

MAKING SENSE OF TAXPAYER CENTS: A LOOK AT LAKEWOOD, NEW JERSEY'S UNIQUE SCHOOL

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ABSTRACT

Since the birth of the nation, Americans have been concerned with the separation of church and state. As a result, there have been many First Amendment constitutional challenges in the nation's short history. This note focuses on Lakewood, New Jersey and examines taxpayer funding of transportation for non-public school pupils, state grants for the Lakewood Yeshiva and federal Pell grants used at religious institutions. The note analyzes key First Amendment cases from the mid-20th Century to the present-day.

I. BACKGROUND ON LAKEWOOD

Lakewood, New Jersey is unlike any other town in the state of New Jersey. Lakewood is the fastest growing town in the state¹ and in 2017, one publication even labeled it “New Jersey’s most controversial town.”² While there are a number of controversial issues in Lakewood that could be discussed, this note seeks to determine if there are First Amendment violations occurring in the township in a few separate areas. First, this note discusses state tax dollars paying for the transportation of students to private schools. The landmark decision on this issue is a 1947 case, *Everson v. Board of Education*.³ Next, this note discusses a successful legal challenge by the ACLU to prevent the Lakewood Yeshiva (“BMG”) from receiving millions of dollars in government aid. Lastly, this note explores the New Jersey legislature’s proposed solution to the busing crisis. Before diving into the

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¹ Payton Guion, *Lakewood is fastest-growing NJ town; hits 100,000 people*, ASBURY PARK PRESS (May 31, 2017), <http://www.app.com/story/news/local/redevelopment/2017/05/31/lakewood-fastest-growing-city-nj-hits-100-000-people/359366001/>.

² Kelly Heyboer, *A look at Lakewood: Inside NJ's Most Controversial Town*, NJ.COM (Aug. 3, 2017), http://www.nj.com/news/index.ssf/2017/08/window_on_lakewood_inside_the_fastest-growing_comm.html.

³ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

analysis, however, it is necessary to understand the dynamics of Lakewood and what makes it such a unique place.

The main issue presented is an analysis of the constitutionality of busing private school students to their schools using public dollars. New Jersey statute, §18A:39-1: Transportation of Pupils Remote from School, requires the busing of non-public students, who live more than 2 but less than 20 miles from their school.⁴ Aid for the private school students may be provided by the government in lieu of transportation.⁵ Lakewood's private school attendance numbers are atypical of the average New Jersey town—over 30,000 students attend one of the 130 private schools in town while only about 6,500 students attend public school.⁶ In New Jersey, state aid for schools is based on the amount of students enrolled in public schools.⁷ In effect, Lakewood receives financial aid to bus about one-sixth of the school population (6000 students) but has to come up with money to transport the remaining 30,000 (since they are private school students) without state aid.⁸ This results in an astronomical amount, nearly \$40 million, spent on transporting private school students to and from school.⁹ Lakewood expects to spend more on busing during the 2017-18 school year than it does on classroom instruction.¹⁰

Due to the congestion and overpopulation in Lakewood, Orthodox Jewish families are moving to surrounding towns.¹¹ As a result, these towns are facing booming private transportation costs

⁴ N.J.S.A. § 18A:39-1 (1967).

⁵ *New Jersey Nonpublic School Transportation Procedures*, N.J. DEP'T OF EDUC., http://www.state.nj.us/education/finance/transportation/procedures/np_proc.pdf (last updated Nov. 2013).

⁶ Kelly Heyboer, *Why is Lakewood Spending \$32M to send kids to private school?*, NJ.COM (Aug. 8, 2017), http://www.nj.com/news/index.ssf/2017/08/why_is_lakewood_spending_32_million_to_send_kids_t.html.

⁷ Mike Davis, *Rabbit Kotler talks Lakewood development, school funding during 'Ask the Editor'*, ASBURY PARK PRESS (June 8, 2017), <http://www.app.com/story/news/local/communitychange/2017/06/08/lakewood-orthodox-jewish-aaron-kotler-yeshiva-bmg/380375001/>.

⁸ Payton Guion, *3 reasons Lakewood schools are broke*, ASBURY PARK PRESS (May 26, 2017), <http://www.app.com/story/news/investigations/watchdog/education/2017/05/26/3-reasons-lakewood-schools-broke/341950001/>.

⁹ *Id.*

¹⁰ Heyboer, *supra* note 6.

¹¹ Mike Davis, *The next Lakewood? Jackson, other districts face booming private bus costs*, ASBURY PARK PRESS (Apr. 27, 2017), <http://www.app.com/story/news/investigations/watchdog/education/2017/04/27/nj-aid-in-lieu-of-school-transportation-nonpublic-lakewood/100616474/>.

for busing students.¹² As of April 2017, private transportation costs in neighboring Jackson, NJ are up 357% from the 2015-2016 school year.¹³ As tax costs continue to rise, so does the tension between the orthodox community and other residents. There was even a “letter to the editor” published in a local paper proclaiming that there is “no legal way” to keep the Orthodox out of the towns surrounding Lakewood.¹⁴ In 2009, neighboring Toms River passed a zoning ordinance prohibiting new houses of worship along a major road where a rabbi, who was holding services in his home, was effectively prevented from continuing the services.¹⁵ Shortly thereafter, Toms River received a letter from the U.S. Department of Justice informing them that an investigation into religious discrimination had been launched.¹⁶ The rabbi filed a federal civil rights lawsuit against Toms River in March 2016 arguing it is a violation of his civil rights to require a use variance for him to conduct weekly prayer meetings at his house.¹⁷ Mediation talks began in early 2017 but as of December, no agreement had yet been reached between the sides.¹⁸

Toms River is not the only Ocean County town being investigated. Just up Route 9 is Jackson Township, which is also under investigation by the U.S. D.O.J. and New Jersey Attorney General for discrimination against Orthodox Jews in land-use issues.¹⁹ The investigation stems, in part, from the township’s rejection of permitting the Orthodox community to build “eruv” on utility poles.²⁰ Eruvs look like a simple wire but in Jewish law, they allow Orthodox Jews to carry children, keys or bags, which

¹² *Id.*

¹³ *Id.*

¹⁴ John Lewis, *Letter to the Editor: No legal way to keep out the Orthodox Jackson*, ASBURY PARK PRESS (Dec. 11, 2017), <http://www.app.com/story/opinion/readers/2017/12/11/lakewood-orthodox-jews-jackson-communities-discrimination/108510968/>.

¹⁵ Karen Wall, *Discrimination Probes by Justice Department in 2 Ocean Towns*, TOMS RIVER PATCH (Dec. 14, 2017), <https://patch.com/new-jersey/tomsriver/discrimination-probes-justice-department-2-ocean-towns>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Jean Mikle, *Talks continue between Toms River, Chabad Jewish Center*, ASBURY PARK PRESS (Dec. 18, 2017), <http://www.app.com/story/news/local/communitychange/2017/12/18/no-settlement-yet-chabad-jewish-centers-lawsuit-against-toms-river/956942001/>.

¹⁹ Austin Bogues, *Jackson: Justice Department, NJ probe anti-Semitic discrimination claims*, ASBURY PARK PRESS (Dec. 14, 2017), <http://www.app.com/story/news/crime/jersey-mayhem/2017/12/14/justice-department-jackson-discrimination-orthodox-jewish/951696001/>.

²⁰ *Id.*

they would not normally be permitted to do on the Sabbath.²¹ An eruv, in effect, extends the boundaries of the home.²² Additionally, tensions continue to rise in the community due to instances of aggressive real estate solicitation by Orthodox Jews in Jackson and plans for the construction of Orthodox schools with dormitories.²³ Jackson's township council responded by strengthening its ordinance against the aggressive real estate solicitation tactics,²⁴ and Toms River went so far as to ban real estate solicitation in sections of the town.²⁵ With the exception of a few areas, Jackson banned the construction of all schools and dormitories in the summer of 2017.²⁶ There have also been reports of harassment, physical abuse and verbal abuse directed towards members of the Orthodox community recently.²⁷

It is clear from the disputes, hostility and tensions in Ocean County that the rapidly expanding growth of the Orthodox community in Lakewood and beyond is having a major effect not just inside of Lakewood but also stretching beyond its borders. As tax dollars continue to rise as a result of the influx of Orthodox Jews to the area, this note seeks to assess the tax issue and constitutionality of the government's solution. Questions this note will answer are: Does the state's interest in providing transportation to students outweigh the fact that the state mandate is bleeding taxpayers' wallets dry? Is the state's plan to fix the busing crisis, a pilot program created in 2016, constitutional?

