FPLG: CIVIL LITIGATION

Trinity Lutheran Pops Up in Latest Religion Case

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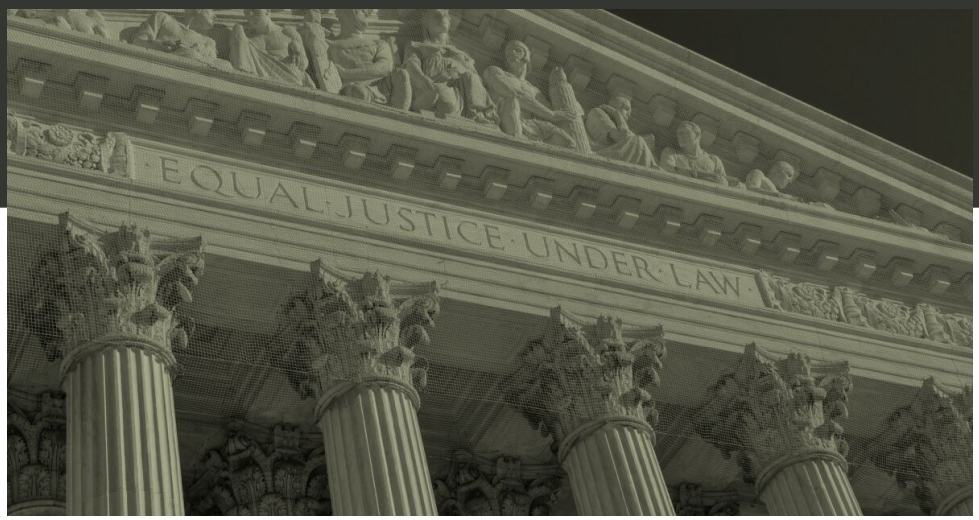

In the veritable blizzard of this year's end-of-term Supreme Court rulings – which is not over yet – is a significant First Amendment/religious liberty case: *Espinoza v. Montana Department of Revenue*, (full text). Handed down on Tuesday, June 30, 2020, the decision was a 5-4 win from for the conservative wing of the Court.

Simply put, "religious schools should have the same access to scholarships and funds as other private schools…." Chief Justice Roberts wrote the majority opinion that relied heavily on a June 2017 decision which he authored as well: *Trinity Lutheran Church of Columbia v. Comer*.

That case name may ring a bell for our long-time readers because we posted about the *Trinity Lutheran* case when it was issued, and then again four more times in the next year or so.

Trinity Lutheran was described at the time as "one of the most important rulings on religious rights in decades." Hailed by religious conservatives, this ruling horrified many on the other side of the debate including Harvard Law Professor Noah Feldman. He wrote: "In other words, the free exercise clause has trumped the establishment clause, which was created precisely to stop government money going to religious purposes. Somewhere, James Madison is shaking his head in disbelief."

Free Exercise Clause

"It all started several years ago on a playground at a church preschool in Columbia, Missouri," we explained in *Religious Nonprofits Score Big Constitutional Win* (August 11, 2017).

Trinity Lutheran Church ran a preschool and daycare on its premises. In 2012, the state – Missouri – established a funded program "to help eligible nonprofits repair their old playground coverings with a pour-in-place rubber surface made from recycled tires. The new material is squishy, sustainable, and

much safer for kids."

The Church applied for the grant. Although it scored high compared with other applicants for this limited pool of money, its application was rejected. The agency in charge of the program, the Missouri Department of Natural Resources, "had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." This policy was grounded in Article I, Section 7 of the Missouri Constitution that prohibits providing "financial assistance directly to a church."

Trinity Lutheran sued and lost at both the federal trial and appellate levels. But the Supreme Court reversed – 7 to 2 – on the grounds that "the Free Exercise Clause of the First Amendment "…protects religious observers against unequal treatment," concluding that a state "may not deny a church an otherwise available public benefit or payment because of its religious status."

After Trinity Lutheran

There were already lower court cases in the pipeline involving First Amendment "free exercise" arguments, and these litigants (and other, newer ones) did not hesitate to hop on the *Trinity Lutheran* train with their own facts.

In *Hurricanes, Houses of Worship, and FEMA Help* (November 2, 2017), we wrote about three small Texas churches damaged in the devastating – Category 4 – Hurricane Harvey a few months earlier. In *Harvest Family Church v. FEMA*, the churches sued FEMA for disaster aid, challenging that agency's longstanding ban on granting financial relief to religious organizations.

The churches argued that "this discriminatory policy stood in defiance of […*Trinity Lutheran*…] which they assert "protects the right of religious organizations to participate in widely available programs on equal footing with secular organizations."

They just wanted a "fair shake," reminding the trial court that, while houses of worship like them are "denied access to grants," other organizations like "museums and zoos qualify for FEMA's relief programs to help make basic structural repairs and begin rebuilding." To further drive home their point, the churches made sure the court was aware that "an octopus research center, a botanical garden, and community centers that provide sewing classes and stamp-collecting clubs" had easily obtained FEMA assistance grants.

