

Council for American Private Education

CAPE outlook

Voice of America's private schools

Supreme Court to Consider Blaine Amendment Case

Does a state violate the U.S. Constitution when it excludes religious institutions from an aid program with an entirely public purpose solely because they are religious? That's the fundamental question the U.S. Supreme Court agreed to answer this year when on January 15 it decided to hear the case of *Trinity Lutheran Church v. Pauley*.

The precise issue before the court is, "Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern." Justices will likely hear arguments this spring and render a decision in June.

Scrap Tires

Missouri's Department of Natural Resources (DNR), of which Sara Parker Pauley, the named respondent in the case, is director, administers a grant program that allows eligible entities to purchase playground surfacing materials made of recycled scrap tires. Trinity Lutheran, which has a playground used by children in the neighborhood as well as children in its pre-school learning center, applied for a grant in 2012. Its application was ranked fifth in a field of 44 applicants, 14 of which received the grant.

But instead of a grant, the church received a letter from DNR stating the following: "[A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically 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....'"

The language at issue is known as the state's Blaine Amendment, which, accord-

ing to the petition filed by the Alliance Defending Freedom (ADF) asking the Supreme Court to take the case, is "born of religious bigotry." The amendment was enacted in 1875, "the same time as the federal Blaine Amendment was proposed and debated," and thus, according to the petition, "shares the same grounding in 'hostility to the Catholic Church and to Catholics in general' that this Court recognized in *Mitchell v. Helms*."

Lawsuit

Trinity Lutheran brought suit to a U.S. district court claiming that DNR's decision to deny grants to churches violated the Free Exercise, Equal Protection, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the U.S. Constitution. When the district court rejected the church's claim, Trinity appealed to the Eighth Circuit, which affirmed the lower court's decision.

Both courts cited as justification for their decisions the 2004 ruling by the U.S. Supreme Court in *Locke v. Davey*, which upheld the exclusion of a theology student from a publicly funded scholarship program in the state of Washington. In its petition to the Supreme Court, the ADF said that the Eighth Circuit's decision regarded *Locke* as providing a state "with unfettered discretion to exclude churches from generally available public benefits."

Disfavor of Religion

Arguing that the Eighth Circuit "did not faithfully apply *Locke*," the ADF identified several factors that distinguish the Trinity case. For one, Trinity was seeking

funding for "a purely secular endeavor." What's more, Missouri exhibited a "categorical disfavor of religion" as well as "a categorical exclusion of religion from a neutral benefits program." And finally, as noted above, the language at issue in the

Missouri Constitution was "born of religious bigotry."

"No state can define religious neutrality as treating religious organizations worse than everyone else," said ADF Senior Counsel David Cortman in a statement on

the court's decision to take the case. "That isn't neutrality; it's a hostility to religion that violates the First Amendment. That's the primary issue that the Supreme Court will address."

Huge Implications

"Children's safety is just as important on church daycare playgrounds as it is on other daycare playgrounds," added ADF Senior Counsel Erik Stanley. "Missouri and every state should understand that the U.S. Constitution prohibits religious hostility, which is what Missouri exhibited when it denied Trinity Lutheran's scrap tire grant application. This case has huge implications for state constitutional provisions across the nation that treat religious Americans and organizations as inferiors solely because of their religious identity."

ACSI and LC-MS Brief

In a brief supporting the request that the Supreme Court review the case, the Association of Christian Schools International (ACSI) and the Lutheran Church—



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CAPE member organizations:

- Agudath Israel of America
- American Montessori Society
- Association Montessori International—USA
- Association of Christian Schools International
- Association of Christian Teachers and Schools
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Council on Educational Standards and Accountability
- Evangelical Lutheran Church in America
- Friends Council on Education
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Oral Roberts University Educational Fellowship
- Seventh-day Adventist Board of Education
- United States Conference of Catholic Bishops
- Wisconsin Evangelical Lutheran Synod Schools
- 35 Affiliated State Organizations

a coalition of national associations serving private schools K-12
Executive Director: Joe McTigue

