Merchant/PenaBrief

TABLE OF CITED AUTHORITIES

HISTORICAL SOURCES

Stephen S. Nelson, Comm. of the Danbury Baptist Ass'n in the State of Conn. (January 1, 1802)
St. George Tucker, Blackstone's Commentaries with Notes of Reference (1803)
Joseph Story, Commentaries on the Constitution of the United States (Arthur E. Sutherland ed. 1970) (1833)

FACTS OF THE CASE

Trinity Lutheran Church (Trinity) manages a preschool and daycare (The Learning Center). The daycare itself started out as a non-secular organization but was later integrated with Trinity, causing The Learning Center to incorporate daily prayer sessions in their program. The Learning Center has an open policy, anyone can be admitted regardless of their faith. Trinity Lutheran Church applied for a grant from The Missouri Department of Natural Resources (DNR) for recycled tire material. However DNR denied Trinity's request on the basis that the Missouri Constitution prohibits the use of "public treasury...in aid of any church, section or denomination of religion." Trinity Lutheran Church sued on the basis that this act violated their First Amendment right to freedom of religion and speech.

QUESTION PRESENTED

1. Does funding a playground associated with a Church violate the Establishment Clause of the First Amendment?

STATEMENT OF THE ARGUMENT

The Missouri Department of Natural Resources donating scrap tire material to the Trinity Lutheran Church Learning Center is a violation of the Establishment Clause.

The Establishment Clause of the 1st Amendment, written by Thomas Jefferson, states "Congress shall make no law respecting an establishment of religion." By funding the Trinity Lutheran Church's (Trinity) day care and educational center, The Learning Center (LC), the Missouri Department of Natural Resources would be doing just that. Under *Lemon v. Kurtzman, 403 U.S. 602 (1971)*, the court established details for legislation concerning religion, which contains 3 prongs.

1. The first prong states the statute must have a secular purpose. The scrap tire material that would be donated to LC will directly be used in association with Trinity, which is a religious institution, thus causing this case to fail the first prong of the Lemon Test.
2. The second prong states, the principal or primary effect of the statute must not advance nor inhibit religion. An example of inhibiting religion can be found in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah 508 U.S. 520 (1993)* where the city of Hialeah Florida instilled several ordinances addressing religious sacrifice, prohibiting possession of animals with the intent of sacrifice or slaughter, which was a big aspect of the Church of Lukumi. These ordinances suppressed religious conduct as they singled out the activities and rituals of the Santeria faith. These ordinances targeted religious behavior, as only conduct tied to religious belief was punished. In today's case, refusal to provide scrap tire material is in no way inhibiting religion as playgrounds are not necessary in any faith nor does any religious doctrine state as such. By providing scrap tire material to The Learning Center, the Missouri Department of Natural Resources would be advancing religion. This is due to The Learning Center being a "ministry of the Trinity Church that teaches a Christian worldview and incorporates daily religious instruction in its programs." Providing to such an organization would be taking from the public treasury in direct aid of a church or religious denomination, which is in violation of both the Missouri Constitution and the United States Constitution.
3. The statute must not result in an excessive government entanglement with religion. Once again, by permitting the grant of scrap tire material to the Learning Center, the state would be violating its own constitution. The children's daily prayer session integrated into the Learning Centers Curriculum would make this action unconstitutional, regardless of the fact that the Center is accessible to people of all faiths. Any government aid would result in excessive government entanglement. In *School District of Abington Township. Pennsylvania v. Schempp 374 US 203 (1963)* the children in question were required to participate in religious prayer every day, by reading and reciting the Lord's word before class. This was seen as a violation of the First Amendment's Establishment Clause and Free Exercise clause since the recitations were essentially religious ceremonies and were intended to be interpreted by the state

> as so. Similarly, the children praying in school in today's case operate under a church and recite daily prayers. This can also be seen as a religious ceremony as the Learning Center operates under Trinity and teaches a Christian worldview. Funding any organization of this nature would be unconstitutional, and nowhere has the Supreme Court ever authorized funding a religious facility.

