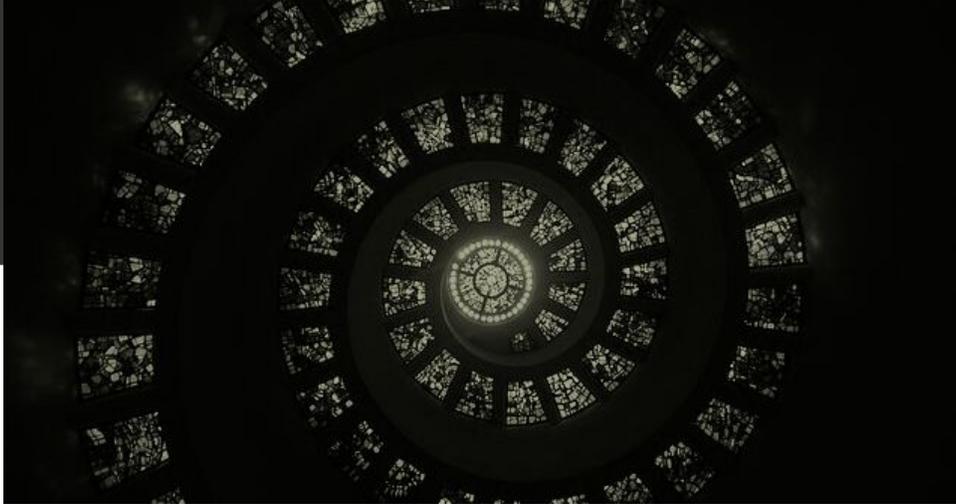


More Federal Aid to Religious Institutions

10.17.18 | Linda J. Rosenthal, JD



The latest chapter in the chipping away of the wall between church and state was announced in early May 2018 by Secretary of Education Betsy DeVos. She set the stage to “loosen federal regulations on religious universities” in connection with federally administered funding.

It’s the most recent example of the potentially far-reaching impact of last year’s Supreme Court ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017). We wrote about it [then](#), explaining that it was described as a “[landmark](#)” [religious freedom ruling](#). It seems to be living up to that characterization, as plaintiffs and the current Administration are eager to cite it as authority for their positions.

Whether or not the proposed action by Secretary DeVos is, indeed, within the scope of the *Trinity Lutheran* decision is open to question and may eventually be the subject of a future court battle.

Restrictions on Religious Aid

In a broad range of actions since January 2017, the current Administration has moved aggressively to overturn what it views as programs, policies, and rules that unduly disfavor religious groups and institutions.

The Secretary of Education is [eager to move](#) that agenda forward. On May 9, 2018, she announced the Department will remove many existing federal regulations on religious universities. It is part of a “[sweeping deregulatory agenda](#) for the Education Department announced on ... by the White House budget office, which outlined [several rules and regulations](#) for the department to scrap or amend.

Among those are rules that restrict faith-based entities from receiving federally administered funding.”

An Education Department spokeswoman, Liz Hill, explained that some current regulations on “eligibility of faith-based entities and activities do not reflect the latest case law regarding religion or unnecessarily restrict religion” – referring to *Trinity Lutheran*. Those regulations, she said, would be reviewed and amended “in order to be more inclusive.” Provisions that “unnecessarily restrict participation by religious entities” or impose “unnecessary burdens and restrictions on religious entities and activities” are likely to be tossed.

In particular, the department takes the position that some provisions of the Higher Education Act may be “overly broad in their prohibition of activities or services that relate to sectarian instruction or religious worship” or “in prohibiting the benefits a borrower may receive based on faith-based activity.”

The department plans to review regulations, keeping an eye out for provisions that “unnecessarily restrict participation by religious entities” and “to reduce or eliminate unnecessary burdens and restrictions on religious entities and activities,” according to the department’s explanation of its proposals.

Previously, in the fall of 2017, Attorney General Jeff Sessions released a [memo](#) with 20 principles that “should guide agencies in enforcing federal laws.” It began: “Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting and programming.”

Does Trinity Lutheran Apply?

Whether any such new rules and regulations can or will be challenged is open to question. The *Trinity Lutheran* decision doesn’t appear to be as broad and expansive as the Administration asserts.

In [Religious Nonprofits Score Big Political Win](#), we reported on *Trinity Lutheran Church of Columbia, Inc. v. Comer* shortly after it was issued. In 2012, the State of Missouri had a grant program to help preschools resurface their playgrounds with new, cushiony surfaces that are safer for the young children. The preschool associated with Trinity Lutheran Church applied for one of the grants and could have been approved except for its religious affiliation. The State of Missouri has a constitutional prohibition on using government funds for religious purposes.

At the trial level as well as at the appellate level, the plaintiffs lost. However, at the U.S. Supreme Court, by a 7-2 vote, they scored a win. The money in question was earmarked for the secular purpose of making an outdoor playground space safer for the children. The sole reason for denial of the grant was the religious affiliation of the applicant-organization. Writing for the majority, Chief Justice John Roberts explains that the Free Exercise Clause of the First Amendment “...protects religious observers against unequal treatment.” In other words, a state “may not deny a church an otherwise available public benefit or payment because of its religious status.”

The *Trinity Lutheran* majority made clear that it was a limited ruling only: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address

religious uses of funding or other forms of discrimination.”

Conclusion

The Administration is moving full-steam-ahead on the apparent assumption that the *Trinity Lutheran* decision has authorized them to interpret and apply the decision expansively. But the express language appears to negate any such broad application.

And, recently, the New Jersey Supreme Court, in *Freedom from Religion Foundation v. Morris County Board of Chosen Freeholders*, April 18, 2018, A-71-16, (079277), ruled unanimously that “*Trinity Lutheran* did *not* prohibit New Jersey from denying state aid to repair damaged sanctuaries because that would support religion.”

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