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IN THE SUPREME COURT OF THE UNITED STATES

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TRINITY LUTHERAN CHURCH OF :
COLUMBIA, INC., :

Petitioner : No. 15-577

v. :

CAROL S. COMER, DIRECTOR, :
MISSOURI DEPARTMENT OF NATURAL :
RESOURCES, :

Respondent. :

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Washington, D.C.

Wednesday, April 19, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:12 a.m.

APPEARANCES:

DAVID A. CORTMAN, ESQ., Lawrenceville, Ga.; on behalf
of the Petitioner.

JAMES R. LAYTON, ESQ., Jefferson City, Mo.; on behalf of
the Respondent.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-577, Trinity Lutheran Church v. Comer.

Mr. Cortman.

ORAL ARGUMENT OF DAVID A. CORTMAN

ON BEHALF OF THE PETITIONER

MR. CORTMAN: Thank you, Mr. Chief Justice, and may it please the Court:

The State of Missouri has excluded The Learning Center from a recycling program that provides a safer playground for children solely because the preschool is operated by a church rather than a secular not-for-profit.

The State has made several important concessions in this case. Number one, that the policy in this case is not facially neutral, and number two, that based on their religious character, churches are not eligible for the benefit here.

This admitted discrimination against religion violates this Court's Free Exercise Principles. First, as stated in *McDaniel and Smith*, the Free Exercise Clause prevents the government from imposing special disabilities on the basis of religious views or

1 religious status, and forcing a choice between the
2 exercise of religion and receiving either a government
3 benefit, right, or privilege.

4 JUSTICE KENNEDY: Assuming that there's no
5 serious risk of an establishment violation, that's off
6 the table, are there ever instances in which status --
7 religious status can be used to deny religions or
8 religious believers benefits from the State? Or are you
9 saying that it's -- that absent in Establishment Clause
10 problem, that status can never be the base -- religious
11 status can never be the basis for a governmental action
12 or governmental ordinance, governmental statute?

13 MR. CORTMAN: I -- I'm not sure if it can
14 be. I can't think of a specific example. And the
15 reason I say that is, the question is, is why would
16 someone's religious status matter in the first place to
17 receiving a government benefit? And that's another --

18 JUSTICE GINSBURG: On that -- on that
19 question, I guess rather long ago now in the Everson
20 case back in 1947, this Court said in no uncertain terms
21 what the Framers didn't want was tax money imposed to
22 pay for building or maintaining churches or church
23 property. And doesn't that fit this case? And if so,
24 is Everson passé?

25 MR. CORTMAN: I don't think it does.

1 Everson also said that we have to be careful in not
2 establishing a church not to deprive religious people or
3 organizations of general government benefits. And so I
4 think that's the key here. I think there's a difference
5 between funding of religious activities and funding
6 secular activities of religious organization. And I --

7 JUSTICE SOTOMAYOR: So how is the building
8 separate from the religious exercise therein? I believe
9 that this playground is part of the ministry of this
10 church. And, in fact, I look at its bylaws, I look at
11 its advertisements, and it includes play and conducted
12 in a religiously valuable way. I think that's the
13 materials that you're -- that the church is advertising.

14 How do you separate out its secular function
15 from its religious function?

16 MR. CORTMAN: I think the way the Court
17 always has. And the answer to that is, for example,
18 even though the motivation behind operating this
19 preschool is a religious motivation, doesn't mean that
20 every single activity that occurs there happens to be
21 religious.

22 JUSTICE SOTOMAYOR: Well, how about if the
23 school does a prayer before the children start playing?

24 MR. CORTMAN: I don't think --

25 JUSTICE SOTOMAYOR: Or how about if it

1 chooses on a sunny day to do its religious instruction
2 outside. How does the State know or how can it control
3 without then controlling on the -- on the basis of
4 belief and viewpoint? How could they control against
5 that involvement?

6 MR. CORTMAN: Sure. It's the same way it
7 has in all the case law. And that is, is we have to
8 look at where's the money going to? What's it going to
9 fund?

10 And in this particular instance, for
11 example, if you look at the -- this Court's case law
12 going back from Everson and all the way forward, it
13 always said is the money going to a religious activity
14 or is it going to a secular activity?

15 This Court has approved funding to --

16 JUSTICE KAGAN: But --

17 MR. CORTMAN: -- religious schools, just not
18 for religious activities.

19 JUSTICE KAGAN: So do you think,
20 Mr. Cortman, suppose there was an application and a --
21 from a -- a church that used its playground for
22 religious activities. Had prayer services there, for
23 example. Could the State, in your view, deny the money
24 on that ground, or at least would you think that that
25 was a significantly different case?

1 MR. CORTMAN: I -- I think it would be a
2 different case. I would say the answer to the question
3 would be I don't think they should, and here's why: I
4 think there would be a --

5 JUSTICE KAGAN: That they -- I'm sorry.
6 They don't think they should --

7 MR. CORTMAN: They should be able to deny it
8 on that ground. And the reason I say that is, is all
9 we're talking about is a -- is a surface, a safer
10 surface on the playground for when -- when kids play.
11 As was mentioned in one of the amicus briefs, I believe
12 it was the World Vision brief, the surfacing being
13 softer doesn't enable religious activities, it doesn't
14 allow it, it doesn't prohibit it. It's really
15 completely separate and apart from it.

16 And I think a good example would be
17 something like this --

18 JUSTICE KAGAN: How would you -- for
19 example, one of the things that the Court has -- has
20 thought about in the past is like computers for
21 education. So I guess somebody could make the same
22 argument about computers. Well, it doesn't really --
23 it's separate from the religious instruction that might
24 be carried out over those computers.

25 Do you think that that's the same, or is it

1 different?

2 MR. CORTMAN: I -- I think it's actually
3 easier than computers because you don't have to get into
4 diversion and all the -- the concept this Court has
5 talked about over the -- over the years in the Mitchell
6 case and the other types of cases.

7 And here the reason is, is that what we're
8 talking about is just a surface. It's not even the
9 entire playground. It's just the surface that doesn't
10 enable any religious activity.

11 So, for example, if there was a program from
12 a State that said we have a lot of old buildings in
13 town, and we're going to -- we're going to reimburse for
14 fire extinguishers for all of the old buildings,
15 including the religious schools and all the schools.
16 And they said, but if -- if you have a religious school
17 and you use this fire extinguisher reimbursement, could
18 they then be able to say now that you received that --
19 that public benefit, that safety benefit, you can no
20 longer include any religion in those classrooms or in
21 the schools?

22 CHIEF JUSTICE ROBERTS: But don't you --

23 MR. CORTMAN: And all my point --

24 CHIEF JUSTICE ROBERTS: I'm sorry. Finish
25 your sentence.

1 MR. CORTMAN: All my point is I think that
2 would be going too far because it's not advancing or
3 furthering the religious activity. It's separate and
4 apart from it.

5 CHIEF JUSTICE ROBERTS: I'm not sure I
6 understand your answer to the playground being used for
7 a more religious activity. Let's suppose that the
8 public school sometimes uses its playground for things
9 other than children playing, whatever they're going to
10 have, a -- you know, an auction or anything else.

11 Isn't it the consequence of your argument
12 that the church can use the playground for more
13 religious activities if the public school can use the
14 playground for other non-playground activities?

15 MR. CORTMAN: I think it can. And -- and I
16 think that the key here is, is that --

17 CHIEF JUSTICE ROBERTS: I'm sorry. You
18 think it can what?

19 MR. CORTMAN: I think they should be able
20 to -- I think both the public schools should be able to
21 use it for other activities, and I think that the
22 religious schools should be able to also.

