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SPEAKERS

Anthony Sanders, Michael Bindas

A **Anthony Sanders** 00:06

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on June 23, 2022. Now, usually around the Institute for Justice, June 23 is the day we commemorate the anniversary of the Kelo decision from 2005, which I'm sure most of our listeners are familiar with, which said the government could take your home and give it to a another private party just for economic development. Well, it still is Kelo day on June 23. But this year on Short Circuit, we're having a special edition and we're having much happier news, which is a different result at the Supreme Court just two days ago in our case, Carson v. Makin. And joining us here today to celebrate the victory in that case and to talk about its implications is my very good friend, Michael Bindas, senior attorney at IJ out of our Washington office, who's lead attorney in the case and argued it before the Supreme Court. Michael, thank you for coming.

M **Michael Bindas** 01:20

Thanks for having me, Anthony.

A **Anthony Sanders** 01:21

Well, we'll get to Michael in a moment. And we're very excited to have him on one of these rare occasions where we deviate from the federal courts of appeals and talk about a different area of law, namely the Supreme Court and school choice. We also though want to remind you, and this is the last time we'll do this on this podcast, that just a week from the day we're recording, is our event at UCLA in the Los Angeles area. So if you live in the Los Angeles area and you'd like to come see some folks from IJ and see our new project that we're going to present that day and also to hear a live recording of Short Circuit, then you can RSVP in the shownotes for our event on Constitutional GPA, a new report Is Your Government Preventing Accountability? This is a survey of various states and their federal jurisdictions on qualified immunity and what law is clearly established to be able to defeat qualified immunity, a topic of course that we've

talked about on the podcast many times. There are a host of folks who will be there. It starts at 10 in the morning, on Thursday, June 30. It will go to about two o'clock. There is lunch provided. And before lunch, we're presenting our study and then after lunch, we're recording a Short Circuit. And as you'll see on the website, a number of people who will be there and specially excited to announce Eugene Volokh, professor of law at UCLA, of course the grandmaster of the Volokh Conspiracy and a name familiar to many of our listeners, will be there, along with Julia Yoo, who's president of the National Police Accountability Project, Nicholas Yoka, who is an attorney from the area, also a client of ours at the Institute for Justice, RenÃ© QuiÃ±onez, and several IJ lawyers including Anya Bidwell, Patrick Jaicomo, Marie Miller, and Jaba Tsitsuashvili, all of whom you probably familiar with from Short Circuit, and all of whom will be delighted to see you. So please RSVP if you're interested if you're in the LA area. So today, we're going somewhere very far from UCLA. And that's the state of Maine. So Michael, why are you representing parents in Maine? And how did they get to the Supreme Court?

M Michael Bindas 04:04

We are representing parents in Maine to further our one of our long-term objectives, which is empowering parents to make the decisions concerning their kids education. One of IJ's core practice areas is defending school choice programs across the country in maximizing the ability of parents to make the decisions concerning their kids schooling. So we have been defending school choice programs throughout the country since literally our opening back in 1991. And when school choice was in its infancy, the kind of big unresolved question was whether school choice was permissible under the federal constitution, specifically, to the extent that it includes religious options. The teachers unions and school choice opponents would argue that if you have a voucher program and it allows parents to select religious options, that that somehow constitutes a state establishment of religion in violation of the First Amendment. And in 2002, we put that argument to rest in a case called Zelman v. Simmons-Harris. Speaking of anniversaries, that decision will celebrate its 20th anniversary on Monday of next week. So that took off that, you know, one of the two major constitutional questions off the table. After Zelman it was clear that school choice programs are perfectly permissible under the federal Constitution, so long as they're neutral toward religion, meaning religious and non-religious schools could participate, and so long as it is a program that operates on private choice, meaning its parents, rather than government, deciding where their kids go to school.

A Anthony Sanders 05:46

And by school choice, just to clarify, we mean a parent choosing to send their child to a school, whether it's public or private. So it's not school choice as in, you could go to a different public school in a different district or to a charter school. It would include that but also the chance to empower parents to go to a private school of their choice, whether they're religious or non-religious, or whatever.

