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SPEAKERS

Michael Bindas, Introduction, Anthony Sanders

I **Introduction** 00:01

The Institute, Institute, Institute for Justice, the national law firm for liberty.

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 and said the government could take your home and give it to 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 a 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** 01:19

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 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 want to remind you, and

this is the last time we'll we'll do this on this podcast that just a week from today, the day we're recording. This 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 show notes for our event on constitutional GPA a new report is your government preventing accountability. This is a survey of various states and their 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'll go to about two o'clock. There was lunch provided, and before lunch we're presenting our study, and then after lunch, we're recording a short circuit, and as as you'll see on the website, number of people will be there, and especially excited to announce Eugene Volokh, Professor of Law at UCLA Of course, the Grand Master of the Volokh Conspiracy, and a name familiar to many of our listeners, will be there along with Julia Yu, who's president of the National Police Accountability Project, Nicholas Yocha, who is an attorney from the area, also clients of ours at the Institute for Justice, René Quiñonez and several IJers, including Anya Bidwell, Patrick Jaicomo, Marie Miller and Jaba Tsitsuashvili all of whom you are 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 in 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 IJs 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 of next week. So that took off one of the two major constitutional questions off the table. It 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 it's parents, rather than government, deciding where their kids go to school.

A Anthony Sanders 05:45

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, but it would include that, but also the chance to empower parents to go to a private school of their choice, whether that's religious or non religious or whatever.

M Michael Bindas 06:13

You're right, so I should have clarified some terms here. So you know we, 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, 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 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 clarified 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 and some of their allies, didn't just pack up and go home after Zelman. 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 these 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 has 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 v. Montana Department of Revenue. And another is this case out of Maine Carson v. Makin. So the Carson case we filed in 2018 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, if you live in such a town, if the town doesn't, 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 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 religious, it can be non religious, it can be public, it can be private, it can be in state, it can be out of state, but the one thing it could not be until two days ago, was religious. The state, for the last 42 years, has imposed. 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 Porters, schools of that nature, but you can't go to a Jewish Day School in your hometown or your local Catholic parishes school or an Islamic school. So we challenged that law back in 2018 and while that law, while that case was pending, we were simultaneously litigating another case through the Montana State Court challenging a similar exclusion in a school choice program in that state. So these broke cases are kind of going on 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. You 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

All done but the paperwork

M Michael Bindas 11:23

Exactly. Well, it was clear to everyone, except the First Circuit, which four months after the Supreme Court's decision in Espinosa, the Montana case upholds Maine's religious exclusion. And so listeners might be thinking, what gives how do 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, it 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 and in the First Circuit's mind, this is a constitutionally meaningful distinction. 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 was, 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's what they're thinking. Maybe some of these schools that participate on the program 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, 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 Espinoza, because prior to Espinosa, when the Supreme Court hadn't officially resolved this question of whether you can exclude a school because of its religious status, Maine said, if it's religious, it's out, it didn't kind of engage in this status versus use thing. It just said, if the school's religious, it's out.

A Anthony Sanders 13:57

And that doesn't disqualify in the First Circuit's eyes?

And that doesn't disqualify in the First Circuit's eyes?

M Michael Bindas 14:00

No. Well, Maine, of course, after Espinosa, kind of changes its tune, after Trinity Lutheran, actually, a case we don't need to get into, but that that, you know, held status discrimination unconstitutional in a slightly different context, Maine kind of changes it to 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 in the First Circuit, accepted that argument and distinguished Espinosa on that basis.

A Anthony Sanders 14:28

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

M Michael Bindas 14:53

There? There was evidence of a school called Cardigan Mountain, a school in, I believe, New Hampshire. I'm sure 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 at Cardigan Mountain School. Where the state was asking, what goes on in these chapel services and what are these universal, spiritual and moral things? 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.

A Anthony Sanders 16:24

And in some ways it's even worse, because then the state really is getting its its fingers into what the school is is teaching about religion Exactly. And this is treating something that Chief Justice Roberts notes, in his majority opinion, that we'll get to here in a bit, that it does raise that that danger.

M Michael Bindas 16:44

But in any event, so the First Circuit upholds Maine's exclusion four months after Espinosa invalidates the exclusion in Montana's school choice program. We petitioned 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 8 of 2021, and we received a decision in the case two days ago on on the 21st of June.

A Anthony Sanders 17:19

So you get a order from the court saying your case has been accepted. I'm sure that was quite an interesting moment, although you were, you're on the West Coast, so maybe waking up a little bit when you get that order.

M Michael Bindas 17:36

Actually, I was in the Mountain Time Zone that day, sitting on my in laws front porch because 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

Hopefully you didn't have too loud of a Yee haw to wake up your mother in law.

