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Supreme Court: Church-State Cases, 2001-2002 Term

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Supreme Court: Church-State Cases, 2001-2002 Term

SUMMARY

In its 2001-2002 Term the Supreme Court decided two cases with significant church-state implications. In *Watchtower Bible and Tract Society of New York, Inc. v. Stratton, Ohio*, the Court, by an 8-1 margin, held unconstitutional a municipal ordinance requiring religious groups (and others) to obtain a permit prior to engaging in neighborhood canvassing. In *Zelman v. Simmons-Harris* the Court, by a 5-4 margin, upheld as constitutional an Ohio school voucher program providing tuition subsidies to students in failing public schools to allow them to attend private schools, most of which were religious.

Watchtower Bible and Tract Society of New York, Inc. v. Stratton, Ohio, concerned a municipal ordinance that required all door-to-door canvassers in the community to first obtain a permit. The ordinance required potential canvassers to disclose their identities, the purpose of their calls, the addresses they would visit, and the time period in which the calls would be made. The ordinance had been largely upheld as constitutional by a federal district court and the U.S. Court of Appeals for the Sixth Circuit. But the Supreme Court struck it down. The Court held that the ordinance restricted far more speech than necessary and was not narrowly tailored to serve the village's interests of protecting its citizens' privacy and preventing crime.

Zelman v. Simmons-Harris concerned the constitutionality of Ohio's Pilot Scholarship Program. That program provided up to \$2250 to poor students in kindergarten through the eighth grade in public schools in Cleveland to help them attend private schools in the city or public schools in the neighboring suburbs that chose to participate. None of the suburban schools chose to participate, however; more

than 80 percent of the private schools in the city that took part were church-affiliated; and 96 percent of the subsidized students attended such schools. The program had been held unconstitutional by a federal district court and the U.S. Court of Appeals for the Sixth Circuit. But the Supreme Court held it not to violate the establishment clause, 5-4. The majority said that the voucher program was but one of a number of options available to parents and schoolchildren in Cleveland. Eligible parents, the Court said, could obtain special tutoring for their children in the public schools, send them to public magnet schools or publicly-financed community schools, or use the vouchers to send them to private sectarian or secular schools. Thus, the Court held, the program was "entirely neutral with respect to religion." It provided benefits to a wide spectrum of individuals defined on the basis of nonreligious criteria, and it afforded parents a "true private choice" in selecting the appropriate education for their children. As a consequence, the Court concluded that the program was constitutional.

In addition, the Court during its 2001-2002 Term affirmed a lower court decision that found no constitutional violation in the exclusion of 11,000 overseas Mormon missionaries from the 2000 census; and it vacated and remanded two cases for reconsideration in light of other recent decisions. It has also denied review in twenty-six cases raising issues of church and state, and it will carry one such case on its docket over to the next Term.

This Issue Brief provides a detailed summary of *Watchtower* and *Zelman* and brief summaries of all other church-state cases on the Court's docket in the 2001-2002 Term.



MOST RECENT DEVELOPMENTS

In late June the Supreme Court decided two cases having significant church-state implications. In Watchtower Bible and Tract Society of New York, Inc. v. Stratton, Ohio, the Court on June 17, by an 8-1 margin, held unconstitutional a municipal ordinance that required religious organizations (and others) to obtain a permit prior to engaging in neighborhood canvassing. On June 27 the Court in Zelman v. Simmons-Harris upheld as constitutional, 5-4, a school voucher program providing tuition subsidies to students in failing schools in Cleveland to enable them to attend private schools in the city, notwithstanding that most of the schools were religious in nature. During its 2001-2002 Term the Court also affirmed one lower court decision that found no constitutional violation in the exclusion of 11,000 overseas Mormon missionaries from the 2000 census; and it vacated and remanded two cases for reconsideration in light of other recent decisions. In addition, the Court denied review in twenty-six cases raising church-state issues during the Term, and one additional church-state case remains pending on its docket for consideration in its next Term.

BACKGROUND AND ANALYSIS

Cases Decided

Watchtower Bible & Tract Society of New York, Inc. v. Stratton, Ohio

70 U.S.L.W. 4540 (June 17, 2002) (No. 00-1737): In this case the Supreme Court held unconstitutional a village ordinance which barred individuals and organizations from going door-to-door in the community unless they first obtained a permit from the mayor's office. The Court held the ordinance to be unconstitutionally overbroad and not to be tailored to serve the village's claimed interests. The decision was 8-1.

The Village of Stratton's ordinance required all "canvassers, solicitors, peddlers, [or] hawkers" that wanted to go to a private residence in the Village for the "purposes of advertising, promoting, selling and/or explaining any product, service, organization, or cause" to register with the office of the Mayor. The registration form required the name and home address[es] of the solicitors and their sponsoring organization[s], a description of the nature and purpose of the solicitation, the specific addresses that were to be visited, the length of time for which the privilege was sought, and "such other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired." Unless the information was incomplete or fraudulent, the ordinance mandated that a "Solicitation Permit" then be issued which allowed the applicant to canvas between the hours of 9 and 5. No fee was required to obtain the permit. Another part of the ordinance not challenged in this litigation also allowed homeowners to file a "No Solicitation Form" with the Village barring specified organizations from canvassing at their homes and to post "No Solicitation" signs on their lawns. This form

listed a number of organizations that would be barred unless the homeowner specified that they could visit, including the Jehovah's Witnesses.