II. THE LAKEWOOD YESHIVA

The second issue surrounds Beth Medrash Govoha, America's largest Jewish college (known as a "yeshiva"), which is located in Lakewood.²⁸ The Yeshiva, which is only open to Jewish males,

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Austin Bagues, *Jackson: Justice Department, NJ probe anti-Semitic discrimination claims*, ASBURY PARK PRESS (Dec. 14, 2017), <http://www.app.com/story/news/crime/jersey-mayhem/2017/12/14/justice-department-jackson-discrimination-orthodox-jewish/951696001/>.

²⁵ Wall, *supra* note 15.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Adam Clark, *A rare glimpse into the elite college that changed Lakewood forever*, NJ.COM (Aug. 7, 2017),

enrolls close to 7000 students who spend their school days studying the Torah and Talmud.²⁹ The Yeshiva does not report any graduation data or job placement data to the government.³⁰ On its grant application, the Yeshiva claimed to represent 59% of Lakewood's families and 74% of Lakewood's married couples. The Yeshiva further asserts it plays a major role in the development of Lakewood.³¹ All twelve of their required undergraduate courses involve the study of the Talmud.³² Graduate programs offered are for advanced degrees in Talmudic studies, as well as, a rabbinic ordination program for the elite students.³³ In 2013, the school was awarded \$10.6 million in taxpayer funds for a new library and academic center on campus.³⁴ However, this award was successfully challenged by the American Civil Liberties Union (ACLU) and Americans United.³⁵ The ACLU challenged the grant on the basis it violated Article I, Paragraph 3 of the New Jersey Constitution because funds would be used to support religious instruction.³⁶ Constitutional analysis of Article 1, Paragraph 3 of the state constitution is controlled by the New Jersey Supreme Court's holding in *Resnick*.³⁷ In 2016, a New Jersey Appellate Court agreed with the ACLU's argument and invalidated the requests since the funds would support religious instruction.³⁸

The Appellate Court was faced with deciding whether to apply a narrow or broad interpretation of *Resnick*. The ACLU

http://www.nj.com/news/index.ssf/2017/08/a_rare_glimpse_into_the_elite_college_that_changed.html.

²⁹ Jarrett Renshaw & Kelly Heyboer, *Ultra-Orthodox Jewish college wins \$10.6 million in public funds*, THE STAR LEDGER (Aug. 8, 2017),

http://www.nj.com/politics/index.ssf/2013/05/ultra_orthodox_jewish_college.html.

³⁰ Shannon Mullen, *\$10.6M Lakewood yeshiva grant struck down*, ASBURY PARK PRESS (May 26, 2016),

<http://www.app.com/story/news/education/2016/05/26/court-strikes-down-bmg-yeshiva-grant/84981268/>.

³¹ Am. Civil Liberties Union of N.J. v. Hendricks, 445 N.J. Super. 452, 458 (App. Div. 2016).

³² *Id.*

³³ *Id.*

³⁴ Renshaw & Heyboer, *supra* note 29.

³⁵ Press Release, Americans United, Landmark Ruling Stops Unconstitutional Taxpayer Funding of N.J. Yeshiva and Seminary After ACLU and Americans United Suit (May 26, 2016), <https://www.au.org/media/press-releases/landmark-ruling-stops-unconstitutional-taxpayer-funding-of-nj-yeshiva-and>

³⁶ Hendricks, 445 N.J. Super. at 454.

³⁷ *Id.* at 455.

³⁸ Hendricks, 445 N.J. Super. at 452.

argued the state constitution prohibited the use of state tax dollars for the maintenance of a religious organization regardless of whether or not such funds are provided on an equal basis to secular organizations.³⁹ The State countered that the funding did not violate the constitution because the money was not funding places of worship but instead being used for classrooms, libraries and computer equipment.⁴⁰ The State argued it was not prohibited from providing aid for religious instruction or to sectarian institutions.⁴¹

The court's analysis began with an attempt to interpret the founders' intent behind the language chosen in Article I Paragraph 3. There were early notions of religious freedom in New Jersey's first constitution in 1776 and later, in 1844, debate included adding a provision to create public schools open to all.⁴² In 1873, the New Jersey Constitutional Commission discussed excluding schools that were influenced or controlled by any religious denomination from the definition of "free" or "public" schools.⁴³ Rutgers Law Professor, Robert F. Williams, wrote, "it is absolutely clear" based on the 1873 Commission's proceedings and report that the Commission's intent was that religious, private or college preparatory schools would not be eligible for state funds.⁴⁴ While there were no recorded objections to the exclusion of these schools, the amendment that passed in 1874 did not contain any specific reference to sectarian schools.⁴⁵ There were again discussions regarding state funding of religious institutions, particularly for busing students to private schools, at the 1947 constitutional convention.⁴⁶ An attempt was made to expressly prohibit the State from providing funds to religious schools in the constitution but the effort died in the Taxation and Finance Committee.⁴⁷

An analysis of the founders' intent provided no clear answer but instead reaffirmed that both the State and the ACLU had compelling arguments. On the one hand, the State had a strong argument asserting the framers of the 1947 New Jersey Constitution did not interpret Article I Paragraph 3 to disallow

³⁹ *Id.* at 464.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 465.

⁴³ *Id.* at 466.

⁴⁴ Hendricks, 445 N.J. Super. at 467.

⁴⁵ *Id.*

⁴⁶ *Id.* at 468.

⁴⁷ *Id.*

public aid to sectarian schools because they transferred the proposed amendment to a different committee and never expressed an opinion that it was unnecessary to add the amendment.⁴⁸ Conversely, the ACLU argued none of the constitutional delegate committees adopted a provision banning the aid because they interpreted the original language from 1776 as prohibiting it.⁴⁹ Interestingly enough, despite a thorough analysis of the history, the court punted at the opportunity to resolve the dispute and instead took the safe road by stating that the *Resnick* holding provided the proper interpretation of Article I Paragraph 3.⁵⁰

The *Resnick* majority held that Article I Paragraph 3 “prohibits the use of tax revenues for the maintenance or support of a religious group.”⁵¹ Since *Resnick* was decided in 1978, no New Jersey cases have revisited this ban on religious aid.⁵² The State’s attempt to distinguish *Resnick* from the present case failed because the funds for the Yeshiva would benefit older, undergraduate and graduate students; rather than younger, elementary students in *Resnick* who may have been more vulnerable to religious indoctrination based on their age.⁵³ Additionally, the State argued providing money for capital improvements on the Yeshiva’s campus was not “maintaining a minister or ministry.”⁵⁴ However, neither of these arguments factored into the majority’s decision in *Resnick*.⁵⁵ The *Resnick* court was not concerned with the public school building being used afterhours by a religious group but was instead concerned that the group renting the building was sectarian.⁵⁶ The concern in *Hendricks* was identical. The Yeshiva is a sectarian school where the instruction is almost entirely, if not entirely, religious.⁵⁷ The fact that non-religious groups also rented the classrooms did not cure the problem in *Resnick*, just as non-sectarian universities receiving some of the grant funding did not cure the problem with the Yeshiva being a recipient.⁵⁸

⁴⁸ *Id.* at 469.

⁴⁹ *Id.* at 469-70.

⁵⁰ *Hendricks*, 445 N.J. Super. at 470.

⁵¹ *Resnick v. E. Brunswick Twp. Bd. of Educ.*, 77 N.J. 88, 102 (1978).

⁵² *Hendricks*, 445 N.J. Super. at 473.

⁵³ *Id.* at 475.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Hendricks*, 445 N.J. Super. at 476.