M Michael Bindas 06:13

Yeah, yeah, yeah, you're right. So I should have clarified some terms here. So you know, generally speaking there are public choice programs, programs that provide options within the public school system itself, whether it's open enrollment within or across school districts,

magnet schools, charter schools, you know, public schools different than the traditional brick and mortar neighborhood school. But then there are private school choice programs. And that's really what IJ's involvement in this space is, defending programs that empower parents to select private schools or other private educational providers for their children, if they are unsatisfied with their local public school or the other public options that they have. So in defending these programs, our focus is not so much on those public programs that provide charters, magnets, open enrollment and such, but rather defending programs that provide scholarships or other financial assistance that enable parents to choose private options for their children, if that's what they wish. So, you know, that Zelman decision from 2000 to clarify one of the big questions concerning the constitutionality of these programs, and again, the court said, look, so long as the program's neutral toward religion, so long as it operates on private choice, it's perfectly permissible to have these programs and for the government to include religious alongside non-religious options. But as you can imagine, the opponents of school choice, which are typically the teachers unions and some of their allies, didn't just pack up and go home after that. And they kind of retrained their focus to state law, specifically to state constitutions, state statutes that prohibit public funding of either religious schools or religious institutions more broadly. They said, look, doesn't matter if these programs are permissible under the federal constitution, they still violate the state constitutions or state statutes that prohibit public funding of religious schools or religious institutions. And that has been where the real fight in this area is has been over the last couple of decades since Zelman was decided. And IJ has been working for those two decades to put that argument to rest as well. And we've litigated a number of cases in that respect. One of them was another case that eventually made its way to the Supreme Court back in 2020, a case called Espinoza versus Montana Department of Revenue. And another is this case out of Maine Carson v. Makin, so the Carson case we filed in 2018.

M Michael Bindas 08:59

And it concerned a school choice program in Maine for children who live in towns that don't operate a public high school. So if you live in such a town at the town, because of the town's rural nature or the population density just doesn't justify operating a public school, the town has two options under state law. It can contract with another town's public school or a private school to educate the kids from the town. Or if it doesn't do that it has to provide tuition funds to a family to use on the school of their choice. And that school can be public, it can be private, it can be in-state it can be out-of-state, but the one thing that could not be until two days ago was religious. The state for the last 42 years has imposed a sectarian exclusion on this program. And so you can go to some of the most elite boarding schools throughout New England under this program, you know, Avon Old Farms, Miss Porter's, schools of that nature. But you can't go to a Jewish day school in your hometown or your local Catholic parish's school, or an Islamic school. So we challenged that law back in 2018. And while that case was pending, we were simultaneously litigating another case through the Montana state courts, challenging a similar exclusion in a school choice program in that state. So these cases are kind of going on parallel tracks. And we, in the challenge to the main religious exclusion, we lose in the district court, we go up on appeal to the First Circuit. While we are at the First Circuit, the Montana case goes up to the Supreme Court, and the Supreme Court holds that Montana's exclusion of religious options from its school choice program violates the Free Exercise Clause of the federal Constitution. So it's a great outcome, uou think, in light of that decision? Surely, we're going to win this main challenge to a similar religious exclusion, right?

A Anthony Sanders 11:20

It's all done but the paperwork.

M Michael Bindas 11:22

You're right, exactly, exactly. Well, it was clear to everyone except the First Circuit, which four months after the Supreme Court's decision in Espinoza, the Montana case, upholds Maine's religious exclusion. And so, you know, listeners might be thinking, what gives? How did they come to that conclusion just months after the Supreme Court upholds a similar exclusion? The First Circuit basically says this, look that exclusion in the Montana case, that applied because schools were religious, the state was excluding schools because of their religious status or their religious identity simply by virtue of the fact that they were religious. And the First Circuit says that's not what Maine's doing. They're not excluding schools because they are religious. They're excluding schools because of the religious use to which a student's scholarship or tuition funds might be put at the school. In the First Circuit's mind, this is a constitutionally meaningful distinction. You know, the First Circuit fully recognizes that a state cannot exclude schools because they are religious. But the First Circuit says it's perfectly fine for a state to exclude schools if they do religious stuff, like teach religion.

A Anthony Sanders 12:43

So if they're a school like my college, that's nominally Methodist. But you never hear about Methodism the whole time you're there. It's not enforced in class. It's you can go engage with it if you want, but you totally don't have to. Is that what they're thinking? Maybe it's some of these schools that they are okay to participate in the program because they don't include their status in their actual teaching.

M Michael Bindas 13:14

Presumably, yeah, you know, one of the interesting things is, apart from the statutory exclusion that says a school must be non-sectarian, there were no real criteria or guidelines for determining when a school is sufficiently irreligious and therefore a permissible choice or too religious and therefore an impermissible choice. So, but yes, I think what Maine would say, at least what Maine would say after Espinosa because prior to Espinoza, when the Supreme Court hadn't you know officially resolved this question of whether you can exclude a school because of its religious status, Maine just said if it's religious it's out, you know. It didn't kind of engage in the state versus use thing; it just said if the school is religious it's out.

