
*Van Orden v. Perry, 545 U.S. 677*
*Allegheny County v. ACLU, 492 U.S. 573*
*Sherbert v. Verner, 374 U.S. 398*
*Abington School Dist. v. Schempp, 374 US 203*
*Lee v. Weisman, 505 U.S. 577*
*Rosenberger v. Rector and Visitors of Univ. of Va., 515 US 819*
*Zorach v. Clauson, 343 U. S. 306, 314, 315*
*Everson v. Board of Education, 330 U.S.*
*Board of Educ. v. Allen, 392 U.S. 236*
*Santa Fe Independent School Dist. v. Doe, 530 US 290*
*Wallace v. Jaffree 472 U.S. 38*
*Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753
*Zelman v. Simmons-Harris, 536 U.S. 639*

## STATEMENT OF THE FACTS

In 1985 Trinity Lutheran Church merged with a nonprofit organization called the Learning Center, a daycare and preschool that has an open application policy. The Department of Natural Resources, in an effort to keep tires from Missouri landfills and recycle them in a way that benefits the community, offers Playground Tire Scrap Surface Material Grants that provide funds to qualifying organizations to resurface their playgrounds. Trinity Lutheran Church applied for said grant for their Learning Center because the hard, jagged edges of their pea gravel surfacing pose a safety risk to their students and to the community children after school hours, (*Petitioner's brief*) and when considered secularly was ranked fifth out of forty four due to the fact that the community surrounding Trinity Lutheran Church is below the poverty level. However the application

was denied because the grant board refuses to give funds to religious organization citing Article 1 section 7 of the Missouri constitution to justify its refusal.

## STATEMENT OF THE ARGUMENT

The Missouri Department of Natural Resources violated the Establishment clause of the constitution by refusing to give Trinity Lutheran Church's Learning Center a Playground Tire Scrap Material Grant on the sole basis of religion (they had otherwise qualified and would have received the grant). This act of denying the grant would not pass constitutional muster under the Founder's original intent, the Coercion Test (*Agostini v. Felton, 521 U.S. 203*), any interpretation of the Lemon test (*Lemon v. Kurtzman, 403 U.S. 602*), nor would the act being upheld be consistent with judicial history in Establishment Clause cases. The primary error occurred when the State favored secular organizations over religious organizations, thus failing to maintain governmental neutrality towards religion.

## ARGUMENTS

1. **The original intent of the Founder's was not to build the Wall of Separation so high that it amounts to the discrimination against religion.**

Providing safe playgrounds for children is an eminently neutral benefit far removed from "the coercion that was a hallmark of historical establishments... coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Van Orden v. Perry, 545 U.S. 677*

Thomas Jefferson's letter to the Danbury Baptists that coined the term "Wall of Separation" was written sixteen years after the Establishment Clause was passed and was written with the purpose of explaining the Establishment clause. The letter explains that religion was "between man and his God" and "the government had authority over actions, not opinions." From this letter it is clear that the intent of the Founders (expressed through Thomas Jefferson) was to ensure that the government did not infringe on the church's rights or favor one religion over another.

The Wall of Separation that must be maintained between church and state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman, 403 U. S., at 614* Although this is a concept that has been referenced many a time regarding the relationship between the church and state, "it has never been thought either possible or desirable to enforce a regime of total separation ...." *Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)*. "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids

hostility toward any." *Zorach v. Clauson, 343 U. S. 306, 314, 315 (1952)* The Founders never intended for the Establishment Clause to be used as a way of essentially achieving a legal backdoor for discrimination against religion, similar to the way the Missouri Department of Natural Resources has used it in the case before us.

"States cannot exclude...members of any other faith, because of their faith, or lack of it, from receiving [public] benefits." *Everson v. Board of Education, 330 U.S.* reaffirmed by *Sherbert v. Verner, 374 U.S. 398* The DNR refused the Learning Center the grant because of its affiliation with Trinity Lutheran Church which in effect is excluding members of The Learning Center from the benefits of Public Welfare legislation in direct contradiction to *Everson*. An absolute Wall of Separation does not protect religious right, but rather penalizes members of a faith. The goal in past Supreme Court cases has not been to uphold an absolute wall of separation between church and state and neither should the goal of the Court regarding this case be.

