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Supreme Court Hears Cleveland Voucher Case

In what could prove to be a watershed for school reform, the United States Supreme Court heard oral arguments last month in *Zelman v. Simmons-Harris* (00-1751), a case that will determine whether government-funded vouchers for tuition at religious schools are constitutional. The consequences of the case for school choice, education policy, and church-state jurisprudence could be enormous.

At issue before the high court was a program enacted in 1995 by the Ohio legislature that offers vouchers of up to \$2,250 to elementary school children who live in Cleveland. The vouchers can be used to attend private schools within the city or public schools in participating districts adjacent to the city. So far, no public school district has agreed to take part in the program, and the overwhelming majority of voucher recipients attend religious schools.

Chief Justice William H. Rehnquist and at least three associate justices (Anthony M. Kennedy, Sandra Day O'Connor, and Antonin Scalia) seemed to signal support for the program's constitutionality during the often lively hearing. A fifth likely supporter, Justice Clarence Thomas, though not showing his hand at the proceedings, has a solid history of siding with the majority in cases that have upheld aid to children in religious schools.

Ohio's Assistant Attorney General

Judith L. French, the undisputed star of the proceedings, commenced oral arguments for the pro-voucher side with the assertion that the Cleveland program



Judith L. French, Ohio's assistant attorney general, meets with reporters following the hearing, as Kenneth W. Starr, former U.S. solicitor general and current advisor to Ohio on this case, looks on.

satisfies two pivotal tests established by the high court. It distributes aid neutrally to parents, and those parents exercise true private choice when selecting schools for their children. French went on to argue that any funds that go to religious schools do so only because of the free intervention of parents.

Representing a coalition of school choice opponents, Robert H. Chanin, general counsel for the National Education Association, argued that the Cleveland program is so skewed toward religious schools that the private choices of parents are essentially meaningless gestures. He called the role of parents in the

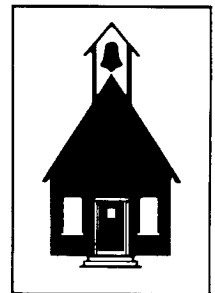
program "ritualistic." Within such an arrangement, said Chanin, the aid that flows to religious institutions is properly attributable to the state, in violation of the Establishment Clause of the First Amendment.

His argument, however, did not appear to persuade a majority of the justices. Countering Chanin's claim that the only practical choice voucher parents in Cleveland have is religious schools, Justice O'Connor noted the full framework of educational options available to parents, including charter schools, magnet schools, private schools, and regular public schools. And Justice Scalia suggested that basing the constitutionality of a voucher program on the proportion of religious schools available at any given time was entirely untenable. He asked rhetorically if the court would be required to monitor the ratio from year to year.

In one of the more feisty exchanges of the hearing, Scalia, in response to Chanin's claim that more money was needed to fix Cleveland's public schools, said it was not a matter of money but a matter of monopoly.

U.S. Solicitor General Theodore B. Olson, in what appeared to be a

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direct appeal to Justice O'Connor (widely considered a swing vote in this case), argued that a "reasonable observer" of the Cleveland program would



Parents and students chanting for choice outside the U.S. Supreme Court.

not conclude that it involved government support of religion. Olson seemed to be drawing from O'Connor's opinion in *Mitchell v. Helms*, in which she wrote, "[W]hen government aid supports a school's religious mission only because of independent decisions made by nu-

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(ABC's This Week continued)**

groups can be treated like any other group seeking government funding. And the Cleveland program makes that point even stronger by giving the money to the parents not to the schools. Now that's a separate question from whether vouchers are a good idea, but I think this court may approve them.

Cokie Roberts: I think the court can approve them, and I think that that's fine. I think that vouchers in some ways are just off the point. We have these huge debates about them, and initiatives come up, which, by the way, tend to be defeated when it comes to a ballot issue. But you're talking about 90 percent of American kids are in public schools. And so the real point here is to improve public schools. I have no problem giving vouchers to kids who need them to get out of a bad public school situation, but what you need to do is make the public schools better.

George Will: The Cleveland program, which is at issue in this, is the most important case on equality of opportu-

merous individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the fact...an inference that the state itself is endorsing a religious practice or belief."