A Anthony Sanders 13:57

And that qualifies in the First Circuit's eyes?

M Michael Bindas 14:01

No, no. Well, in Maine, of course, after Espinoza kind of changes its tune after Trinity Lutheran

No, no. Well, in Maine, of course, after Espinosa kind of changes its tune after, Trinity Lutheran actually, a case we don't need to get into that that, you know, held status discrimination unconstitutional in a slightly different context. Maine kind of changes its tune and says, Look, we're not we're not excluding schools because they are religious. We're excluding them because they do religious stuff. And the First Circuit accepted that argument and distinguished Espinoza on that basis.

A Anthony Sanders 14:28

So I'm sorry to drill down on this point. But I think there's just something that I don't know much about. Listeners may be curious about. Are there examples in the record? I remember this came up at oral argument too, which we'll get to in a little bit. But are there examples in the record of, you know, schools like my college that really were like that and participated? Or was it just totally spurious?

M Michael Bindas 14:53

There was evidence of a school called Cardigan Mountain, a school in I believe, New Hampshire, that has a chaplain, that has compulsory chapel attendance, that teaches in its words universal spiritual and moral values or truths. I can't recall if it's values or truths, but they applied to participate to the program several years back. And understandably, in light of this exclusion, it raised the eyebrows of some folks in the Maine Department of Education, that led to a four-month back and forth inquiry between the state and the administration and Cardigan Mountain School, where the state was asking, you know, what goes on in these chapel services and, you know, what are these universal spiritual, moral things, you know, and at the end of that four-month back and forth, the state approved the school, presumably because it determined that these spiritual and moral values that the school was teaching were sufficiently universal, and therefore not sectarian. But who knows if that's what you know, the reasoning was, because again, there was no criteria. There were no criteria to kind of guide this inquiry in the first place. But yes, there in that situation, a school that at least purported to teach spiritual truths was permitted to participate. But again, good luck to the Jewish day school or the Islamic school or the Catholic school. And it's, I mean, in some ways, it's even worse, because then the state really is getting its fingers into what the school is teaching about religion. And this is treating something that Chief Justice Roberts notes, you know, in his majority opinion that we'll get to here in a bit that it does raise that danger, so but in any event, so the First Circuit upholds Maine's exclusion four months after Espinoza invalidates the exclusion in Montana's school choice program. We petition for cert in 2021. And last summer, on the last day of the term, I think we got a cert grant. And we argued, we briefed the case, obviously, during the summer and fall of last year and argued it December 8th of 2021. And we received a decision in the case two days ago on on the 21st of June.

M Michael Bindas 14:58

So you get an order from the court saying your case has been accepted. I'm sure that was quite an interesting moment. Although you're on the West Coast. So maybe waking up a little bit when you get that order. But that's very exciting.

M Michael Bindas 17:18

I was in the Mountain Time Zone that day sitting on my inlaws' front porch, because I didn't want to, you know, it wasn't terribly early, but it was still too early where my mother-in-law was sleeping, I think, so I didn't want to disturb anyone. So I was holed up on the front porch waiting and celebrated by myself on the front porch.

A Anthony Sanders 17:55

Well, hopefully you didn't have too loud of a yeehaw to wake up your mother-in-law.

M Michael Bindas 18:01

That's what we say in New Jersey, where I'm from, yeehaw.

A Anthony Sanders 18:08

So you go forward from that. And then, this is something that you and I know, but I know a lot of people who have never practiced at the Supreme Court would be curious, what do you have to go through after that? What's the timing? And how do you eventually make it to the day where you go to the Court itself?

M Michael Bindas 18:27

Sure. So , you know, there's a full round of briefing before the Court even accepts the case. You have to file a petition. The other side if it wants to can file a response. If it opts not to do this, the Court can request a response. And then you have the opportunity to file a reply brief. So you go through this full course of briefing just on the front end before you even know whether the Court is going to take the case. If the Court does decide to grant cert and except the case, you go through another full round of briefing where the petitioner, the party asking the Court to accept the case, which was or which were our clients in this situation, files an opening brief. The other side, which in this case was the state or the folks from the State Department of Education, they file a response brief. You get to file a reply to that response brief. And then you also have the opportunity, both sides have the opportunity, to solicit amicus briefs, friend of the court briefs, in support of their position. And I think the final number that we got on the merits in support of our position was 33 briefs. And it was a really, really interesting assortment of organizations and arguments that were, you know, brought to bear in support of our position. You know that so many great briefs but one that was really, really interesting was submitted by folks at the Notre Dame Religious Liberty Initiative on behalf of Muslim, Jewish, and Catholic school organizations. You had kind of all the all three of the Abrahamic faiths on one brief, which I think was a first in our school choice cases. You know, we've had certainly amicus briefs from, you know, schools from those faiths in the past. But to have all three on one brief was really, really impressive.