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Court's Second Chance to Overturn Blaine

Trinity Lutheran Church v. Pauley (see p. 1) is not the only vehicle available to the U.S. Supreme Court this term to rule on Blaine amendments. Several parties have petitioned the court to review a decision by the Colorado Supreme Court that last year struck down a school voucher program in Douglas County on the basis of that state's Blaine amendment. The Colorado Constitution prohibits the use of public funds "to help support or sustain any school...controlled by any church or sectarian denomination whatsoever."

Petitions urging the high court to hear the case have been filed by the Douglas County School District, the Colorado State Board of Education, and several interested parents. The court has not yet agreed to grant a hearing.

The potentially high-profile case has attracted amicus briefs in support of the petition from a host of school choice advocacy groups, such as the Friedman Foundation for Educational Choice. Four organizations—the Goldwater Institute, the Foundation for Excellence in Education, the Hispanic Council for Reform and Educational Options, and the American Federation for Children—have combined forces behind a joint brief written by Clint Bolick, then vice president of litigation at the Goldwater Institute. Bolick has since been appointed to the Arizona Supreme Court (see p. 4).

Bolick's brief urges the court to grant review to what he called "an urgent issue of nationwide significance." The brief explains that "roughly

two-thirds of the states have Blaine amendments in their constitutions, which present an obstacle to the provision of high-quality educational opportunities to millions of American school-children." The removal of Blaine amendments, wrote Bolick, "is necessary to vindicate our nation's sacred promise of equal educational opportunities."

If the court were to strike down Blaine amendments, it would open a path for school choice programs in states that rely on the language to block them. The U.S. Con-

stitution does not include the prohibitive language, and the Supreme Court has found no federal constitutional barrier to properly designed voucher programs.

"The Blaine amendment is an archaic and ill-designed provision designed to sanction state-sponsored discrimination," said Patricia Levesque, CEO of ExcelinEd, one of the four organizations sponsoring the joint brief.

"This case could represent an important breakthrough in securing educational opportunities for children who today are trapped in failing schools," said Julio Fuentes, the president of Hispanic Council for Reform and Educational Options.

And Kevin P. Chavous, executive counsel for the American Federation for Children, said, "Every child deserves the opportunity to access a quality education that suits their needs." He continued, "This lawsuit challenges an outdated law rooted in bigotry."

[photo © James H. Pickerell/Dollar Photo Club]



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Missouri Synod LC-MS), two members of CAPE, also argued that the Eighth Circuit "adopted an erroneous, expansive interpretation" of *Locke v. Davey* that "threatens to marginalize religious schools, churches, and other faith-based entities from public life in the United States by licensing religious discrimination against them in the administration of public benefits."

Their brief went on to say that, if allowed to stand, the reading of *Locke* advanced by the Eighth Circuit and other lower courts could "jeopardize many religious entities' ability to participate on equal terms in hundreds of generally accessible state and local programs across the country."

Indeed, the "sweeping misinterpretation of

Locke implicates an alarming number of public aid programs, including: vouchers and scholarships for schools; subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; funding for rehabilitation centers; and subsidies for resurfacing playgrounds with rubber made from recycled tire scrap, like the Missouri program at issue here."

The Supreme Court, the brief argued, should "correct the Eighth Circuit's erroneous reading of *Locke* by reaffirming that neither *Locke* nor any other decision of this Court broadly licenses the government to discriminate against otherwise eligible religious groups in the provision of generally available public benefits."

[photo p. 1 © geargodz/Dollar Photo Club]

Over 16,000 Events Scheduled to Mark School Choice Week

The nation celebrated its biggest National School Choice Week (NSCW) yet with over 16,000 events scheduled for January 24-30.

