STATE PLAYGROUND PROGRAM DISQUALIFIED RELIGIOUS ORGANIZATIONS

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The Environmental Protection Agency (EPA) has conducted research on recycled tire crumb use in playgrounds and playing fields.
https://www.epa.gov/chemical-research/federal-research-recycled-tire-crumb-used-playing-fields

In a December 2016 report, the U.S. Consumer Product Safety Commission (CPSC) found "no specific chemical hazards from recycled tires in playground surfacing," but cautioned "mouth contact with playground surfacing materials, including mouthing, chewing, or swallowing playground rubber" should be avoided.
https://www.cpsc.gov/Safety-Education/Safety-Education-Centers/Crumb-Rubber-Safety-Information-Center

A number of jurisdictions have programs promoting the use of recycled tires to provide scrap tire chips as ground cover and scrap tire matting in the safety surface material for playgrounds. Such programs reduce the number of used tires otherwise destined for landfills and dumpsites.
One such jurisdiction is Missouri.

In Missouri, the State's Department of Natural Resources administers a "Scrap Tire Program" which offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. The program is funded through a fee imposed on the sale of new tires in the State.
https://dnr.mo.gov/env/swmp/tires/tirefinassistance.htm
https://dnr.mo.gov/pubs/pub2425.pdf

One would not expect that administration of a rather modest recreational grant program involving recycled tire scraps would prompt a significant case and controversy for review and a published opinion by the Supreme Court of the United States, but it did. In so doing, the Supreme Court further delineated the relationship between the government and religious organizations within the context of the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Establishment Clause and the Free Exercise Clause in the First Amendment embody the constitutional guarantee of religious freedom from two different perspectives. The Establishment Clause focuses on the government's relationship with religion. The Free Exercise Clause focuses on the ability of groups and individuals to practice their religion free of governmental interference. While the Establishment Clause ensures the separation of Church and State, the Free Exercise Clause prohibits the government from discriminating against the religious status of a group or individual.

The Establishment Clause precludes excessive governmental "entanglement" with religion, prohibiting governmental sponsorship or showing any preference or favoritism to a particular religious view. In contrast, the Free Exercise Clause precludes governmental interference with

the ability of groups and individuals to adhere to their religious beliefs, prohibiting governmental action that effectively disqualifies or penalizes individuals and groups based on their religious status.

RELIGIOUS IDENTITY DISCRIMINATION

In the case of *Trinity Lutheran Church of Columbia, INC. v. Comer*, 582 U.S. ___ (2017), 2017 U.S. LEXIS 4061 (U.S. 6/26/2017), the Supreme Court of the United States recognized that the denial of eligibility for a state grant to provide surfacing for a church playground might seem of little consequence, resulting "in all likelihood, a few extra scraped knees." The Supreme Court, however, found the legal consequence to be much more significant within the context of the scope and applicability of the Free Exercise Clause in the First Amendment.

As described by the Supreme Court, the Free Exercise Clause "protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status." Accordingly, absent a "state interest of the highest order," the Court acknowledged that it would impose an unconstitutional penalty on the free exercise of religion for the government to deny "a generally available benefit solely on account of religious identity."

FACTS OF THE CASE

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground-resurfacing program.

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri, and the surrounding area. Established as a nonprofit organization in 1980, the Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in the Missouri Scrap Tire Program.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote

recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

> 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.

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively."

After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. The Department ultimately awarded 14 grants as part of the 2012 program. Despite its high score, the Center was deemed categorically ineligible to receive a grant because the Center was operated by Trinity Lutheran Church. In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.

ROAD TO THE SUPREME COURT

Trinity Lutheran sued the director of the Department in federal district court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violated the Free Exercise Clause of the First Amendment. Trinity Lutheran sought a court order prohibiting the Department from discriminating against the Church on that basis in future grant applications.

The federal district court granted the Department's motion to dismiss. The Free Exercise Clause, the district court stated, prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit withholding an affirmative benefit on account of religion. Accordingly, the district court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran.

The Court of Appeals for the Eighth Circuit affirmed. The federal appeals court recognized that it was "rather clear" that Missouri *could* award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the United States Constitution. That beings said, the federal appeals court found the Free Exercise Clause did not compel the State to disregard the antiestablishment principle reflected in its own Constitution. Viewing a monetary grant to a religious institution as a "hallmark of an established religion," the federal appeals court concluded that the State could rely on an applicant's religious status to deny its application.

