

## CE #2: Supreme Court, with Gorsuch, set to hear church-state case

AP

MARK SHERMAN and MARIA DANILOVA

Associated Press April 16, 2017



*In this photo taken Jan. 26, 2016, the empty playground at Trinity Lutheran Church in Columbia, Mo. Justice Neil Gorsuch's first week hearing Supreme Court arguments features a case that's giving school choice advocates hope for an easier use of public money for private, religious schools in dozens of states. The long-delayed argument Wednesday, April 19, 2017, deals with whether Missouri should pay for a soft surface at the church playground. (Annaliese Nurnberg/Missourian via AP)*

WASHINGTON (AP) — Justice Neil Gorsuch's first week on the Supreme Court bench features an important case about the separation of church and state that has its roots on a Midwestern church playground. The outcome could make it easier to use state money to pay for private, religious schooling in many states.

The justices on Wednesday will hear a Missouri church's challenge to its exclusion from a state program that provides money to use ground-up tires to cushion playgrounds. Missouri is among roughly three dozen states with constitutions that explicitly prohibit using public money to aid a religious institution, an even higher wall separating government and religion than the U.S. Constitution erects.

Trinity Lutheran Church of Columbia, Missouri, says its exclusion is discrimination that violates its religious freedoms under the U.S. Constitution.

If the justices agree, "the decision could have implications far beyond scrap tires and playgrounds," said Michael Bindas of the Institute for Justice, which is backing the church. "It has the potential to remove one of the last legal clouds hanging over school choice."

That prospect worries groups of public school teachers and others who oppose vouchers and other forms of public aid for private schooling.

Adding to the intrigue is the long delay between when the Supreme Court agreed to hear Trinity Lutheran's appeal, a month before Justice Antonin Scalia died in February 2016, and the argument. The span of more than 15 months suggests the justices were concerned they might divide 4-4. Indeed, the case wasn't scheduled for argument until after President Donald Trump nominated Gorsuch for the seat.

The timing of the argument "heightened our concern that the court has held this case for so long," said Alice O'Brien, general counsel of the National Education Association, which opposes state aid to private schools.

Missouri's new governor, Republican Eric Greitens, injected some uncertainty into the high court case on Thursday, when he directed state agencies to allow religious groups and schools to receive taxpayer money for playgrounds and other purposes. The court on Friday asked both the church and the state to tell it whether the governor's announcement affects the case.

A lawyer for the church said in an interview with The Associated Press that the case would be unaffected because Greitens' policy change does not resolve the legal issue. But a top aide to state Attorney General Josh Hawley told the AP that state lawyers were evaluating whether the new policy would affect the case.

Should the court decide to go forward, Gorsuch's votes and opinions in religious liberty cases as a judge on the federal appeals court in Denver would seem to make him more inclined to side with the church,

and potentially provide the decisive, tie-breaking vote if the rest of the court is divided between liberals and conservatives, Bindas said.

The case arose from an application the church submitted in 2012 to take part in Missouri's scrap tire grant program, which reimburses the cost of installing a rubberized playground surface made from recycled tires. The money comes from a fee paid by anyone who buys a new tire. The church's application to resurface the playground for its preschool and daycare ranked fifth out of 44 applicants.

But the state's Department of Natural Resources rejected the application, pointing to the part of the state constitution that says "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

A recycled scrap tire is not religious, the church said in its Supreme Court brief. "It is wholly secular," the church said.

Leslie Hiner, vice president of programs at Ed Choice, a school voucher advocacy group said, "It is difficult to understand that a little school could not participate in a safety measure determined by the state because somehow safety of children is conflated with religious purpose."

But the question of where the dividing line should be between church and state is complicated, said the NEA's O'Brien.

The Supreme Court has upheld some school voucher programs and state courts have ratified others. But "in many instances challenges to voucher programs have succeeded based on state court views that their constitutions draw a different line than does the federal constitution," O'Brien said.

Thirty states and the District of Columbia have some form of school choice, including vouchers, tax credits and education savings accounts, according to Ed Choice.

The justices could themselves draw a line that decides the case in Missouri without saying anything more broadly about school choice.

But that issue already is looming at the court in appeals from a Colorado Supreme Court ruling that blocked the nation's first county-initiated voucher program in Douglas County, Colorado.

The Missouri church and some of the groups backing it have invoked what they describe as anti-Catholic bias that motivated the adoption of the Missouri provision and similar measures in other states in the late 1800s. They are similar to the proposed 1875 Blaine Amendment to the U.S. Constitution that would have prohibited the allocation of public school funds to religious institutions.

"Both the Colorado and Missouri Blaine Amendments share discriminatory, anti-Catholic origins that make their contemporary use to compel religious discrimination particularly unacceptable," lawyer Paul Clement wrote on behalf of the Colorado county.

But 10 legal and religious historians said in a separate court filing that there is no evidence that "anti-Catholic or anti-religious animus" played a role in the adoption of the Missouri constitutional provision. And they said anti-Catholicism was a minor factor behind the Blaine Amendment. The broader debate was about the future of American education, they said.