

Council for American Private Education

CAPE outlook

Voice of America's private schools

Supreme Court Issues 9-0 Ruling in Religious School Case

In a groundbreaking 9-0 decision, the U.S. Supreme Court last month agreed that the government cannot intervene in the decisions of religious schools regarding the employment of ministers. It was the high court's first ruling on the issue of a "ministerial exception" to employment statutes.

The court unanimously rejected the claim of the U.S. Department of Justice that an employment discrimination law prohibited the Hosanna-Tabor Evangelical Lutheran Church and School (affiliated with the Lutheran Church—Missouri Synod, a member of CAPE) from dismissing a minister who violated church teaching. The government's attempt to force a church to employ a minister, or to punish it for not doing so, said the court, "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." Such an action would violate the First Amendment's Free Exercise Clause, "which protects a religious group's right to shape its own faith and mission through its appointments," and would also run afoul of the Establishment Clause, "which prohibits government involvement in such ecclesiastical decisions." The ruling, written by Chief Justice John Roberts, concluded that both clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers."

Decisive Dismissal

The court decisively dismissed the Justice Department's view that the Free Exercise Clause and the Establishment Clause were not relevant to the case. "We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers," said the court. The decision described as "untenable" the department's claim that religious organiza-

tions could use the right of freedom of association, rather than freedom of religion, to defend themselves in employment discrimination suits, saying the result would be to treat the Lutheran Church the same as "a labor union, or a social club" when it comes to First Amendment analysis.

Magna Carta

In upholding the right of the church to determine its ministers, the court provided an extensive history of disputes between church and state over who shall serve in religious offices. "In 1215, the issue was addressed in the very first clause of *Magna Carta*," said the court, explaining that King John upheld the right of the English Church to be free. But after the *Act of Supremacy* in 1534 made the king the head of the church and the *Act of Restraint of Annates* gave him the power to appoint church officials, the Puritans "fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." Through the religious clauses of the Constitution, the framers "ensured that the new federal government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

James Madison

The court went on to recount two events involving James Madison that illustrated his understanding of the clauses.

In 1806, Madison responded to Catholic Bishop John Carroll's request for advice on who should oversee the Catholic Church in the new Louisiana territory. Then Secretary of State Madison replied that the issue "was an 'entirely ecclesiastical' matter left to the Church's own judgment." In

1811, President Madison vetoed a bill incorporating the Episcopal Church in Alexandria. His grounds for the veto was that it "exceeds the rightful authority to which governments are limited, by the essential distinction between civil

and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'"

Minister?

Having recognized the ministerial exception, the court turned to whether Cheryl Perich, the teacher dismissed by the school, was indeed a minister and thus covered by the exception. In concluding that she was, the court noted that Hosanna-Tabor identified her as a minister, that Perich went through religious training and a formal commissioning to become a minister, that she considered herself to be a minister, claiming, for example, a special housing allowance on her taxes, and that her duties "reflected a role in conveying the Church's message and carrying out its mission."

On this final point, the court pointed out that she taught students religion, led

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them in prayer, took them to chapel, and was commissioned with faithfully teaching scriptures and leading students to mature in their faith. “In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception,” said the court.

Not by a Stopwatch

The justices agreed that the amount of time Perich devoted to the performance of religious duties (roughly 45 minutes each school day) was not a factor in determining her status as a minister. “The issue before us, however, is not one that can be resolved by a stopwatch,” they said. The Equal Employment Opportunity Commission had argued that ministerial exceptions should extend only to persons who perform “exclusively religious functions,” but the court said, “we are unsure whether any such employees exist,” noting that even heads of congregations engage in a mix of secular and religious duties.

Still, despite citing numerous conditions that factored into the determination that Perich was indeed a minister, the court decided not to impose a set rule for making that determination in the future. “We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”

The court also refused to say whether it would bar suits other than employment discrimination suits against religious employers. “We express no

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Paul Krebbs, president of All Hallows High School in Bronx, NY, explained how the school, which is located in the poorest Congressional district in the country, provides stability and structure to students. Krebbs has been at the school for 18 years; the current principal, an All Hallows graduate, has served for 16 years. What’s more, fourteen faculty members are former students, personifying the message regularly delivered to students and alumni: learn, earn, and return. Graduates returning to support the school help close the gap between the annual \$5,700 tuition and the \$7,200 per-pupil cost.

view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”

Church’s Alone

Ruling that the First Amendment “requires dismissal of this employment discrimination suit,” the court said that requiring the church “to accept a minister it did not want...would have plainly violated the church’s freedom under the Religion Clauses to select its own ministers.” By the same token, requiring the church to pay “frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney’s fees” would “be no less prohibited by the First Amendment than an order overturning the termination.” As the court put it, “Such relief would depend on a determination that Hosanna-

Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.” The purpose of the exception, said the court, is to ensure “that the authority to select and control who will minister to the faithful...is the church’s alone.”