Ultimately, the appellate court reversed because *Resnick's* holding has never been called into question, and decades later it is still good law.⁵⁹ The holding was kept extremely narrow though and does not apply to other instances where a religious institution of higher education that is less sectarian receives public grants.⁶⁰ When applying the *Resnick* ruling to the facts in *Hendricks*, the key determination the Court had to make was whether the grant of monetary aid equaled “maintenance or support” and also whether the Yeshiva would be considered a “religious institution.” The Yeshiva is most certainly a religious institution. There are no majors or classes offered outside of Talmudic study, which is conducted six days a week.⁶¹ The Talmud is a collection of writings on Jewish laws and traditions.⁶² There is no instruction on Saturdays, because it is the Sabbath, but the Talmudic study continues from morning until evening the rest of the week.⁶³ Given the nature of the study the students pursue at the Yeshiva, it would be extremely difficult, if not impossible to argue the Yeshiva is not a “religious institution.”

Since the argument against the Yeshiva being a religious institution is weak, the focus becomes whether or not a financial grant qualifies as maintenance or support. Talmudic study is useful outside of the realm of the Jewish faith. It sharpens analytical and debate skills and many students take their improved skills and go on to pursue degrees from undergraduate institutions.⁶⁴ Only approximately five percent of the Yeshiva graduates become rabbis or hold other religious positions.⁶⁵ Many work in other fields like business and law, where they claim their time spent studying the Talmud gave them an advantage over their peers who did not.⁶⁶ There is a misconception that students spend their entire life studying the Talmud and never go out into the workplace to land a job. However, Rabbi Aaron Kotler, president of the Yeshiva, says this is true for some but not most of

⁵⁹ *Id.* at 477.

⁶⁰ *Id.* at 478.

⁶¹ Clark, *supra* note 28.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Adam Clark, [A rare glimpse into the elite college that changed Lakewood forever](http://www.nj.com/news/index.ssf/2017/08/a_rare_glimpse_into_the_elite_college_forever.html), NJ.COM (Aug. 7, 2017), http://www.nj.com/news/index.ssf/2017/08/a_rare_glimpse_into_the_elite_college_that_changed.html.

the students.⁶⁷ The average stay at the school is six years.⁶⁸ *Resnick* held that the prohibition on maintenance and support of religious groups is not carried to such an extreme as to prevent religious organizations from general services like police and fire protections.⁶⁹ It was decisive that the court found those protections to be an obligation to the public, while at the same time, permitting a religious group to rent school property during off-hours was not held to be a public obligation.⁷⁰

Given this emphasis on whether or not protections are an obligation of the public, it is clear the *Hendricks* court reached the correct conclusion. The monetary grant to the Yeshiva is more analogous to the renting of the classrooms in *Resnick* than to an obligation of the public, like providing fire protection. While our society highly regards education, which is evident by the establishment of public schools, the type of education pursued by the students at the Yeshiva cannot be found constitutional under New Jersey's constitution. The Yeshiva is a religious group and if the funding were granted, it would undoubtedly go towards maintaining or supporting the study of the Talmud.

III. RELIGIOUS PROTECTIONS GRANTED BY NEW JERSEY'S CONSTITUTION

For the purposes of this note, Article I of New Jersey's constitution, which established the rights and privileges of its citizens is most relevant.⁷¹ The state constitution protects religious freedom and includes the clause, "...nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform."⁷² Similar to the U.S. Constitution, New Jersey's also guarantees no establishment of religion by including, "There shall be no establishment of one religious sect in preference to another."⁷³

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Resnick*, 77 N.J. at 103.

⁷⁰ *Id.*

⁷¹ N.J. Const., Art. I (1947).

⁷² N.J. Const., Art. I, Para. 3 (1947).

⁷³ *Id.* at Para. 4.

IV. IS IT CONSTITUTIONAL FOR TAXPAYERS TO PAY FOR PRIVATE SCHOOL TRANSPORTATION?

The simple answer to the question proposed is probably, yes. However, the mandated transportation of non-public school pupils is sinking Lakewood, and now the surrounding areas, financially. It is necessary to evaluate the constitutionality of the state busing program and the New Jersey Legislature's solution to the problem under both federal law and New Jersey law.

Applying the Supreme Court's ruling in *Everson*, the question to answer is if New Jersey law violates the First Amendment. Article 8 of the New Jersey State Constitution states, "The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school."⁷⁴

In addition to the state constitution, there is a state statute which holds in part, "...transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than twenty miles from the residence of the pupil..."⁷⁵ Under current state law, school districts must provide transportation to grade school students who live more than two miles from their schools and to high school students who live more than two and a half miles from their schools.⁷⁶ Beyond the requirements of the state statute, Lakewood, as a courtesy, also provided free busing to students who lived within the two mile walking distance not mandated by state law.⁷⁷ However, because of the budget challenges facing the township, Lakewood ended courtesy busing in 2016.⁷⁸

Courts have to consider both the Establishment Clause and the Free Exercise Clause when analyzing First Amendment cases. Simply explained, the government cannot endorse a particular religion, but it also cannot prevent its citizens from practicing any religion either. On its face, the New Jersey statute is neutral.

⁷⁴ *Id.* at Art. VIII, Sec. IV, Para. 3.

⁷⁵ N.J.S.A. § 18A:39-1 (1967).

⁷⁶ Shannon Mullen, Make-or-break Lakewood busing vote Thursday, ASBURY PARK PRESS (June 28, 2016), <http://www.app.com/story/news/education/in-our-schools/2016/06/28/lakewood-orthodox-busing-costs-singer/86429836/>.

⁷⁷ *Id.*

⁷⁸ Mark Di Ionno, Lakewood busing issues expose private school rides on public dollars, THE STAR LEDGER (May 14, 2017), http://www.nj.com/news/index.ssf/2017/05/lakewood_busing_issues_expose_private_school_rides.html.

Article 8 of the constitution is also neutral. The aim is clear. The state legislature sought to provide transportation for students, regardless of whether they attended public or private school. If they were bussed to a private school, the type of school was irrelevant. There is no discrimination against any type. The issue lies with the effect of the law, but this issue is likely unique to Lakewood solely because of the uncommon and extremely high percentage of private school students in the township. There are three primary criteria applied to determine whether government aid has the effect of advancing religion. It must not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement between government and religion.⁷⁹

First, the statute certainly does not define its recipients by reference to religion. As previously mentioned, it is facially neutral towards religion. To determine if there is governmental indoctrination, ultimately, the question is whether any religious indoctrination occurring in the Lakewood schools can reasonably be attributed to governmental action.⁸⁰ The principle of neutrality is key to evaluating whether or not there is any governmental indoctrination.⁸¹ The government is permitted to provide aid to all, this includes, both the religious and irreligious, without regard to religion in order to further a legitimate secular purpose.⁸² The government must conclude that the level of aid it chose is necessary to further its intended purpose to secular recipients and it cannot provide more to religious recipients.⁸³ The New Jersey busing statute is likely safe under the government indoctrination test because providing transportation for students to receive an education is a legitimate secular purpose. To find otherwise, would require a successful argument that the state busing laws are not “public welfare legislation” extended to virtually every member of the population.⁸⁴ Since the busing is available to all children within the mileage requirements, this would likely be a failing argument.

The final criterion evaluates whether there is excessive entanglement between government and religion. Excessive

⁷⁹ Mitchell v. Helms, 530 U.S. 793, 808 (2000) (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)).

⁸⁰ Helms, 530 U.S. at 809.

⁸¹ *Id.*

⁸² *Id.* at 809-10.

⁸³ *Id.* at 810.

⁸⁴ *Id.* at 874 (Souter, J., dissenting).

entanglement has consistently been a part of the Court's analysis in Establishment Clause cases.⁸⁵ The Court has looked at both whether the program in question had the forbidden effect of advancing religion and also as a factor independent from "effect."⁸⁶ To assess entanglement, the Court looks at "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."⁸⁷ It is inevitable that there will be some level of interaction between religion and government, so the Court permits it so long as it is not excessive. Three grounds for excessive entanglement were provided in *Aguilar*: 1) does the program require pervasive monitoring by government employees to ensure there is no religious indoctrination; 2) does the program require administrative cooperation between government and church; and 3) does the program increase the dangers of "political divisiveness."⁸⁸

Providing students with transportation does not require oversight to monitor whether there is excessive entanglement because the service is provided to all students regardless of whether they attend a private or public school. Therefore, the busing statute passes this entanglement factor.