A Anthony Sanders 20:26

Anthony Sanders 20:20

Am I right, that was authored by Professor Nicole Garnett, who was an IJ attorney in our very first case in Maine, 25 years ago.

M Michael Bindas 20:38

Yep. So Nicole worked on the first of our three challenges to this Maine exclusion, which is a whole other story. But yeah, we first challenged back in the 1990s. Nicole was a young attorney at IJ. Then she worked on that case alongside our beloved former colleague Dick Komer. And she authored this brief along with her husband Rick Garnett, also a professor at Notre Dame, and Mike McGinley, an attorney at, I believe, Dechert, and it was an outstanding brief, but it was one of many outstanding briefs. You know, another really, really interesting one was by Ashley Berner at Johns Hopkins, talking about, you know, the value of pluralism in our society and the importance of a pluralistic education system to promote, you know, the values that we hold dear as a nation, just so many really, really interesting briefs. And Michael McConnell submitted one that talked about kind of the status use distinction and kind of historically how it was, you know, wholly unsupported. So it was a incredible assortment of amicus briefs on our side. And that whole process, yeah, going back to what you asked about, that whole process takes months. So we got the cert grant in July. I think all of the briefing was complete by mid-November. So that means we filed our reply brief in mid-November. And then we had the oral argument roughly a month after that, 3-4 weeks after that in December. And that was quite a process as well. So the briefing is intense. But while you're briefing, you're also starting to have to gear up for the argument. And I don't know how many moots we did internally at IJ and externally with, you know, our friends and colleagues from other firms, from practitioners in the area. But it was, you know, I would say I was, you know, away from home doing those moots more than I was at home with my family for, you know, those three, four months between September and December when we had the argument, but you know, it was intense, but while it did pay off you know, it was nerve racking, it was demanding. But by the time it got to the Supreme Court, I felt oddly comfortable in the argument itself. And that's only attributable to how much preparation we did in the run up to the argument.

A Anthony Sanders 23:11

And for the argument itself, you're historically hopefully going to be in this very strange period where you did actually get to go to the Court, unlike the folks last term who had to argue remotely like our colleague Patrick Jaicomo had to do with case he was involved with, but you were pretty lonely in the courtroom. So tell us about how, with everything going on with a pandemic, how you threaded the needle to be able to have the dream of so many attorneys that stand there in front of the nine justices?

M Michael Bindas 23:48

We were incredibly lucky. So in October of 2021, the first arguments of the term, the Court announced that for the next three months, so the October, November and December sitting arguments, would be back in the courtroom, but they would be limited to only court staff, credentialed press and two attorneys per side, the attorney arguing and then one second chair. And in that case our second chair was Kelly Shackelford, from our co-counsel in the case, First Liberty. And the morning before the argument, as a condition of allowing these arguments to

be held back in the courtroom, we had to go in and get COVID tests. And I can tell you the most nerve wracking part of this whole process was the four or five hour window between going in to get the COVID test the morning before the argument and getting the results that afternoon because it was the difference between, you know, being able to be in the Supreme Court or being holed up, you know, in a conference room, talking to the justices through a speakerphone which still would have been fantastic and a great opportunity. But being in the courtroom, even if the only folks in there are Court staff, you know, the credentialed press and you know, one other attorney on your side was still a really, really cool opportunity. You know, probably the only opportunity I'll ever get and I was glad to be there in person. It was really cool.

A Anthony Sanders 25:22

It's been a few months now, six months since your argument. What really, we don't go have to go through everything blow by blow because we have an opinion to talk about now, but what do you remember most from that time? What was the most nerve racking question? Where did you feel you hit the high points or the low points?