23 And -- and as I mentioned, I think the
24 reason for that is it would be a penalty on the benefit
25 to say because we're putting up a safer surface for when

1 the kids play and fall, and that's the main activity
2 here, if for some reason someone prays one day there or
3 they decide to go outside for -- for one event, that
4 doesn't -- it's not the government there who's advancing
5 religion. It's an incidental advancement that's --
6 that's done by the private party.

7 JUSTICE KAGAN: Would you say --

8 JUSTICE KENNEDY: Are all of these questions
9 really ones that verge onto the Establishment Clause;
10 fire extinguishers, bible lessons on a sunny day, and so
11 forth? Because we could go on and on. Suppose you have
12 an earthquake safety program for schools or -- or for --
13 for public -- or for buildings with large numbers of
14 people. And you have an earthquake -- in California,
15 40 percent of the cost of structure is earthquake-proof.
16 Suppose they have earthquake reinforcement for a -- a
17 church and have to spend extra money because there --
18 there's a window in the shape of a cross.

19 That's all -- these are all establishment
20 problems?

21 MR. CORTMAN: They -- they are. And
22 interestingly in this case, the State concedes, and as
23 did the lower court, there is no Federal Establishment
24 Clause.

25 JUSTICE KENNEDY: But -- see, but that's

1 what makes the case a -- just a little bit -- in --
2 in -- in my last hypothetical about earthquake safety,
3 any problem there with giving the money to a church and
4 spending extra money for the cross in the window? It's
5 all -- it's for public safety.

6 MR. CORTMAN: I think it would be an issue
7 on the -- on the Establishment Clause, the question of
8 the Establishment Clause. But once you get to the fact
9 that there is no Establishment Clause problem, which is
10 what we have here, the question then is can you single
11 out religious people or religious organizations for a
12 penalty from this benefit? Or, as this Court said in
13 McDaniel and Sherbert, is that you're forcing them to
14 choose between exercising their religious faith and
15 receiving the -- a public benefit.

16 JUSTICE KAGAN: Well, I'm sorry --

17 JUSTICE KENNEDY: Going back to my first
18 question, that means what your position is, if there is
19 no Establishment violation, there can never be a
20 distinction based on religion.

21 MR. CORTMAN: I wouldn't say never. We --
22 we --

23 JUSTICE KENNEDY: Give me an example.

24 MR. CORTMAN: Well, play in -- what comes to
25 mind is Locke v. Davey and play in the joints. And the

1 reason that's an important one there is because that was
2 a narrow distinction that was based on, what this Court
3 said, a unique historical interest. And the Court also
4 said that the program there went a long way to include
5 religion. Here, it closes religion right out at the
6 door.

7 JUSTICE SOTOMAYOR: I'm sorry --

8 JUSTICE GINSBURG: We -- we did --

9 JUSTICE SOTOMAYOR: -- but it does --

10 JUSTICE GINSBURG: We did say in this
11 case -- well, I think you stipulated that this school
12 has a nondiscriminatory admissions policy. But suppose
13 it didn't. Suppose its policy was we prefer Lutheran
14 children, and then if we have any space left over after
15 that, we'll take other Christians. And then after that,
16 maybe Jews, and then everyone else. Everything else is
17 the same. They want the paving of their playground.

18 Could -- could this -- could they demand as
19 a matter of Federal constitutional right that that
20 playground be funded, even though they have an -- an
21 admissions policy that favors members of their church?

22 MR. CORTMAN: I -- I think they can, because
23 they have a -- they have a free exercise right to
24 religious autonomy to decide who their members are. In
25 fact, most private organizations and religious

1 organizations do so. I --

2 JUSTICE GINSBURG: So this church could say,
3 we will take only Lutheran children.

4 MR. CORTMAN: I believe it can.

5 JUSTICE GINSBURG: And -- and still get the
6 public money.

7 MR. CORTMAN: I believe so, because we're
8 still at the premise of -- of why are we making the
9 church choose between exercising its religion, the same
10 facts in *McDaniel v. Paty*, and saying he can't both be a
11 minister and also be a constitutional delegate.

12 JUSTICE ALITO: Mr. Cortman, do we know what
13 Missouri -- how Missouri interprets the term "church" in
14 its constitution? It speaks about church. Does it have
15 to be -- is this a matter of the form of the ownership
16 of a facility? Is this playground considered to be --
17 by the State to be part of the church because of its
18 proximity to the church? What if it was a -- what if we
19 had a -- a religiously affiliated school that was not
20 adjacent to a church and it had a playground. Would
21 they consider that to be part of -- would they consider
22 that to fall within the prohibition?

23 MR. CORTMAN: I think it would depending on
24 how religious it is. And so what Missouri Supreme Court
25 case law has -- says, number one, any -- any

1 organization that's owned or controlled by a church. So
2 that answers the church part.

3 JUSTICE ALITO: So if it's controlled.

4 MR. CORTMAN: That's right.

5 And also, any religious organizations that
6 are sectarian or denominational. And so it's not only
7 the church, it's other religious organizations.

8 And Missouri Supreme Court case law says the
9 way we decide those questions is -- is -- is how much
10 religious influence is there in a church? In other
11 words, are they serious about their faith? Do they --
12 is it voluntary for the students there? And so there's
13 a question about how religious you may be in order to
14 receive the benefit or not. But it's clear it applies
15 to -- to religious organizations, and that's what their
16 briefing has conceded, and to churches.

17 JUSTICE KAGAN: Mr. Cortman, my questions
18 about religious uses, I think, was to get at a -- a
19 broader point, a broader distinction, and asked -- ask
20 what you think of it. And as it seems that you are on
21 strongest ground when you say, look, the State has
22 decided to fund some activity, and it's denying that --
23 that funding to a particular party based solely on that
24 party's religious status.

25 MR. CORTMAN: Yes.

1 JUSTICE KAGAN: And that's the way you
2 briefed the case.

3 I hear you making a different argument, or a
4 broader argument now, that extends into a State's
5 decision to deny some uses -- to deny funding to some
6 uses at the same time as it gives funding to other uses,
7 and a State's decision to say, look, we really just
8 don't want to fund religious exercise. They can do
9 religious exercise. We don't want to fund religious
10 exercise. And I understand that you might think that's
11 out of bounds, too. But what I'm trying to figure out
12 is, is there a distinction between these two things.

13 MR. CORTMAN: I don't think it's a broader
14 argument that we're making. What I'm -- what I'm trying
15 to communicate is, is that when you look at what you're
16 funding -- so this program says that you can't use this
17 money for any religious activities and it has to go
18 toward the playground resurfacing. So it's actually a
19 reimbursement grant whereas the church already lays out
20 the finances. Once it proves that it's put down the
21 surfacing, then it puts its information in and gets
22 reimbursed for it. So the money has to be used for
23 that.

24 My only point is, is can the State then say,
25 for example, in Everson and Allen, now that we've given

1 you this bus transportation or these books, you can't
2 engage in any religious activity once we've given you
3 that separate benefit. Not that you can't use the money
4 for religious activity, which you cannot, and we
5 don't -- we don't disagree with that. The question
6 is --

7 JUSTICE KAGAN: Okay. So you don't disagree
8 with that.

9 MR. CORTMAN: That's right.

10 JUSTICE KAGAN: But the State is entitled to
11 say you can't use this money for religious activity, and
12 maybe I'll bring you a little bit further, we're
13 entitled to take certain prophylactic measures to make
14 sure that you don't use the money for religious
15 activity.