**2. The Missouri Department of Natural Resources violated the Establishment Clause under the Coercion Test.**

In his dissent in *Allegheny County v. ACLU, 492 U.S. 573* Justice Anthony Kennedy created what is now known as the "Coercion test". This test holds that the government does not violate the Establishment Clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church or (2) forces people to support or participate in religion against their will. The coercion test was later adopted by the Court in *Lee v. Weisman, 505 U.S. 577* and continues as precedent today.

First, the grant in this case would not be providing direct aid to religion especially not in a way that would establish a state Church. *Board of Educ. v. Allen, 392 U.S. 236, 242* Like "police and fire protection, sewage facilities, and streets and sidewalks" offered equally to all entities, playground surfacing is not "support of a religious institution,"

Second, the tire grant would not coerce people to support or participate in religion against their will. Any coercion that is foreseeable in this case would come from perhaps the daycare being more desirable due to a better playground. However, that does not imply that attendance this Learning Center due to a better playground would cause people to participate in religion against their will.

**3. The act of refusing the grant on the sole basis that the organization had religious affiliation would not pass muster under the Lemon Test.**

*Lemon v. Kurtzman, 403 U.S. 602* created a test that provides three elements to weigh and consider when determining whether or not a law violated the Establishment clause. Under that test the law must have a legitimate secular purpose, must not have the primary effect of either advancing or inhibiting religion, and also must not result in an excessive entanglement of government and religion.

**Secular Legislative Purpose**

*Black's Law Dictionary (5th ed.)* defines secular as: not spiritual. Therefore, a law that has secular purpose does not regard religious or spiritual affiliation, but rather views all organizations on its secular value. By putting an addendum that expressly states that religious organizations and religiously affiliated organizations are banned from receiving the grant merely because of their ties to religion removes all traces of secularism from the grant's purpose and instead allows the DNR to discriminate against a religion. That discrimination makes it clear that the grant's purpose is not secular.

**Advancement or inhibition of religion**

The second prong of the Lemon Test examines whether a state actions primary effect would be to advance or inhibit religion. Justice O'Connor famously created the Endorsement Test in *Lynch v. Donnelly, 465 US 668 – Supreme Court*
expressly to evaluate this prong. She opined "The proper inquiry under the purpose prong of Lemon, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion." Further, in examining issues of government endorsement "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of an establishment of religion. *Santa Fe Independent School Dist. v. Doe, 530 US 290* citing *Wallace,* 472 U. S., at 73, 76 (O'Connor, J., concurring in judgment); see also *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Allowing Trinity Lutheran Church's Learning Center to receive the tire grant would not have the primary effect of advancing religion, nor would it convey a message of endorsement of religion by the government. Granting tire scrap material to the daycare and preschool does not advance religious practice or aid the church in advancing its reach in any particular way. The grant would not even be awarded to the church itself, but rather its school, which has an open admission policy allowing students to enroll regardless of their faith. Further, this is not a situation in which the government is providing material that is being used to teach religious principles or aid in a student's understanding of religion. Rather, a daycare would be given scrap tire materials so that children may benefit from a safer playground surface. The mere fact that the school integrates some daily religious instruction into its programs does not indicate that awarding the school the grant would aid the religious instruction in any way. The name of the grant is "Playground Scrap Tire Surface Material Grants", the grant has designated its purpose to be used in playgrounds and materials are limited to use in that. Therefore, the Learning Center has no agency to use the grant in a way that would appear to be the government aiding or endorsing religion to an objective observer.

The DNR's refusal of the grant on the basis that it would be going to a preschool and daycare managed by a church would be discrimination equating to the "disapproval of religion" expressly forbidden by the Establishment Clause. By disqualifying religious

organization from receiving the grant, the DNR is effectively placing secular organizations above organizations with religious affiliation. The effect would be unconstitutionally punishing The Learning Center for its affiliation.

