

Report from the Capital

NEWSLETTER OF THE BAPTIST JOINT COMMITTEE

High court hears arguments in voucher case

The nation's highest court joined the debate on school vouchers, considering Feb. 20 whether the state aid that pays for tuition in religious schools is constitutional.

The discussion during oral arguments at the Supreme Court focused on such issues as the high percentage of Cleveland students who choose religious schools among private school choices and whether parents truly have an array of educational options.

The case centers on a pilot program adopted by the Ohio Legislature to aid mostly low-income children who attend troubled public schools.

"It offers true choice to parents," argued Judith French, chief counsel for Ohio's attorney general.

She asked the justices to overturn the 2000 ruling of the 6th U.S. Circuit

Court of Appeals, which said the program was unconstitutional because it advances religion.

Parents who choose to send their children to a private school receive a maximum of \$2,250 per student per year. They sign over a check to the school they select.

Justices considered the percentages of students who have enrolled in the program and chosen religious schools. That number has risen from 96 percent in 1999 to 99 percent in the current school year.

Justice Stephen Breyer imagined the impression of a newcomer to this country viewing the program with "a large amount of money" spent by the government and used by students at parochial schools.

"Wouldn't you say the government endorses a religious education?" he

asked.

David Young, a Columbus, Ohio, lawyer for parents and schools who benefit from the program, added to French's arguments, saying that rather than endorsing religion, the government "was trying to resolve a problem of these disadvantaged, low-income children."

Solicitor General Theodore Olson argued for the Bush administration, which filed a friend-of-the-court brief supporting the voucher program.

With his arguments, the debate lasted 80 minutes instead of the usual hour.

Olson urged the court to consider the history and context of the program, which was designed to fix a "manifestly failing system."

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Hollman, Henry say justices should reject vouchers

Cleveland's voucher program violates the U.S. Constitution "by allowing tax dollars to flow directly to religious schools," Baptist Joint Committee General Counsel K. Hollyn Hollman told reporters after the U.S. Supreme Court heard arguments about the validity of the plan.

"It improperly advances religion and threatens the uniquely independent position of religious insti-



Holly Hollman (left) speaks with reporters at Supreme Court; and Wanda Henry (right) addresses an anti-voucher rally on the U.S. Capitol grounds across the street.

tutions in the United States," Hollman said.

She added: "The question is not whether students in Cleveland or anywhere else deserve a quality education - clearly they do. The



question is whether the state can subsidize religious indoctrination in parochial schools.

"In our view, the Constitution forbids such funding. The First Amendment should not be sacrificed in the name

of education reform." Speaking at a rally on the east grounds of the Capitol, BJC Administrator Wanda Henry said the

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NewsMakers

◆ **Pat Robertson**, on a recent edition of his *700 Club* television program, said that Islam is a violent religion full of radicals who want to "control, dominate and then, if need be, destroy." According to *The Washington Post*, Robertson said, "I have taken issue with our esteemed president in regard to his stand in saying Islam is a peaceful religion. It's just not. And the Quran makes it very clear, if you see an infidel, you are to kill him."

◆ **Thomas Monaghan**, the founder of Domino's Pizza, plans to place a 250-foot crucifix at a site near an office park he owns in Ann Arbor Township, Mich. According to his plans, the site will also house Ave Maria College, a Catholic Institution he founded, which is currently located in Ypsilanti, Mich. The town's planning commission recommended that the town board reject the proposal because of burdens on local resources.

◆ Attorney General **John Ashcroft**, speaking at a Feb. 19 meeting of the National Religious Broadcasters, said that fighting terrorism is based on an understanding "that the source of freedom and human dignity is the Creator." He said "the call to defend civilization from terrorism resonates from a deeper source than our legal or even our political institutions," and that "civilized individuals, Christians, Jews and Muslims, all understand that the source of freedom and human dignity is the Creator."

Court hears arguments on door-to-door witnessing

Before Jehovah's Witnesses knock on doors, should they be required to get a permit?

The justices of the U.S. Supreme Court heard oral arguments about that question Feb. 26 in a case stemming from a requirement by the village of Stratton, Ohio, that the religious groups and other solicitors fill out a form before approaching the homes of residents.

The Jehovah's Witnesses, who say anonymous door-to-door activity is a part of their ministry, argued the 1998 ordinance is unconstitutional because it violates free speech.