16 MR. CORTMAN: Yes. But -- I absolutely
17 agree. But once you take that benefit, I think it goes
18 too far to say, like in *Allen*, for example, we're
19 providing you with these textbooks, so you have to stop
20 all religion in your school. And that's all my point
21 of -- that I was trying to --

22 JUSTICE KAGAN: Well, then how about the --

23 CHIEF JUSTICE ROBERTS: What does the record
24 show about non-daycare or playground activities on this
25 surface?

1 MR. CORTMAN: There's -- there's nothing in
2 the record that occurs except for children playing on
3 the playground.

4 JUSTICE SOTOMAYOR: Excuse me, but you were
5 talking about Locke --

6 MR. CORTMAN: Yeah.

7 JUSTICE SOTOMAYOR: -- and how this is
8 dissimilar from Locke.

9 MR. CORTMAN: Yes.

10 JUSTICE SOTOMAYOR: Well, there is a
11 tradition. There are 39 States with constitutional
12 amendments like the one Missouri has. That's a history
13 that's even longer than the Locke history. And the
14 essence of that history is, basically, we don't want to,
15 as a country -- well, the vast majority of States, to
16 fund houses of worship. One would think that if there's
17 play in the joints, that that would include the concept
18 that States are free to say we don't want to spend money
19 from the public FIs on houses of worship.

20 Now, you say this affects free exercise. We
21 seem to be confusing money with religious practice. I
22 don't think the two are tied. This church is not going
23 to close its religious practices or its doors because
24 its playground doesn't have these tires. So I'm not
25 sure how this is a free-exercise question, because there

1 is no effect on the religious beliefs. No one is asking
2 the church to change its beliefs. In fact, no one is
3 asking the church as a condition of saying don't use
4 what we give you for religious purposes; they're not
5 even doing that. They're just saying we don't want to
6 be involved with the church.

7 MR. CORTMAN: Sure. But there's -- there's
8 government coercion when you say there's a public
9 benefit, and the only way you could receive that public
10 benefit is if you do not exercise your religion.

11 JUSTICE SOTOMAYOR: But why is that coercion
12 with respect to your beliefs?

13 MR. CORTMAN: Because it's -- it's a choice,
14 just like with *McDaniel v. Paty*. He could not do both
15 things simultaneously. He could not -- Mr. *McDaniel*
16 could not both be a minister and be a constitutional
17 delegate, and what the court said forcing that choice --

18 JUSTICE SOTOMAYOR: But you can have a
19 playground here.

20 MR. CORTMAN: But you can't be -- you can't
21 be a religious organization and have a playground.

22 JUSTICE SOTOMAYOR: You have a playground.
23 No one is taking the playground away from you.

24 MR. CORTMAN: No. But you're -- you're
25 being penalized by not receiving the public benefit --

1 JUSTICE SOTOMAYOR: No. The priest was
2 being penalized. The priest was being told you can't be
3 a priest or a congressman. So you can't do one or the
4 other.

5 MR. CORTMAN: Right.

6 JUSTICE SOTOMAYOR: Here, there's nothing
7 being taken away from.

8 MR. CORTMAN: Sure. It's the same public
9 benefit. You can't be both, run this -- operate this
10 daycare as a religious organization and receive the
11 public benefit.

12 JUSTICE SOTOMAYOR: What do we do with
13 discrimination for religion under your theory? Because
14 the way you're going in your theory is an expansion of
15 McDaniel; but putting aside that it's an expansion of
16 McDaniel, what are we going to end up with when secular
17 people say religious people are being discriminated in
18 favor of and against us? If status should not be an
19 effect on free exercise, what are we going to do with
20 tax benefits?

21 MR. CORTMAN: I think --

22 JUSTICE SOTOMAYOR: What are we going to do
23 with all the exemptions that churches receive?

24 MR. CORTMAN: Sure.

25 JUSTICE SOTOMAYOR: Those are benefits.

1 MR. CORTMAN: Sure. And I would say that
2 the -- the clauses take care of that. So, for example,
3 if it goes too far and the government benefit is solely
4 favoring religion, it's likely a violation of the
5 Establishment Clause. But we also have a --

6 JUSTICE SOTOMAYOR: Well, there's plenty of
7 people who would think tax exemption goes too far.

8 MR. CORTMAN: Right.

9 JUSTICE SOTOMAYOR: But I don't. I'm just
10 saying there are people who make that claim.

11 MR. CORTMAN: Sure. And the Court's already
12 ruled on that. And so on one side you have the
13 Establishment Clause. If you're going too far to favor
14 religion, there's an Establishment Clause problem; but
15 if you go the other side on the Free Exercise Clause,
16 this Court has said for decades, sometimes we may and
17 even must accommodate religion, and I think is the
18 favorable treatment that Your Honor is talking about.
19 But I think all the clauses work together in that route.
20 If you take it too far, you do have an Establishment
21 Clause problem.

22 In this -- this case, it's considered there
23 is no Establishment Clause problem, and -- and there is
24 a point where you can accommodate religion, this other
25 benefit, under the Free Exercise Clause, but I think

1 they all balance out each other. And in this particular
2 case, it's not only McDaniel v. Paty, but McCauley
3 specifically said that if you target religion on its --
4 on its face, which this policy does, then it's -- it's
5 unconstitutional.

6 JUSTICE ALITO: And Mr. Cortman, I don't
7 know whether we -- excuse me. I don't know whether we
8 need to get into the history of this particular
9 amendment here. I tend to think we don't need to, but
10 at the beginning of the line of questioning that Justice
11 Sotomayor just finished, she began with the suggestion
12 that perhaps this amendment reflects an admirable
13 historical tradition that should be respected.

14 Do you think that that is the proper way to
15 analyze this question?

16 MR. CORTMAN: I don't. And -- and this --
17 this particular provision that we're discussing, they
18 are -- and this has been briefed by several amicus
19 briefs and -- and briefly by us, is a product of what we
20 would consider to be one of the Blaine Amendments that
21 was not found in Locke v. Davey. And the reason for
22 that is, is it has that same language in the Blaine
23 Amendment. It was adopted the same exact year, and
24 there is much history showing about the anti-Catholic
25 bigotry that's behind this specific provision, and

1 several members of this Court have opined on that
2 before. So I think it doesn't carry the same history
3 as -- as this general Establishment Clause, not --

4 JUSTICE SOTOMAYOR: There is a serious
5 debate about that, isn't there?

6 MR. CORTMAN: There is. And that's why our
7 argument is, is we believe it is one, but it -- it
8 doesn't matter to the deciding of this case.

9 JUSTICE BREYER: Has the -- has the -- the
10 State courts, have they ever said the amendment prevents
11 the State from giving grants or from spending money on
12 police protection for churches?

13 MR. CORTMAN: They -- they have not, and --

14 JUSTICE BREYER: Have they ever said that it
15 prevents the State from, say, having a -- a border
16 guard, you know, crossing guards or fire protection?
17 Or, let's say, health inspections?

18 MR. CORTMAN: They have not.

19 JUSTICE BREYER: Okay.

20 MR. CORTMAN: But what --

21 JUSTICE BREYER: In that case, why, just --
22 just like you and the other side to spend a minute on
23 this, just a minute, why isn't the case moot? That is,
24 we have a governor. He said he's going to give you the
25 grants. He said that we know for four years this is

1 going to recur anyway. There's certainly -- of course,
2 it could happen, somebody brings the case in the Supreme
3 Court and they decide it differently in -- in -- in the
4 State.