The Supreme Court of the United States granted the Church's certiorari petition to review these lower court decisions to determine "whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment."

NOTHING LEFT TO DECIDE?

In April 2017, the Governor of Missouri announced that he had directed the Department to begin allowing religious organizations to compete for and receive Department grants on the same terms as secular organizations. If this action actually eliminated any dispute or controversy, with nothing left to decide, the Supreme Court could have dismissed review of this case as "moot."

However, in this particular instance, the Court found the Department's action did not moot this case. In so doing, the Court noted: "such voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." In this particular instance, the parties agreed that nothing would prevent the Department from reinstating its policy in the future based on the source of the Departments original policy in the Missouri Constitution. Accordingly, a real controversy and dispute remained for the Supreme Court to determine whether the existing interpretation of the Missouri Constitution posed an unconstitutional irreconcilable conflict with the First Amendment to the United States Constitution.

FREE EXERCISE CLAUSE

As cited by the Supreme Court: "The First Amendment provides, in part, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'." In this particular instance, the Church and Department both agreed: "the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." That being said, the Supreme Court recognized that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."

In considering constitutional challenges under the Free Exercise Clause, the Court would distinguish between laws that are "neutral and generally applicable without regard to religion" and laws that "single out the religious for disfavored treatment." Accordingly, the Supreme Court noted that the Free Exercise Clause would prohibit governments from "discriminating in the distribution of public benefits based upon religious status or sincerity."

Specifically, in the opinion of the Supreme Court, it would effectively penalize the free exercise of constitutional liberties to "condition the availability of benefits upon a recipient's willingness

to surrender his religiously impelled status." In this particular instance, the Supreme Court found: "The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character":

> [T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church... But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way... the State has punished the free exercise of religion.

In response, the Department contended "merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights":

> Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church.

The Supreme Court agreed "the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel." That being said, the Supreme Court noted the Department itself had acknowledged the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." In so doing, the Supreme Court reiterated the principle that the liberties of religion and expression may not be infringed by the denial of or placing conditions upon a benefit or privilege.

In this particular instance, the Supreme Court noted "Trinity Lutheran is not claiming any entitlement to a subsidy." On the contrary, the Court found Trinity Lutheran simply "asserts a right to participate in a government benefit program without having to disavow its religious character." As characterized by the Court, in this case, the discrimination against religious exercise was not the denial of a grant, but the refusal to allow the Church "to compete with secular organizations for a grant," solely because Trinity Lutheran is a church.

In the opinion of the Supreme Court, the "imposition of such a condition upon even a gratuitous benefit inevitably deters or discourages the exercise of First Amendment rights." Specifically, the Court found "no question that Trinity Lutheran was denied a grant simply because of what it is—a church."

Moreover, the Court noted Trinity Lutheran was not seeking funding for an "essentially religious endeavor" which would endorse religion in violation of the Establishment Clause. On the contrary, in this particular instance, the Court found nothing religious could be said about Trinity Lutheran seeking to compete for funding in "a program to use recycled tires to resurface

playgrounds."

On appeal, the Department had emphasized Missouri's "constitutional tradition of not furnishing taxpayer money directly to churches." In so doing, however, the Supreme Court found Missouri had put Trinity Lutheran to "the choice between being a church and receiving a government benefit."

As applied to this playground grant program, in the opinion of the Supreme Court, "[t]he rule is simple: No churches need apply." Accordingly, the Supreme Court concluded such "express discrimination based on religious identity with respect to playground resurfacing" was unconstitutional:

> The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified... [S]uch a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny.
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> Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling.

As a result, the Supreme Court found the State had "pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." The Supreme Court, therefore, concluded the Department's policy "goes too far" in violation of the Free Exercise Clause.

In the opinion of the Supreme Court, "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution... and cannot stand." Accordingly, the Supreme Court reversed the judgment of the federal appeals court and remanded [i.e. sent back] this case to the lower courts "for further proceedings consistent with this opinion." On remand, the Court's decision would prevent the State from ever reinstating the previous policy that had disqualified religious organizations from competing and receiving Department grants on the same terms as eligible secular organizations in Missouri's Scrap Tire Program. In the alternative, to pass constitutional muster, Missouri could either terminate this grant program altogether or amend the program to exclude all non-profit organizations and limit grants to public entities.

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