National and local organizations of Jehovah's Witnesses, who engage in door-to-door proselytizing and distribution of literature as a matter of religious mandate, brought suit challenging the constitutionality of the ordinance. But a federal district court, with a few modifications, generally found the ordinance to be a valid, content-neutral regulation. *See* 61 F.Supp.2d 735 (S.D. Ohio 1999). The court said that the 5 p.m. time restraint in the ordinance was "an unreasonable restriction on time" and needed to be changed to allow visitations during "reasonable hours of the day." It held the "purpose" section of the ordinance overbroad as applied to the Jehovah's Witnesses and said they need only note on the application that they seek to canvas "as part of the Jehovah's Witness." Finally, it held the requirement that a canvasser identify each address he or she intended to visit to be onerous and potentially unconstitutional, but it said that the Village had cured this problem by itself attaching a list of residents willing to receive canvassers to the form. Because of these modifications, the court found the Jehovah's Witnesses to be a prevailing party in the litigation and, under 42 U.S.C. 1988, awarded them attorneys' fees and costs in the amount of \$58,892.41.

Nonetheless, the Jehovah's Witnesses appealed the rest of the court's ruling on the constitutionality of the statute, and the Village appealed the ruling on attorneys' fees. The U.S. Court of Appeals for the Sixth Circuit, in a 2-1 decision, affirmed both of these aspects of the trial court's decision. *See* 240 F.3d 553 (6th Cir. 2001). It rejected the Jehovah's Witnesses' argument that the case was a hybrid rights case involving both free speech and the free exercise of religion and that, under *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), it should be reviewed under a strict scrutiny standard. The pertinent language in *Smith*, it said, was "dicta and therefore not binding." It also rejected their argument that the ordinance was overbroad because it impaired the right to distribute political pamphlets anonymously that the Supreme Court had recognized in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). And it rejected as well the argument that the ordinance was similar to numerous regulation of solicitation schemes which the Supreme Court had struck down in the 1930s and 1940s on the grounds that those earlier decisions had involved either a flat prohibition on the dissemination of ideas or had left the issuance of a permit to the discretion of a municipal officer. The ordinance, the Sixth Circuit concluded, was content neutral and of general applicability and was a reasonable means of promoting the village's interests of protecting its citizens from fraud, crime, and undue annoyance.

On the attorneys' fees issue, the Sixth Circuit simply deferred to the trial court's finding that the alterations the Jehovah's Witnesses obtained in the ordinance were sufficiently substantial to warrant the award of attorneys' fees, notwithstanding their failure to invalidate the ordinance entirely or to gain an exemption.

The Supreme Court reversed, 8-1. Justice Stevens, writing for the Court, said that the case was informed, although not resolved, by the Court's 1930s and 1940s decisions which had invalidated a variety of restrictions on door-to-door canvassing and pamphleteering. Cases such as *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939), and others, he said, had emphasized the value of door-to-door canvassing and pamphleteering as means

of disseminating ideas and had recognized door-to-door evangelism as a form of speech entitled to First Amendment protection. The earlier cases, he said, had also recognized the legitimacy of a town's interests in preventing fraud and other crimes as justifications for the regulation of certain forms of canvassing, particularly those involving the solicitation of money. But, he cautioned, "our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights."

If the ordinance had applied only to commercial activities and the solicitation of funds, the Court stated, "arguably the ordinance would have been tailored to the Village's interests in protecting the privacy of its residents and preventing fraud." But the ordinance, Justice Stevens noted, was far broader and applied not only to religious causes but political ones as well. He stated:

The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task ..., a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

The ordinance, Justice Stevens said, swept within its purview those who might wish to maintain their anonymity while canvassing or distributing literature in support of unpopular causes for fear of economic or official retaliation or social ostracism, individuals with religious or political objections to having their speech "licensed by a petty official," and even spontaneous speech by neighbors or others who might make a spur-of-the-moment decision to become active in a political or other cause.

But, the Court stated, the ordinance was not unconstitutional simply because it swept within its purview speech that is constitutionally protected. The ordinance also, it said, was not tailored to the Village's stated interests. The interest in preventing fraud might support the ordinance to the extent it applied to commercial transactions or the solicitation of funds, Justice Stevens asserted, but that interest provided no support for its application to religious or political canvassing. The village's interest in protecting the privacy of its residents, he stated, was better served by the opportunity given residents to post "No Solicitation" signs on their lawns and the residents' "unquestioned right to refuse to engage in conversation with unwelcome visitors." And finally, he said, the village's interest in preventing crime was not well served by the ordinance because criminals could easily register under a false name or avoid the permit requirement altogether by posing as persons not covered by the ordinance, such as surveyors or census takers or simply as persons needing directions or use of a phone. Moreover, he asserted, in the lower courts the village had not even asserted an interest in preventing crime as a justification for the ordinance.