M Michael Bindas 25:44

Um I don't know. I felt oddly comfortable in the moment of the argument itself. I think the worst part was waiting. There's a room off the, you know, the actual courtroom itself called the lawyers lounge. I think they are, I was really, really kind of nervous. But by the time we were ushered into the courtroom itself, I calmed down and felt good in the argument. But I can tell you from an outsider's perspective, someone listening in on the argument, specifically my daughter, I can tell you where she thought I was having a hard time. One of the justices who wound up ruling against us was asking a series of questions. If I remember correctly, it had to do with the standing of our clients or something along those lines. And this justice was not satisfied with my answers and kept coming back and kept coming back and kept coming back. 2500 miles away, my kids were playing hooky from school to listen. Well, they were going in late to school that day. But they were listening to the live stream. And apparently during this exchange, my daughter says to my wife, why is this justice being so mean to Dada?

M Michael Bindas 27:12

She, the justice, was not being mean, but to my daughter's ears, she was giving me a hard time. And apparently I wasn't satisfying the justices, what the justice was getting at with the questioning. So anyway, that yeah, that was at least my daughter's take on the argument.

A Anthony Sanders 27:33

So you argued at the Supreme Court, and then you do what we all do, which is you sit down and wait. And six months later, we have this opinion.

M Michael Bindas 27:44

There's a step between argument and sitting down and waiting and that is drinking heavily. So

There's a step between argument and sitting down and waiting and that is drinking heavily. So you lay down for a while herel

A Anthony Sanders 27:55

I believe in your household that's bourbon.

M Michael Bindas 27:58

Rye, bourbon. Whatever's available.

A Anthony Sanders 28:01

Yeah. Yeah. Sure. leaning fluid. Okay. So you get an opinion. People people may not know this, but the Court will tell you ahead of time, sometimes not that ahead of time, that opinions are coming out. But you don't know if your own opinion is coming out. But they do give the lead attorney a bit of advance warning. Is that Is that right?

M Michael Bindas 28:30

Nom that is not correct. That might have been the practice in the past. I don't know. But these days, the attorneys on the case are doing what the general public is doing, which is either logging on to SCOTUS blog and following along the live stream of opinions being issued, or you know, logging on to the Court's website and hitting refresh constantly on the on the opinions page.

A Anthony Sanders 28:56

So they don't give a phone call, you know, simultaneously or a couple of minutes after or before?

M Michael Bindas 29:03

Yep. You know, a couple days before that the Court is issuing one or more opinions on that day, but you don't know whether your case is among them until the opinion itself comes out.

A Anthony Sanders 29:14

And so where were you on Tuesday when the opinion came in?

M Michael Bindas 29:18

Um, I was right here in the chair that I'm recording from. I had barely made it here. I take the train in every day. And I was kind of sprinting, following along the orders on my phone on the run from the station to the office. And fortunately I was in my chair like three minutes before the opinion comes down. So I don't know what would happen if I hadn't been but yeah, so it was good. And that kicked off a whole day of, well first of all, you know going through the opinion very, very quickly because you know, we need to get a release out, media is calling all that good stuff. But you know I spent the rest of that day going through the opinion, fielding, you know, I don't know how many interviews. And most importantly, though, before all of that, calling our clients to let them know that they won, and that was the best part of the day by far.

A Anthony Sanders 30:16

So what's the takeaway then from the opinion, those of us into some of the doctrinal stuff, what surprised you? What was some of the reasoning that's most important? And then maybe go through a little bit about what the dissent said as well?

M Michael Bindas 30:35

Yeah. So it was a six-three opinion. And it was authored by Chief Justice Roberts, which was interesting, because he had authored the two status discrimination cases that had come before this one, Trinity Lutheran, which we mentioned briefly, but Espinoza as well, the Montana school choice case. So it was authored by Chief Justice Roberts. And the Court reverses the First Circuit's decision and holds Maine's exclusion unconstitutional under the Free Exercise Clause. And the Chief starts the opinion by laying out Trinity Lutheran and Espinoza and saying how the principles in those case really govern this one. Maine, like Missouri and like Montana, and those two cases, is singling out and excluding someone from a public benefit program simply because they are religious, because of their religious exercise. And that's, you know, unconstitutional in light of Espinoza, unconstitutional in light of Trinity Lutheran, as well as some earlier cases where the Court had held that you cannot condition receipt of an otherwise available public benefit on someone's foregoing their rights under the Free Exercise Clause. Then he gets to the First Circuit's attempt to distinguish Trinity Lutheran and Espinoza and explains why the First Circuit's distinguishing of those cases, that line of precedent, just didn't work. You know, going back to what we said about the First Circuit, you know, the big thing that they said was different here was that Maine was targeting not the religious status of the schools, but rather the religious use to which a student's aid might be put. And the Chief on that says, Look, we never said in Espinoza, or in Trinity Lutheran, that religious use discrimination was permissible, we just didn't reach the issue. And free exercise, you know, protects the right of schools, not only to be religious, but do teach religious, and he cites some cases from the Court where that talk about, you know, kind of the core function of a religious school is to pass on the faith. And so it would be, you know, kind of absurd to suggest that a state, while it can't discriminate against a student's chosen school because of if it is religious, could nevertheless discriminated against it because of the fact that it actually passes on the faith that it holds. So he rejects that status use distinction, and says, you know, either way, this is conditioning the availability of a benefit on the surrender of free exercise rights. And that is unconstitutional, no matter how the state chooses to characterize the discrimination that it's engaged in. And then he also addresses another distinction that Maine and the First Circuit had tried to draw between specifically between this case and the Espinoza case out of Montana. Maine said, Look, this is not a true school choice program. This is the state providing the equivalent of a public school education. This program only applies in towns where there are no public schools. And what