They asked the high court to overturn a 6th U.S. Circuit Court of Appeals decision affirming a district court ruling saying the ordinance could be applied to the Witnesses.

"It is a criminal act to go from door to door in the village of Stratton" without a permit, said Paul Polidoro, associate general counsel for the Watchtower Bible and Tract Society of New York, the headquarters for the faith group.

Chief Justice William Rehnquist questioned how the village's registration process limits Jehovah's Witnesses since the mayor is supposed to give the permit at no cost to those who apply for it.

"You can't be turned down," he said.

But Justice Anthony Kennedy seemed to take a different view. "It seems ... troubling to me," he said. "You have to make the disclosure to the mayor" as well as to the homeowner.

"We don't believe that anyone needs to go to the government to ask permission to speak to their neighbor," argued Polidoro.

Justices questioned the lawyers on either side about the specifics of who could be barred from door-to-door soliciting and whether it is wrong for a group that wishes to make such visits to have to state their cause ahead of time. Some justices attempted to ascertain how the Witnesses might differ in their door-to-door encounters from other groups.

Several justices focused on whether municipalities are justified in requiring permits for those who wish to knock on doors.

"The concern may stem from a concern about preventing burglars and unfortunate incidents in the area," said Justice Sandra Day O'Connor.

Abraham Cantor, the lawyer for the village of about 300 people, said the municipi-

ality is exerting its "police power" to deter crime by having the permitting process.

David Gormley, the state solicitor of Ohio, who argued for the permitting process, said it gives the residents "a little greater sense of security" when an "uninvited person" enters their private property.

The Witnesses have not applied for a permit, but six other groups had at the time of the district court's consideration of the case. Now, about 15 have permits, Gormley said.

Among those formally supporting the village are nine states other than Ohio, as well as the U.S. Conference of Mayors and the National Association of Counties. Groups that filed friend-of-the-court briefs supporting the Witnesses include the American Civil Liberties Union, the Independent Baptist Churches of America and the Church of Jesus Christ of Latter-day Saints.

Supreme Court turns away Ten Commandments case

The U.S. Supreme Court refused to enter the debate over whether the Ten Commandments should be displayed on government grounds when it declined to hear an appeal from Indiana Gov. Frank O'Bannon.

Without comment, the high court did not consider the appeal to erect a 7-foot stone monument on the statehouse grounds in Indianapolis, The Associated Press reported.

O'Bannon argued that the commandments represent tenets of American law as well as religious teachings and he wanted the court to overturn rulings preventing the monument from being erected. The justices' decision not to hear the case marked the second time in less than a year that they have sidestepped the controversial issue.

The American Civil Liberties Union had sued to prevent the monument's installation and lower courts blocked its erection, saying it promoted a religious purpose.

In a statement, the Liberty Counsel, a Florida-based organization that is involved in defending several cases concerning other displays of the commandments, reacted to the high court's refusal to hear the case.

"To eliminate the Ten Commandments from public displays would require a significant rewriting of American history," said Mathew D. Staver, president of Liberty Counsel.

Are vouchers about 'choice' or tax funding of parochial schools?

One can study prior opinions, read the parties' briefs, and even have a front-row seat in the courtroom during oral arguments and still not want to make a prediction on the outcome in *Zelman vs. Simmons-Harris*. If anything was clear after the Supreme Court hearing in the Cleveland voucher case, it was that the debate over public education and government aid to religion invites polar perspectives.

Three questions raised during oral argument illustrate the struggle the justices will have in deciding this case.

Regardless of the outcome, these questions will likely dominate state and local debates about future voucher proposals.

The first question is how to define the scope of "choice" in a given voucher program. In the Cleveland case, the justices must decide whether the constitutional question should be answered in the context of the voucher program alone or by taking into account unrelated public school alternatives. In the Cleveland program, the voucher recipients' choices are constrained by design. For example, private and suburban public schools decide if they will take part in the program. The few students who receive tuition vouchers (less than 10 percent) may only use them at participating voucher schools — almost all of which are religious schools.

Proponents argue that parents have other options within the public school system: to leave their children in the failing schools (with a possible \$300 per year tutoring stipend), to transfer them to a magnet school, or to try one of the newly created "community" schools, which are public charter schools. They claim these options diminish the significance of the fact that 99 percent of the vouchers fund religious education. Opponents counter that the proper focus is on the voucher program alone, within which the choices are limited.