The language designated by *Lemon v. Kurtzman* states that direct aid from the government is unconstitutional as it causes an excessive government entanglement concerning religion. The Supreme Court has ruled direct aid as unconstitutional. The issue is Trinity Lutheran is asking for state funds that will go straight to the Church, instead of indirect funds by a third party as designated by the Neutrality test. In *Zelman v. Simmons-Harris 536 U.S. 639 (2002)* the decision designates evenhandedness when it comes to the issue of who may receive aid. The court ruled that that direct aid to religious institutions for use in religious activities unconstitutional; however an indirect aid to a religious group through a third party such as a parent is constitutional as they are the ultimate deciders of the final destination of the funds. For example, a parent may use a state voucher wherever they please, even if it is government aid. This is because the "government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients and the incidental advancement of religion is reasonably attributed to the individual aid, not the government." This system operates on a system of financial aid, not religious discrimination or endorsement. The state is not allowed to aid any program which will directly benefit a religious organization. Similarly, in *Quick Bear v. Leupp*, Sioux Indians sued American trustees for taking money from a trust fund to Catholic Indian Mission to provide schools. This was seen as excessive entanglement but since the funds belonged to the American Indians, they had the authority to designate where those funds would end up. The Catholic Church received indirect aid from a neutral third party. This dichotomy boils down to indirect contributions and direct contributions. The Supreme Court prohibits direct aid from a government organization. In *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County 333 U.S. 203 (1943)* members of multiple religions formed a Council under the Campaign board of Education. The Council at hand offered religious classes for public school pupils. The children who did not want to participate were required to go to some other location. The court ruled that the use of a religious class violated the Establishment Clause because tax-dollars were going to the school. The same tax dollars that were being used to directly "aid religious groups and spread the faith" in a public school system. Likewise, in today's case the Missouri Department of Natural Resources, a government agency funded by tax dollars, giving money to a school under the Trinity would be unconstitutional. It would be impermissibly advancing religion in that the playground is a luxury, not a necessity. The plan also forced the children to participate in religious ceremonies which prohibits their right to free

exercise. In *Essex v. Wolman* an Ohio statute allowed grants to schools. This statute contained a provision that reimbursed parents of children attending private schools for tuition costs. There was no valid point to defend this statute because the administrators of the grant would have no way to ensure that money would not go towards religious purposes as that would be a direct aid of a religious organization. In *Levitt v. Commission for Public Education & Religious Liberty, (PEARL),* involved a plan to provide funds for testing. The court ruled that it was unconstitutional because it provided direct aid to the parochial schools and violated the Establishment Clause. In *PEARL v. Nyquist,* a New York plan gave money to a parochial school. This was given the same ruling as *Lewitt v. Commission,* that it was unconstitutional because it provided direct aid to the schools. The act of reimbursement in these cases is unconstitutional because it would have the primary effect of advancing religion. If the Missouri Department of Natural Resources donated resources to a religious facility, that would be a direct aid to a facility of religious nature, which would make the actions of the DNR unconstitutional. The Learning Center is classified as a part of the Trinity Lutheran Church because Trinity has accepted it as a ministry of its own denomination. In *Marburger & Griggs v. Public Funds for Public Schools 417 U.S. 961*, New Jersey reimbursed parents of Catholic school kids for school supplies as well as giving them additional funds. The court ruled this unconstitutional because "that direct aid violated the Establishment Clause." Public funds were being transferred to parochial schools for their use, thus advancing religion and treating a religious institution differently than a non-religious one.

In *Engel v. Vitale* the court held that it was unconstitutional for a school to read a nondenominational prayer as that would be a violation of the first amendment's Establishment Clause because in doing so, New York approved religion. New York violated the United States Constitution, and the Missouri Department of Natural Resources would be too if the court allows this donation. The Learning Center recites a denominational prayer every day. Just like *Engel*, by doing that Missouri is passively endorsing the Christian faith. You will see through all of these cases that never once has the Supreme Court authorized the government to directly aid a religious facility.
In the case of indirect aid, the Supreme Court allows minimal government action. The government action may not have the primary purpose of advancing or inhibiting religion.
In *Mitchell v. Helms 530 U.S. 793 (2000)* Chapter 2 of The Education Consolidation and Improvement Act of 1981 provided educational materials to both public and private schools, some of which were Catholic. The question in that case is whether or not that act violated the Establishment Clause. The court ruled that the Education Consolidation and Improvement Act did not violate the clause because all people, "religious, irreligious, and areligious" alike were eligible for the governmental aid. It did not provide direct aid to Catholic schools, simply because many of the beneficiaries were Catholic, it was an act that