One issue of concern to some justices was the relevance of the court's 1973 decision in *Committee for Public Education and Religious Liberty v. Nyquist*, which struck down a New York program which, among other things, provided private school tuition grants of \$50 (for elementary school students) or \$100 (for secondary school students) to low-income families. Attorneys supporting the Cleveland program argued that whereas the New York program provided funds only to parents of children in private schools, the Ohio program is more comprehensive, providing tuition scholarships and tutoring

in American education since *Brown v. Board of Education* 48 years ago. The students at issue in this case—don't say these are beside the point—they are getting out of drug- and gang-infested schools in the heart of Cleveland. The reason initiatives vote down school choice is because they're dominated by middle class parents who are perfectly happy with their schools and perfectly happy to ignore inner-city schools.

Cokie Roberts: But a lot of those kids are non-Catholic kids in Catholic schools because their parents were desperate to get them out of the public school. And you look at the New York private voucher program where now the black kids who are in that program's test scores have gone up so significantly that they have really more than halfway closed the gap with white kids. So the programs work, that's not my concern. My concern is that they only work for a

grants to children in public schools. Further, they said, since *Nyquist* the court has handed down decisions more germane and controlling.

Outside the courtroom, a large crowd of parents, children, and other school choice supporters carried signs and chanted for choice. Christine Suma, a participating parent in the Cleveland program who spoke at the rally, later offered these reflections: "As I stood at the rally this afternoon, I looked up and saw 'Equal Justice Under the Law.' That's all I want for my children. I want the field to be leveled so that all children can receive funding for the school of their choice."

Following the hearing, Clint Bolick, vice president for the Washington, D.C.-based Institute for Justice, said he was "cautiously optimistic that the court will lift the constitutional cloud from this vital education reform."

A decision in the case, *Zelman v. Simmons-Harris* (00-1751), is expected early summer.



Judith L. French answers questions after her superb performance as lead counsel for the pro-voucher side.

tiny, tiny fraction.

George Will: The best thing that ever happened to the American automotive industry was the Japanese automotive industry. Competition. FedEx makes the post office better. Why are public schools, of all the institutions in the world, to be immune to competition?



What They're Saying About the Cleveland Case

Secretary of Education Rod Paige: Throughout America, far too many children are trapped in failing schools. These children need and deserve access to a quality education, and their parents should be empowered to help them achieve their dreams. That's precisely the focus of this case.

Those who oppose empowering parents to select the best school for their children argue that school-choice programs would somehow hurt the system of public education. I reject this argument.

As a nation, we must focus squarely on the needs of children and parents, not on perpetuating the status quo, especially in those areas where the system has failed to adequately serve its students. If I have to choose between protecting the system and educating the children, I'll choose the children every time.

House Education and the Workforce Committee Chairman John Boehner: *Zelman v. Simmons-Harris...* could prove as important to the hopes and dreams of disadvantaged Americans as the *Brown v. Board of Education* decision in 1954.

This case is an important one for our society and a key moment in the drive for equal educational opportunity in America. The Cleveland program and others like it have freed thousands of parents to exercise a right that only upper- and middle-income parents can currently exercise—the right to choose the best school possible for their children.

Clint Bolick, Vice President, Institute for Justice: This morning's argument went very well. A majority of

the justices, including Justice O'Connor, seemed receptive to the argument that the choice program is about education, not religion, and that the state sought to embrace a wide range of options to bail out a failing school system. Our side's advocates did very well.

Bob Chase, president of the National Education Association: However the Court rules, we do not anticipate an expansion of voucher plans, given strong public opposition. [NEA's general counsel, Robert Chanin, was the lead attorney for the respondents in the case.]

From CNN's Capital Gang (2/23)

Kate O'Bierne: I think school voucher supporters will be smiling [when the Supreme Court announces its decision]. I think the lower court probably was wrong. The Cleveland program is neutral as to religion. Both religious schools and non-religious schools can participate. It's up to the parents to decide which they want. And that's why Clint Bolick, who for my money has done more for low-income black children than Marion Wright Edelman or Hillary Clinton or any of these other child advocates, likens it to a G.I. Bill for kids. And of course, under the G.I. Bill, it's perfectly constitutional to take that federal money and go to Notre Dame or Yeshiva University.

