

Report from the Capital

NEWSLETTER OF THE BAPTIST JOINT COMMITTEE

High court upholds Ohio voucher scheme

A divided U.S. Supreme Court ruled June 27 that providing taxpayer funds for religious school tuition does not necessarily violate the Constitution's ban on state support for religion.

The high court's 5-4 ruling said that Ohio could continue providing state-funded scholarships to disadvantaged Cleveland children to use in private schools, including religious ones. The program was established to give students more educational opportunities. The city's public schools are some of the lowest performing in the nation.

Voucher opponents argued that including religious schools in the program violated the separation of church and state.

"This is probably the worst church-state decision in the last 50 years," said Barry Lynn, director of Americans United for Separation of Church and State. "All taxpayers now have to pay for religious indoctrination."

The ruling is likely to reinvigorate efforts of "school choice" proponents, who had feared a defeat in the case would have been a fatal blow to their cause.

"This is the most significant Supreme Court decision, in terms of its impact on public education, since *Brown vs. Board of Education*," Richard Land, president of the Southern Baptist Ethics and Religious Liberty Commission, said in a statement. Land's reference was to the landmark 1954 case that declared racial segregation in public schools illegal. He said

"For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."

— Justice David Souter
Dissenting Opinion



he believes the new ruling "will have a tremendously positive effect."

President Bush called the ruling "a great victory [for] parents and students throughout the nation." Speaking at a rally in Cleveland, Bush said July 1 that decisions about education should be made locally and not dictated from Washington.

Others, however, said the decision would undermine religious freedom.

"This decision is a blow to the constitutional principle that government should not advance religion," said K. Hollyn Hollman, general counsel for the Baptist Joint Committee on Public Affairs.

BJC Executive Director Brent Walker concurred: "Government has no business subsidizing religion," he said. "It does no less by passing vouchers through the pockets of parents."

The Supreme Court said the Cleveland program doesn't establish religion, because parents exercised free choice in using the vouchers to send their children to parochial schools.

"The Ohio program is entirely neutral with respect to religion," Chief

Justice William Rehnquist said in the majority opinion. "It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district."

Joining Rehnquist in the majority opinion were Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O'Connor.

Even though 96 percent of the vouchers provided under the program in a recent year went to church schools, the court majority said parents exercised "true private choice" in where to send the money.

Justices Ruth Bader Ginsburg, David Souter, Stephen Breyer and John Paul Stevens dissented from the majority on several grounds, including the majority's central assertion that Cleveland parents had a "genuine choice" between religious private schools and other schooling alternatives.

"For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious," Souter said in a dissent that ran longer than the majority's opinion. Of 55 schools participating in the program, he said, 45 were religious in nature.

Souter and other dissenting justices also said a \$2,500 cap on scholarship assistance "has the effect of curbing the participation of nonreligious schools," because secular private schools usually charge higher

See **Vouchers**, Page 4

NewsMakers

◆ **Felice D. Gaer** was elected to chair the U.S. Commission on International Religious Freedom. Gaer, director of the American Jewish Committee's Jacob Blaustein Institute for the Advancement of Human Rights since 1993, began her yearlong term July 1. She succeeds Michael K. Young as chair of the panel, whose chairmanship alternates yearly between Democratic and Republican appointees.

◆ **Nicholas Miller**, a board member of the Seventh-day Adventists-affiliated Council on Religious Freedom, disagreed with the recent Supreme Court decision regarding school vouchers. "There's one word that describes this [decision's] theme — majoritarianism — giving power to the majority in terms of religious matters," he said. Miller participated in a panel discussion June 29 sponsored by the Pew Forum on Religion and Public Life.

◆ **Rep. J.C. Watts**, R-Okla., a sponsor of House-passed charitable choice legislation, announced July 2 that he would not run for a fifth term. "It is time to go home, to go on with other things in my life and assume one of the most time-honored titles in America: 'citizen,'" Watts said. △

More globalization causing tug-of-war, O'Brien tells RLC

Rapid technological developments and increasing globalization have induced a "tug-of-war between technology with a life of its own and the need to protect one's roots and sense of identity," William O'Brien told those attending the annual luncheon meeting of the Religious Liberty Council.

The RLC, the individual membership organization of the Baptist Joint Committee, met June 29 in Fort Worth, Texas, in conjunction with the Cooperative Baptist Fellowship General Assembly.