The Court concluded:

The rhetoric used in the World War II-era opinions that repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from

totalitarian attack is unchanged. It motivates our decision today. The judgment of the Court of Appeals is reversed

Justice Breyer, joined by Justices Souter and Ginsburg, concurred with the Court's opinion but wrote separately to emphasize that the village's claimed justification for the ordinance of preventing crime was decidedly weak. The legislative body that passed the ordinance, he claimed, did not consider that justification; the village made no reference to that rationale in the courts below; and its references to crime in its brief to the Court seemed to cover nothing other than fraud, which it asserted as a separate interest. "I can only conclude," he stated, "that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so."

Justice Scalia, joined by Justice Thomas, concurred in the Court's judgment but not with all its reasoning. In a separate opinion he expressed particular disagreement with the Court's view that the ordinance was unconstitutional in part because it would lead persons with religious or other objections to having their speech regulated at all to forego speaking rather than complying with the ordinance. Such objections, he said, provided no basis either for the exemption of such speakers from a lawful ordinance or for the invalidation of the ordinance.

Chief Justice Rehnquist dissented. Terming the Court's decision to be "newly fashioned doctrine," he said it "contravenes well-established precedent, renders local governments largely impotent to address the very real safety threats that canvassers pose, and may actually result in less of the door-to-door communication that it seeks to protect." Canvassers, he emphasized, do have the potential of lessening "the peaceful enjoyment of a home" and of engaging in crime; and for that reason, he said, the Court "for over 60 years [has] categorically stated that a permit requirement for door-to-door canvassing which gives no discretion to the issuing authority, is constitutional." Citing language to that effect from each of the cases cited by Justice Stevens, the Chief Justice said that Stratton's ordinance had "none of the defects" of an invalid regulation of canvassing. It was not a blanket prohibition of canvassing, he said; it conferred no discretion on any official to decide who gets a permit; and its language was not vague.

Moreover, he said, the Court had failed to articulate what test it was using to evaluate the ordinance and, instead, had simply asserted that it affected more speech than necessary and was not tailored to the village's interests. But because the ordinance was content-neutral and merely regulated the manner of canvassing rather than barring it, the Chief Justice stated, it was clear that intermediate scrutiny was the appropriate standard of review. Under that standard, he asserted, "the ordinance easily passes muster." It was, he said, narrowly tailored to serve each of the village's three claimed interests. In particular, he said, it furthered the interest of preventing crime because it applied to everyone who wanted to canvass door-to-door and increased the possibility of detecting and apprehending those who commit crimes in the process. Finally, he claimed, the ordinance satisfied the last element of the intermediate scrutiny standard by leaving open "ample alternatives for expression." "A discretionless permit requirement," the Chief Justice concluded, "does not violate the First Amendment."

Zelman v. Simmons-Harris

70 U.S.L.W. ____ (June 27, 2002) (No. 00-1751): In this case the Supreme Court, by a narrow margin, upheld as constitutional a school voucher program affording certain students in Cleveland's public schools the opportunity to attend private schools in the city, notwithstanding the fact that most of the schools were religious in nature. The Ohio Pilot Project Scholarship Program had been enacted in partial response to a 1995 federal district court decision directing the state to take control of Cleveland's public schools, which had chronically failed to meet even minimal academic performance standards. As re-enacted in 1999, the program provided grants of up to \$2250 to poor families with elementary and middle school students in Cleveland's public schools to enable those who chose to do so to attend private schools in the city. Notwithstanding that most of the private schools participating in the program were sectarian in nature and that most of the subsidized students enrolled in such schools, the Court held that the program did not coerce parents into sending their children to religious schools but afforded them a constitutionally sufficient range of secular and religious educational choices. Those choices, the Court said, included not only subsidized attendance at religious and nonreligious private schools in the city but also subsidized tutoring for those who chose to remain in public schools, transfer to public magnet schools in the city, and attendance at publicly-financed community schools. The decision was 5-4. (*Note*: The Court's decision also applies to two other appeals that had been consolidated with this case – *Hannah Perkins School v. Simmons-Harris* (No. 00-1777) and *Taylor v. Simmons-Harris* (No. 00-1779)).

Zelman has a tangled legislative and judicial history. In 1995, in partial response to a court order placing the Cleveland public schools under direct state control, the Ohio legislature adopted the Ohio Pilot Scholarship Program. The program had two components. One component provided scholarships to selected students attending the Cleveland public schools in grades kindergarten through the eighth grade to enable them to attend private schools within Cleveland or public schools in the suburban school districts adjacent to the city that chose to participate. Preference was given to students from families with incomes below 200 percent of the poverty line, and the scholarship could pay 90 percent of the private or out-of-district public school's tuition charge up to a maximum of \$2250. For students from families with higher incomes, the scholarship was capped at \$1875 and could pay up to 75 percent of the tuition charge. In the second component of the program, eligible students who chose to remain in public school could receive up to \$360 to pay for special tutorial assistance. In the 1999-2000 school year 3761 students participated in the voucher program, and more than 2000 chose to receive tutorial assistance grants. Because no suburban public schools chose to participate in the voucher program, all of the voucher students attended private schools in the city. Forty-six of the 56 private schools participating in the program that year (82 percent) were religiously-affiliated; and 96 percent of the scholarship students were enrolled in those schools.