Not long afterward, the lawsuit became moot because the Administration in Washington issued an executive order reversing the historical FEMA ban on aid to religious organizations in disaster situations.

And at about the same time, Attorney General Jeff Sessions released a memo with 20 principles that "should guide agencies in enforcing federal laws." He explained that "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."

This policy was issued in part relying on the *Trinity Lutheran* case. The lingering question has been whether *Trinity Lutheran* can support the Administration's expansive accommodation of religious groups in all manner of government benefits.

More Cases

In *Religious Nonprofits in the Trinity Lutheran Era* (April 12, 2018), we discussed two additional federal lawsuits that referenced that landmark June 2017 church/state decision.

An association of bible colleges sued on behalf of its member institutions in *Illinois Bible Colleges Ass'n v. Anderson* (August 2017). They wanted to issue degrees and credentials without any supervision or interference by state agencies imposing statutory standards. But Illinois has a number of statutes that apply to all post-secondary educational institutions that mandate that a higher education board approve certain categories of degrees. This plaintiff-association threw in "the entire spectrum of First Amendment challenges," including *Trinity Lutheran* on the purported ground that the Supreme Court there bolstered its general argument that the credential-and-degree statute somehow involved an "underlying and unconstitutional anti-religious animus or bias." That argument went nowhere; the plaintiff lost.

In *Taylor v. Town of Cabot* (October 2017), the Vermont Supreme Court issued a ruling that referenced *Trinity Lutheran*. There, "certain municipal taxpayers sued to challenge a town's use of federally derived but municipally managed funds to repair a historic church. Vermont has a Compelled Support Clause in its Constitution – similar to Missouri's – which protects against the state financial support of 'worship.'"

In an ironic twist, the taxpayer-plaintiffs "won a battle but lost the war." While they had "standing to request" a preliminary injunction, they were "out of luck on ultimately winning the merits of the case." Most of the state funds in this particular situation were "to be used for maintenance and repairs to a building that serves not only as a place of worship but also as a place for nonsectarian community events and gatherings." So, Vermont's Compelled Support Clause didn't apply at all. Nor did *Trinity Lutheran* under these facts, according to the Vermont justices.

***Espinoza* Takes Center Stage**

Many states in addition to Missouri have constitutional prohibitions on direct financial aid to religious organizations or for religious purposes. This week's *Espinoza* decision involved a clause in the Montana constitution that "… restricts government aid to religious groups.

Three mothers in Kalispell, Montana, with children at Stillwater Christian School "wanted to participate in a state program enacted in 2015 'to provide parental and student choice in education.' It was financed by private contributions eligible for tax credits, and it provided scholarships to students in private schools. In 2018, 94 percent of the scholarships went to students attending religious schools."

In a bit of overkill, the Montana Supreme Court not only ruled against the parents but also shut "down the entire program for all schools, religious or not" based on the constitutional clause "that bars the use of government money for 'any sectarian purpose or to aid any church, school,

academy, seminary, college, university or other literary or scientific institution, controlled in whole or in part by any church, sect or denomination.'"

So the question that arrived in front of the U.S. Supreme Court justices this term in *Espinoza v. Montana Department of Revenue* was the "opposite one: May states refuse to provide such aid if it is made available to other private schools?" (emph. added) The American high court "has long held that states may choose to provide aid to religious schools along with other private schools." Accordingly, the Montana justices were overruled.

Chief Justice John G. Roberts Jr., writing for the majority in *Espinoza,* explained that this "provision of Montana's Constitution ran afoul of the federal Constitution's protection of the free exercise of religion by discriminating against religious people and schools." Citing *Trinity Lutheran* and other authorities, he added this caveat: although a state "need not subsidize private education,…, once a state decides to do so, it cannot disqualify some private schools solely because they are religious."

Strange Bedfellows

It's interesting to note that while cases like this generally break down on partisan lines, the issue of government aid to religious organizations is not uniformly supported by any and all such groups across the United States. For instance, in 2017 – when *Trinity Lutheran* was in the news – there was a divide of opinion on the Hurricane Harvey cases as to whether FEMA should or should not make religious institutions eligible for disaster aid. Jewish groups, for example, took opposite sides: "Groups on the Jewish right, led by the Orthodox Union" … lobbied the government for a change in the exclusion of houses of worship." They were opposed by the "… Jewish left" who aligned "with interfaith coalitions to keep taxpayer funds from supporting religious organizations."

Conclusion

The meaning and scope of *Espinoza v. Montana Department of Revenue* (and *Trinity Lutheran*) will be debated and litigated often in the coming months and years.

Critics of *Trinity Lutheran* who were upset at that 2017 ruling are more concerned now.

Justice Sotomayor, who strongly dissented back then, characterized the majority's opinion in *Espinoza* as "perverse." Legal commentators worry particularly about certain troubling language in the concurring opinions of Justices Alito, Gorsuch, and – especially – Thomas in *Espinoza*, including what they describe as "… reiterating [Thomas's] conviction that the First Amendment's establishment clause was 'likely' designed to preserve states' ability to establish official religions." (emph. in orig.)

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