Q&A: *Trinity Lutheran* and Religious Freedom

Q. What did the Court decide?

In *Trinity Lutheran v. Comer*, the Supreme Court ruled 7-2 that, under the Free Exercise Clause of the First Amendment, states may not exclude religious organizations from participation in generally available public benefits simply because of their religious identity. It was the first time in this country's history that the Supreme Court held that states *must* allow religious organizations to participate on equal terms in generally available public benefits – such as the grant program at issue here to subsidize the purchase of qualifying playground surfaces for children.

Q. Who voted in the majority and in the dissent?

Chief Justice John Roberts authored the majority opinion. He was joined by five other Justices as to his reasoning (Justices Thomas, Alito, Gorsuch, Kagan, and Kennedy), and one additional Justice as to his conclusion in favor of Trinity Lutheran (Justice Breyer). However, Justices Thomas and Gorsuch joined forces to protest a quizzical footnote in the majority opinion ("Footnote 3") that attempts to limit the ruling to the specific facts of the case. Thomas and Gorsuch noted that regardless of what the footnote says, the strong religious-freedom principles of the opinion itself have definite application beyond the context of preschool playgrounds.

Justice Sonia Sotomayor authored a long and scathing dissent, and she was joined by Justice Ruth Bader Ginsburg.

Q. What does *Trinity Lutheran* mean for religious freedom at large?

The precise effect remains to be seen. But it will likely have the biggest impact on the nationwide debate over private "school choice."

Most state constitutions – including Nebraska's – contain a so-called "Blaine Amendment" prohibiting the distribution of public funds to "sectarian" or "denominational" schools. These amendments have been used to blunt state efforts to enact private school-choice programs such as vouchers or tax-credit scholarships – even though such laws have been expressly upheld by the U.S. Supreme Court as perfectly compliant with "Establishment Clause" of the First Amendment.

In other words, many states go *beyond* what is required by the First Amendment by attempting to categorically shut out private religious schools from participation in school choice policies intended to help families in need. *Trinity Lutheran* puts such restrictive state laws in doubt, insofar as they discriminate purely based on the religious identity of private schools.

Indeed, after issuing its decision in *Trinity Lutheran*, the Supreme Court immediately vacated a decision by the Colorado Supreme Court that had cited its state's Blaine Amendment to invalidate a private-school voucher program near the Denver area. (Douglas County School Dist.

v. Taxpayers for Public Education). That decision has now been wiped out, and the Colorado Supreme Court has been instructed to reconsider the case in light of *Trinity Lutheran*.

Whatever it decides, the Colorado decision will likely be appealed to the Supreme Court next year, and we will likely be in for yet another historic and controversial decision on religious freedom.

Q. What does *Trinity Lutheran* mean for Nebraska?

Application to school choice:

This is an interesting question. Although Nebraska indeed has a "Blaine Amendment" (See Neb. Const. Art. VII, §11), it has been significantly watered down over time. In fact, our state constitution is already quite favorable to school choice. While our Blaine Amendment originally forbade the distribution of public funds "in aid of" "sectarian" schools, the people of Nebraska amended the provision in the 1970s to forbid only the distribution of public funds directly "to" "private" schools. Since then, the Nebraska Supreme Court has ruled on multiple occasions that public funds providing only an *indirect* benefit to religious schools are perfectly constitutional. In other words, our amended Blaine prohibits only *direct* aid.

Thus, in the case of *Lenstrom v. Thone* (1981), the Nebraska Supreme Court upheld a state-funded higher-education scholarship program that was used by students attending private religious colleges. Such aid went directly to the students, the Court ruled, and not to religious schools. Therefore, under our amended Blaine, the program was entirely legal.

In summary, private school choice programs were already legal in Nebraska, with or without *Trinity Lutheran*.

Application to general programs:

However, *Trinity Lutheran* will likely have a direct legal impact on a different provision of our state constitution: Article I, §4, which prohibits the "compelled . . . support" of "any place of worship[.]" Similar laws exist in other states and were originally intended to ensure that states do not impose a tax for the express purpose of subsidizing and maintaining churches and their ministers. However, courts on occasion have cited these provisions as an excuse for denying religious organizations the opportunity to participate in generally available public benefits. Such cases exist in Nebraska (see, e.g., *United Community Services v. Omaha Nat. Bank* (Neb. 1956) (citing Article I, §4 in ruling that the Nebraska Constitution forbids the Omaha Public Power District from making charitable contributions to private religious organizations)). These decisions have likely been nullified in the wake of *Trinity Lutheran*.

Q. Are there any other important takeaways?

Yes. *Trinity Lutheran* is an important affirmation that religious freedom extends beyond the four-walls of a church. In his Apostolic Exhortation *Evangelii Gaudium* (2013), Pope Francis wrote that:

> [a] healthy pluralism . . . does not entail privatizing religions in an attempt to reduce them to the quiet obscurity of the individual's conscience or to relegate them to the enclosed precincts of churches, synagogues or mosques. This would represent, in effect, a new form of discrimination and authoritarianism. The respect due to the agnostic or non-believing minority should not be arbitrarily imposed in a way that silences the convictions of the believing majority or ignores the wealth of religious traditions.

[Paragraph 255].

In *Trinity Lutheran*, the Court determined that a denial of grant funds for purchasing playground surfaces constitutes a *burden* on the preschool's *religious exercise*. In other words, the Court recognized the totality of the preschool's ministry as bound up with its religious mission – even when it comes to playground safety. When one goes after their playgrounds, then, one goes after their very faith.

This is an important victory for the meaning of religious freedom. The First Amendment, after all, protects the "free *exercise*" of religion, and not just the freedom to hold internal beliefs. *Trinity Lutheran* should therefore have a broad impact on the culture's understanding of religious freedom and a practical effect of protecting the manifold ministries of the Church at large, insofar as those ministries flow from her very faith.

In the end, *Trinity Lutheran* means that religious organizations can't be treated as second-class citizens, and that religious freedom cannot be confined within the four walls of a church.