Regarding the second consideration, the program does however, require some level of administrative cooperation between government and church. If vehicles owned by the school district provide transportation, then the school board does not have to put out a bid for the service, but if third-party vehicles provide the transportation, then there must be a bid.⁸⁹ The logistics of providing transportation for the private school students are impossible to finalize without some level of cooperation between church and state. A private school must collect applications for transportation from its students who plan on riding the bus to and from school and submit the forms to the public school district.⁹⁰ The private school must also provide the public school with the private school's academic calendar for the year.⁹¹ The district board of education must create the busing routes for the students

⁸⁵ *Agostini*, 521 U.S. at 232.

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)).

⁸⁸ *Agostini*, 521 U.S. at 233 (quoting *Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985)).

⁸⁹ N.J. Dep't of Educ., *supra* note 5.

⁹⁰ *Id.*

⁹¹ *Id.*

and is also required to submit a “private school transportation summary” to the private schools twice yearly.⁹² Clearly in order for transportation to be provided, there is a necessary level of cooperation between parochial schools and the government.

The political divisiveness consideration analyzes the dangers of an aid plan resulting in the establishment of state religion or significant religious control over our democratic processes.⁹³ In *Aguilar*, the Court was concerned that the aid at issue, public money paying for the salaries of government employees working in parochial schools, was the type to lead to immense political conflict.⁹⁴ Interestingly enough, a strong case could be made that providing busing to Lakewood private school students has led to political strife in the township and the surrounding community. As the population continues to grow and Orthodox families move into Lakewood and other nearby areas, tax dollars are continuing to rise to pay for these children to get to and from their private schools.

However, the “administrative cooperation” and “political divisiveness” considerations are not enough alone to qualify as excessive entanglement.⁹⁵ In effect, it is necessary for there to be pervasive monitoring by the government in order for there to be a finding of excessive entanglement. Based on this judicial interpretation, instances where the second and third considerations are met, like in the present issue, are not enough for a finding of excessive entanglement. In conclusion, under the analysis there is no governmental indoctrination, the statute does not define its recipients by reference to religion and it does not create an excessive entanglement between government and religion. Therefore, a constitutional challenge to the school transportation statute would likely fail today, just as it did in *Everson* over 70 years ago.

So, what, if anything, can be done to challenge this state law, which seemingly has no ill effects in virtually the entire state but is causing tremendous financial burden in a single municipality and its surrounding areas? Unfortunately for residents of the area, nothing can likely be done to rectify the situation under the First Amendment. The First Amendment does not require a

⁹² N.J. Dep’t of Educ., *supra* note 5.

⁹³ *Aguilar*, 473 U.S. at 416.

⁹⁴ *Id.* at 417.

⁹⁵ *Agostini*, 521 U.S. at 233-34.

complete separation of church and state in every possible respect.⁹⁶ There is nothing unconstitutional about the New Jersey busing laws because the statute does not favor Judaism over any other religion, it does not favor parochial schools over public schools and the law does not require the government to be excessively entangled in religion. Busing is provided to all students regardless of whether they attend a Jewish school, Catholic school or public school. While the overwhelming majority of students in Lakewood attend Orthodox Jewish schools, the statute is neutral towards religion and is therefore constitutional.

A. KEY CASES: *EVERSON V. BOARD OF EDUCATION*

The First Amendment to the U.S. Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁹⁷ In *Everson*, the seminal case regarding transportation for private school students, a taxpayer challenged the constitutionality of the New Jersey state statute, arguing that it violated the First Amendment.⁹⁸ The majority opinion interpreted the “Free Exercise Clause” of the First Amendment as forbidding the government from levying any tax to support any religious activities or institutions to teach or practice religion.⁹⁹ In reaching its conclusion on the constitutionality of the NJ statute, the majority also balanced the Free Exercise Clause against the “Establishment of Religion Clause”.¹⁰⁰ New Jersey, like every state, is prohibited from contributing money from tax revenue to support an institution which teaches a religion, but at the same time, the state also cannot hamper its citizens from practicing their faith.¹⁰¹ The Supreme Court held that state tax dollars could support the transportation of students to schools because the state was not endorsing a particular religion- it did not provide any support or money to the schools but rather to the parents of the students.¹⁰²

⁹⁶ Donald T. Kramer, 37 L.Ed. 2d 1147, “*Annotation: Supreme Court Cases Involving Establishment and Freedom of Religion Clauses of Federal Constitution*” (2012).

⁹⁷ U.S. CONST. amend. I.

⁹⁸ *Everson*, 330 U.S. at 8.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 18.

The state legislation “does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”¹⁰³

The dissent argued that First Amendment prohibition was broad and forbid any state support for religious purposes.¹⁰⁴ The dissent took issue with the majority’s argument that the reimbursement of transportation costs to the parents was not a form of governmental support of religion.¹⁰⁵ The transportation reimbursement the parents received from the tax dollars helped the student receive religious training and teaching.¹⁰⁶

What was the actual intent of the framers when they inserted the Establishment Clause into the First Amendment? The Court is still divided over an answer to this question.¹⁰⁷ Both the majority and dissenting opinions rely heavily on the writings of James Madison and Thomas Jefferson in interpreting the framers’ intent behind the text of the First Amendment.¹⁰⁸ It is clear from Madison’s works, including *Memorial and Remonstrance Against Religious Assessments*, which is referenced in Justice Rutledge’s dissent in *Everson*, that he was strongly opposed to governmental establishment of religion.¹⁰⁹ Jefferson’s view on the subject is equally as clear from the “Virginia Bill for Religious Liberty”, which he wrote and Virginia enacted.¹¹⁰ The bill stated, “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief”¹¹¹ Jefferson believed there should be a “wall of separation” between church and state.¹¹²

¹⁰³ *Everson*, 330 U.S. at 18.

¹⁰⁴ *Id.* at 33 (Rutledge, J., dissenting).

¹⁰⁵ *Id.* at 45 (Rutledge, J., dissenting).

¹⁰⁶ *Id.*

¹⁰⁷ Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. Pa. J. Const. L. 585, 587 (2006).

¹⁰⁸ Munoz, *supra* note 107 at 588-591.

¹⁰⁹ Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 Wm. & Mary L. Rev. 837, 919-920 (1995).

¹¹⁰ *Everson*, 330 U.S. at 12.

¹¹¹ *Id.* at 13.

¹¹² Munoz, *supra* note 107 at 590.

B. KEY CASES: *RESNICK V. EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION*

Everson was argued before the U.S. Supreme Court, but the last major case was *Resnick v. East Brunswick Board of Education*.¹¹³ The case involved the constitutionality of religious groups leasing public school property for religious purposes during non-school hours.¹¹⁴ In its state constitutional analysis, the court relied on Article I Paragraph 3 of the New Jersey Constitution, which prohibits the use of tax revenues for the maintenance or support of a religious group.¹¹⁵ The court also performed a First Amendment establishment clause analysis by applying a three-part test: (1) it must have a secular legislative purpose; (2) a principal or primary effect of the practice must be one that neither advances nor inhibits religion; and (3) it must not foster excessive governmental entanglement with religion.¹¹⁶ However, the third prong- the entanglement prong, has since been folded into the second prong- an inquiry which analyzes the primary effect of the statute.¹¹⁷ The court cites a few cases for this test, but this test is currently known as the “Lemon Test”¹¹⁸ and originally stemmed from *Lemon v. Kurtzman*.¹¹⁹

The majority felt the secular purpose requirement was satisfied because the purpose was to enhance the public use of the school properties for the benefit of all residents of the township.¹²⁰ Next, the majority found the second prong was satisfied because its primary effect was to benefit non-profit groups as a whole, not advance religion.¹²¹ Lastly, no excessive entanglement was found because there was no administrative function, no public school class instruction occurring while the rooms were in use and no appropriations.¹²²

¹¹³ Shannon Mullen, *Supreme Court Ruling Could Impact Yeshiva Grant*, ASBURY PARK PRESS (May 27, 2016), <http://www.app.com/story/news/local/courts/2016/05/27/bmg-yeshiva-grant-supreme-court/85040124/>.