5 But what case would you cite as closest to
6 the proposition? This is not moot -- you didn't ask for
7 money, did you?

8 MR. CORTMAN: No.

9 JUSTICE BREYER: You just want an injunction
10 for the future.

11 MR. CORTMAN: Because of the 11th Amendment.

12 JUSTICE BREYER: And you're going to get
13 that injunction, whether you want it or not, with the
14 present governor.

15 MR. CORTMAN: Possibly, and likely,
16 temporarily.

17 JUSTICE BREYER: And that's -- well,
18 temporarily. Is there any chance he would change his
19 mind?

20 MR. CORTMAN: Yes.

21 JUSTICE BREYER: What?

22 MR. CORTMAN: Well -- well, for -- if the
23 political winds change, we have -- we have this policy
24 by Facebook or press release. So it can easily be
25 changed back if political --

1 JUSTICE BREYER: No. I see that.

2 What case would you cite?

3 MR. CORTMAN: I -- I -- excuse me. I think
4 the best two cases are Friends of the Earth and the Knox
5 case.

6 JUSTICE BREYER: Okay.

7 MR. CORTMAN: In fact, I think those cases
8 are more difficult cases than --

9 JUSTICE BREYER: Okay. Okay. Fine.

10 MR. CORTMAN: -- this case, because of the
11 voluntary cessation proposition. But I think that's --

12 JUSTICE GINSBURG: There's two -- there's
13 two questions, isn't there? One is we're talking about
14 is the case moot, and I think, technically, it's not
15 moot. But if we think -- suppose Missouri had a policy
16 that it has today, very recently, and we were asked to
17 grant cert in this case. That would be a factor in our
18 decision whether we thought this was an appropriate case
19 to review, wouldn't it?

20 MR. CORTMAN: This case would have to be
21 here, I guess, in a different posture, maybe coming from
22 the other side, if that was already the policy. I think
23 one of the problems is, is that the original policy was
24 based on the Missouri Supreme Court's interpretation.

25 So what's interesting here is there's

1 already talk that the new policy is immediately going to
2 be go challenged, and likely struck down by the Missouri
3 Supreme Court. So absent a ruling here, the -- the old
4 policy will be back in place. And that's why it's
5 important for the Court to rule because it's not -- this
6 isn't a permanent change by any means. It's a temporary
7 change. In fact, the government is -- is actually
8 defending both the old policy and the new policy, which
9 I think shows why this Court needs to issue a ruling.

10 And -- but I think what's likely to happen
11 under the Voluntary Cessation Doctrine, especially as
12 this Court has said, we look at this with a -- a
13 critical eye because of the 11th hour change, is the
14 State free to return to its old ways? It clearly is,
15 not only in this administration, but in the new lawsuit
16 being brought to challenge the new policy, because it
17 violates why we're here in the first place, is the
18 Missouri State constitutional provision.

19 JUSTICE KAGAN: May I take you back to the
20 substance, Mr. Cortman, unless anybody -- it's -- let's
21 talk a little bit about federalism, and here's what I
22 would like to know. You know, usually when we see these
23 funding cases, it comes in a different context. It
24 comes where the State wants to give money and somebody
25 is objecting. And this case comes in the converse way,

1 where a State says we just don't want to fund --

2 MR. CORTMAN: Right.

3 JUSTICE KAGAN: -- this institution. And
4 these -- these church/States divide, it's a -- it's a
5 fraught issue. It's a hard issue. It's a -- it's an
6 issue in which States have their own very longstanding
7 law. It's an issue on which I -- I guess I'm going to
8 say nobody is completely sure that they have it right.
9 And -- and so I guess there's something attractive about
10 having some play in the joints where States can go their
11 own way and make their own choices. And why shouldn't
12 this be one of those cases?

13 MR. CORTMAN: Because I don't think this is
14 one of the difficult cases. In fact, I would say, with
15 all the Court's jurisprudence under Free Exercise and
16 Establishment Clause, this is actually one of the easier
17 cases. And the reason for that is if you look at the
18 play in joints, the first conclusion was there was no
19 Free Exercise violation there. Here, there clearly is.
20 If you look at the Court's case law under Sherbert and
21 McDaniel and McCauley and Smith, this is clearly
22 singling out a religious organization with no
23 justification to do so. So just having a Free Exercise
24 violation takes it out of the play in the joints where
25 there wasn't one there.

1 I think the other thing is, if you're
2 looking at the --

3 JUSTICE KAGAN: Well, that's, of course,
4 true, that if there's a -- a constitutional right at
5 stake, that trumps. But the question is, how are we
6 going to interpret the constitutional right? What are
7 we -- so -- so I guess what I'm asking is, do you see
8 value in the other side in having some flexibility here
9 for States to make these sorts of choices?

10 MR. CORTMAN: I think States have tremendous
11 leeway in the way they set up and decide these types of
12 programs. And here's what I would say, which I think is
13 an easy solution. Number one, the State doesn't have to
14 set up the program in the first place. Number two, it
15 could set it up in a way that said, we're only going to
16 do government schools' playgrounds and not any private
17 schools.

18 But once it sets up the program to include
19 all not-for-profits and all not-for-profit preschools,
20 it sets out 16 different criteria, neutral criteria,
21 that everyone has to comply with. Then the question is,
22 is -- when you have a -- a religious organization that
23 meets those criteria; in fact, does better on them than
24 almost everybody else, and then you look at the
25 application and say, well, we just found out you're

1 operated by a religious organization, we're going to
2 take you back out of that, even though you meet the
3 State's criteria and further our interest better than
4 almost everybody else, that seems to be not a
5 difficult --

6 JUSTICE KAGAN: But one last -- I know your
7 white light is on. But might the State think that
8 here's the problem. The problem is this church has come
9 in with a very competitive application. We want to give
10 money to this church. Let's say, you know, a Protestant
11 church. There's a Catholic church across the street.
12 Catholic church applies, doesn't get money, this happens
13 five years running. And people start thinking, well,
14 why is the Protestant church keeping on getting the
15 money and the Catholic church never gets the money? And
16 the State says, we just won't -- don't want to sow that
17 kind of division, that kind of mistrust, that kind of --
18 well, that --

19 MR. CORTMAN: Sure. It sounds like a -- a
20 reasonable observer question, but put that aside for a
21 second. If you know the history and context of the
22 program, you would know that this is a competitive
23 grant, and they actually should be religion blind.

24 So if you're not looking at who is applying,
25 you can grade this just like this application was graded

1 highly, based on secular and neutral criteria. So
2 anyone knows that the program is purely religion blind,
3 not looking at who's applying, they'll know that it's
4 not favoring any religious organization or secular.

5 But what you do when you favor -- when you
6 remove the religious organizations, even though you've
7 scored them high under your own competition, you're
8 actually singling out for -- for a benefit they should
9 otherwise get under Free Exercise.

10 If I might save the rest of my time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Layton.

13 ORAL ARGUMENT OF JAMES R. LAYTON

14 ON BEHALF OF THE RESPONDENT

15 MR. LAYTON: Mr. Chief Justice, and may it
16 please the Court:

17 Justice Alito asked the question as to
18 whether this is an admirable tradition that should be
19 respected, this 39-State tradition of have -- keeping
20 hands off of religion, and the answer from the States'
21 view is yes.

22 In 1820, Missouri's first constitutional
23 convention adopted from Jefferson's Virginia Statute for
24 Religious Freedom the language that, "No man can be
25 compelled to erect, support, or attend any place of

1 worship."

2 We modified that, made it more specific in
3 the 1865 and 1875 constitutions. And in 1945, it was
4 reenacted in our latest constitution with reference back
5 to the founding era.

6 The -- the question, then, is whether that
7 fits within this Court's jurisprudence under the First
8 Amendment. And there we look at both the Establishment
9 Clause and the Free Exercise Clause, and the play
10 between the joints that this Court confirmed or
11 recognized in *Locke v. Davey*.

