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STATE SUPREME COURT UPHOLDS CONSTITUTIONALITY OF TEXTBOOK LOAN PROGRAM

SANTA FE – The New Mexico Supreme Court today ruled that the state constitution allows the use of taxpayer money to provide non-religious textbooks to students in private schools, both secular and religious.

In a divided decision, three justices of the state's highest court concluded that a Public Education Department textbook loan program did not violate Article XII, Section 3 of the New Mexico Constitution, which prohibits the use of public funds "for the support of any sectarian, denominational or private school, college or university."

The textbook program "provides a public benefit to students and a resulting benefit to the state. Any benefit to private schools is purely incidental and does not constitute 'support' within the meaning of Article XII, Section 3," the Court said in a majority opinion written by Justice Barbara J. Vigil.

The Court said its decision on the textbook program avoided a clash with the First Amendment protection of the free exercise of religion under the U.S. Constitution.

Justices Petra Jimenez Maes and Charles W. Daniels concurred in the majority decision. Chief Justice Judith K. Nakamura and Justice Gary L. Clingman dissented.

Today's decision replaces the Court's earlier decision in 2015, in which the Court determined that the textbook loan program violated Article XII, Section 3 of the New Mexico Constitution. The Court was directed to reconsider its 2015 decision by the U.S. Supreme Court last year after the federal justices ruled that Missouri unconstitutionally discriminated against a church by denying it a playground improvement grant solely because it was a religious institution.

The federal ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer* "changed the landscape of First Amendment law," the New Mexico Court said. "Under *Trinity Lutheran*, if a state permits private schools to participate in a generally available public benefit program, the state must provide the benefit to religious schools on equal terms."

The Court acknowledged that the wording of New Mexico's funding restriction does not single out religious institutions and instead bars the use of public money to support any private school—secular or religious. But the Court's majority said there was "discriminatory intent" underlying the provision in its pre-statehood history. "New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system, and Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood," the Court said.

To avoid a conflict with *Trinity Lutheran* and other recent federal court decisions about religious discrimination, the Court said it had to reconsider its previous legal view of how the state constitutional restriction applied to the textbook loan program.

In a dissenting opinion, Chief Justice Nakamura said the majority "embraces a construction of Article XII, Section 3 that is inconsistent with the provision's plain language and 'permits the state to loan secular textbooks to private school students, including religious students.' They do so to 'avoid constitutional concerns,' but these are concerns that do not exist."

The Court's 2015 "conclusion that the plain language of Article XII, Section 3 prohibits the state from loaning textbooks to children enrolled in private schools does not run afoul of the principles articulated in *Trinity Lutheran*," the Chief Justice wrote.

The state Public Education Department stopped funding textbooks for students in private schools after the Supreme Court's 2015 ruling. The legal challenge to the textbook program began in 2012 with a lawsuit filed by Cathy Moses of Santa Fe and Paul Weinbaum of Las Cruces. A district court in Santa Fe and the state Court of Appeals ruled that the program did not violate the constitutional prohibition on public support for private schools.

In today's ruling, the Court's majority said the textbook loan program also does not violate a provision of the New Mexico Constitution known as the anti-donation clause – Article IX, Section 14 – because "a textbook loan is not a donation," and the program "does not result in any appropriation to a person or entity not under the absolute control of the state as prohibited by Article IV, Section 31."

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To read the decision in *Moses v. Ruszkowski*, No. S-1-SC-34974 slip op. (N.M. S. Ct. December 13, 2018, please visit the New Mexico Compilation Commission's website using the following link:

http://www.nmcompcomm.us/nmcases/nmsc/slips/SC34,974A.pdf