



REPORT from the Capital

Supreme Court hears arguments in religious hiring case

WASHINGTON — The U.S. Supreme Court heard arguments Oct. 5 on religious exemptions to employment law, and advocates for greater church autonomy say several justices seemed to be on their side.

Those justices focused on the motivation for a Michigan religious school to fire teacher Cheryl Perich and the proper role for the government in the internal affairs of churches, synagogues and other religious groups. The BJC filed a brief in the case supporting church autonomy.

Several justices asked whether narrowing a church's right to hire and fire would violate the separation of church and state.

"The court was openly skeptical of much of the (government's) position," said Douglas Laycock, a University of Virginia law professor who argued on behalf of Hosanna-Tabor Evangelical Lutheran Church and School.

Attorneys for the government argued that Perich, who taught secular subjects and religion at the now-closed school, was fired for threatening to sue under the Americans with Disabilities Act, but church and school officials used her religious duties as a pretext for firing her.

"All that needs to be decided has nothing to do with religion," said former Solicitor General Walter Dellinger, who argued on Perich's behalf.

The church, meanwhile, argued that Perich was a special kind of teacher — a "commissioned minister" — and said she was fired for not upholding her religious responsibilities and flouting a religious doctrine against taking internal disputes outside the church.

Dellinger acknowledged that church leaders cited the Apostle Paul's letter to the Corinthians in firing Perich, but he said the government still has a responsibility to ensure equal treatment for employees.

At the heart of the case lies the "ministerial exception," a 40-year-old legal doctrine that allows religious institutions some exemptions from employment law. Under the ministerial exception, for example, a Roman Catholic church could not be sued for gender discrimination for refusing to hire a female priest.

Justices questioned why the government should get in the business of deciding who is or



Douglas Laycock, a University of Virginia law professor, argued on behalf of Hosanna-Tabor Evangelical Lutheran Church and School. Behind him are the BJC's K. Hollyn Hollman and J. Brent Walker.

is not a ministerial employee and therefore subject to the exception. Some asked if the government was minimizing the protections from government interference afforded to religious institutions.

"[T]here, black on white in the text of the Constitution, are special protections for religion. And you say that makes no difference?" Justice Antonin Scalia asked government attorney Leandra R. Kruger, who argued the case with Dellinger.

Chief Justice John Roberts asked Kruger why the government should determine whether a certain religious doctrine is vital to a belief system, such as the Lutheran one mandating that disputes within the church are to be solved internally.

"[Y]ou're making a judgment about how important a particular belief is to a church," Roberts told Kruger. "[Y]ou're saying, 'We don't believe the Lutheran Church when it says that this is an important and central tenet of our faith.'"

But other justices engaged the argument that society has a compelling interest in protecting the rights of all employees — whether they work for a religious institution or not — to petition the government for help.

"How about a teacher who reports sexual abuse to the government and is fired because of that reporting?" asked Justice Sonia Sotomayor. "[D]oesn't society have a right at some point to say certain conduct is unacceptable, even if religious...?"

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BJC Board elects new officers, presents J.M. Dawson award

WASHINGTON—During its annual meeting, the Baptist Joint Committee Board of Directors was challenged to continue the fight to protect the separation of church and state.

On Oct. 3-4, representatives from organizations supporting the BJC met in Washington, D.C. The group passed an operating budget of \$1,213,700 (a 1 percent increase over 2011) and elected new officers to serve for the next two years. The new board chair is Mitch Randall, the pastor of NorthHaven Church in Norman, Okla., and a representative of the Religious Liberty Council. Carroll Baltimore, who is the president of the Progressive National Baptist Convention, was elected vice chair. Terri Phelps of Louisville, Ky., is a Religious Liberty Council representative on the board and the new secretary. Seventh Day Baptist General Conference Executive Director Rob Appel will serve as treasurer.

On Oct. 4, author and former Maryland Lt. Gov. Kathleen Kennedy Townsend discussed the role of religion in politics with the group and encouraged members to continue the fight for the separation of church and state.

During the meeting, Richard Ice, a church-state advocate and member of the BJC Board for more than 40 years, received the J.M. Dawson Religious Liberty Award, the BJC's highest honor. See page three for more information.



BJC Communications Director Jeff Huett makes his presentation to the BJC Board of Directors.



Kathleen Kennedy Townsend speaks to the BJC Board about challenges facing Christians in the public arena, including a narrow view of faith.

At right: The new BJC Board officers are, from left to right, Treasurer Rob Appel (Seventh Day Baptist General Conference); Secretary Terri Phelps (Religious Liberty Council), Chair Mitch Randall (Religious Liberty Council) and Vice Chair Carroll Baltimore (Progressive National Baptist Convention).



