2017 Harlan Institution Virtual Supreme Court: Callan O'Connor and Katherine Grisham

TRINITY LUTHERAN CHURCH, PETITIONER

V.

SARAH PARKER PAULEY

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://m.youtube.com/watch?v=vpg5uaQqbPg&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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Statement of Argument:

The First Amendment's Establishment Clause does not prevent public funding for a church playground under the ruling of Lemon v. Kurtzman 403 U.S. 602 (1971) as well as Agostini v Felton 521 U.S. 203 (1997). Though the Trinity Lutheran Church daycare incorporates daily religious teaching into its programs, playgrounds are not inherently religious, and thus the playground funding is neutral. Playgrounds are also a child benefit as understood in Everson v Board of Education of the Township of Ewing 330 U.S. 1 (1947), which allocates the use of public funding for religious groups. In Justice Wiley Rutridge's dissent of the case he states, "The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not 'support' in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion 'entangled in precedents." 330 U.S. 1, 45. Disregarding Trinity Lutheran Church's need for funding is religious discrimination as further confirmed by Rosenberger v Board of Visitors of the University of Virginia 515 U.S. 819 (1995). It has been made clear through these various rulings that the Establishment Clause can and will protect Trinity Lutheran Church's right for funding of a playground regardless of its religious affiliations.

Argument

I. Public funding for a religiously affiliated playground passes the Lemon Test

To test for violations of the Establishment Clause, the ruling of Lemon v Kurtzman 403 U.S. 602 (1971) created the three-pronged Lemon Test and states:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion 403 U.S. 602 (1971)

The Lemon Test was later modified by Agostini v Felton 521 U.S. 203 (1997) which combined the "effect" and "entanglement" prongs, making the test the "purpose" and "effect" prongs. The "government entanglement" prong is now one of the factors of the "effect" prong. When talking about "advancing" a religion, the Court's concern lies in preferentialism and endorsement. The Playground Scrap Tire Surface Material Grant is allocated through a secular process, and therefore no one party is favored or specifically endorsed through the grant. The process is neutral to all religious and nonreligious organizations and cannot endorse a specific one. In County of Allegheny v. American Civil Liberties Union 492 U.S. 573 (1989) the Establishment Clause was violated as the creche on display was directly outside a courthouse and had a clear religious message. The proximity of the creche to a government building suggested that the government had aligned itself with a specific religion. In this case, a playground is a secular location with no religious message or purpose, and by granting The Playground Scrap Tire Surface Material Grant, the government is not aligning itself with any religion. The first prong of the Lemon Test is satisfied because the purpose of bestowing the grant is to create a safe playing environment for children, not to further or aid any specific religion; therefore, the purpose is secular. The second prong of the Lemon Test is likewise satisfied since the primary effect of granting aid to repair a playground neither advances nor inhibits religion as the money is given for the sole purpose of resurfacing a playground and not promoting or denying any religious activity. In Committee for Public Education and Religious Liberty v. Nyquist 413 U.S. 756 (1973), grants were allocated generally, with the money to be used for non-secular repairs or activities, which was then deemed unconstitutional. The Playground Scrap Tire Surface Material Grant differs from Nyquist because the grant has one specific, secular purpose (resurfacing the playground) and cannot be used for religious purposes. The second part of the "effect" prong referring to government entanglement is satisfied as there would be no need to repeatedly review the funds like in Lemon v Kurtzman 403 U.S. 602 (1971). In Lemon, to ensure that teaching was secular, a large amount of government oversight would have been necessary. This would have fostered an excessive government entanglement as the government would have become constantly involved with religious education. In this case, there is no government entanglement. This is a one time grant allocated for a specific purpose and therefore no governmental oversight would be necessary.

II. Funding a playground of a daycare is a child benefit

As stated in Justia US Law's database in the article "Access of Religious Groups to School Property," "The Court has made clear that public colleges may not exclude student religious organizations from benefits otherwise provided to a full spectrum of student 'news, information, opinion, entertainment, or academic communications media groups.'" In the ruling of Cochran v. Louisiana State Board of Education 281 U.S. 370 (1930), the Court ruled that the state could tax citizens for funds allocated to purchase school books. The books were then given to private and public schools. The Court ruled that school books were a child benefit. This then set the precedent for the ruling of Everson v. Board of Education of the Township of Ewing 330 U.S. 1 (1947). The Court ruled, the New Jersey law of providing reimbursement to parents, religious or nonreligious, whose children rode the public buses, was constitutional as the New Jersey law was not a violation of the establishment clause and it benefited the children. This case went on to develop the Child Benefit Theory, which allows for governmental or state aid to religious schools given the aid benefits the child. In the case In the case of Zobrest v. Catalina Foothills School District 509 U.S. 1 (1993), the court ruled a district could not deny the request for a translator even if he or she is required for a religious institution as it would otherwise be unconstitutional. In the case Mitchell v. Helms 530 U.S. 793 (2000), the court ruled providing funds for secular materials, such as computer software, to both religious and nonreligious schools is not a violation of the Establishment Clause. In the case of Zelman v. Simmons-Harris 536 U.S. 639 (2002), the court ruled there was, again, no violation of the Establishment Clause as Ohio's school voucher program was available to both religious and nonreligious and the decision of where to attend school was left entirely to the parents. Their ultimate purpose was to promote education for children, which the court viewed as a benefit. All of these cases seek to benefit the children, just as in the case of Trinity Lutheran Church. Though it is religiously affiliated, the church wants to have a playground that is safe for the children.