Soon after the program's original enactment in 1995, a number of plaintiffs brought suit in state court challenging its constitutionality under the establishment of religion clause of the First Amendment and several provisions of the Ohio Constitution. The Ohio trial court held the program to be constitutional. But on May 1, 1997, the Ohio Court of Appeals reversed, holding the program to violate both the establishment clause and two provisions of the Ohio Constitution it said were "coextensive" with the establishment clause. Adopting the reasoning of the Supreme Court's 1973 decision in *Committee for Public Education v.*

Nyquist, 413 U.S. 756 (1973), the appellate court stated that the domination of the universe of participating schools by sectarian schools meant that the parents did not have a “genuine and independent choice” about where to use the scholarships and that the program provided “direct and substantial, non-neutral government aid to sectarian schools.”

On May 25, 1999, however, the Ohio Supreme Court reversed on the establishment clause issue (with one minor exception) by a margin of 4-3 but still held the program to violate a procedural provision of the Ohio Constitution, 5-2. *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E. 2d 203 (1999). On the establishment clause issue, the court emphasized that the primary beneficiaries of the program were “children, not sectarian schools” and that the relationship between state aid and the schools was “attenuated” because the parents made “independent decisions to participate in the School Voucher Program and independent decisions as to which registered nonpublic school to attend.” But while upholding most of the program, it did strike down one provision on establishment clause grounds. That provision allowed participating schools to give preference in admission on the basis, among other reasons, that the students’ parents were “affiliated with any organization that provides financial support to the school.” The court found that provision to create a financial “incentive for parents desperate to get their child out of the Cleveland City School District to ‘modify their religious beliefs or practices’ in order to enhance their opportunity to receive a ... scholarship” and thus to be unconstitutional.

But the Ohio Supreme Court also held the program to have been enacted in a manner that violated a provision of the Ohio Constitution mandating that each bill adopted by the legislature contain no more than one subject (Art. II, § 15D). Noting that the voucher program had been enacted as a rider to a massive appropriations bill and constituted only 10 pages of a 1000 page bill, the court said that there was a “blatant disunity” between the voucher program and the rest of the appropriations bill and no “rational reason for their combination.” As a consequence, it held the one-subject provision of the state constitution to have been violated. It delayed the effective date of the decision, however, until June 30, 1999, “in order to avoid disrupting a nearly completed school year.”

On June 29, 1999, the Ohio legislature re-enacted the Pilot Scholarship Program, eliminating only the parental affiliation preference that had been found unconstitutional by the Ohio Supreme Court. Within a month two new suits — *Simmons-Harris v. Zelman* and *Gatton v. Zelman* — were filed challenging the constitutionality of the program under the establishment clause, this time in federal district court rather than state court. On August 24, 1999, Judge Solomon Oliver consolidated the cases and granted the plaintiffs’ motion for a preliminary injunction barring further implementation of the program, stating in a lengthy opinion that “the Plaintiffs have a substantial chance of succeeding on the merits.” *Simmons-Harris v. Goff*, 54 F.Supp.2d 725 (N.D. Ohio Aug. 24, 1999) (order granting preliminary injunction). However, this order came down on the same day private schools in Cleveland opened and only one day before the public schools were to open. As a consequence, a substantial public outcry ensued about the hardship the injunction placed on the voucher children who were already enrolled in private schools and on the public schools that suddenly would have to accommodate several thousand new students. In response Judge Oliver on August 27, 1999, partially stayed the injunction and permitted students who had been enrolled in the scholarship program in the previous school year (but not students newly enrolled) to continue for one more semester. However, after an emergency appeal by Ohio, the U.S. Supreme Court on November 5, 1999, by a 5-4 margin, granted an emergency

request by Ohio and stayed the preliminary injunction in its entirety, thus allowing about 800 new students to participate as well and permitting the voucher program to continue beyond the first semester. *Zelman v. Simmons-Harris*, 528 U.S. 943 (1999) (the majority was comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas.)

On December 20, 1999, Judge Oliver held Ohio's Pilot Scholarship Program to violate the establishment clause. *Simmons-Harris v. Zelman*, 72 F.Supp.2d 834 (N.D. Ohio 1999). Because 82 percent of the private schools in Cleveland which were participating were church-related, he said, the program was "skewed toward religion" and provided "financial incentives to attend religious schools." Under Ohio's program, he asserted, "parents and their children do not have a significant choice between parochial and nonparochial schools That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature." Finding *Nyquist* to be controlling, the court permanently enjoined continuation of the voucher program; but it stayed the injunction pending review by the U.S. Court of Appeals for the Sixth Circuit.