Below: Those attending the annual meeting of the Baptist Joint Committee Board of Directors include representatives from the BJC's member bodies and the leadership of the Religious Liberty Council.



REFLECTIONS

In George Washington's words

At our annual board meeting this year, I had the privilege of making a special presentation of the J.M. Dawson Religious Liberty Award. Established on the 50th anniversary of the Baptist Joint Committee in 1986 and named for the BJC's first executive director, the Dawson Award recognizes Baptists who have made outstanding contributions to the defense of religious liberty and who support the BJC. Previous recipients include the likes of Bill Moyers, Jimmy Carter, Walter Shurden, Gardner Taylor and James Dunn.

We presented the award to Richard E. Ice, a board member of 41 years, upon his retirement from the BJC board.

Dick Ice's contributions to the life and work of the BJC are incalculable. In over four decades, he missed only one board meeting — then because he was hospitalized for a few days during a trip to Russia and could not get back in time. His business acumen and advice were well appreciated as chairman of the BJC's Endowment Committee. Yet Dick is not just a financial guru. He understands and appreciates Baptist principles and the American concept of the separation of church and state like few others. He is also a student of history who can call up the words of our Founders on the spur of the moment and make scholarly presentations on James Madison, Thomas Jefferson and others.

Upon receiving the award at the meeting — which Dick **did not know** was coming — he instinctively and immediately pulled out a copy of George Washington's 1790 letter to the Hebrew Congregation of Newport, R.I., and read it to the



group as something of a swan song to his legacy on the board.

That powerful letter is reproduced in the side bar. Although we tend to know well the words and sentiments of Jefferson and Madison, we often overlook Washington's commitment to fostering religious pluralism and religious liberty for all, including "the children of the Stock of Abraham," a shockingly brash sentiment in the late 18th century. (I think I know what George Washington would say today about the other children of Abraham — Muslims!). If you want to read more about Washington and his letters to other religious groups, including Baptists, download a copy of my friend Dan Swett's fascinating new book titled "**Protecting Religious Diversity to Achieve National Unity: A Fantasy Memoir of George Washington**" and give it a good read. (It is available exclusively in an electronic format.)

Thank you, Dick, for your generous beneficence to the BJC and for reminding us of the father of our country's commitment to the rights of conscience and religious liberty for all of God's children.

Brent Walker
presents
Richard Ice
with the J.M.
Dawson
Religious



Liberty Award. To see part of Ice's acceptance speech, scan the above QR code with your smartphone or visit our video page at vimeo.com/bjcvideos/videos.



J. Brent Walker
Executive Director

LETTER FROM GEORGE WASHINGTON TO THE HEBREW CONGREGATION OF NEWPORT, R.I. AUGUST 18, 1790

The Citizens of the United States of America have a right to applaud themselves for giving to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support. ...

May the children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other inhabitants, while every one shall sit in safety under his own vine and fig-tree, and there shall be none to make him afraid.

May the Father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.

Religious Free It Cuts B

By Kira Cozzolino

One of the most obvious signs of a person's religious affiliation is the clothes that the person wears, and such attire can often become a cause for controversy. While the most often cited example of this is the burqa, worn by many Muslim women, another equally contested case is that of the kirpan. The kirpan is a small knife which is one of the "five K's" — five articles of attire which must be worn by all initiated members of the Sikh religion.¹ In many cases, the rights of Sikhs to wear the kirpan have clashed with the dress codes of society, especially in school and work environments, which have laws against the carrying of weapons.

As there is much variation among how different individuals express their religion, there is a similar amount of variation among the types of kirpans worn by Sikhs, ranging from symbolic necklaces to actual swords. The most commonly carried type,

however, is a dagger between three and six inches

in length — a size which, despite the bluntness of the blade, is sufficient to have it categorized as illegal in many places.² The kirpan's purpose according to the Sikh religion is as an article of protection — its literal meaning is "weapon of defence."³ It also traditionally represents the commitment to fight evil.⁴ Since the kirpan is not considered a weapon, but rather an article of faith, there have been several court rulings in the United States confirming the unconstitutionality of forbidding Sikhs from wearing the Kirpan.³

However, since the majority of schools in the United States have a zero tolerance policy regarding weapons, the issue of how to deal with kirpans has been brought to court multiple times. One of the more publicized cases was that of the Plymouth-Canton school district, which put bans on kirpans

into place when a fourth grader was found carrying one. This ban was eventually reversed, and specifications on the type of kirpan which could be carried were instituted in its place. These new rules required the kirpan's blade to be below a certain length and dull, worn under the clothing so as to not be visible, and sewn into its sheath at all times, so that it would no longer qualify as a dangerous weapon according to the school's policies.⁴ The kirpan is not the first cultural or religious item to come under such scrutiny, though — in another Michigan case, a boy was expelled from his high school for wearing a ceremonial Scottish knife along with his kilt to a dance.⁵ In both cases, the crux of the issue was that an item not seen by the wearer as a weapon represented something more dangerous to outside viewers.