we're really doing is just providing the equivalent of a public education. It's not a private school choice program. And the First Circuit, you know, bought that argument, and the Supreme Court rejected it. First, it looked at the statute itself, it said, look, the statute says that the tuition can be used at the public or private school of the parents choice. On its face, it encompasses private educational options. It doesn't treat those private educational options as public. And then he looked at the operation of the program, and he said that look at the private schools that are allowed to participate. The non-religious private schools that are allowed to participate in this program are unlike public schools in a whole host of respects. They don't have to admit all comers like public schools typically do. They can charge tuition and do charge tuition to the tune of 10s of 1000s of dollars. They don't have to follow Maine's public school curriculum. They don't have to hire state certified teachers, which Maine's public school do. They can be single sex, which, you know, is not the case within the public system. And so he goes through this whole kind of laundry list of ways in which the permissible private schools are completely unlike Maine's public schools and says, Look, this, this is not about providing the equivalent of a public education, because the state doesn't treat these private schools like public schools, except in one respect, and that is religion. The only thing apparently in Maine's view that distinguishes a public school from a private school is the presence or absence of religion. And, you know, the chief just sees right through this argument and says, No, this is not a situation where Maine is providing the equivalent of a public education. Maine is providing this program and affording parents the choice of a public education or a private education. Once it makes that choice, once a state decides to provide assistance that can be used to procure private education, the government has to remain neutral between religion and non-religion. And it doesn't matter how the state characterizes, you know, the discrimination that is engaging in when it targets religion, whether it's more status or more use, the Free Exercise Clause protects against religious discrimination. And no matter how Maine tries to categorize this religious discrimination, it is religious discrimination.

A Anthony Sanders 36:26

One point that the chief made in the opinion on the status and use distinction and that the dissents never pick up on but I think is pretty compact, I don't think it's necessary at all for the ruling in the case, but I think it's pretty interesting, is that the program was like, before 1980, where you could use these funds for whatever private school you wanted. But then in response to some rulings, well, response to a Maine attorney general opinion at the time that said, if we let this money go to to these religious, private schools, it would be unconstitutional under the Establishment Clause. And I think it probably based on some of the Burger Court's kind of murky religious jurisprudence. The legislature changed the law in response, but it wasn't, you know, some heartfelt statement on principle. It was in response to this change in the law. And the state got along just fine. Before there was that change in the law, which seems to show that, really, this is because of what we found out years later in Zelman, it was a mistaken view of the law. It wasn't because of the reasons that are given for this whole status use distinction.

M Michael Bindas 37:58

Yep, you're absolutely right. So this program has been around since the late 19th century. And for most of that time, kids were perfectly free to choose religious schools if they thought that was what was going to best meet their educational needs. And it was in 1980 that the state attorney general issued an opinion that said religious options must be excluded from the