A year later, on December 11, 2000, the Sixth Circuit affirmed Judge Oliver's decision, 2-1. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). The majority held that the "choice" afforded the participants in the program was "illusory," and that "the program clearly has the impermissible effect of promoting sectarian schools":

We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious The effect of the voucher program is in direct contravention to ... Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution.

On June 27, 2002, the Supreme Court reversed, 5-4. Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, stated that the lower courts had used too narrow a framework in evaluating the choices available to the voucher students and their parents. The proper framework, he said, included not only the private school options, whether secular or religious, but also the option of remaining in public school and obtaining special tutoring, transferring to one of the 23 magnet schools in the city that had specialized curricula or teaching methods, or attending one of the 10 start-up community schools in the city that, although publicly financed, had their own school boards and enjoyed substantial academic independence from state prescriptions. Within that broader framework, he asserted, parents clearly were not coerced into sending their children to religious schools but did so only as the result of a genuinely independent choice among a range of secular and religious options.

There was no dispute, the Chief Justice observed, that the Pilot Scholarship Program served the "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." The key question, he said, was whether it had the forbidden effect of advancing or inhibiting religion. The pertinent criteria for that

question, he said, had been established in three prior cases involving indirect assistance to sectarian schools. In *Mueller v. Allen*, 463 U.S. 388 (1983), he stated, the Court had upheld a state program allowing tax deductions for various educational expenses, including private school tuition, because the class of beneficiaries included all parents, not just the parents of children attending private schools, and because the subsidy of the educational expenses at private sectarian schools occurred “only as a result of numerous, private choices of individual parents of school-age children.” Similarly, he said, the Court in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) had upheld as constitutional a vocational rehabilitation grant program which provided tuition aid to a student studying at a religious institution to be a youth minister. The Court had done so, he stated, because the aid was made available generally without regard to the nature of the institution ultimately benefitted and because “any aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” Finally, he asserted, the Court in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) had upheld the provision of a sign-language interpreter to assist a deaf student in a sectarian high school pursuant to a program that generally assisted disabled students in public and private schools. Again, he said, the Court had done so because the aid was made available on a religiously neutral basis and because parents, not the government, made the decision to send their children to public or private schools.

With respect to the Ohio Pilot Scholarship Program, Chief Justice Rehnquist stated that “[w]e believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional.” The program, he said,

is neutral in all respects toward religion It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District Program benefits are available to participating families on neutral terms, with no reference to religion There are “no financial incentives” that “skew” the program toward religious schools There ... is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school.

Consequently, the Chief Justice concluded, “in keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.”

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. Terming the Court’s decision a “dramatic departure from basic Establishment Clause principles,” he said that the majority’s criteria for evaluating the constitutionality of a voucher program amounted to “verbal formalism,” violated the no aid to religious instruction principle set forth in *Everson v. Board of Education*, 330 U.S. 1 (1947), opened the door to substantial public subsidy of religious schools, and defied “every objective supposed to be served” by the establishment clause.

In *Everson*, Justice Souter claimed, the Court had adopted the principle that public funds should not subsidize religious instruction. Subsequent decisions – until *Mueller* – had

adhered to that principle, he said; but *Mueller* “started down the road from realism to formalism.” *Mueller*, *Witters*, and *Zobrest* allowed indirect aid to be used for religious instruction, he stated, subject only to the criteria of neutrality and private choice. But not until this case, he asserted, had a majority of the Court rejected the “substantiality of aid” as constitutionally irrelevant and “held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools.”

The neutrality test, he said, ought to focus on the aid program that may be directed to religious as well as secular schools and ask whether the scheme “favors a religious direction”; and in this case, he stated, that meant the question ought to be directed to the scholarship and tutoring program itself. But, he claimed, the majority looked “not to the provisions for tuition vouchers ... but to every provision for educational opportunity.” As a consequence, he said,

the majority’s reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. “Neutrality” as the majority employs the term is, literally, verbal and nothing more.

The majority committed the same error, Justice Souter asserted, with respect to the private choice criterion. By focusing on “the entire menu of possible educational placements” rather than on where the scholarships can be spent, he said, the majority “ignores the reason for having a private choice enquiry in the first place.” That enquiry properly asks, he said, whether the parent or student that initially receives the public aid is free to channel it in either a secular or religious direction. But the majority eliminates the utility of that enquiry, he said, by bringing into the equation public spending on public magnet and community schools “that goes through no private hands and could never reach a religious school under any circumstance”:

If “choice” is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school.

By allowing “substantial amounts of tax money” to be used to systematically underwrite religious practice and indoctrination, Justice Souter said the Court’s decision undermines the three major purposes of the establishment clause. It violates respect for freedom of conscience by compelling individuals to subsidize religious instruction contrary to their own beliefs; it threatens to compromise the integrity and independence of religious institutions by bringing government regulation in its wake; and it threatens social conflict as religious sects compete for public subsidies and religious differences become the subject of public debate. “The reality,” Justice Souter concluded, “is that in the matter of educational aid the Establishment Clause has largely been read away.”