However the range of options is defined, the second question is whether the result reflects government endorsement of religion. During oral arguments,

both sides faced tough questions about their position in extreme hypothetical cases. Justice Stevens pressed the lawyers for Ohio on whether they would concede government endorsement of religion if the program consisted of only religious schools. Justices Scalia and Rehnquist

asked the other side if the court could approve a program with many secular options and only one parochial school. Neither side was eager to identify where they would draw the line.

The third question is whether a public policy failure, in this case the

failure of a public school system, justifies altering the constitutional ban on government funding of religion. While the court has approved some forms of government aid to religious schools when provided as part of a neutral program for public and private schools, it has never approved an unrestricted tuition program. The Cleveland public schools, which have been judicially declared "failing," demand reform. No one disputes that. But are government subsidies of religious education the answer? Justice Scalia implied as much; critics instead promote alternative education reforms, including public school choice programs that would do no harm to our constitutional protections.

The Baptist Joint Committee has been unwavering in its position. Even if the choices for parents were many, we would remain concerned about the crucial issue that got little attention at oral argument — the funding of religious activity. There was no attempt in the Cleveland program to limit the use of tax dollars to secular programs in private schools.

Whatever the proportion of students in religious schools, government funding of religious education and activities ensures an appearance of government endorsement. No matter how severe the crisis in public education, the policy response should not tread on our country's long-established religious liberty. △



K. Hollyn Hollman

General Counsel

Bush raises religious freedom issues in China

President Bush has asked Chinese President Jiang Zemin to open dialogue with religious leaders about freedom of worship in China.

National security adviser Condoleezza Rice told reporters Feb. 21 in Beijing that the two leaders had "a really rather long exchange" about the issue in a far-ranging discussion with a small group.

She said Bush encouraged Jiang to "think hard about opening dialogue" with religious leaders, including the Vatican, the Dalai Lama and other organized religions.

China's record on religious freedom has been criticized of late because of reports of a crackdown on unofficial house churches and religious movements.

"China's future is for the Chinese people to decide, yet no nation is exempt from the demands of human dignity," Bush said Feb. 21 in a joint press conference with the Chinese president. "All the world's people, including the people of China, should be free to choose how they live, how they worship and how they work."

Jiang denied that China restricts the practice of religion.

China's constitution guarantees the freedom of religion, he said. However, the nation's laws also require churches to register and meet government-approved standards.

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He cited an increase in the number of nonreligious schools participating in Milwaukee's voucher program.

But Justice David Souter pondered the fact that 99 percent of the students who currently use the vouchers in private schools have opted for religious schools.

"Doesn't that suggest there is perhaps something specious about the notion of wide choice here?" he asked.

The high percentage of religious schools among private school choices is a key to the argument of program opponents.

"It is a mathematical certainty that almost all of the students will end up going to religious schools," said Robert Chanin, a Washington lawyer who represented the National Education Association before the justices.

More than one justice questioned whether the array of choices beyond pri-

vate schools should be considered in determining the constitutionality of the voucher program.

"Why should we not look at all of the options open to parents?" asked Justice Sandra Day O'Connor, who cited community and magnet schools as examples.

She said the numbers may be "skewed" in favor of religion or favor because voucher opponents are not including all choices in their argument against the program.

But Chanin maintained that the support of religious schools is unconstitutional. "It's a back-door approach to precisely what the Establishment Clause prohibits," he said.

He said community schools are a "species of public education."

"The only rational line to draw is between public and private," Chanin said. △



Former Independent Counsel Kenneth Starr and BJC General Counsel Holly Hollman were panelists as students at Langley High School in McLean, Va., previewed the Cleveland case.

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agency opposed vouchers in a friend-of-the-court brief "because it is a direct, unrestricted subsidy of religious education by state government."

Henry said decision-makers should not pursue education policies that "sap the vitality of our religious institutions by making them dependent upon government dollars and stifling them with government regulations."

"Public dollars should fund public education," Henry added. "We urge the

administration and Congress, along with decision-makers at the state and local levels, to address the needs of public education in ways that do not violate constitutional principles."

Welton Gaddy, executive director of the Interfaith Alliance, also addressed the rally. School vouchers "will compromise our nation's commitment to strengthening democracy through a vital system of public education and further erode, or maybe complete the erosion of, our nation's support for religious liberty," he said. △

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