12 CHIEF JUSTICE ROBERTS: Well, you don't want
13 us -- you say we don't have to look at the Establishment
14 Clause. In your brief, you said there's no
15 Establishment Clause problem here.

16 MR. LAYTON: No. I -- we say that there is
17 not an Establishment Clause violation. Some of the
18 amici on our site -- side say that there is, but no,
19 that in the State's view, there is not an Establishment
20 Clause violation. And so Governor Greitens' decision to
21 proceed differently does not violate the Establishment
22 Clause.

23 The question is whether that's the limit.
24 There are Establishment Clause concerns here, even if
25 there's not a violation. And those concerns arise both

1 with regard to endorsement and with regard to
2 entanglement.

3 JUSTICE KENNEDY: And is it your argument
4 that this statute is valid to keep us away from close
5 Establishment Clause questions?

6 MR. LAYTON: Yes. Yes. We don't want to be
7 in a position, for example, in this case, where we are
8 selecting among churches. We don't want to be in a
9 position where we are making a visible, physical
10 improvement on church property.

11 JUSTICE KENNEDY: But -- but this -- this is
12 quite different than Locke, because this is a
13 status-based statute.

14 MR. LAYTON: Well, in -- in that respect, it
15 is different. In other respects it's different as well.
16 For example, in that case, we have independent
17 decisionmaking, which has been key to many of this
18 Court's decisions. In this Court, the decisionmaking is
19 not by some third party, it is by the State.

20 JUSTICE ALITO: Well, Mr. Layton, you said
21 you don't want to -- you don't want to have a program
22 that makes physical improvements to -- to churches. And
23 I just wanted to ask you about some Federal laws that
24 are highlighted in the amicus brief filed by the Union
25 of Orthodox Jewish Congregations, and get your reaction

1 whether a program like that would be permissible under
2 the Missouri constitution.

3 So one of them is a Federal nonprofit
4 security grant program providing grants through the
5 Department of Homeland Security to harden -- harden
6 nonprofit organization facilities that are deemed to be
7 at high risk for terrorist attacks. So if you have a --
8 a synagogue that is at high risk for an attack by an
9 anti-Semitic group or a mosque that is considered to be
10 at high risk for attack by an anti-Muslim group, would
11 the Missouri constitution permit the erection of
12 bollards like we have around the court here?

13 MR. LAYTON: The answer traditionally -- and
14 I'm not sure that I can speak for the current
15 governor -- of course, I was brought back to argue this
16 case and instructed I could defend the prior position,
17 but the answer traditionally would be no. State money
18 could not be used to actually erect or -- or operate or
19 provide that kind of physical addition to a -- to a
20 church or synagogue.

21 JUSTICE ALITO: Okay. Here's another one.
22 I have two more, if you'll indulge me.

23 This is a Federal program that provided
24 grants for the repair of buildings near the Federal
25 building in Oklahoma City that were damaged by the

1 bombing there. Would that be permitted?

2 MR. LAYTON: Under the traditional view of
3 -- in the State of Missouri, it would not be permitted,
4 provided that those were actually church buildings.
5 Worship buildings.

6 JUSTICE ALITO: Okay. Last one. This is a
7 New York City program that provides security -- money
8 for security enhancements at schools where there's fear
9 of shooting or other school violence.

10 MR. LAYTON: Again, under the traditional
11 view in Missouri, if -- if this was actually a cash
12 grant, money leaving the public treasury to go to a
13 church, it would not be permissible.

14 Now, that doesn't mean that a
15 religious-affiliated school could not qualify. The
16 St. Louis University case by the Missouri Supreme Court
17 shows that the Missouri courts have been willing to draw
18 the definition of churches and religious institutions
19 pretty narrowly.

20 JUSTICE ALITO: So what is the definition of
21 a church? So a religiously-affiliated school is not a
22 church under the -- under the Missouri constitution?

23 MR. LAYTON: The decision with regard to
24 St. Louis University was that even though it is a Jesuit
25 institution that is founded by Jesuits, had a Jesuit

1 president and Jesuits on its board, since it had a
2 self-perpetuating board, even though it declared a -- a
3 Jesuit philosophy, it was determined to be eligible to
4 receive -- in that instance not direct payment from the
5 State, but eligible to receive State funds.

6 JUSTICE ALITO: But why --

7 JUSTICE KAGAN: Mr. Layton --

8 JUSTICE ALITO: Why would that be so?

9 MR. LAYTON: I suspect because the Missouri
10 courts are trying to provide as much assistance as they
11 can within the realm that they feel that the Missouri
12 constitution permits.

13 JUSTICE ALITO: Oh. So suppose you -- we
14 have the -- a school that's run by the Trinity Lutheran
15 Church of Columbia. And then next to it we have a -- a
16 Jesuit elementary and secondary school. One would be
17 eligible, one would not be eligible?

18 MR. LAYTON: It would depend on the nature
19 of the two. In fact, if the Trinity Lutheran went back
20 to the position it was in in 1985 where the preschool
21 was an independent, although somewhat affiliated, entity
22 using the church's facilities, presumably under some
23 kind of a lease arrangement, the State likely would have
24 said yes, because that would be consistent --

25 JUSTICE ALITO: But even though they're

1 equally controlled by a religious organizations?

2 MR. LAYTON: No. I don't think -- I -- it
3 would be a fine line in terms of the control. But no,
4 if the organization itself, the church itself rather
5 than the self-perpetuating board, such as with St. Louis
6 University, controlled the -- the preschool, that --
7 that is what has made the difference in Missouri in the
8 past, although understand, we have very few cases in
9 Missouri that have addressed these questions.

10 JUSTICE KAGAN: Mr. Layton, could we go back
11 to where Justice Alito started --

12 MR. LAYTON: Yes.

13 JUSTICE KAGAN: -- and -- and you said no
14 money to churches. Why can the State provide police
15 protection or fire protection?

16 MR. LAYTON: Well, the -- the -- the State
17 does, and I think for a couple of reasons. One is that
18 we are not actually taking money from the State treasury
19 and giving it to the church. And this Court has seldom,
20 if ever, actually said it's okay to write a check from
21 the public treasury to a church. So this -- we're
22 providing a service. And the service there is not being
23 provided solely for the benefit of the church. The
24 service is being provided for police and fire for the
25 benefit of the public safety --

1 JUSTICE BREYER: Yeah, but the whole --
2 that's easy to change. I mean, we imagine a State,
3 State X. And State X says, we're not going to provide
4 police protection. We will for everybody, but not a
5 church. And by the way, that costs us extra money. We
6 have to hire extra policemen -- revoke.

7 Okay? That's all. Why not?

8 MR. LAYTON: That --

9 JUSTICE BREYER: We don't want -- we
10 don't -- we don't want to because they're a church.
11 That's why not.

12 Same with fire protection. Same with
13 vaccination programs. Same with public health. Same
14 with helping children who get sick at school. Okay?
15 You know, the hypotheticals are obvious. Nothing to do
16 with Missouri. But as soon as you answer that, I'll be
17 able to know that ask you a question and how does this
18 differ. Okay?

19 MR. LAYTON: Well, this -- this differs --

20 JUSTICE BREYER: No, I'm not asking that
21 yet.

22 (Laughter.)

23 MR. LAYTON: So what -- what are you asking
24 first?

25 JUSTICE BREYER: I'm asking --

1 (Laughter.)