program in order to comply with the federal Establishment Clause. That was a mistaken view of what the Establishment Clause requires. If it wasn't clear in 1980, it became increasingly clear as the Supreme Court issued decisions such as Witters, Zobrest, Muller, and then if it wasn't clear after those decisions, it was absolutely clear after Zellman in 2002, where the Supreme Court said point blank, the Establishment Clause does not prohibit a school choice program that includes religious options, again, so long as the program is neutral between religion and non-religion, and so long as it operates on private choice. Unfortunately, Maine didn't get rid of the exclusion at that point. It continued to bar students choice of religious options. And then fast forward to Trinity Lutheran in 2017, where the Court says, Look, you can't withhold a public benefit based on on religious status. Eeven then the state doesn't get rid of the sectarian exclusion, it continues to enforce it, just changes its justification again, so before, you know we need to do this to comply with the Establishment Clause. Then it changes to after Zelman, and then when Trinity Lutheran says you cannot exclude religious schools, it changes its tune again and says, Well, we're not excluding schools because of their religious status. We're doing it because they do religious stuff. And that's different at every turn, as it became clearer and clearer and clearer that this exclusion was unconstitutional. The state doubled down on it, just changed its justification in order to continue enforcing it, and thankfully the jig is up now.

A Anthony Sanders 40:04

On the dissents, I think there's nothing too surprising in them and the three dissenting justices, of course, are the ones that dissented in some of these cases before, although Justice Kagan and Breyer were in the majority, at least the majority ruling in Trinity Lutheran, but Justice Breyer wrote what he's written several times before starting in Zelman about how allowing this kind of program can lead to religious strife. And, you know, get the sense of armed bands of different religions fighting in the streets, because, you know, they're able to go to different schools, and they don't all go to the same public school. It just seems to me, it's just a really misguided view of how the American melting pot works, that really, you know, goes back over 100 years to this, the drive that is often targeted minorities about Americanization of a people when they come into the country, who are of different faiths and different backgrounds. And I don't mean that he's not saying it in good faith, but I think it really misunderstands what it means to have a pluralistic society and what it means to have a pluralistic education system. What are your thoughts on that? Not just Breyer's dissent now, but that kind of ongoing message of you know, it would be better if people didn't go to a lot of religious schools, because then people are going to disagree, it seems to me is what the the implication is?

M Michael Bindas 41:46

Yeah, yeah. So the first thing I would say on Justice Breyer's dissent is that this religious strife that supposedly would, you know, result from allowing religious schools to participate equally in this program is not going to happen, because it didn't happen. Remember, for 100 years this program was available for use at religious schools. And that, you know, those knife fights you're talking about between denominations weren't breaking out across Maine. So it's belied by the history here. And, you know, I would also point out a couple of other things. Number one, he mentions a couple of times that you know, the sheer number of different religious faiths and denominations in this country and how we have so many different belief systems and therefore, we need to expel religion from the program in order to ensure that these denominations are not fighting each other. The fact that we have so many religious denominations in this country

is evidence of the fact that we are a pluralistic and tolerant society . And the way you maintain that is not by singling out and excluding religion for disfavor. It's by ensuring that government complies with what the Supreme Court has always held, which is government must remain neutral with respect to religion. Certainly government can't favor religion or advance religion, but nor may it disfavor or inhibit religion. And that's unquestionably what Maine's religious exclusion was doing. And you know, the other thing is the language of Maine's sectarian exclusion. Maine does not have a Blaine Amendment. But you know, I'm sure a lot of the kind of listeners know, or at least have heard of Blaine amendments. These are state constitutional provisions with an anti-Catholic history that go back to or trace their lineage back to the late 19th century. Maine, interestingly, doesn't have a Blaine Amendment, even though Senator Blaine for whom they're named, was from Maine. But they essentially wrote a Blaine amendment into this program, right? The prohibition on use of these funds at sectarian schools is essentially a statutory Blaine Amendment. And in that light, you know, this focus on quote, unquote, sectarian schools and ensuring that, you know, not a penny of public money finds its way iin any way to a sectarian school. Really, that is, you know, shares this sordid history as the Blaine amendments themselves, this notion that government in order to promote, you know, a tolerant and pluralistic society has to target sectarian persons or sectarian institutions just doesn't make sense. And, you know, when I give talks about Blaine amendments, and, I always emphasize that when opponents of school choice weaponize these provisions to take educational opportunity away from kids, they're not relying on some high minded, you know, principled notion of a separation of church and state. They're relying on vestiges of 19th century anti-Catholic, anti-immigrant animus and Msie's sectarian exclusion looks a whole lot like these 19th century Blaine amendments, and I think, you know, it shares some of that animus toward religion that the Blaine amendments themselves share. And so, you know, it's just strange for me or difficult for me to understand this argument that in order to promote pluralism and tolerance, we need to discriminate against religion. You promote tolerance and pluralism by welcoming people of all, you know, walks of life, all beliefs, or no belief, in allowing them to, in this case, participate in a public benefit program on equal footing as their fellow citizens. But Justice Breyer sees things differently, I guess.