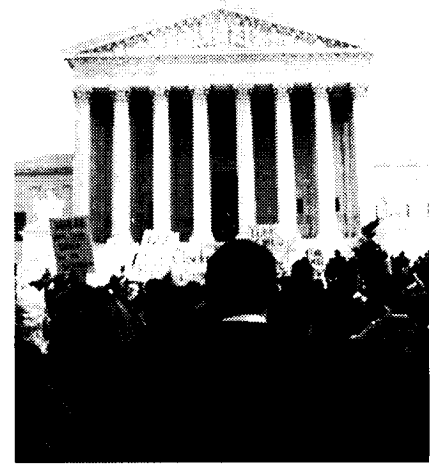
Al Hunt: I, of course, disagree with Kate about Marion Wright Edelman and Hillary Clinton, but I do agree with her on vouchers. I am pro-vouchers. But what we find is that maybe a number of inner-city blacks favor it, but white, suburban conservatives always vote

against it when it goes to the polls.

Robert Novak: I think the other side of the coin is what Clint Bolick said, that the liberals are equally hypocritical on this because they're in hock to the teachers union. So it's sort of an equilibrium of hypocrisy that we have right now.



A cheerful Clint Bolick, vice president of the Institute for Justice.



An enthusiastic crowd responds to speakers at the pro-voucher rally.

Margaret Carlson: You don't have to be in hock to the teachers unions to be concerned about what happens to public schools if vouchers become widespread. But what happened here is it's not the government's supporting religion. By default, these children ended up in parochial schools, which we should all be proud of for having a place for them to go in the meantime, while you hope that the public schools get better. The suburban schools would not take these children with their \$2,200 vouchers. And shame on them for it.

From ABC's This Week (2/24)

George Stephanopoulos: I think there's a very good chance that the Supreme Court is going to approve the Cleveland voucher program. What you've seen over the years is the Supreme Court moving on the establishment clause to the idea that religious

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While the Supreme Court considers the constitutionality of school vouchers, new evidence shows that parents who use them to switch to private schools tend to be satisfied with those schools.

According to a report released last month by Mathematica Policy Research, Inc., and the Program on Education Policy and Governance at Harvard University, 42 percent of parents who used vouchers to move children from public to private schools under a privately funded voucher program in New York City gave their schools a grade of "A." By contrast, only 10 percent of parents who applied for vouchers but kept their children in public schools gave their schools the same grade. Private school parents considered their schools more orderly than public school parents and were less likely to report the following as serious problems: students destroying property, tardiness, missing classes, fighting, cheating, and racial conflict.

Private school students received more homework than their public school counterparts, and their parents received more communications from school.

As for test results, the study found no difference between the performance of voucher and non-voucher students who were Latino, but a significant difference between voucher and non-voucher students who were African American. "After three years the composite test scores (a combination of math and reading) of African American students who were offered a scholarship were about 5.5 percentile points higher than the composite test scores of African Americans not offered a scholarship."

The study looked at elementary students who in 1997 applied for vouchers from the New York City School Choice Scholarships Foundation. More than 20,000 students applied for 1,300 scholarships worth \$1,400 annually. Recipients were selected by lottery.

According to David Myers, project director and co-principal investigator of the study, and a senior fellow at Mathematica, "The results are especially relevant to current debates about the value of education vouchers, since they come from a rigorous evaluation that used random assignment procedures, and the findings apply to a diverse population of students over time. Until now, high-quality evidence about vouchers

has been limited."

As the name suggests, a random assignment experiment assigns participants to a treatment group (in this case, students with vouchers) and a control group (non-voucher students). Because the groups are statistically equivalent, the effects of the intervening factor (vouchers) can be isolated.

At a U.S. Department of Education seminar last month on scientifically based research, Valerie Reyna, Senior Research Advisor in the Office of Educational Research and Improvement, described randomized clinical trials as the "gold standard" of education research. She said such research is the norm in the field of medicine, but is just now catching on in education, which has a history of basing practice on information "lower on the hierarchy of strength of evidence." For Reyna, education should employ a medicine model of research whenever feasible. Whether it's a treatment for cancer or poor reading, clinical trials can trace a cure causally to the intervention.

An executive summary of the study of the New York voucher program is available at www.ksg.harvard.edu/pepg/execsum.htm.

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