Playground case touches on separation of church and state

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WASHINGTON, D.C. — The U.S. Supreme Court signaled last Wednesday that it will decide an important case on the separation of church and state in favor of a Missouri church. The church wants state grant money to put a soft surface on its preschool playground.

The First Amendment of the Constitution does not use the words "separation of church and state," but it says the government can't interfere with religion. The government is not allowed to officially recognize any religion or keep people from practicing their beliefs.

The Missouri case is being closely watched by supporters of school vouchers, who hope a broad ruling would remove obstacles to voucher programs in some states. Vouchers would allow government money to be used to pay for students to attend private schools rather than public schools.

Justices Troubled By Church's Exclusion

Liberal and conservative court justices alike seemed troubled by Missouri's decision to exclude the church from a grant program. Liberal justices tend to favor more separation between church and state while conservative justices have sided with religious groups in the past. The grant program would pay for playground surfaces made from recycled tires.

The court did not appear ready to drop the case, even after Governor Eric Greitens, a Republican, announced two weeks ago that he was changing the policy that said churches couldn't participate in the program.

The justices posed a stream of hypothetical questions to both sides. Their questions were aimed at finding the right line between the improper mixing of government and religion on the one hand and discrimination against religious institutions on the other.

"This church-state divide, it's a fraught issue. It's a hard issue," Justice Elena Kagan said.

Church Filed Lawsuit After Losing Grant

The case grows out of a lawsuit filed by Trinity Lutheran Church of Columbia, Missouri, after it lost out on a grant for its playground in 2012. It had been ranked fifth out of 44 applicants.

The state said its decision not to give the church any money was based on a provision of the Missouri Constitution that prohibits using public money to aid a religious institution. Roughly three dozen states have similarly worded provisions.

"All we're talking about is a safer surface on the playground for when kids play," David Cortman, the church's lawyer, told the court.

James Layton, representing Missouri's director of natural resources, faced considerably tougher questions from the justices.

Justices Have Differing Views

In response to a question from Justice Stephen Breyer, Layton said the state could not deprive the church of police, fire and public health protection without violating the U.S. Constitution.

That response led Breyer to ask how the state could keep money from going to the same place "for helping children not fall in the playground, get tetanus, break a leg, whatever."

Layton suggested one difference is that the playground program involves a direct payment to the church.

"Writing a check that says payable to Trinity Lutheran Church ought to be on the other side of the line," Layton said.

Justices Ruth Bader Ginsburg and Sonia Sotomayor sounded most doubtful of the church's position.

"This church is not going to close its religious practices or its doors because its playground doesn't have these tires. So I'm not sure how this is a free-exercise question, because there is no effect on the religious beliefs. No one is asking the church to change its beliefs," Sotomayor said.

Gorsuch Seems In Favor Of The Church

Cortman replied that the church is, in effect, being forced into a choice. "You can't ... operate this day care as a religious organization and receive the public benefit," he said.

Justice Neil Gorsuch, hearing the highest-profile case in his first days on the court, was quiet until almost the end of the hourlong argument. When he spoke, he indicated he was likely to rule for the church.

Gorsuch laid out a broad view of religious liberty during his 10 years as a federal appeals court judge. On Wednesday, he suggested it might be easier for the court to draw a bright line in favor of religion.

"Well, discrimination on the basis of status of religion, there's no line-drawing problem there. We know that's happened in this case, right?" Gorsuch said.

A decision in the case, which has the official name of Trinity Lutheran v. Comer, is expected by late June.