Eloquently concluding the decision, Chief Justice Roberts wrote: “The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”

Regarding the school’s college-going rate, Krebbs said 98 percent would be “an off year for us.” All current seniors, the school’s hundredth graduating class, are expected to go to college.

Other champions honored at the White House were Sr. Rosa Maria Ruiz, C.F.M.M., superintendent of Catholic schools in the Diocese of Tucson, AZ; Yvonne Schwab, principal of St. James the Less Catholic School in Columbus, OH; Joseph Womac, executive director of the Fulcrum Foundation in Seattle, WA, and Rev. Charles Currie, S.J., president of the Association of Jesuit Colleges and Universities in Washington, DC.

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White House Honors Champions of Change

The Obama administration last month honored nine leaders in Catholic education as Champions of Change for service “to their communities and our nation.” The White House event, hosted by the Office of Faith-Based and Neighborhood Partnerships, provided administration officials an opportunity to praise the accomplishments of not only the honorees, but also Catholic education in general.

“Each of these nine leaders embodies the values of education, innovation and service through their stellar contributions to Catholic schools and the wider communities they serve,” said Alexia Kelley, senior policy advisor at the White House Office of Faith-Based and Neighborhood Partnerships. “These champions, like their colleagues in Catholic education across the country, inspire all of us to build up our communities and our nation’s young people.”

Joshua DuBois, director of the faith-based office, called Catholic schools “national treasures,” important not only to their students but “to the common good of the nation as a whole.” He noted how these schools “step up to the plate on behalf of all children,” and he said the event was designed to “spread the word about how much Catholic schools mean to our country.”

Roberto Rodriguez, special assistant to the president for education policy, called Catholic schools “a lifeline of support for neighborhoods and families that are struggling around our country.” He thanked Catholic educators “for your commitment day in and day out to our families and to our children.”

The event took place January 25, a few days before the start of Catholic Schools Week and a few days after the administration’s decision that health insurance offered by Catholic schools and other religious institutions must cover reproductive services that violate their convictions. Referring to the controversy, Denis McDonough, deputy national security advisor to the president, acknowledged there may be times when Catholics disagree with the decisions of the administration. He then attempted to assure the audience that the president knows about and appreciates Catholic education, having at-

tended a Catholic school in Indonesia as a child and having worked as a community organizer in Chicago. McDonough also acknowledged his own Catholic school roots and how they continue to inform his decisions. He told his listeners they have “an open door” at the White House and “a deep reservoir of goodwill.”



Joshua DuBois, director of the White House Office of Faith-Based and Neighborhood Partnerships, applauds Catholic school “Champions of Change” at the White House January 25. (Photo: U.S. Dept. of Education)

Most of the event involved the champions providing testimony and insights about their successful work. Rev. John P. Foley, S.J., chief mission officer of the Cristo Rey Network, described how the 24 schools in the innovative system are “temporary employment agencies,” providing students a chance to cover a good share of the cost of their own high school education. Last year, over 6,000 students earned an astounding \$32 million. The network serves 50 percent Latino students and 40 percent African-American. Eighty-four percent of last year’s graduates went on to college.

Sr. Jennie Jones, S.F.F., principal at St. Mary’s Academy in New Orleans, said a good Catholic school focuses on academics and excellence, believes that all children can learn, teaches morals, and encourages students to do their best. But she said the truly distinguishing factor is that “Christ is the center of all that we do.”

The only student in the group, Bertha Castaneda, a senior at Archbishop Carroll High School in Washington, DC, said the school has challenged her and has helped make her the person she has become. She reported she has received a great deal of encouragement from the school community, an ingredient she said is essential for young people.

In a touch of irony at the event, one of the champions, Annette “Mickey” Lentz, chancellor of the Archdiocese of Indianapolis, drew considerable applause when noting that Indiana’s new voucher initiative has brought 2,000 additional students to schools in the archdiocese. Cheers for vouchers are probably uncommon in a White House that staunchly opposes them. Lentz said she believes the voucher program is “just going to really open wonderful things for these children and these families.”

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Choice Week

January 22 signaled the start of National School Choice Week, in which thousands of people took part in more than 400 events across the country to focus on the value of helping parents choose the school their children attend.