Several Justices filed additional opinions as well. Justice O’Connor authored a concurring opinion challenging Justice Souter’s contention that the voucher program would lead to substantial public aid to private religious schools and defending the inclusion of a broad range of educational choices in evaluating whether an aid recipient has a genuinely independent choice. Justice Thomas wrote to suggest that all of the strictures of the establishment clause ought not to be deemed incorporated in the due process clause of the Fourteenth Amendment and that the states are more free than the federal government to “pass

laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.” Justice Stevens filed a dissenting opinion arguing that three factual matters relied upon by the majority – the educational crisis in Cleveland’s public schools, the availability of a wide range of choices within the public school system, and the voluntary character of a private choice to prefer parochial education over a public school education – were irrelevant to the constitutional enquiry. Finally, Justice Breyer, joined by Justices Stevens and Souter, wrote a dissenting opinion stressing “the Establishment Clause concern for protecting the Nation’s social fabric from religious conflict” and the dangers posed to that concern by the Court’s decision.

Cases Affirmed

Utah v. Evans

143 F.Supp.2d 1290 (D. Utah), *judgment affirmed*, 70 U.S.L.W. 3359 (November 26, 2001) (No. 01-283): A three-judge federal district court held that the federal law including overseas federal employees in the 2000 census but excluding approximately 11,000 overseas Mormon missionaries violated neither the Religious Freedom Restoration Act nor the free exercise clause because the law imposed no burden on the missionaries’ religious beliefs or practices.

Cases Vacated and Remanded

Gentala v. Tucson, Arizona

244 F.3d 1065 (9th Cir.), *judgment vacated and case remanded for reconsideration in light of Good News Club v. Milford Central School*, 533 U.S. 98 (2001), 70 U.S.L.W. 3267 (October 9, 2001) (No. 01-75): The lower court held a city’s refusal to cover the costs of a religious group’s use of a public park for a National Day of Prayer ceremony to violate the establishment clause in light of the fact that the city did so for all other groups using the park. (*Note*: The Ninth Circuit subsequently remanded the case to the district court for reconsideration. *See Gentala v. City of Tucson*, 275 F.3d 1160 (9th Cir. 2002).)

O’Connor v. Northshore International Insurance Services

___ F.3d ___ (3d Cir.), *judgment vacated and case remanded for reconsideration in light of Swierkiewicz v. Sorema N.A.*, 70 U.S. 4152 (2002), 70 U.S.L.W. 3773 (June 11, 2002) (No. 01-1205): Lower court upheld the dismissal of a suit by an employee who claimed she had been fired for religious reasons in violation of Title VII, because she failed to show that anyone with the authority to fire her knew she was a fundamentalist Christian.

Cases on Which Decision To Review Has Not Been Made

Warren v. Morris Cerrullo World Evangelism

___ Cal. ___ (Cal. Ct. App. 2001), *pet. for cert. filed*, 70 U.S.L.W. 3742 (May 17, 2002) (No. 01-1699): State court held free exercise and establishment clauses to preclude adjudication of minister's claim that world evangelism had fraudulently induced him to relocate and had reneged on its promise to make him the successor to the head of the organization.

Cases Denied Review

Adler v. Duval County, Florida, School Board

250 F.3d 1330 (11th Cir.), *cert. denied*, 70 U.S.L.W. 3383 (December 10, 2001) (No. 01-287): After remand from the Supreme Court for reconsideration in light of *Santa Fe Independent School System v. Doe*, the lower court reinstated its former decision upholding as constitutional a school system's policy permitting the graduating senior class in each public high school to vote on whether to select a student to give a "message" wholly of the student's own choosing at the beginning or closing of their graduation ceremony.

Ali v. Alamo Rent-A-Car, Inc.

___ F.3d ___, 2001 U.S. App. LEXIS 3389 (4th Cir.), *cert. denied*, 70 U.S.L.W. 3245 (October 1, 2001) (No. 00-1813): Lower court dismissed Title VII complaint by an employee whose employer barred her from wearing a headscarf as required by her religion on the grounds she had suffered no adverse employment action and such action is a prerequisite to a Title VII suit.

Arkansas Presbytery of Cumberland Presbyterian Church v. Hudson

344 Ark. 332, 40 S.W.3d 301, *cert. denied*, 70 U.S.L.W. 3245 (October 1, 2001) (No. 01-8): State court, using a neutral principles of law approach, awarded title to two pieces of property to the local church rather than its parent body notwithstanding the hierarchical nature of the organization.

Broughton v. Pulaski Fiscal Court

___ Ky. ___ (Ky. Ct. App. 2000), *cert. denied*, 70 U.S.L.W. 3240 (October 9, 2001) (No. 01-90): State court held an occupational tax levied as a percentage of income rather than as a flat fee to be a religiously neutral revenue measure and not to violate the free exercise clause as applied to taxpayers whose income resulted from their practice of their religion as ministers or principals of parochial schools.