Whether governmental aid to religious schools results in religious indoctrination ultimately depends on whether any indoctrination that occurs could reasonably be attributed to governmental action. See, e. g., Agostini, 521 U. S., at 226. Moreover, the answer to the indoctrination question will resolve the question whether an educational aid program "subsidizes" religion. See id., at 230—231. In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Court has consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion. Mitchell v. Helms 530 U.S. 793, 7—9 (2000)

Aid, in the case of Trinity Lutheran Church would be assisting in making safe playgrounds for the children of the daycare, a clear child benefit. As it passes the Lemon Test, the neutrality standard is met, unlike in the case of Locke v. Davey 540 U.S. 712 (2004). Scholarships were available; however, Joshua Davey would have used the scholarship to

promote religious doctrine, which is an infringement of the second part of the Lemon test as it enhances religion, thereby violating the neutrality standard. Funding the Trinity Lutheran Church playground is neutral and a child benefit.

III. Denying funding for the playground is religious discrimination

The founding fathers of the United States desired there to be a separation of church and state. They believed it critical that the people have the right to choose their own religion. "In this enlightened age, & in this land of equal liberty, it is our boast, that a man's religious tenets will not forfeit the protection of the laws, nor deprive him of the right of attaining & holding the highest offices that are known in the United States." said George Washington in his letter to the members of The New Church in Baltimore in January 1793. Despite, however, the fact that religion has no interference in holding the highest position of office, it does seem interfere with funding for a playground. Originally, Trinity Lutheran Church qualified to receive the grant, but would have to disassociate itself from the church to receive it. The Free Exercise Clause of the First Amendment clearly states Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thereby rendering the refusal unconstitutional. In Lamb's Chapel v. Center Moriches Union Free School District 508 U.S. 384 (1993) the Center Moriches School District prohibited religious groups to use their schools after hours for activities despite allowing non-religious groups doing the same, violating the Freedom of Speech Clause. This was ruled unconstitutional. This case then acted as a base for the case Rosenberger v. Board of Visitors of the University of Virginia 515 U.S. 819 (1995). The court ruled that the University of Virginia violated the First Amendment rights of its Christian publications staff by denying them the same funding resources that it made available to secular publications. According to Agostini "Aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis" Agostini v Felton 521 U.S. 232, 233 (1997) (emphasis added). These cases are parallel with the dispute of the Trinity Lutheran Church playground. The grant has been given to fund many secular parks, however The Missouri Department of Natural Resources (DNR) refuses to give the grant to a non-secular daycare. There is no compelling state interest to not fund the park, as it is not a violation of the Establishment Clause. The state should have an interest in protecting the children playing on the playground, ensuring the park's safety and security for the children and not whether or not the children are religious.

Conclusion

Funding for the playground for the daycare of Lutheran Trinity Church is not a violation of the Establishment clause. Bestowing the grant clearly pases the Lemon Test. It has a secular

purpose because the goal is to make a safe environment for children. It does not enhance nor inhibit religion since the purpose of the grant is to repair a playground, not to support a singular religion. Likewise the Supreme Court should note that because the grant process is secular no one religion would be favored, which means the applicant's religious affiliation would never be taken into account making this neutral. There is also no government entanglement because it would be a one time, pre-designated grant. Allowing the grant is also a benefit for the children's safety. Otherwise disregarding the need for funding when secular playgrounds receive funding is religious discrimination. There is no compelling state interest to not allow funding for the playground, since repairing the playground was proven neutral and it doesn't violate the Establishment Clause.

In the case of Trinity Lutheran Church v. Sarah Parker Pauley, the Supreme Court should rule there is no violation of the Establishment Clause and therefore funding for the church daycare playground is constitutional. The Supreme Court should also recognize that not bestowing the grant would be religious discrimination.

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