¹¹⁴ *Resnick*, 77 N.J. at 93.

¹¹⁵ *Id.* at 102-03.

¹¹⁶ *Id.* at 108.

¹¹⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002).

¹¹⁸ *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 204 (4th Cir. 2017).

¹¹⁹ *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

¹²⁰ *Resnick*, 77 N.J. at 109.

¹²¹ *Id.* at 111.

¹²² *Id.* at 116.

C. KEY CASES: *ZELMAN V. SIMMONS-HARRIS*

The public-school system in Cleveland, Ohio was consistently evaluated as one of the worst not just in Ohio, but in the entire country.¹²³ The city school system was placed under state control by a federal court.¹²⁴ To help solve the education crisis, Ohio developed the “Pilot Project Scholarship Program.”¹²⁵ The program provided tuition aid to parents who were permitted to choose any public or private school (so long as it was participating in the program) for their children to attend.¹²⁶ Zero public schools elected to participate in the program but fifty-six private schools opted in, forty-six of which were religiously affiliated schools.¹²⁷ Approximately 3700 students participated in the program and more than 95% of them attended religiously affiliated schools.¹²⁸

Citing three key previous decisions, the majority upheld the state program as constitutional because the program offered aid directly to a broad class of individuals and also because the recipients of the aid were able to choose which school to send their children to.¹²⁹ The Ohio program was neutral towards religion as the only preference for aid was given to low-income families.¹³⁰

Justice O'Connor wrote separately in concurrence because she wanted to illustrate her belief that the majority's decision was not a departure from the Court's prior Establishment Clause jurisprudence and also to paint a clearer picture of how the parents of schoolchildren in Cleveland really exercised a “true private choice” in choosing schools.¹³¹ First, she argued that the data the respondents provided was incomplete because when you factor in the option of attending magnet or community schools, the percentage of students who enrolled in religious schools was really 16.5%.¹³² She emphasized how at worst, \$8.2 million from the public program went towards religious schools and how this

¹²³ *Zelman*, 536 U.S. 639 at 644.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 645.

¹²⁷ *Id.* at 647.

¹²⁸ *Id.*

¹²⁹ *Zelman*, 536 U.S. 639 at 649 (relying on *Mueller v. Allen*, 436 U.S. 388 (1983); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)).

¹³⁰ *Id.* at 653.

¹³¹ *Zelman*, 536 U.S. 639. at 663 (O'Connor, J., concurring).

¹³² *Id.* at 663-64.

amount pales in comparison to the amount Ohio spent on students in Cleveland magnet schools and the amount religious organizations save in federal and state tax exemptions.¹³³ She also wrote about the reliance on Medicare funds by religious hospitals in their revenue to illustrate how the amount in question here is miniscule and not atypical when compared to existing government programs and expenditures.¹³⁴

Justice Thomas joined the decision in full but wrote separately to express his disdain for applying the Establishment Clause, through the 14th Amendment, to the states because it prevents educational opportunity for minority students.¹³⁵ The basis for his argument is that “without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment.”¹³⁶ If the Court disallowed religious schools from participating in the program, then Cleveland children could only use their scholarships from the state program at 10 of the 56 schools (46 of the schools have a religious affiliation).¹³⁷

The problem with Justice Thomas’ argument is two-fold. First, Cleveland students had the opportunity to attend ten non-religious, non-public schools. The parents had a choice. They were not stuck sending their child to a failing public school or a religious private school- there were other options available. Second, the intent of the founders is clear from their writings. They were extremely wary of allowing public dollars to be spent for religious purposes. While states have a constitutional right to test different ways of promoting educational opportunity to their residents,¹³⁸ this must be done within the framework of the constitutional analysis. The program must have a secular purpose and cannot have the effect of promoting religion.¹³⁹ Constitutional analysis should not bend simply because the Cleveland public schools are not up to snuff. The elected officials in Cleveland and the state of Ohio can improve the school system within the boundaries of the Constitution and if not, then the general public has the power to vote them out and replace them with people who can. Justice Thomas criticized those who disagree with him as

¹³³ *Id.* at 664.

¹³⁴ *Id.* at 667.

¹³⁵ *Zelman*, 536 U.S. 639 at 677 (Thomas, J., concurring).

¹³⁶ *Id.* at 680.

¹³⁷ *Id.* at 681.

¹³⁸ *Id.* at 681.

¹³⁹ *Id.* at 677.

expansively applying the Establishment Clause in this case,¹⁴⁰ but he was the one twisting it to fit his view.

D. KEY CASES: *LOCKE V. DAVEY*

In *Locke*, the state of Washington created a college scholarship program to assist gifted students with the cost of post-secondary education.¹⁴¹ The scholarship could be used at any private or public school but pursuant to the state constitution, it could not be used to pursue a degree in devotional theology.¹⁴² Mr. Davey argued the denial of a scholarship to pursue a degree in devotional theology violated the Free Exercise, Establishment and Free Speech clauses of the First Amendment as well as the Equal Protection clause of the Fourteenth Amendment.¹⁴³

The issue presented was whether Washington could deny the scholarship for pursuit of a degree in in devotional theology without violating the Free Exercise Clause.¹⁴⁴ The Court held that the state indeed could deny the scholarship because its “disfavor of religion” was mild and did not require students to choose between their religious beliefs and a government benefit¹⁴⁵—something that will be at issue in the following case, *Trinity Lutheran*. The decision was rationalized based on the argument that the state’s interest in not funding devotional theology degrees was substantial versus the minimal burden imposed on the scholars denied from using the funds to pursue the degree.¹⁴⁶ Washington simply declined to fund a distinct degree, devotional theology.¹⁴⁷ The majority even claimed that the scholarship program was not hostile towards religion but rather inclusive since a student could use a scholarship at a religion school so long as it was an accredited institution.¹⁴⁸

In his dissent, Justice Scalia argued that when a state provides a generally available public benefit to citizens but denies it to some solely on the basis of religion, it violates the Free

¹⁴⁰ *Id.* at 684.

¹⁴¹ *Locke v. Davey*, 540 U.S. 712, 715 (2004).

¹⁴² *Id.*

¹⁴³ *Id.* at 718.

¹⁴⁴ *Id.* at 719.

¹⁴⁵ *Id.* at 720-21.

¹⁴⁶ *Id.* at 725.

¹⁴⁷ *Locke*, 540 U.S. 712 at 721.

¹⁴⁸ *Id.* at 724.

Exercise Clause.¹⁴⁹ The only field of study excluded from the scholarship program is religion.¹⁵⁰ Here, Davey did not want a special benefit but rather the right to equal treatment- the right to use his scholarship in whatever field of study he chose.¹⁵¹ He also pointed out that other options were available to the state that would fit within the “play in the joints” between respecting Washington’s taxpayers and the federal Free Exercise Clause such as allowing the scholarship to only be used at public universities, where the state sets the curriculum.¹⁵²

Comparing and contrasting the Supreme Court’s opinion here with the analysis by the New Jersey state court in the Beth Medrash Govoha grant case, it is evident that both courts applied a similar examination before reaching a decision. The educational program offered to students at the Yeshiva is entirely religious, which is similar if not even more religious than the degree in devotional theology that was scrutinized in *Locke*. At least at an accredited university with a major in devotional theology, a student would still likely need to take elective courses in secular subjects like History, English, Economics and so on. At the Lakewood Yeshiva, the only courses and degrees offered revolved entirely around religious study. If the student in *Locke* were to attend a private university (like he did) but pursue a degree in something other than pastoral ministries or some other devotional theology, the scholarship would be available to use. This led to Justice Scalia’s argument that the scholarship money was a widely available public benefit but was denied solely on the basis of religion. The scholarship was not denied on the basis of the type of school but rather on the type of degree. If a student attended a public university that offered a devotional theology degree, the scholarship still would not be granted. Justice Scalia was correct in his dissent, because the denial of the scholarship was a violation of the Free Exercise Clause. A clear understanding of *Trinity Lutheran* is necessary before proceeding in the analysis, but in *Locke*, a generally available public benefit was denied on the basis of religion, which violates the First Amendment. The Court reached the incorrect conclusion.