O'Brien is the former executive director of The Global Center at Samford University and current co-director of BellMitra Associates, an agency through which he and his wife, Dellanna, conduct workshops in missions innovation and conflict transformation.

Drawing a parallel to Thomas Friedman's *The Lexus and the Olive Tree*, O'Brien said, "those who feel most threatened by the political and economic alliances of globalization utilize Lexus-type technology to destroy anyone who threatens their olive trees.

"Meanwhile, back on the ranch, religious liberty for us is no longer solely an American constitutional issue. It is 'glocal,' in that faithful defense of religious liberty in this country has global implications, while global realities have come to roost among us," he said. △

Federal court bans reciting Pledge of Allegiance in school

A federal court has ruled that the phrase "under God" in the Pledge of Allegiance makes it unconstitutional to recite the historic oath in public schools.

A divided three-judge panel of the 9th U.S. Circuit Court of Appeals, based in San Francisco, ruled that the phrase is unconstitutional because it fails several tests designed by past Supreme Court decisions in church-state cases.

Michael Newdow, a Sacramento father, sued the Elk Grove Unified School District, saying his daughter should not be made to feel like an outsider when teachers in her elementary school lead students in reciting the pledge.

While the U.S. Supreme Court has long upheld the rights of children to opt out of reciting the pledge for religious or political reasons, Newdow's case argues that saying the pledge in public schools violates

the First and 14th amendments to the U.S. Constitution, which ban federal, state and local governments from establishing religion.

Newdow said even if his daughter refused to recite the pledge, her religious freedom would be violated by pressure she felt to recite the pledge along with her government-employed teacher in her government-funded school.

Newdow represented himself in the suit, arguing that several Supreme Court decisions — the most recent against pre-game prayers at public school football games in Texas — supported his case.

The Pledge of Allegiance was written in 1892, but the original version did not include the words "under God." Congress added the phrase in 1954, at the height of the Cold War and in the immediate wake of McCarthyism.

Two of the three judges on the appeals panel agreed that addition of the words had no secular purpose, a key test used by the Supreme Court in determining whether laws are neutral with regard to religion.

Attorneys for the school district and the federal government argued that other Supreme Court cases have allowed added protection for traditional governmental references to God, such as prayer in Congress and using the national motto "In God We Trust" on money and government buildings.

K. Hollyn Hollman, general counsel for the Baptist Joint Committee on Public Affairs, said she was surprised by the 9th Circuit's decision because of past Supreme Court opinions on what former Supreme Court Justice William Brennan called "ceremonial deism."

"It is clear that state-sponsored religious exercises are unconstitutional," Hollman said, "but the court has found that acknowledging that we are a religious people falls short of a constitutional violation."

Hollman said ceremonial religious language has generally escaped First Amendment scrutiny because the Supreme Court has said it isn't truly religious in nature: "Such government acts would likely be upheld, because they have lost their religious meaning by repetition," she said.

But the 9th Circuit judges said the reference to God in the pledge refers to a specific monotheistic faith. "A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under

See Pledge, Page 4

Voucher ruling a serious setback to separation of church and state

The Supreme Court answered one very important question in the *Zelman* case — whether the U.S. Constitution's Establishment Clause bars the use of tax-funded tuition vouchers at religious schools. In programs like the one in Cleveland, where vouchers may also be used at nonreligious private schools (however few), where there are other educational options available (regardless of quality), and where the money is first paid to parents (however superficially), a majority of the Court held that the answer is no.

Despite the pervasively religious character of the participating schools, the lack of any limits on the religious use of public funds and the fact that 96 percent of the voucher program funding went to religious schools, a five-justice majority found the Cleveland program constitutional.

Does this mean that vouchers will be coming soon to your school district? Not necessarily. Such programs face other significant hurdles. First, many state constitutions provide greater protection against state sponsorship of religion than the federal Constitution. The U.S. Constitution sets a floor, not a ceiling. It would not be surprising to find that a voucher program that meets the federal test under *Zelman* fails to pass muster under a state constitution. The 1986 *Witters* case is a prime example. Larry Witters, a blind student, sought state vocational rehabilitation funds for use at a Bible college where he was preparing to be a pastor. He was successful at the U.S. Supreme Court, but on remand the Washington Supreme Court found that the state's constitution prohibited the funding.