M Michael Bindas 18:00

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

A Anthony Sanders 18:05

So I don't want to ask what they say in New Jersey. So you, you go forward from that, and then what's the this is something that you and I know, but I know a lot of people have never practiced at Supreme Court. Be curious, what's the the what do you have to go through after that? What's the timing and and how do you eventually make it to the day where you you go to the court itself?

M Michael Bindas 18:27

Sure. So there 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 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 accept 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 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 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. We've had certainly amicus briefs from schools from from those faiths in the past, but to have all three on, on one brief was really, really impressive.

A Anthony Sanders 20:26

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 20:37

Yep. So Nicole worked on one of one of our the first of our three challenges to this Maine exclusion, which is a whole other story, but yeah, we first challenged this back in the 1990s Nicole was a young attorney at IJ. Then she worked on that case alongside our beloved former colleague, Dick Comer, and she authored this brief, along with her husband, Rick Garnett, also a professor at Notre Dame, and Mike McGinley, a an attorney at, I believe, Decker. And it was an outstanding brief, but it was one of many outstanding briefs. Another really, really interesting one was by Ashley Burner at Johns Hopkins, talking about, you know, the value of pluralism in in our society, and the importance of a pluralistic education system to promote 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 wholly unsupported. So it was a incredible assortment of amicus briefs on our side, and that whole process, 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 there the briefing is intense, but while you're briefing, you're also start, starting to have to gear up for the 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 I would say I was away from home, doing those Moots more than I was at home with my family for those three, four months between September and December when we had the argument. But it was intense, but it did pay off. It was nerve wracking, it was demanding, but by the time we got to the Supreme Court, I felt oddly comfortable in the argument itself, and that's only attributable to how much you know preparation we did on the on in the run up to the argument 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 with everything going on with the pandemic, how you threaded the needle to be able to to have the dream of so many attorneys that the stand there in front of the nine justices. Yeah, it was. We were incredibly lucky. So in October of 2021, so 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 Institute 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 being able to be in the Supreme Court or being holed up in a conference room, talking to the justices through a speaker phone, which still would have been fantastic and 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 that six months since your argument. We don't go have to go through the everything, blow by blow, because we have an opinion to talk about now. But what do you remember most from that time? What was most what was the most nerve wracking question? Where did you feel you hit the high points or the or the low points?

M Michael Bindas 25:49

I felt oddly comfortable in the moment of the argument itself. I think the worst part was waiting. There's a room off the the actual courtroom itself, called the lawyers lounge. I think there I was really, kind of nervous, but once, by the time we we were ushered into the courtroom itself, I'd 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 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 during this exchange, my daughter says to my wife, why is this justice being so mean to Dada? So 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 what the justice was getting at with the questioning. So anyway, that was at least my daughter's take on the argument.

A Anthony Sanders 27:33

So you argue 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.

A Anthony Sanders 27:50

Oh, right, yeah.

M Michael Bindas 27:51

So you lay down for a while?

A Anthony Sanders 27:55

Yeah, I believe on your household that's bourbon?

M Michael Bindas 27:58

Rye, bourbon, whatever's available.

A Anthony Sanders 28:01

Yeah, sure, cleaning fluid. Okay so you get an opinion. Now people may not know this, but the the court will tell you ahead of time, although sometimes not that at a time that opinions are coming out, but you don't know if your own opinion is coming out, but they do. They do give the lead attorney a bit of advance warning. Is that right?

M Michael Bindas 28:30

No, 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 the opinions being issued, or logging onto the court's website and hitting refresh constantly on the on the opinions page.

A Anthony Sanders 28:57

They don't give a phone call simultaneously, or a couple of minutes after before it's just you get it.

M Michael Bindas 29:03

Yep, you know, a couple days before that, the court is issuing opinions, 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 when the when on Tuesday opinion came out?

M Michael Bindas 29:19

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 happened if I if I hadn't been but, but yeah, so it was good. And that kicked off a whole day of first of all going through the opinion very, very quickly, because we need to get a release out. Media is calling all that good stuff. But you know. Spent the rest of that day going through the opinion, Fielding 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 from the opinion, those of us into the into some of the doctrinal stuff, what? What surprised you? What was some of the reasoning that it'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 Espinosa 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 Espinosa and saying how the principles in those case cases really govern this one Maine, like Missouri and like Montana, in 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, unconstitutional in light of Espinosa, unconstitutional in light of Trinity Lutheran, as well as some earlier cases where the government or 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 Espinosa, and explains why the First Circuits distinguishing of those of those cases, that line of precedent just didn't work. You know, going back to what we said about the First Circuit the big thing that they said was different here was that Montana or 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 Espinosa or in Trinity Lutheran that religious use discrimination was permissible. We just didn't reach the issue and free exercise protects the right of schools not only to be religious, but to teach religious. And he cites some cases from the court where that talk about kind of the core function of a religious school is to pass on the faith. And so it would be kind of absurd to suggest that a state, while it can't discriminate against a student's chosen school because it is religious. Could nevertheless discriminate 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, 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 an 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 first the Supreme Court rejected it. First, it looked to 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 iton on its face, 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, 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 tens of thousands of dollars. They don't have to follow Maine's public school curriculum. They don't have to hire state certified teachers, which means Public. Schools 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 and the Chief Justice sees right through this argument and says, No, this is 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 a private education. The government has to remain neutral between religion and non religion, and it doesn't matter how the state characterizes the discrimination that it's engaging in when it targets religion, whether it's more statusy or more usey 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 that the Chief made in the opinion on the on the status and use distinction, that the dissents never pick up on, but I think is pretty compelling. I don't think it's necessary at all for the the ruling in the case. But I think it's pretty interesting is that the program was like, I guess it is now post June 21 before what was it? 1980 where you could use the these funds for whatever private school you wanted. But then, in response to a an attorney general opinion, Maine Attorney General opinion at the time that said if we let this money goes to private 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 some heartfelt statement on on principle. It was, it was in response to this. The 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