2 JUSTICE BREYER: I'm asking, does the
3 Constitution of the United States permit a State or a
4 city to say, we give everybody in this city police
5 protection, but not churches? We give everybody fire
6 protection, but let the church burn down. We give
7 everybody public health protection, but not a church.
8 That's -- that's the law in my imaginary State.

9 And I'm saying, does the Constitution, which
10 guarantees free exercise of religion, permit such laws?

11 MR. LAYTON: I -- I am not going to take the
12 position that it permits those laws --

13 JUSTICE BREYER: All right. Now you say no,
14 it does not permit those laws. Very well.

15 If it does not permit a law that pays money
16 out of the treasury for the health of the children in
17 the church, school, or even going to church, how does it
18 permit Missouri to deny money to the same place for
19 helping children not fall in the playground, cut their
20 knees, get tetanus, break a leg, et cetera? What's the
21 difference?

22 MR. LAYTON: The difference is that the
23 establishment concerns that motivate Missouri's policy
24 do not apply in the police and fire context, but they
25 apply here.

1 JUSTICE BREYER: Why in health context? So
2 if there's --

3 MR. LAYTON: No.

4 JUSTICE BREYER: -- an epidemic?

5 MR. LAYTON: No, I don't know that they
6 apply in health context. Because the kind of examples
7 Your Honor is giving are examples where the -- the
8 benefits are universal. They are not selective, which
9 they are here; they are universal.

10 So we start on the endorsement side. In
11 those instances, the State is not endorsing a particular
12 church by choosing to provide that church with those
13 benefits and not another church, which is --

14 JUSTICE KAGAN: Mr. Layton, I understand
15 that --

16 CHIEF JUSTICE ROBERTS: The Establishment
17 Clause -- the -- the entire basis for your rule is that
18 you're afraid of violating the Establishment Clause,
19 even though you're sure there's no violation of the
20 Establishment Clause?

21 MR. LAYTON: No. I -- it -- it is that we
22 do not want to come to the edge of violating the
23 Establishment Clause. I mean, we are not taking the
24 position that we would by doing this, but the
25 question --

1 CHIEF JUSTICE ROBERTS: No, you take the
2 position that it is not, that this is not a violation --

3 MR. LAYTON: It is not a violation.

4 CHIEF JUSTICE ROBERTS: -- Establishment
5 Clause violation.

6 MR. LAYTON: The question is, do we have to
7 come all the way to the edge of a violation, which is
8 what I think Petitioners are arguing.

9 JUSTICE BREYER: Yeah, I --

10 MR. LAYTON: But it -- that it -- that as
11 long as we aren't violating, there is no room between.

12 JUSTICE KAGAN: So, Mr. Layton, let's say
13 I -- I accept that the State might have an interest in
14 saying we just don't want to be seen as giving money to
15 one church and not another in these selective programs.

16 MR. LAYTON: And that's the endorsement
17 side. There's also entanglement.

18 JUSTICE KENNEDY: Yes. I --

19 JUSTICE KAGAN: I -- I think that that's
20 legitimate.

21 But here's the thing. There's a
22 constitutional principle. It's as strong as any
23 constitutional principle that there is, that when we
24 have a program of funding -- and here we're funding
25 playground surfaces -- that everybody is entitled to

1 that funding, to -- to that particular funding, whether
2 or not they exercise a constitutional right; in other
3 words, here, whether or not they are a religious
4 institution doing religious things. As long as you're
5 using the money for playground services, you're not
6 disentitled from that program because you're a religious
7 institution doing religious things.

8 And I would have thought that that's a
9 pretty strong principle in our constitutional law. And
10 how is that the State says that that's not violated
11 here?

12 MR. LAYTON: Well, let me react to the way
13 that you set that out. If we're only going to look at
14 the rubber, then what Your Honor asks does make sense.
15 But the rubber doesn't have any meaning until it's
16 placed there and is available for use. And under this
17 theory, we not only have to put rubber on playgrounds,
18 but don't we have to put new paint on the sanctuary if
19 the old one had lead paint? Don't we have to put --
20 pay -- reimburse for pews to be upholstered? I mean,
21 what -- what is the --

22 CHIEF JUSTICE ROBERTS: Not -- maybe not --

23 JUSTICE KAGAN: I think --

24 CHIEF JUSTICE ROBERTS: -- not under -- not
25 under Locke, right? Locke drew a distinction between

1 assistance for devotional, theological education and
2 scholarship and others.

3 MR. LAYTON: It did.

4 CHIEF JUSTICE ROBERTS: So perhaps -- I
5 mean, maybe you'd have a good argument. Or on the other
6 hand, maybe if you painted the interior of all sorts of
7 other buildings but singled out religious, I don't know.
8 But it seems to me that that's -- raises much more
9 serious problems than this case.

10 MR. LAYTON: I don't think that Locke
11 raise -- I think that this case raises more serious
12 problems than Locke in a number of respects. It is a
13 direct payment to a church. It's not an indirect
14 payment chosen by someone else. It is not available to
15 everyone. It's only available to those who are selected
16 that --

17 JUSTICE KAGAN: But here's the deal. You're
18 right that this is a selective program. It's not a
19 general program in which everybody gets money. But
20 still the question is whether some people can be
21 disentitled from applying to that program and from
22 receiving that money if they are qualified based on
23 other completely nonreligious attributes, and they're
24 disqualified solely because they are a religious
25 institution doing religious things. Even though they're

1 not -- they could -- they could promise you, we're not
2 going to do religious things on this playground surface,
3 and you're still saying, well, no, you -- you can't get
4 the money.

5 MR. LAYTON: Well, they -- they could, but
6 that still doesn't get us out of the entanglement issues
7 here. We have a church that, in order to participate,
8 has to agree to curriculum requirements in their
9 preschool. The idea that the government is going to
10 dictate what is taught at a church, even if they're
11 willing to accept it, which they are here, is anathema
12 to the Establishment Clause considerations that have
13 highlighted many of these questions --

14 JUSTICE BREYER: You suggested two lines.
15 I'm back to my question --

16 MR. LAYTON: Yes.

17 JUSTICE BREYER: -- which is really quite
18 similar to what Justice Kagan is asking. You -- once
19 you accepted the first part of what I asked, you agree
20 there has to be a line.

21 MR. LAYTON: Yes.

22 JUSTICE BREYER: Now, one line you've
23 suggested is the question that you're selecting rather
24 than giving to any -- everyone.

25 MR. LAYTON: Universal versus select.

1 JUSTICE BREYER: But would you say the same
2 case, were you to give the money to all schools instead
3 of just some by selection, then would be
4 unconstitutional barring churches? I don't think you
5 would. But wait. Say the other line.

6 The other line, which I want you to
7 contrast, is that where there is a grant given to all
8 schools, private and public, and the purpose -- and that
9 grant has nothing to do with religious practice, but it
10 does -- has to do with health or safety. Then you have
11 to do it. What about that?

12 MR. LAYTON: Well, that's --

13 JUSTICE BREYER: That's -- that's -- because
14 you win -- you lose -- or you win on the first; you lose
15 on the second.

16 MR. LAYTON: That -- that is --

17 JUSTICE BREYER: Now, they are two competing
18 lines that I'm at least seeing. Maybe there's some
19 others.

20 MR. LAYTON: If the sole benefit to the
21 church and its members was health and safety and we
22 could draw that line, that may make some sense. But, of
23 course, that's not true here. It's -- it's more than
24 that here. What we are being asked to give to this
25 church is actually a visible improvement in their

1 physical plant. And understand that this is a church
2 that declares in their petition that they use this
3 preschool to bring the gospel message to nonmembers.
4 This is --

5 CHIEF JUSTICE ROBERTS: So it's -- it's
6 not -- now your line is the benefit, if the benefit is
7 physical, that's okay; but if it's not, it's not?