Brown v. Gilmore

258 F.3d 265 (4th Cir.), *cert. denied*, 70 U.S.L.W. 3315 (October 29, 2001) (No. 01-384): Lower court held a Virginia statute mandating that all pupils begin each day with a moment of silence during which they may “meditate, pray, or engage in any other silent activity” to accommodate rather than promote religion and, consequently, not to violate the establishment clause.

Bruff v. North Mississippi Health Services, Inc.

244 F.3d 495 (5th Cir.), *cert. denied*, 70 U.S.L.W. 3267 (October 9, 2001) (No. 01-210): Lower court held Title VII not to be violated by a medical center’s discharge of a counselor who refused to counsel clients on subjects that conflicted with her religious beliefs, including gay and extra-marital relationships, on the grounds the center was so small accommodation would impose an undue hardship.

Calderon v. Sandoval

241 F.3d 765 (9th Cir.), *cert. denied*, 70 U.S.L.W. 3244 (October 1, 2001) (No. 00-1774): Lower court held, *inter alia*, that prosecutor’s argument at the penalty phase of a capital trial to the effect that the imposition of the death penalty would vindicate divine authority and give the defendant a chance for redemption after death violated the Eighth Amendment’s requirement that the jury assume personal responsibility for its decision and focus on the specific factors set forth in the statute.

Church of Scientology International v. Time-Warner, Inc.

238 F.3d 168 (2d Cir.), *cert. denied*, 70 U.S.L.W. 3233 (October 1, 2001) (No. 00-1683): Lower court affirmed trial court ruling that magazine’s highly critical article of religious group did not constitute libel because the statements were made on the basis of extensive research and were not made with any actual malice.

DiBari v. Bedford Central School District

245 F.3d 49 (2d Cir.), *cert. denied*, 70 U.S.L.W. 3234 (October 1, 2001) (No. 00-1932): Lower court held a public high school’s earth day celebration, which included the assembly of the student body before an earth-totem on a tripod and various ceremonies to “honor the Earth,” not to violate either the establishment or the free exercise clause.

Gernetzke v. Kenosha Unified School District No. 1

274 F.3d 464 (7th Cir. 2001), *cert. denied*, 70 U.S.L.W. 3654 (April 22, 2002) (No. 01-1181): Lower court held that a principal did not violate the Equal Access Act by barring a student Bible club from including a large cross in a hallway mural due to concerns over possible litigation and disruption, because he barred secular symbols in other student displays for the same reason.

Hack v. President and Fellows of Yale College

237 F.3d 81 (2d Cir.), *cert. denied*, 70 U.S.L.W. 3240 (October 1, 2001) (No. 01-70): Lower court held Orthodox Jewish students' objection to Yale's policy requiring all unmarried freshmen and sophomores to live in college dorms, all of which were co-ed, not to state a claim under either the Fair Housing Act or, because Yale is not a state actor, the First Amendment.

Henderson v. Mainella

253 F.3d 12 (D.C. Cir. 2001), *cert. denied*, 70 U.S.L.W. 3654 (April 22, 2002) (No. 01-978): Lower court held that a National Park Service ban on the sale of T-shirts on the Mall did not substantially burden the evangelical Christian plaintiffs' religious vocation of spreading the gospel "by all available means" within the meaning of the Religious Freedom Restoration Act, given the alternatives available to them of selling the T-shirts on nearby streets or giving them away for free.

Hope Lutheran Church of Hastings, Minn. v. Shepherd of the Valley Lutheran Church of Hastings, Minn.

626 N.W.2d 436 (Minn. Ct. App.), *cert. denied*, 70 U.S.L.W. 3427 (January 7, 2002) (No. 01-670): A state appellate court held that the trial court had properly used neutral principles of law in awarding disputed property to the existing congregation and holding the vice president of the congregation, who had tried unsuccessfully to orchestrate the removal of the minister and then transferred the church's property to a newly formed congregation for no compensation without informing his fellow officers of what he was doing, not to be entitled to the good faith immunity from civil liability afforded unpaid directors of nonprofit corporations by state law.

Jae-Woo Cha v. Korean Presbyterian Church of Washington

262 Va. 604, 553 S.E.2d 511, *cert. denied*, 70 U.S.L.W. 3668 (April 29, 2002) (No. 01-1264): State court held the free exercise clause to preclude its exercise of jurisdiction over a pastor's wrongful discharge suit against his church and several members who served on its governing board, on the grounds that adjudication would necessarily involve the court in issues of church governance and internal organization and would interfere with the church's right to select its religious leaders.

James v. United States

___ F.3d ___ (7th Cir. 2001), *cert. denied*, 70 U.S.L.W. 3741 (June 3, 2002) (No. 01-1580): Lower court dismissed with prejudice a complaint asserting that citizens have a right to vote on whether prayer should be restored to the public schools.

Knights of Columbus, Council # 94 v. Lexington, Mass.