Here in Washington, House Speaker John Boehner spoke of the “headway” being made within the school choice movement and renewed a commitment “to build on successful school choice initiatives like the Opportunity Scholarship Program.” Boehner said that “education reform starts with giving children in need a way out of chronically underperforming schools.”

Two publications released in DC during the festivities heralded good news on the choice front. The American Legislative Exchange Council (ALEC) unveiled its 17th *Report Card on American Education*. Dr. Matthew Ladner and Dan Lips delineate in the document the stunning school choice victories achieved over the past 12 months, declaring that “2011 stands as the most successful year in the history of the parental choice movement, and whatever year would rank second ranks a distant second.”

The remarkable recent advance of school choice was also chronicled in the *School Choice Yearbook 2011-12*, produced by the Alliance for School Choice. The publication describes seven brand-new programs enacted last year, including the expansive voucher program in Indiana.

“It was unquestionably a remarkable year in the fight to give educational opportunities to low-income families,” said coauthor Malcom Glenn, national director of communications at the Alliance. “The gains of 2011 give us great momentum towards helping even more kids in the year ahead.”

The publication is available at <http://www.allianceforschoolchoice.org/>.

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CAPE notes

★ A superior court judge in Indiana affirmed the constitutionality of the state's new voucher initiative on January 13, thereby allowing thousands of students to continue attending the school of their parents' choice.

Judge Michael Keele ruled that the Choice Scholarship Program (CSP) is religiously neutral and was established to benefit "students, not religious institutions or activities." He further ruled that the extent to which religion permeates the program in a participating school is immaterial. "CSP recipients have a choice as to which school to attend, religious or non-religious. If a parent wishes to send her child to a 'pervasively sectarian' institution, then that is her choice. The precise degree of religiosity of schools participating in the CSP has no bearing on the program's constitutionality."

Institute for Justice Senior Attorney Bert Gall said the ruling is "a resounding win for Indiana parents and students, and it is a major defeat for school choice opponents." Gall defended the program's constitutionality along with Indiana Solicitor General Tom Fisher. "The court's well-reasoned decision," said Gall, "makes clear that the Choice Scholarship Program is constitutional and that the teachers' unions' lawsuit against it is completely meritless."

One of Gall's clients, school choice parent Heather Coffy, whose three children participate in the scholarship program, said, "Thanks to today's ruling, I and

thousands of other parents across the state of Indiana can continue to choose schools for our children that best suit their educational needs."

IJ Senior Attorney Dick Komer said, "The court got it exactly right: While the Choice Scholarship Program is inconsistent with the self-serving agenda of the teachers' unions who are supporting this lawsuit, it is perfectly consistent with the Indiana Constitution." He added, "We expect the teachers' unions to appeal, but we are confident that the trial court's decision will be affirmed."

★ In yet another legal victory for school choice—this one coming January 25, during National School Choice Week—Maricopa County Superior Court Judge Maria del Mar Verdin upheld the constitutionality of Arizona's new empowerment scholarship accounts (ESAs). This first-ever program provides state funds to parents of children with special needs. The funds are placed by the state into education savings accounts that parents can use for a range of educational services. The program saves the state money, while allowing parents to choose from a variety of cost-effective options such as online programs, private schools, instructional materials, and even college tuition.

"The Court ruled that Arizona's [program] passes constitutional muster because parents, not government officials, decide what educational options are best for their children," said Tim Keller, executive direc-

tor of the Institute for Justice Arizona, which represented parents in the case. "The program gives parents a full menu of educational options on which to spend the funds. In that way, it is abundantly clear the program aids individuals—not institutions. And, with all constitutional choice programs, parents—not the government—decide which school a child attends."

"Though this is only the opening round of a protracted legal battle, it is gratifying to start with a victory for the kids," declared Clint Bolick, who argued on behalf of the Goldwater Institute, which originally proposed the program and which is calling for its expansion to children enrolled in poor-performing schools. Bolick is vice president for litigation at Goldwater.

★ The Friedman Foundation for Educational Choice recently released the 2012 edition of its annual *ABCs of School Choice*, a comprehensive guide to school choice programs throughout the United States.

According to the foundation, "the 2012 version contains more information than any before, from a basic primer on school choice to specific, detailed updates on all 34 school choice programs in the country."

"When it comes to school choice, the tide of reform is rising," said Robert C. Enlow, president and CEO of the foundation. "Last year, we saw unprecedented progress for school choice, and...we expect this year to be just as successful."

A PDF version of the report is available at <<http://www.edchoice.org/>>.