made school materials accessible to all schools. In *Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995)*, the students involved in this case were applying for the space as a religion-neutral student communications group, however in this case, Trinity Lutheran Church didn't identify as secular or religion neutral as they were being sponsored by Trinity. They were claiming a stance against free speech however that is not an issue in today's. By funding this playground the state would be using public funds to directly fund a church facility, a facility that is not necessary for the church to carry out their practices. A public university does not violate the establishment clause if it operates on a religion neutral basis, but Trinity is not asking the court to use premade facilities, they are asking for government and presumably public funds to make their own facility, which would then be utilized in a religious setting for religious purposes. Nor is Trinity isn't asking the court for permission to share a secular, neutral facility, they are asking us to build their own facility. We as the State have no obligation to help a church construct a facility that will in part be used for religious purposes. In *Roemer v. Maryland Public Works Board 426 U.S. 736* a Maryland law provided funding for private universities except for the ones that solely offered theology degrees. This was supposed to be used for non-seminary purposes and schools were to provide an affidavit stating what the money would be going towards. The court deemed this rule constitutional. Although some of the beneficiaries happened to belong to a religion, they were not predesignated to be the sole beneficiaries as this program was open to many people. This was considered to be indirect aid. In *Mueller v. Allen 463 U.S. 388* Minnesota established a plan allowed a tax deduction for parents with children who were in school. It was ruled to be Constitutional because parochial schools benefitting was not the primary goal, it was a collateral effect. The plan "neither advanced nor prohibited religion since the aid to parochial schools only came as a result of the private choices of individual parents [a neutral third party]." The schools were not receiving aid because they were religious, they just happened to qualify for it. *Cochran v. Louisiana State Board of Education 281 U.S. 370* was the first case to allow indirect aid to religious schools based on the "child benefit theory." This theory is a principle that "allows state funds to be given to students studying in private schools provided the allotment can be justified as benefiting the child." *Everson v. Board of Education 330 U.S. 1* the state of New Jersey allowed reimbursement to parents of school children for bus transportation both to and from school. The court deemed this Constitutional under the child benefit theory since no religious association was benefitting, but the children were by getting transportation to school. In *Board of Education v. Allen 392 U.S. 236* a New York law required public schools to lend textbooks to its students, free of charge. Some of these schools included parochial schools. The court ruled that the textbooks would have no effect on religion, but instead would benefit the children and parents primarily. It deemed Constitutional. Along with this, in *Grand Rapids v. Ball, 473 U.S. 373* a Michigan state plan provided funding for special education programs in religious schools, taxpayers sued the school district. The

court held that this action did not inhibit nor advance religion in that the appointment of the special education programs was for the students that needed their services, not for the benefit or betterment of the non-secular school. Similarly, in *Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481* Witters, a vision impaired individual, applied for benefits that were offered to the impaired but was denied due to his choice to enter a Bible College. The Court decided that the aid was benefitting the vision impaired individual, not the Bible School or any other religious entity. In *Zobrest v. Catalina 509 U.S. 1* a deaf high school student requested a state assigned interpreter. The issue was that he attended a Roman Catholic High School. Once again the court ruled that the assignment of an interpreter would not affect religion, it would be to solely benefit the student under the Child Benefit Theory. The facts of this case do not fit under the Child Benefit Theory. Trinity Lutheran Church is requesting scrap tire material. The argument can be made that the children will benefit from the playground however, the playground is the final result of the state's donation. The only party that would be benefitting would be Trinity Lutheran Church because they would then have the means to proceed to build that playground. Only then will children benefit. Today's case does not qualify under the Child Benefit Theory.

Conclusion

The Appellant has little to no evidence to support their claim that the Missouri Department of Natural Resources' donation would not be a direct aid to Trinity Lutheran Church. As upheld by many Supreme Court cases, direct aid to any religious institution is unconstitutional. In donating scrap tire material to Trinity Lutheran Church, the Missouri Department of Natural Resources would be directly aiding a religious institution. We pray that the lower court's decision be upheld.