8 MR. LAYTON: No. I'm saying --

9 CHIEF JUSTICE ROBERTS: Well, what is your
10 issue? Your -- your answer said the -- the issue here
11 is that it's the physical area near the church.

12 MR. LAYTON: No. I'm saying that -- that
13 even physical changes, even if they have a safety
14 element, may still have an entanglement problem.
15 Because we are saying to the church, you -- you have
16 this now incentive to rearrange your property, your
17 church site, in order to maximize the amount you get
18 from the State rather than maximizing the spiritual
19 development of the children.

20 CHIEF JUSTICE ROBERTS: What if you had a
21 program at the -- the State capital? You had tours for
22 school groups, and you had someone who, you know,
23 coordinated, tied it into the social studies program;
24 school groups can come in, but no religious schools.

25 Is that okay?

1 MR. LAYTON: I don't know that it would be.
2 We don't know who -- we -- we -- frankly, we have tours
3 like that, and we --

4 CHIEF JUSTICE ROBERTS: You have to have a
5 position. And -- and it seems to me that if you can't
6 answer the question whether or not you could prohibit
7 tours for religious schools while allowing tours for
8 other schools, I don't understand the basis of your
9 program -- your position.

10 MR. LAYTON: The -- the tours, at least in
11 our experience, are also universal. Everyone who comes
12 to the capital gets a tour. And so --

13 CHIEF JUSTICE ROBERTS: Well --

14 MR. LAYTON: -- we would be -- in terms of
15 universal versus selective, we would be in that same
16 range. But also with regard to entanglement, the tours
17 do not require the State to be entangled in any way with
18 the church and its ministry. And the playground
19 improvement here does require that, not just as to
20 curriculum, but as to the manner in which this is done,
21 and the way in which it is portrayed to the community.
22 That's the kind of entanglement that --

23 CHIEF JUSTICE ROBERTS: What -- what do you
24 mean, "the way it is portrayed to the community"?

25 MR. LAYTON: Well, among other things, in --

1 in this particular program, the church gets points for
2 telling people in the community that the State paid for
3 this improvement to their church. And so the -- in
4 essence, it -- it exacerbates the endorsement problem by
5 telling them what they have to say publicly about this
6 particular improvement.

7 JUSTICE KENNEDY: I mean, you could say the
8 same thing, that -- that the church is delighted that it
9 has fire protection.

10 MR. LAYTON: Well, I -- I suppose if we
11 said --

12 (Laughter.)

13 MR. LAYTON: -- we're only going to provide
14 fire protection to churches that will declare publicly
15 that they appreciate the States providing that, maybe;
16 but, again, that's not selective. And so that -- that
17 statement by the church has no meaning. It -- it can't
18 be perceived as an endorsement. But when I drive past
19 this church and this church has this beautiful new
20 playground surface that the State paid for, I am
21 receiving a message with regard to the State in this
22 particular regard.

23 JUSTICE ALITO: And -- and so long as the
24 money is granted based on neutral criteria that are
25 faithfully applied, I don't know how you can draw a

1 distinction between a program that's open to everybody
2 and a selective program.

3 I mean, suppose Missouri offered 50 full
4 college scholarships every year to students who achieved
5 certain academic criteria -- who satisfied certain
6 academic criteria, and this was open to public school
7 students and private school students. But, you know,
8 after a few years, the school saw -- the State saw that
9 a disproportionate number of these were going -- among
10 those given to the religiously affiliate, to the private
11 schools, a disproportionate were -- a number of the
12 scholarships were going to students at schools that are
13 affiliated with a particular faith.

14 Would it be, then, justified to say, well,
15 we better not -- we better disqualify every student who
16 went to a religiously affiliated school so there aren't
17 any hard feelings?

18 MR. LAYTON: Well, I think that may be an
19 Equal Protection problem, because I don't know what
20 the -- the basis for that would be.

21 JUSTICE ALITO: So what's the difference
22 between that situation and this situation --

23 MR. LAYTON: Well, here, it's --

24 JUSTICE ALITO: -- as far as the difference
25 between selective and nonselective?

1 MR. LAYTON: If we're going to deal with the
2 Equal Protection approach to this, then the question
3 becomes whether our endorsement and entanglement
4 concerns are a rational basis.

5 JUSTICE ALITO: No. I'm not talking about
6 equal protection. You -- you said there's -- that it
7 matters that this is selective as opposed to not
8 selective.

9 MR. LAYTON: Yes.

10 JUSTICE ALITO: And what is the basis for
11 drawing that distinction? I thought that -- I thought
12 your asserted basis was it prevents the perception of
13 favoritism.

14 MR. LAYTON: Yes, it -- it does. Because
15 this is a very selective program, very few institutions
16 get it. And unlike the scholarship example or, frankly,
17 the example in *Locke v. Davey*, it is a publicly visible
18 manifest demonstration of State endorsement.

19 JUSTICE KAGAN: But I don't understand --
20 I -- I think I understand how the States' interests
21 might differ some, but essentially this is a program
22 open to everyone. Happens to be a competitive program,
23 but everyone is open to compete on various neutral
24 terms, and you're depriving one set of actors from being
25 able to compete in the same way everybody else can

1 compete because of their religious identification.

2 MR. LAYTON: And that is what we are doing,
3 because we are concerned about the endorsement and
4 entanglement issues that arise in connection with this
5 type of a program.

6 JUSTICE KAGAN: Yes. And those are
7 interests. I don't mean to say that those are not valid
8 interests. But it does seem as though this is a clear
9 burden -- looked at that way, this is a clear burden on
10 a constitutional right. And then your interests have to
11 rise to an extremely high level.

12 MR. LAYTON: Well, I don't know that I --
13 I --

14 JUSTICE KAGAN: It's a burden on
15 constitutional right, in other words, because people of
16 a certain religious status are being prevented from
17 competing in the same way everybody else is for a
18 neutral benefit.

19 MR. LAYTON: Well, this -- this is -- it's
20 not like McDaniel where someone is being barred from
21 participating in -- in the life of the -- the community.
22 This is a -- kind of the opposite of that. It is not
23 like the -- what we have in Locke, in the sense that --
24 that here we have -- we -- we really have a -- a direct
25 payment to a church.

1 I'm not sure -- I'm not sure I'm answering
2 your question, Your Honor.

3 JUSTICE SOTOMAYOR: Mr. Cortman -- I'm
4 sorry.

5 Mr. Layton, I'm -- I'm -- I know the Court
6 is very grateful that you took up the request of the
7 Missouri Attorney General to defend the old position,
8 but I -- I am worried about the, if not the mootness,
9 the adversity in this case. If the Attorney General is
10 in favor of the position that your adversary is taking,
11 isn't his appointment of you creating adversity that
12 doesn't exist?

13 MR. LAYTON: Well, I don't know the answer
14 to that -- that, but let me -- let me give some of the
15 factual background here.

16 The Attorney General himself is recused
17 because he actually appears on one of the briefs on the
18 other side. The first assistant in this instance is the
19 Acting Attorney General, and the Acting Attorney
20 General, at a time before governor -- the governor gave
21 his new instruction, asked me to defend the position,
22 because at that point, it was still the position of the
23 State, and was not being disavowed.

24 JUSTICE SOTOMAYOR: Well, but that's the
25 question. It doesn't appear to be the position of the

1 State right now. Reading through the lines of the
2 Acting Attorney General to us, it doesn't appear that he
3 believes that you're taking the right position.