Second, in addition to state constitutional claims, the *Zelman* case leaves room for other legal challenges. While the Cleveland program required participating schools to admit students without regard to race, national origin or religion, it did not address other civil rights and regulatory issues. Does government funding change the nature of certain exemptions the schools enjoy as religious institutions?

As in "charitable choice," for example, there will be litigation if the government funds employment discrimination.

Finally, passing a voucher program is not easy politically. Vouchers have always caused controversy in debates about public education. There is certainly no national consensus that they lead to higher academic achievement or are more cost-effective than public schools. In Congress and in recent state referenda, voucher proposals were soundly defeated.

Whatever the consequences for public education, the decision delivers a blow to the separation of church and state. Most significantly, the swing voter has firmly taken a side. Justice O'Connor argues that her opinion — albeit an "important step" — is in line with earlier cases. She acknowledges, however, that a significant portion of program funds reach religious schools without restriction, something the Court has never before approved.

Although alarming, the *Zelman* decision is not an unmitigated disaster. The majority opinion does not make it constitutional for the government to fund religious schools with direct grants. Nor does it allow funding in the absence of other nonreligious choices, and the government must not steer vouchers toward religious schools.

As the voucher debate moves to state courts and legislatures, church-state concerns will continue to be important. Government regulation of religious schools will increase, changing the way in which they provide education. Political demands for accountability in performance will reach those schools previously unencumbered by such standards. Most importantly, as the dissenting justices noted, the religious teachings of participating schools will come under public scrutiny, increasing the risk of sectarian strife.

In short, our mission to defend and extend religious liberty — already a challenge — just became more difficult. Δ



K. Hollyn Hollman

General
Counsel

RLC elects BJC board members, new secretary

Members of the Religious Liberty Council approved changes to the RLC constitution and elected officers and representatives to the Baptist Joint Committee board during their June 29 meeting in Fort Worth, Texas. Suzii Paynter of Austin, Texas, a staff member of the Texas Baptist Christian Life Commission, and Bill Wilson, pastor of First Baptist Church in Waynesboro, Va., were re-elected co-chairs of the RLC. David Rogers of Falls Church, Va., was elected secretary.

Barbara Baugh of Texas, Sue Bennett of Oklahoma and Steve Tondera of Alabama were re-elected to serve three-year terms on the BJC.

Newly elected to represent the RLC on the BJC board for a three-year term was Reba Cobb, coordinator of the Cooperative Baptist Fellowship Resource Center. Joel Avery of Tennessee was elected to complete an unexpired term. Δ

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Report from the Capital

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tuition than church-subsidized parochial schools.

Souter said many low-income families would be coerced to choose a religious school with which they might disagree over a secular private school that they cannot afford.

But the majority said Cleveland's voucher program offered parents a genuine choice in that it also included public charter or "community" schools, public magnet schools, assistance for children in public schools to hire private tutors and suburban school districts that agreed to accept Cleveland students.

In an opinion concurring with the majority, Justice O'Connor said the court "should consider all reasonable educational alternatives to religious schools that are available to parents." To do otherwise, she said, "is to ignore how the educational system in Cleveland actually functions."

But Justice Stevens, in his separate dissent, said the range of choices "has no bearing" on the larger question of "whether the state may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education."

Dissenting justices predicted increased entanglement between church and state in light of the ruling. Souter warned of "corrosive secularism" in religious schools that might water down their religious message to qualify for government funds.

Under the Ohio law upheld by a majority of justices, Souter said Christian schools that refused to hire Muslim or Hindu teachers could be sued.

The dissenters also said competition for public funds could prompt religious conflict. "As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for dis-

cord," Souter argued.

The majority dismissed that concern, however, noting that no religious discord has occurred in the five years the Cleveland program has been in place.

Souter also said individual taxpayers in the future might sue over specific aspects of a school's curriculum.

Not every secular taxpayer will "be content to support Muslim views on differential treatment of the sexes," Souter said, "or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention." Δ

— Robert Marus
Associated Baptist Press

Pledge (Continued from Page 2)

Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion," Judge Alfred Goodwin wrote for the majority.

Judge Ferdinand Fernandez wrote a stinging dissent, accusing his colleagues of wanting to eradicate religion from the public sphere. "Such phrases as 'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity," Fernandez said.

While some observers said the ruling makes good use of recent Supreme Court precedent in the area, most expect it to be overturned by the full 9th Circuit Court or if it makes it to the nation's high court. Δ

— Robert Marus
Associated Baptist Press



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