272 F.3d 25 (1st Cir. 2001), *cert. denied*, 70 U.S.L.W. 3695 (April 13, 2002) (No. 01-1271): Lower court held a municipality's ordinance barring unattended structures from the

village green to be a content-neutral time, place, manner regulation of speech, notwithstanding its effect of barring the long-standing practice of displaying a creche on the green for several weeks during the Christmas season.

LeVake v. Independent School District No. 656

625 N.W.2d 502 (Minn. Ct. App. 2001), *cert. denied*, 70 U.S.L.W. 3427 (January 7, 2002) (No. 01-665): State court found no due process, free exercise, or free speech violation in principal's reassignment of a biology teacher to teach a different subject after discovery that teacher intended to teach criticisms of evolution rather than evolution as prescribed by the curriculum.

Lightman v. Flaum

97 N.Y.2d 128, 736 N.Y.S.2d 300, 761 N.E.2d 1027 (2001), *cert. denied*, 70 U.S.L.W. 3724 (May 28, 2002) (No. 01-1280): State court held a state law establishing a clergy-penitent evidentiary privilege not to give rise to a cause of action against a cleric for breach of fiduciary duty due to the cleric's alleged disclosure of the congregant's confidential communications.

O'Bannon v. Indiana Civil Liberties Union

259 F.3d 766 (7th Cir.), *cert. denied*, 70 U.S.L.W. 3533 (February 25, 2002) (No. 01-966): Lower court held the display of the Ten Commandments on a seven-foot stone monument on the statehouse grounds to violate the establishment clause, notwithstanding the display of the Bill of Rights and the preamble to Indiana's constitution on the other, smaller faces of the monument.

Oregon Arena Corporation v. Lee

276 F.3d 550 (9th Cir.), *cert. denied*, 70 U.S.L.W. 3756 (June 10, 2002) (No. 01-1580): Lower court held a private corporation that leased city-owned outdoor area deemed to be a public forum to be liable under 42 U.S.C. 1983 for issuing regulations on speech that barred persons from preaching in the area.

Protestant Episcopal Church in Diocese of Mississippi v. Mabus

___ Miss. ___ (Cir. Ct. 2001), *cert. denied*, 70 U.S.L.W. 3695 (May 13, 2002) (No. 01-1263): State court dismissed invasion of privacy claim but refused to dismiss tort claim alleging that the plaintiff's priest, church, and diocese had violated ecclesiastical law by allowing her husband to surreptitiously tape her counseling sessions with the priest and subsequently to disseminate the tapes to third parties and to use them against her in a custody proceeding.

REN Laboratories of Florida, Inc. v. Weiss

251 F.3d 161 (11th Cir.), *cert. denied*, 70 U.S.L.W. 3315 (October 29, 2001) (No. 01-292): Lower court reversed trial court's grant of a post-trial motion for judgment as a matter

of law in a case involving the discharge of an employee for harassing his co-workers about religion on the grounds that reasonable jurors could have concluded that the employee's actions did not constitute harassment and that his religion was a factor in his discharge. (The Court also denied review in the companion case of *Weiss v. REN Laboratories of Florida, Inc.*, 251 F.3d 161 (11th Cir.), *cert. denied*, 70 U.S.L.W. 3315 (October 29, 2001) (No. 01-317).)

Searles v. Van Bebber

251 F.3d 869 (10th Cir.), *cert. denied*, 70 U.S.L.W. 3756 (June 10, 2002) (No. 01-785): Lower court held that a provision of the Prison Litigation Reform Act barring recovery for mental or emotional injury unless a physical injury is also demonstrated applied to a free exercise claim by a prisoner based on the temporary denial of a kosher diet and, consequently, found the refusal of the trial court to give the jury an instruction to that effect to be in error.

Wells v. Denver, Colorado

___ F.3d ___ (10th Cir.), *cert. denied*, 70 U.S.L.W. 3315 (October 29, 2001) (No. 01-503): Lower court upheld trial court's denial of injunctive relief to a private group that wanted to add a "Winter Solstice" display to the city's annual holiday display or display it separately, holding that the annual display constituted government speech, that such speech can be selective, and that city's unwritten policy prohibiting unattended private displays did not vest unbridled discretion in city officials.

Wilkinson v. Flagner

241 F.3d 475 (6th Cir.), *cert. denied*, 70 U.S.L.W. 3383 (December 10, 2001) (No. 01-324): Lower court held that prison officials possessed a qualified immunity from suit by an Orthodox Hasidic Jewish prisoner who objected to a prison grooming regulation that required him to cut his beard and sidelocks in contravention of his religious beliefs but that the prisoner could bring a constitutional challenge to the regulation to determine whether it was "reasonably related to legitimate penological interests."

Williams v. Watts-Willowbrook Church of Christ

___ F.3d ___ (9th Cir.), *cert. denied*, 70 U.S.L.W. 3234 (October 1, 2001) (No. 00-1827): Lower court held it had no jurisdiction over an appeal in a case alleging collusion by various parties to oust the appellant as minister.