4 MR. LAYTON: So -- so let me talk about what
5 has happened and what -- what happens next.

6 After the governor did -- made his
7 announcement, the director, who is my client here, in
8 fact, put up on her website the 2017 application and
9 2017 instructions, in which she largely tracked the 2016
10 and prior ones, including 2012 that the Court has, but
11 eliminated all reference to churches, religious
12 instruction; all of those were eliminated.

13 That's all I know about what she intends to
14 do, because I don't represent her with regard to that
15 decision.

16 JUSTICE SOTOMAYOR: I'm asking a simple
17 question. If she -- if the State and she as the
18 representative of the State are not willing to fight
19 this case, are they manufacturing adversity by
20 appointing you?

21 MR. LAYTON: So -- well --

22 JUSTICE SOTOMAYOR: If we have no adversity,
23 hasn't this case become mooted?

24 MR. LAYTON: So let me -- let me tell you
25 what happens next if the director actually grants --

1 issues a grant to a church.

2 If she does, then under Missouri's liberal
3 taxpayer standing rules, someone can then sue and say
4 you are violating the State constitution. And if there
5 is a determination that -- that she was filing in the
6 State constitution, then the question before the -- the
7 Court today would have to be answered.

8 JUSTICE SOTOMAYOR: All right.

9 CHIEF JUSTICE ROBERTS: You -- do you agree
10 that this -- this Court's voluntary cessation policies
11 apply to the mootness question?

12 MR. LAYTON: I agree that they can apply to
13 this. It's not a perfect fit compared to some of the
14 precedents, but -- but certainly there is no assurance
15 that four years from now, with a change of
16 administration, or at some point in the interim through
17 a taxpayer standing suit, that there wouldn't be a -- a
18 change back to the prior practice.

19 JUSTICE GORSUCH: Mr. Layton, I'm struggling
20 still to understand Justice Kagan's question, the answer
21 to it.

22 How is it that discrimination on the basis
23 of religious exercise is better in selective government
24 programs than general programs, first?

25 And second, how do we tell the difference

1 between the two, if that's the line we're going to draw?

2 The tours, isn't it selective based on who
3 can show up at the Capitol and afford to do that?

4 Public benefit programs, aren't they often selective if
5 you meet criteria? Copyright laws? You have to have an
6 original work, things like that. What do we do about
7 those problems?

8 MR. LAYTON: Well, I -- I still maintain my
9 position that when we have a -- a -- a case where it is
10 a selective program that is publicly announced, publicly
11 visible, that that is different from these other kind of
12 programs.

13 JUSTICE GORSUCH: But how do we draw the
14 line between selective and general? One -- one could
15 seem to play with that line forever.

16 MR. LAYTON: Well, one could, just like the
17 rest of the lines in this case. We don't get a -- a
18 fine line --

19 JUSTICE GORSUCH: Well, discrimination on
20 the basis of status of religion, there's no -- no
21 line-drawing problem there. We know that's happened in
22 this case, right?

23 MR. LAYTON: We do know that the decision
24 here was made because it was a church. And assuming
25 that's what "status" means, then I -- I suppose we -- we

1 know that. I mean, that's true.

2 JUSTICE BREYER: If you -- if you make that
3 the line, selective versus universal, if you like, you
4 can reproduce the same problems. Volunteer fire
5 departments, most places that the State give grants to
6 upgrade -- upgrade. We don't have enough money, so we
7 have a selection.

8 Same with police. You have crossing guards.
9 You know, you have dangerous intersections. There are
10 crossing guards. We have grants to help the schools pay
11 for the children.

12 Do the same thing with health of children.
13 You know, I can do that. That's what I see as a
14 difficulty, we choose your line there, and we
15 proliferate litigation forever.

16 MR. LAYTON: I -- let me make --

17 JUSTICE BREYER: In areas that are critical,
18 like police, fire, health.

19 MR. LAYTON: Police, fire, and health, when
20 they are universal. But you gave the crossing guard
21 example --

22 JUSTICE BREYER: Yeah, I --

23 MR. LAYTON: -- and in Missouri, that's
24 not -- that's not universal.

25 JUSTICE BREYER: Of course. That's my

1 problem. I can reproduce programs in the State that
2 seem absolutely necessary for police protection, fire
3 protection, health of children. And it seems like an
4 irrelevant factor, whether they're just open to
5 everybody to apply and you automatically get it, or
6 whether you have criteria and are selected because you
7 have a limited amount of money. And you want to make
8 that line the --

9 MR. LAYTON: Well --

10 JUSTICE BREYER: -- constitutional line on
11 Free Exercise? I'm afraid of that one. Now, I put that
12 out, so you can reply.

13 MR. LAYTON: Well, the -- and -- and the
14 answer would be that the line is some combination. And
15 I -- I can't give you a bright line, because you're
16 rejecting the bright line that we have. Some kind of
17 combination of the endorsement problems with
18 selectivity, and the entanglement problems that come
19 when we're dealing with grant programs that actually
20 affect the physical plant of a church and how that plant
21 is used in a preschool or otherwise.

22 There is no way for the State to comply with
23 the -- its determination, maybe the requirement, that we
24 police the use of the funds and what the funds here put
25 on there without becoming involved with the church.

1 There's a statement in the -- the
2 Appellant's brief that says that the church is told that
3 it can't participate in the life of the community, but
4 what Trinity wants is to have the community participate
5 in the life of the church. And that is anathema to the
6 kind of basic doctrines that we get out of the founding
7 era that provided for a division --

8 JUSTICE GORSUCH: Imagine, why would it be
9 on the basis of a physical plant, as opposed to, say,
10 personnel or nonphysical grant money?

11 MR. LAYTON: Why -- why wouldn't what be?

12 JUSTICE GORSUCH: Now the line is moving.
13 Now it's apparently on the basis of whether we're
14 granting the money to physical plant or to some other
15 purpose. What is that --

16 MR. LAYTON: Well, no, I -- I'm saying that
17 the physical plant is our case, because the physical
18 plant is a -- a -- an improvement to the church property
19 that the church will use and may use for actually
20 proselytizing and not just use it for religious
21 activities.

22 And wherever the line is, that ought to be
23 on the other side of the line, just like wherever the
24 line is, writing a check that says payable to Trinity
25 Lutheran Church ought to be on the other side of the

1 line.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,

4 Mr. Layton.

5 Mr. Cortman, you have three minutes

6 remaining.

7 REBUTTAL ARGUMENT OF DAVID A. CORTMAN

8 ON BEHALF OF THE PETITIONER

9 MR. CORTMAN: Thank you, Mr. Chief Justice.

10 Just three points in rebuttal.

11 First of all, as to the endorsement problem,
12 I think the neutral government criteria here take care
13 of the endorsement problem. So when you have this
14 competitive grant that you have to fill out this -- this
15 pretty complicated application, 16 neutral criteria,
16 there is no endorsement of religion. I think the free
17 speech cases give a good analogue to that.

18 Number 2, as far as the selective or
19 universal government benefit program, I don't think that
20 is really the test here. And the reason, as Your Honors
21 mention, if this was open to all schools, and it was
22 universal, they still would be prohibited from giving a
23 grant to a religious organization. So whether it's a
24 narrow class of all non-for-profits, or a broader class
25 of all schools, they would still not be able to fund

1 based on their constitution.

2 And lastly, as we talk about entanglement,
3 this is not an entanglement issue. Entanglement
4 generally is an ongoing, intrusive surveillance. It's
5 not a one-time grant where you have to show a receipt
6 for the expense to receive the reimbursement.

7 If there are no other questions, I yield my
8 time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:09 a.m., the case in the
12 above-entitled matter was submitted.)

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