**Excessive Entanglement**

The third prong of the Lemon Test is that "a law must not result in an excessive entanglement of government and religion." Providing Trinity Lutheran the grant would not result in excessive entanglement between the government and Trinity Lutheran. In *Widmar v. Vincent, 454 U.S. 263*the university, like the DNR here, attempted to justify its exclusion of a religious group by arguing that it was avoiding a federal Establishment Clause violation and also that it was attempting to achieve the greater degree of separation of church and state required by the Missouri Constitution, including the provision the DNR cites here—Article I, § 7. This Court rejected both arguments. It noted, under the federal Establishment Clause, that an open forum policy "including nondiscrimination against religious speech" avoided entanglement with religion. Therefore, in order to avoid entanglement with religion the DNR must not hold secular organizations over non-secular organizations.

Another precedent with public money and schools is *Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947)*. That case involved the collection of taxes to spend on bussing for mainly parochial schools. In that case the Supreme Court held that spending the taxes for such bussing did not violate the Establishment Clause because taxes were spent for a public purpose. In the case at hand, the playground is public. While it may be on church grounds, the daycare is open to everybody and the grounds can be accessed by all. Due to the extreme similarity between *Everson v. Board of Education* and the case at hand, this court should follow *Everson*'s precedent and by doing so, find that giving the grant for the use of both Trinity Lutheran and the public does not violate the Establishment Clause. Aguilar v. Felton, 473 US 402 1985 held that

"What is crucial to a non-entangling aid program is the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes." What the grant is intended for, and what Trinity Lutheran is asking for, is the funds to be able to purchase tire scraps to rubberize a playground. The playground in this case is not being used to spread religion but merely provides their students and the children of the community a safe place to play. The grants sole purpose is a one-time grant that merely reimburses for funds already expended, which shows that on-site inspections are not required in order to prevent the funds from going to something besides the church following the holding of *Tilton* v. *Richardson*, 403 U. S. 672 (1971) which upheld one-time grants to sectarian institutions because ongoing supervision was not required.

**4. The courts have a history of neutrality regarding the Establishment Clause.**

In the past century we have seen courts rule in favor of neutrality time and time again. In *Locke v. Davey, 540 US 712* the Court ruled in favor of neutrality by holding that students may not use a state given scholarship to pursue a degree in devotional theology at a private, church-affiliated program. The scholarship would have directly aided in training a student in theology and religion. The state paying for a student to get a degree in pastoral ministries would break its position of neutrality.

Neutrality is an important viewpoint when discussing Establishment Clause acts. *Zelman v. Simmons-Harris, 536 U.S. 639* defined neutrality as evenhandedness in terms of who may receive aid and *Rosenberger v. University of Virginia* emphasized the importance of neutrality when evaluating Establishment Clause questions. In *Rosenberger v. University of Virginia* the court held that the university's policies were not intentionally targeting religious organizations, but the attempted actions of the university to withdraw funding did intentionally target said organizations and that because the university provides specific facilities to a large spectrum of student organizations the addition of a religious one didn't violate the establishment clause. The neutrality standard also applies to the service who supplies the grants, namely the The Missouri Department of Natural Resources (DNR). The DNR's goal is to supply grants to schools and organizations to benefit the community and recycle tire scraps. The neutral position of the DNR's grant application means that the Establishment Clause may be violated if religious organizations are excluded from receiving grants on the sole basis of religion because the Court has made clear that the government "must work deterrence of no religious belief" and that "the Constitution enables all people, regardless of creed, to insist on evenhanded treatment from government in the provision of public benefits." *Abington School Dist. v. Schempp, 374 US 203* (Goldberg, J., concurring.) The Establishment Clause may thus be violated not only by promoting a particular religion, but also by promoting non-religion over religion.

## PRAYER

Wherefore premises considered, the Petitioner respectfully requests that this Court rule in favor of the Trinity Lutheran Church by overturning the decisions of the courts below and ruling that Missouri's Department of Natural Resources violated the Establishment Clause.

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