According NSCW organizers, 33 governors and over 240 mayors and county leaders issued official proclamations to recognize the week. Even the U.S. Senate voted unanimously to

mark the event with a bipartisan resolution sponsored by Senator Tim Scott (R-SC), along with a long and im-

pressive list of cosponsors, including Senators Cory Booker (D-NJ), Dianne Feinstein (D-CA), and Lamar Alexander (R-TN).

“We are very grateful for Senator Tim Scott’s leadership and persistence in authoring this resolution and in helping raise awareness—in a bipartisan way—about the many important education options that parents have, or want to be able to have, for their children’s education, including traditional public schools, public charter schools, public magnet schools, private schools, online academies, and homeschooling,” said Andrew Campanella, president of National School Choice Week.

The ABCs of School Choice

Various national organizations used the week as a springboard to spotlight reports and events.

The Friedman Foundation for Educational Choice released its flagship publication, *The ABCs of School Choice*. The idea behind the annual report, which was initially launched 12 years ago, was simple, according to Robert C. Enlow, president and CEO of the foundation: “Put all the latest details from every school choice program in America, such as student eligibility requirements, funding amounts, and regulations, into a compact, easy-to-use publication.”

This year’s report, said Enlow, “is the best yet, not just because of the new look and the fantastic growth in the number of school choice programs, but also because it is now paired with a searchable database on our Web site at www.edchoice.org/dashboard.”

According to the foundation’s data, 59 private-school choice programs of one type or another across the country serve over one million students.

AFC Poll and PSA

The American Federation for Children (AFC) used National School Choice Week to

release its second annual **National School Choice poll** conducted by Democratic polling firm Beck Research. The poll shows that 70 percent of Americans support school choice.

“The most important finding,” said Matt Frendewey, AFC’s national communications director, “is that the concept of school choice has

strong support among voters.” He noted that “in nearly every category we saw modest or incremental growth in sup-

port for school choice compared to 2015 results.” He also pointed out that “Latinos and millennials, two emerging voting blocs, support school choice in strong numbers, and voters are more likely to support a candidate who supports school choice.”

Kevin P. Chavous, founding board member of the AFC and a former councilman in the District of Columbia, called on Democrats to take heed of the survey’s findings: “Democratic voters support school choice, and the programs overwhelmingly benefit families represented by Democrats. Families will only tolerate being represented by politicians who oppose their child’s right to attend a quality school for so long, and it’s time candidates in my party take back the civil rights issue of our time, stand up to the teachers’ union and support our parents who want more access to school choice.”

The AFC also released a national PSA, “**Every Child Matters**,” featuring 15 athletes and celebrities, including WNBA legend Lisa Leslie, ABC/ESPN analyst Jalen Rose, NBA star Shaquille O’Neal, and NFL star and ESPN analyst Marcus Wiley.

AFC officials described the video as drawing attention to “the challenges facing the many children trapped in underperforming schools and the need to offer parents with access to educational choice.”

Kevin Chavous said the organization was “thrilled to once again work with our celebrity Champions for Choice to advocate for choice and educational options for our nation’s children.” He added, “Every child deserves access to a quality education, and through our Champions for Choice initiative and this PSA, we are highlighting this discussion at a national level.”

The PSA campaign targets parents in Memphis, Nashville, Cleveland, Indianapolis, Milwaukee, Raleigh, Charlotte, Tallahassee, Little Rock, Oklahoma City, Jackson, Reno, Washington D.C., New York City, and Chicago.

New York Values

The right of parents to choose their child’s school continues to gain ground in New York.

Governor Andrew Cuomo, a progressive governor in a liberal state, last month proposed a budget that includes a tax credit for donations to improve public schools or to provide tuition scholarships to private schools. Cuomo’s plan also includes a refundable personal tax credit of up to \$500 for tuition expenses incurred by low-income taxpayers.