¹⁴⁹ *Locke*, 540 U.S. 712 at 726-27 (Scalia, J., dissenting).

¹⁵⁰ *Id.* at 727

¹⁵¹ *Id.*

¹⁵² *Id.* at 729 (Scalia, J., dissenting).

E. KEY CASES: TRINITY LUTHERAN CHURCH

The most recent noteworthy case for the issues in Lakewood is the *Trinity Lutheran* case. The decision illustrated just how much First Amendment jurisprudence has changed over time because for the first time, the Court held that the government was required to provide assistance to religious organizations.¹⁵³ Trinity Lutheran Church applied for a grant through the Missouri Department of Natural Resources for its preschool and daycare center.¹⁵⁴ The department concluded the church was ineligible to receive the state grant because under the Missouri Constitution, the state could not provide assistance directly to a church.¹⁵⁵

The majority held that the State violated Trinity Lutheran's rights under the Free Exercise Clause because in order to receive a public benefit for which it was completely qualified, the church would have to denounce its religious character.¹⁵⁶ The majority relied on *Everson*, where it was held that a "state cannot hamper its citizens in the free exercise of their own religion" and that includes excluding people from the benefits of public welfare because of their faith or lack thereof.¹⁵⁷ This was evident from Justice Breyer's concern with ruling in favor of Missouri because the intent of the First Amendment was not to prevent church schools from receiving general government services like police and fire protection.¹⁵⁸ For Justice Breyer, preventing children from having a safe area to play on account of what type of school they attend was akin to these general government services.¹⁵⁹

The majority left the door open about possibly distinguishing between laws that discriminate on the basis of religious status and laws that discriminate on the basis of religious use.¹⁶⁰ There is some uncertainty as to whether or not Chief Justice Robert's

¹⁵³ Erwin Chemerinsky, *Waiting for Gorsuch*, 20 Green Bag (2d) 351, 358 (Summer 2017).

¹⁵⁴ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

¹⁵⁵ *Id.* at 2018.

¹⁵⁶ *Id.* at 2024.

¹⁵⁷ *Id.* at 2020 (quoting *Everson* 330 U.S. 1 at 16).

¹⁵⁸ Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2017 Cato Sup. Ct. Rev. 105, 117 (2017).

¹⁵⁹ *Id.*

¹⁶⁰ *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2017 (Gorsuch, J., concurring).

analysis for discrimination appropriately relied on Trinity Lutheran's status as a church rather than Trinity Lutheran's planned use of the state funds.¹⁶¹ Justice Gorsuch concurred with the decision but believed Roberts' distinction would blur the lines and prove unstable.¹⁶² Going even further, Gorsuch believed Roberts' distinction was unnecessary because the Free Exercise Clause protects both benefits based on status and use.¹⁶³ This case was tailor-made for his argument because there was no need to get into making the distinction as the government cannot force people to choose between participation in a public program and the free exercise of religion, which was precisely what the Court held Missouri was doing here.¹⁶⁴

In this case, the parties agreed there was no Establishment Clause issue here but rather a Free Exercise clause problem.¹⁶⁵ This was peculiar since most Supreme Court cases focused on the Establishment Clause when analyzing instances where the government chose to provide assistance to a religious institution.¹⁶⁶ The only instance where the Court previously considered whether the Constitution compelled the government to give aid to religious institutions was rejected in a decisive 7-2 decision in *Locke v. Davey*.¹⁶⁷ However, Justice Sotomayor's dissent argued there was an Establishment Clause issue.¹⁶⁸ Sotomayor asserted that funds flowing from a public treasury to religious institution was a clear violation of the rule established in *Everson*: "the government may not directly fund religious exercise."¹⁶⁹ Trinity's own materials describe the learning center as a "ministry of the church" and its program is structured "to allow a child to grow spiritually."¹⁷⁰ Sotomayor felt there was an Establishment Clause issue because she believed the playground to be an extension of the learning center, which Trinity Lutheran quite clearly used to advance its religious mission.¹⁷¹

¹⁶¹ Garnett & Blais, *supra* note 158 at 129.

¹⁶² *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2025 (Gorsuch, J., concurring).

¹⁶³ *Id.* at 2026.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2019.

¹⁶⁶ Chemerinsky, *supra* note 153 at 358-59.

¹⁶⁷ *Id.* at 359.

¹⁶⁸ *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).

¹⁶⁹ Garnett & Blais, *supra* note 158 at 119.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

In their dissent, Justices Sotomayor and Ginsburg, stated that the Supreme Court, held for the first time, “the Constitution requires the government to provide public funds directly to a church.”¹⁷² The dissent further noted, “the decision slights both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both.”¹⁷³ Justice Sotomayor acknowledged that the Court had previously found instances where direct government funding to religious institutions did not violate the Establishment Clause.¹⁷⁴ The difference between those cases and *Trinity Lutheran* was that the former came with assurances that the public funds would not be used for religious activity but here, the Church cannot provide those assurances.¹⁷⁵ The holding is concerning because Jefferson’s belief in a “wall of separation” between religion and government, which was gradually eroding, has now been completely demolished after *Trinity Lutheran*. There is speculation that the decision will open the door for religious institutions to bring a claim whenever a secular institution is given aid that a religious one is denied.¹⁷⁶ Justice Roberts attempted to prevent this from becoming a problem by narrowing the scope of the decision in a footnote stating, “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”¹⁷⁷ Only three other justices joined Roberts on the footnote and Gorsuch and Thomas disagreed with him and wanted to go further and overrule *Locke*.¹⁷⁸

The *Trinity Lutheran* majority put significant weight behind whether or not the funding was for a public benefit and absent a state interest of the “highest order”, a generally available public benefit cannot be denied on the basis of religion.¹⁷⁹ A denial of tax dollars for the transportation of Jewish students in Lakewood would be a denial of a benefit for the public welfare of

¹⁷² *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2029.

¹⁷⁵ *Id.*

¹⁷⁶ Chemerinsky, *supra* note 153 at 359.

¹⁷⁷ *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2024 n.3.

¹⁷⁸ Chemerinsky, *supra* note 153 at 360.

¹⁷⁹ *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2019 (quoting *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972)).

the community on the basis of their Jewish faith. Certainly, no assurances can be made that the money used for transporting Lakewood's private school students is only for secular purposes because the vast majority of private school children are taken to private Jewish schools where they study the Jewish faith. However, there is no state interest of the "highest order" that can be successfully argued to end this type of funding. Because of Lakewood's unique makeup, the state law does not put other townships in the financial bind Lakewood is in because most of a town's children attend public school.

The Supreme Court has never understood the "wall of separation" between church and state to entirely rule out cooperation between the two but the question still often arises about where to draw the line.¹⁸⁰ N.J.S.A. §18A: 39-1 helps all children get to school, no matter what type of school, so they can learn. This is a benefit for the general public welfare. The public interest in having safe playgrounds in *Trinity Lutheran* is akin to the public interest in having transportation available for children to get to school. Under the recent Supreme Court ruling, equal treatment is not establishment so long as the funding is for a valid public purpose, so the Lakewood transportation would likely be held as constitutional.¹⁸¹

Even after concluding busing of students to school is a public benefit the analysis is still not complete. There remains the issue of how the transportation of the students is playing out in Lakewood. The issue is similar to *Zelman* where an Ohio program was instituted to provide educational assistance to poor families in the failing Cleveland school system.¹⁸² While the program was enacted for a valid secular purpose of educational assistance, the Court assessed whether the program had the "forbidden effect of advancing or inhibiting religion."¹⁸³ The majority of Lakewood private school students and families are benefitting from the public funding. Justice Sotomayor correctly argued there must be assurances that the funding will not be used for religious activity for it be constitutional.¹⁸⁴ While the money is not flowing directly to the religious institutions, the funding is undoubtedly helping

¹⁸⁰ Garnett & Blais, *supra* note 158 at 107.