A Anthony Sanders 42:26

So other than your clients able to fund their children going to the school of their choice in Maine, and some other children in Maine, what is going to be the impact of this given that we thought Espinoza was kind of the end of the story on this issue? Turns out needed a little bit extra. But then what is the impact going forward as a practical matter in a lot of states, and maybe as a doctrinal matter too?

M Michael Bindas 46:27

Yeah, I think it's important to think about kind of the immediate impact, and then the broader national impact, which is going to be profound. So the immediate impact, of course, is Maine and parents in Maine who desire religious education for their kids and are not able to use their tuition benefit currently, or were not able to use their benefit toto procure such an education. Likewise, Vermont has a tuitioning program, very similar to Maine's. Like Maine, it excludes religious options. We have been litigating a case in Vermont challenging that exclusion for quite a while. It has been on hold pending a decision in Carson. Carson obviously speaks to the constitutionality of that exclusion. And we expect that we will prevail on that state before too

long. But then there's, you know, so that's the kind of the immediate impact is those two states. Most states that have school choice programs don't do what Maine and Vermont do, right? They respect a parent's decision to choose a religious school if that's what they think is best for their kids. And so most states when they adopt programs are neutral with respect to religion, they afford parents religious and non-religious options. The problem, though, is in many states, where there might be a political interest in adopting school choice programs. Whenever a legislature talks about the possibility, floats a bill that would provide school choice, opponents of school choicem typically the teachers unions, run to the statehouse and say, You can't do it here. We've got a Blaine Amendment, or we've got this state statute that says no public funds to religious schools. Legislaturem don't do it, it will, you know, it will violate state law. If they're unsuccessful at convincing the legislature not to adopt the program, then they run, you know, from the state house to the courthouse and they challenge the program, wielding the Blaine amendments as a weapon and saying this program is unconstitutional. It violates our state prohibition on public funds to religious schools. Or if it's not unconstitutional, at least the religious schools have to be excluded. And the program gets tied up in litigation for years and years and years. We're currently litigating, I don't know, five or six school choice cases across the country. You know, some of these programs were enacted, you know, quite some time ago, yet there's still this cloud of kind of legal uncertainty over them because the opponents of parental choice and education are relentless. And they have been harping on, you know, this Blaine or state prohibition on on, you know, funding religion issue for so long. And I think that is the area in which Carson is going to make the most impact. These opponents of choice who go to the statehouse, who go to the courthouse and say you can't do it here because our state law prohibits public funds from going into religious schools. That argument is now off the table. It's out of their arsenal, they can no longer rely on that to try to dissuade legislators from adopting these programs or, you know, relying on that argument to attempt to take away these options in court. It is now clear as day that to the extent state law requires that religious options be excluded from a program like this state law violates federal law, specifically the Free Exercise Clause of the Constitution. So this again, this all argument, this kind of last major constitutional question over school choice, the extent to which states can prohibit school choice programs or prohibit them to the extent that they include religious options is now off the table. Not only does the federal Constitution allow school choice programs that include religious options, a state cannot exclude or require the exclusion of religious options from those programs either.

A Anthony Sanders 50:28

Well, that sounds like an ending where you deserve a little bit more rye or bourbon. And I hope you're taking advantage of that.

M Michael Bindas 50:40

Or that cleaning solution or whatever it was you mentioned before.

A Anthony Sanders 50:45

You know, whatever gets the job done.

M Michael Bindas 50:48

A man's got to relax. Lawrence Taylor said that once.

A Anthony Sanders 50:55

He's never been on the show. I appreciate you coming on today, Michael, and telling us about your journey to the Supreme Court and the future of school choice across the country. So there are still battles to be won on the school choice front. But this particular issue, which has kind of really been the issue for decades, seems to have been settled. And it's been a hard fought victory. And so congratulations to you and everyone on the team, and our clients and everyone else who has fought for this issue. As you can tell listeners, I say this very objectively, as a colleague of Michaels, here at IJ, we usually don't have episodes about iJ cases all that much, but you don't win at the Supreme Court all that often. And and I think it was great that we got to talk through this story today and about a very important issue and an important case. What else going on at the Supreme Court, of course, we're probably not going to dive into all that stuff, at least not yet. Next week, though, we're going to dive into some qualified immunity with the the event at UCLA. So again, I hope some of you are able to join us for that in the LA area. And we'll be back with more of the federal courts of appeals in the coming weeks. But before then, I hope that all of you get engaged.