Meanwhile, the New York State Senate wasted no time passing its own version of school choice legislation. On January 11, it approved, with bipartisan support (47-15), a measure to provide tax credits for donations to public school improvement organizations or private school scholarship organizations. Although the senate’s tax credit scholarship bill differs from the governor’s proposal in certain respects, both measures are a clear sign that the Empire State is fully considering choice within its plans for school reform.

Agudath Israel of America, a member of CAPE, released a statement identifying education tax credits as the “top legislative priority for the Orthodox Jewish community” and calling the executive budget “a powerful affirmation of the governor’s firm commitment to the principle of parental choice in education.” Rabbi David Zwiebel, Agudath’s executive vice president, praised Cuomo “for his vision, his persistence, and his political courage.”

The New York State Catholic Conference also considers education tax credits its “top legislative priority,” according to Executive Director Richard E. Barnes. “For Catholic schools in particular, it can be a game changer in alleviating the funding crisis that has seen hundreds of quality school options for children across the state close in the past two decades simply because families cannot afford the rising costs.”

Return service requested

CAPE notes

★ “When President Obama signed a new federal education law to replace the much-reviled No Child Left Behind last month, there was a whole lot of cheering in public education circles. But they weren’t the only ones celebrating. Advocates for private schools also were pleased.”

So began a story in *The Washington Post* January 26 about provisions “deep within” the *Every Student Succeeds Act* “that dictate what resources private schools will receive to serve their most vulnerable kids and train their teachers.”

The piece, by WaPo education writer Emma Brown, reports that private school advocates say ESSA restores “the intent of the original 1965 law: Poor kids should get the extra help they need, regardless of where they go to school.”

The article goes on to identify some of the new law’s benefits for private school students: the elimination of Title I set-asides, an expansion of professional development opportunities for teachers, and the requirement that state’s identify “an ombudsman for private schools, tasked with making sure that school districts are meeting the letter and spirit of the new law.”

★ Students at Hanalani Schools in Mililani, HI, sure know how to win Botball tournaments (a competition in which teams design and build robots). They’ve won Hawaii’s Botball championship six years in a row and the international trophy twice in succession.

But Botball is just one reason why the

National Association of Secondary School Principals (NASSP) last month selected Winston Sakurai, the upper school principal at Hanalani, as one of only three 2016 NASSP Digital Principals in the country.

Sakurai will travel to Orlando, FL, this month to receive the prestigious award, even though Hawaii to Florida in February is probably a climatic downgrade.

According to an NASSP sketch, Sakurai “launched a Schools of the Future initiative” at Hanalani “in which students harness technology to tackle real-world challenges.” The effort “spawned an online science fair (myonlinefair.com) where students collaborate on projects that are judged virtually by science experts around the globe.” He has also overseen the establishment of Genius Hour, “to help personalize students’ learning experience.”

“Using digital tools, along with the teaching of six critical skills—collaborative leadership, communication, critical thinking, creativity, cultural competence, and digital citizenship—inspires our students to be leaders on a local, national, and global stage,” Sakurai says. “We want our students to be equipped for any challenge, including occupations that have not even been created yet.”

★ Arizona Governor Doug Ducey last month appointed Phoenix attorney Clint Bolick to the Supreme Court of Arizona. It was Ducey’s first opportunity to appoint anyone to the court.

Mr. Bolick has a distinguished history

within the school choice movement. In 1991 he cofounded the Institute for Justice, perhaps the nation’s most successful defender of school choice in the courtroom. While at IJ, he was active in the 2002 landmark case *Zelman v. Simmons-Harris*, which upheld the voucher program in Cincinnati, OH. Soon after the decision, Bolick chronicled his experience fighting school choice legal battles in the book *Voucher Wars*.

In a letter to Governor Ducey, National news columnist George F. Will said Bolick “is the most important reason why such dramatic advances have been made on the most important civil rights issue of our day—school choice.” The columnist continued, “As the prime mover in landmark litigation, he has repeatedly won from courts victories that have firmly established the constitutionality of programs that empower parents to make the choices directing the education of their children in public or private schools.”