¹⁸¹ *Id.*

¹⁸² *Zelman*, 536 U.S at 649.

¹⁸³ *Id.*

¹⁸⁴ Garnett & Blais, *supra* note 158 at 119.

the children attend these private schools where they learn about their faith extensively.

The dissent argued in addition to the Establishment Clause violation, there was also a Free Exercise violation and the majority erred in their analysis.¹⁸⁵ However, there does not need to be a violation of one of the Religion Clauses for there to be concerns about the interaction of government and religion's effect on both clauses.¹⁸⁶ Missouri recognized in its Constitution that the transfer of public money to religious institutions sits right in the middle of the Religion Clauses and has prohibited this type of funding in order to avoid those concerns.¹⁸⁷

I. LAKEWOOD'S PRIVATE SCHOOL TRANSPORTATION

If a taxpayer challenged the private school transportation issue in Lakewood today, the taxpayer would likely succeed as the statute would probably fail the Lemon test. The first prong of the test would presumably be met as the intent of the state statute was likely to provide transportation for all children to schools.

However, there would be issues with the second and third prongs. Certainly, in Lakewood and now spreading to the surrounding communities, the practice of providing transportation to private school children is advancing the Jewish religion on the taxpayers' dime. Per U.S. Census data, over 46% of Lakewood's population (about 100,000 people) is under the age of 18.¹⁸⁸ The Kindergarten-Twelfth grade religious schools have an estimated 30,000 Orthodox Jewish students.¹⁸⁹ As State Senator Bob Singer, who represents the township said, "Lakewood has become a

¹⁸⁵ Trinity Lutheran Church of Columbia, Inc., 137 S. Ct. at 2031 (Sotomayor, J., dissenting).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 2038.

¹⁸⁸ U.S. CENSUS BUREAU, Lakewood Twp., Ocean Cnty., N.J., Population Estimates: Age and Sex (2017 estimate), <https://www.census.gov/quickfacts/fact/table/lakewoodtownshipoceancountynewjersey/PST0452>

¹⁸⁹ Mark Di Ionno, How Lakewood became a worldwide destination for Orthodox Jews, THE STAR LEDGER (May 14, 2017), http://www.nj.com/news/index.ssf/2017/05/how_lakewood_became_a_worldwide_destination_for_or.html.

Jewish mecca.”¹⁹⁰ The argument for the failure of the second prong is similar to the dissent’s argument in *Resnick*.¹⁹¹ The primary effect of the transportation is conferring significant benefits for Jewish students to be transported to Jewish schools.

II. NEW JERSEY’S SOLUTION TO LAKEWOOD’S BUSING CRISIS: THE TRANSPORTATION PILOT PROGRAM

On August 9, 2016, Governor Chris Christie signed S-2049/A-3652 into law.¹⁹² Under the bill, one school district will be designated by the Commissioner of Education to participate in a pilot transportation program.¹⁹³ In order to be eligible to participate in the program, the school district must have provided transportation to more than 5000 students residing in the district to nonpublic schools.¹⁹⁴ Lakewood is the only district in the entire state to meet this criteria.¹⁹⁵ The bill “establishes three-year nonpublic school pupil transportation pilot program in Lakewood School District to provide funding to consortium of nonpublic schools that will assume responsibility for district’s mandated nonpublic school busing.”¹⁹⁶ In his released statement on the bill, Governor Christie cited the unique challenges Lakewood faced in getting students to school.¹⁹⁷ These challenges stem from the fact that the vast majority of students in Lakewood attend private schools and also the congestion in the township from significant

¹⁹⁰ Jeanette Rundquist, Lakewood, N.J.’s fastest-growing town, is defined by its diversity, THE STAR LEDGER (Feb. 6, 2011),

http://www.nj.com/news/index.ssf/2011/02/lakewood_is_njs_fastest-growin.html.

¹⁹¹ *Resnick*, 77 N.J. at 130 (Clifford, J., dissenting).

¹⁹² Tom Davis, Gov. Christie Signs 2 Bills Into Law; Cop Diversity Training Now Required, TOMS RIVER PATCH (Aug. 9, 2016), <https://patch.com/new-jersey/tomsriver/gov-chris-christie-signs-2-bills-law-cop-diversity-training-now-required>.

¹⁹³ 2016 Legis. Bill Hist. NJ A.B. 3652.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ State of N.J., Gov. Chris Christie Takes Action on Pending Legislation, (Aug. 9, 2016) <http://nj.gov/governor/news/news/552016/approved/20160809a.html>

¹⁹⁷ Statement from Chris Christie, Gov. of State of N.J., to the people, (Aug. 9, 2016)

http://nj.gov/governor/news/news/552016/pdf/20160809a_S2049_StatementuponSigning.pdf

growth in population in recent years.¹⁹⁸ The idea behind the bill was to remedy the \$12 million deficit the school district currently faces because of the rapid growth of the Orthodox Jewish community in the district.¹⁹⁹ The cost of transportation for all students, both public and private, in Lakewood was \$24.5 million for the 2016-2017 school year and is estimated to climb closer to \$27 million for 2017-2018.²⁰⁰ Part of the cause of the high transportation costs is because the Orthodox Jewish community, generally, strongly promotes the separation of boys and girls.²⁰¹ Simple, cost-saving measures have been rejected on the basis of religion. For example, Orthodox school owners refused to allow the installation of curtains on the school buses to separate the two genders on their rides into school.²⁰² Instead of transporting both boys and girls heading to the same geographic area on one bus, boys and girls must be bussed to school separately on the taxpayers' dime.

Sen. Singer's bill requires the state to pay \$2.4 million per year to a group of private school owners in Lakewood and then they, on their own, figure out how to provide busing for their students.²⁰³ The way the program works is the state provides funding to Lakewood's Board of Education which then disburses the funds to a "consortium of nonpublic schools."²⁰⁴ \$884 per student attending a nonpublic school in the consortium is provided.²⁰⁵ This amount is equal to the amount currently provided to a student in the state who receives aid in lieu of transportation.²⁰⁶ The consortium then takes on the responsibility of transporting the students to their nonpublic school. Lakewood was providing courtesy busing to 7000 students it was not mandated to provide busing for under

¹⁹⁸

http://nj.gov/governor/news/news/552016/pdf/20160809a_S2049_StatementuponSinging.pdf

¹⁹⁹ Mullen, *supra* note 76.

²⁰⁰ Di Ionno, *supra* note 78.

²⁰¹ Chana Weisberg, Why does the orthodox community promote gender-segregated schools?, http://www.chabad.org/library/article_cdo/aid/602463/jewish/Why-does-the-orthodox-community-promote-gender-segregated-schools.htm.

²⁰² Di Ionno, *supra* note 78.

²⁰³ *Id.*

²⁰⁴ 2016 Legis. Bill Hist. NJ A.B. 3652.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

state law but this legislation requires Lakewood to cease providing the transportation while the pilot program is in effect, unless there is any money left over after transporting the students they are legally required to transport.²⁰⁷ The Office of Legislative Services (OLS) stated that Lakewood was spending approximately \$602 on transportation per non-public pupil.²⁰⁸ Under the pilot program, the cost per pupil increased by 18% to \$735 per pupil but the OLS claims that the prohibition on courtesy busing will result in a decrease in expenditures but the OLS did not have any data on how much Lakewood spent on courtesy busing to support that assertion.²⁰⁹ The OLS also believes that by requiring the consortium to return any unspent funds at the end of the school year after providing transportation to the mandated students that costs will decrease. However, the consortium has the option of using any leftover funds to provide courtesy transportation until the funds are depleted.²¹⁰ There simply is not much evidence that the costs will decrease under this program, in fact, there is evidence to the contrary.