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, and Mueller, and then if it wasn't clear after those decisions, it was absolutely clear after Zelman 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 a student's choice of religious options. And then fast forward to Trinity Lutheran in 2017 where the court says, you can't withhold a public benefit based on on religious status. Even 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 tune 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 justifications slightly in order to continue enforcing it. And thankfully, the jig is up.

A Anthony Sanders 40:05

On on the dissents, I think there was nothing too surprising in them, and in the three dissenting justices, of course, of the ones that dissented in some of these cases before although Justice Kagan and Breyer were in the majority in 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 get the sense of arm bands of different religions fighting in the streets because 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 goes back over 100 years to this the drive for you know that is often targeted minorities, about Americanization of of of people when they come to 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 that 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

So the first thing I would say on on Justice Breyer's dissent is that this religious strife that supposedly would 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 those knife fights you were talking about between denominations weren't breaking out across Maine. So it's, it's belied by the history here. I would also point out a couple of other things. Number one, he mentions a couple of the 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 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. 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. That doesn't mean government 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. 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 a sordid anti Catholic history that go back to the to the 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, this focus on "sectarian schools" ensuring that not a penny of public money finds its way, and you know, in any way to a sectarian school, really, that is, you know, shares this sordid history, the lineage of as of the Blaine Amendments themselves. This, this notion that government, in order to promote a tolerant and pluralistic society has to target sectarian persons or sectarian institutions, just doesn't make sense. And when I give talks about Blaine Amendments. And I 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 principled notion of a separation of church and state. They're relying on vestiges of 19th century anti Catholic, anti immigrant animus and Maine sectarian exclusion looks a whole lot like these 19th century Blaine Amendments. And I think it shares some of that animus toward religion that the Blaine Amendments themselves share. And so I 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 walks of life, all beliefs or no belief religiously, and allowing them to in this case, participate in a public benefit program on equal footing, is as their fellow citizens. But Justice Breyer sees things differently, I guess.

A Anthony Sanders 41:47

So other than your clients being better 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 Espinosa 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 in a lot of states, and maybe as a doctrinal matter too?

M Michael Bindas 42:43

I think it's important to think about this kind of the immediate impact, and then the broader national impact, which is 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 to procure such an education. Likewise, Vermont. 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 in that state before too long. 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. 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 are neutral with respect to religion. They afford parents religious and non religious options alike. 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 choice, typically, the teachers unions run to the state house 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. Legislature don't do it. It will 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, you know, 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. We're currently litigating, I don't know, five or six school choice cases across the country. Some of these programs were enacted 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 this Blaine or state prohibition, on funding religion issue for so long. And I think that is the area in which the Carson decision is going to make the most impact, these opponents of choice, who go to the State House, who go to the courthouse and say, You can't do it here, because our state law prohibits public funds from going to 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 again, this 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 they include religious options, is now off the table. Not only does this 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.

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A Anthony Sanders 44:59

Well, that sounds like an ending where you deserve a little bit more rye or bourbon, and I hope you've taken advantage of that.

M Michael Bindas 44:59

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

A Anthony Sanders 44:59

You know, whatever gets the job done.

M Michael Bindas 44:59

Man's got to relax. Lawrence Taylor said that oncce I think. He's never been on the show. But I appreciate you coming on today, Michael and telling us about your journey to the the Supreme Court and and the future of school choice across the country. So there are still battles to be won on the school choice front, but but this particular issue, which is kind of really been the issue for decades, seems to have been settled and and it's been a hard fought victory. And so congratulations to you and everyone on on the team, and our clients, and everyone else who, who has fought for this issue. As you can tell listeners, I say this very un objectively. As a colleague of Michael's 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 in an important case. A lot else going on at the Supreme Court of course, we're probably not going to dive into all that stuff, at least 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 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.