The greatest threat to the success of the program is that the township's growth will continue to significantly impact the cost of transportation. The latest estimate is that the township's public schools will face somewhere between a \$14-20 million budget shortfall for 2018-19.²¹¹ The district expects to add at least 2,300 students per year who need transportation.²¹² According to Lakewood's Assistant Business Administrator, Robert Finger, most districts in the state spend somewhere between 4 and 9 percent of their budget on transportation and tuition but Lakewood is approaching 20 percent.²¹³

As a result of this bill, the quasi-public "Lakewood Student Transportation Authority" was created and an Executive Director hired with a salary of \$150,000 a year.²¹⁴ The oversight committee consists of five members, who are all appointed by either the State

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 2016 Legis. Bill Hist. NJ A.B. 3652.

²¹⁰ *Id.*

²¹¹ Stacey Barchenger, Lakewood school funding: District needs millions to cover deficit, ASBURY PARK PRESS (Feb. 1, 2018), <https://www.app.com/story/news/investigations/watchdog/education/2018/02/01/lakewood-nj-schools-budget-deficit-shortfall/1084324001/>.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Di Ionno, *supra* note 78.

monitor, the board of education or Commissioner of Education.²¹⁵ Additionally, the bill requires the commissioner to submit a report to the Governor and Legislature at the completion of the 2017-2018 school year.²¹⁶

There is not much transparency into how the LTSA operates. Alfred Longo, who was appointed to the LTSA Oversight Committed, stated in August 2017, "We still have no idea who makes up the entire consortium, if they're drawing up the most efficient routes, when they're going to hold public meetings, or how they're spending the state money."²¹⁷ David Sciarra, the Executive Director of the Education Law Center in Newark, argues that a substantial amount of funding is hidden in the state budget to support private and religious schools.²¹⁸ Transportation aid is underfunded throughout the state, and in order to cope with the shortfall of funds and transport nonpublic students to school, municipalities are forced to kick in money from their municipal budgets.²¹⁹ In Lakewood, the result is that \$12 million allocated for public school use is diverted to nonpublic school transportation.²²⁰

When applying the three-part test to determine if government aid has the effect of advancing religion,²²¹ this pilot program seems unconstitutional. The first criterion certainly passes. The pilot program is facially neutral and does not define its recipients by reference to religion. The program is open to all nonpublic schools who join the consortium, regardless of whether they are religious or not. If they are religious, it does not matter what denomination the school is.

The next criterion that must be met is governmental indoctrination, which the pilot program likely meets, though not as easily as the previous criterion. New Jersey created this program to step in and assist the local government with its busing crisis. This is clear given that Lakewood is the only township in the entire state to meet the criteria of the bill and thus be eligible for the program.²²² The township must have provided transportation to more than 5,000 nonpublic students in the prior year to be

²¹⁵ 2016 Legis. Bill Hist. NJ A.B. 3652.

²¹⁶ *Id.*

²¹⁷ Di Ionno, *supra* note 78.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Helms*, 530 U.S. at 808 (quoting *Agostini*, 521 U.S. at 234).

²²² S.2049, 217th Leg., Reg. Sess. (N.J. 2016).

ftp://www.njleg.state.nj.us/20162017/S2500/2049_I1.DOCX.

eligible for the program.²²³ Additionally, only one school district can participate in the program at a time.²²⁴ Newark, which is New Jersey's largest city,²²⁵ serves 4,220 private school students.²²⁶ Jersey City, the state's second largest city,²²⁷ serves 5,677 private school students²²⁸ but is deemed ineligible for the program because the district must not provide busing to more than 5000 students. Both religious and irreligious students are eligible for the program, provided their school opts in to the consortium. The government is providing an aid program to everyone with the legitimate secular purpose of controlling private school busing costs but only one district in the state is eligible and given the way the statute was crafted, it is clear this program was designed specifically for Lakewood. However, this criterion likely passes as well since the program is open to all non-public students and any district in the state provided it meets the threshold of 5000 students requiring busing.

The pilot program fails the final criterion, which is excessive entanglement between government and religion. The Court has considered 1) whether a program requires pervasive monitoring by public authorities, 2) whether a program requires administrative cooperation between the government and non-public schools and 3) whether the program might increase the dangers of political divisiveness.²²⁹ A finding of excessive entanglement requires the first prong to be met- the second two are insufficient alone to satisfy the threshold.²³⁰ The state pilot program undoubtedly requires pervasive monitoring by public authorities. The Assembly Appropriations Committee's report states, "the bill establishes a committee to oversee the operations of the consortium in implementing the pilot program."²³¹ All members of the committee are appointed by government employees.²³²

The program also unquestionably requires administrative cooperation between the government and non-public schools. New

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Together We Teach, Populations of New Jersey Cities, <http://www.togetherweteach.com/TWTIC/uscityinfo/30nj/njpopr/30njpr.htm>.

²²⁶ Private School Review, Newark Private Schools, <https://www.privateschoolreview.com/new-jersey/newark>.

²²⁷ Together We Teach, *supra* note 225.

²²⁸ Private School Review, *supra* note 226.

²²⁹ Agostini, 521 U.S. at 233 (quoting Aguilar, 473 U.S. at 413-14).

²³⁰ Agostini, 521 U.S. at 233-34.

²³¹ 2016 Legis. Bill Hist. NJ A.B. 3652.

²³² *Id.*

Jersey's non-public school transportation procedures failed this prong before the pilot program was even created. Private school administrators must collect transportation application forms from the parents of non-public school pupils and submit them to the local school district.²³³ Additionally, the private school administrators must certify to the school district that the non-public student was enrolled for both semesters.²³⁴ This is not enough to declare the private school busing requirements across the state unconstitutional, because N.J.S.A. 18A:39 does not fail the crucial pervasive monitoring requirement. However, the state procedures requiring cooperation between private school administrators and local school districts, plus the creation of the oversight committee for the pilot program, are enough to render the program excessively entangled.

Lastly, the pilot program has arguably increased the dangers of political divisiveness, although the school funding crisis itself has certainly increased divisiveness. If the program fails, it will almost assuredly spark more divisiveness. Lakewood began the school year with a nearly \$15 million deficit.²³⁵ There were talks of athletic programs and jobs being cut.²³⁶ The state funding formula, relying on public school enrollment numbers, works for the state as a whole but has failed in Lakewood due to its "upside-down demographics."²³⁷ Now, with Orthodox Jewish families moving to surrounding towns, divisiveness has extended outside the borders of Lakewood as tax increases follow the families.²³⁸ If this pilot program, which was created with Lakewood in mind, fails at curbing transportation costs, then the political debate on how to solve this crisis will only worsen.

²³³ New Jersey Nonpublic School Transportation Procedures, N.J. Dep't of Educ., http://www.state.nj.us/education/finance/transportation/procedures/np_proc.pdf (Nov. 2013).

²³⁴ New Jersey Nonpublic School Transportation Procedures, N.J. Dep't of Educ., http://www.state.nj.us/education/finance/transportation/procedures/np_proc.pdf (Nov. 2013).

²³⁵ Stacey Barchenger, Lakewood schools need state funding fix, experts say, ASBURY PARK PRESS (Jan. 30, 2018), <https://www.app.com/story/news/local/communitychange/2018/01/30/lakewood-schools-need-state-fix-funding-experts-say/1068701001/>.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Wall, *supra* note 15.

V. CONCLUSION

The funding crisis in Lakewood, New Jersey is burdensome on taxpayers. In addition to the tax burden, the crisis is taxing on Lakewood residents mentally as they fear the township slashing programs and jobs to balance the budget. While the state and local governments continue to experiment with ways to fix the crisis, this note assessed whether any constitutional remedies could provide relief to New Jersey residents. The New Jersey Appellate Court correctly decided the nearly \$11 million state grant provided to Lakewood's Beth Medrash Govoha was unconstitutional. This was a victory for New Jersey taxpayers.²³⁹ Unfortunately, relief has not been as easy to find for taxpayers with the busing crisis. New Jersey's busing statute, N.J.S.A. 18A:39, which mandates busing for non-public students, is constitutional. However, the state's newest solution to the crisis, the busing pilot program, appears unconstitutional because of the excessive entanglement required between private schools and the government to run the program. New Jersey residents are stuck in an awkward position because they should be hoping for a solution to end the crisis, but it is unclear whether the state's pilot program is constitutional.

²³⁹ Mullen, *supra* note 30.