Other cases of kirpan possession leading to legal ramifications include that of Anand-Gurdas Singh, a Sikh man who was arrested on public transportation in Los Angeles.⁶ Another was that of Kawaljeet Tagore, a woman who was fired from her job in the IRS for carrying a kirpan, something which came after nearly a year of problems at the job centering on the knife.⁷

Such situations — Sikhs being prohibited or prosecuted for carrying the kirpan — are seen by some as going against the right of Americans to freely practice their religion. In the cases of kirpans at school, banning kirpans forces children to choose between breaking a fundamental tenet of their religion and risking expulsion. On the other hand, one of the main duties of schools is to ensure the safety of their students. While the children carrying kirpans may not intend to use them for harm, there is always the possibility of the knives falling into unsafe hands. The circumstances in both work and school environments are also complicated by the fact that other bladed objects can be found there. In the case of Tagore, the offices where she worked allowed scissors and box cutters, which many schools also allow. However, a kirpan in its sheath carries more threatening connotations in the eyes of people unfamiliar with these dagger-like blades, so they are viewed with alarm.

The Plymouth-Canton school district's answer to the problem is the one that appears to come closest to a reasonable compromise. While the kirpan is not viewed as a weapon by



Cozzolino



Freedom: Both Ways



its owners, neither are other potentially harmful objects. In addition, while the stated purpose of the kirpan is not to threaten, there have been cases of children bringing their kirpans out and voicing a willingness to use them when offended.⁸ The best solution to dealing with the kirpans is one which takes the specific circumstances into account. In a school environment, where safety is an utmost priority and concern, kirpans should be restricted to types that are completely risk-free. In work situations, a solution should be discussed with the employer, but if other objects similar to the kirpan can be found in the business place, the kirpan should be allowed as well, albeit worn discreetly so as not to concern fellow employees.

Education seems the best response to the dilemma of how to deal with a religious symbol which carries a different or misunderstood meaning to outsiders. In the case of the kirpan, an important step seems to be the education of teachers, employers, law enforcement officials, and possibly even the

general public as to the symbolic and religious meaning behind the item. Absolute restrictions on the symbols should rarely be enforced, as this would infringe on the rights granted by the First Amendment. Rather, a reasonable compromise should be sought, in which both sides understand the needs of the other — both the needs for the expression of one's religious faith, and the need for a society in which every person abides by the law.



Essay winner Kira Cozzolino, shown here outside the BJC office with her parents, Michael and Karin Cozzolino, received a \$1,000 scholarship and a trip to Washington, D.C., for her essay. In the 2011 contest, students were asked to write an essay explaining how religious rights clash with other rights or laws in America and how the student would determine an appropriate outcome. The BJC received more than 370 entries from 43 states for the contest.



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K. Hollyn Hollman
General Counsel

Defining the 'ministerial exception'

On October 5, the U.S. Supreme Court heard oral arguments in what may be the most significant religious liberty case to reach the High Court in 20 years. If the intense questioning by the justices was any indication, it may also be one of the most difficult.

At issue in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission* is the scope of a court-made rule that precludes most employment-related lawsuits by ministerial personnel. The BJC joined an *amicus* effort in the case, defending the "ministerial exception" as a core application of the separation of church and state that prevents courts from second-guessing decisions about who is qualified for ministerial leadership.

This particular case arose out of a dispute between Cheryl Perich, a "commissioned" teacher, and the church-run elementary school in Michigan where she taught religion and other subjects. Perich threatened to sue when the school delayed her return from a medical leave of absence for narcolepsy. The church terminated her employment, citing Perich's disruptive behavior and failure to submit to an internal church mediation process.

The EEOC sued the church on Perich's behalf, alleging that she was fired in violation of the Americans with Disabilities Act, a statute that explicitly prohibits retaliation against employees who report or oppose disability discrimination in the workplace. The district court dismissed the case, but the 6th U.S. Circuit Court of Appeals reversed, holding that the ministerial exception does not cover teachers who spend a majority of work time teaching secular subjects.

Two particular issues dominated the questioning from the bench. First, for purposes of applying the ministerial exception, how should the law define who constitutes a minister? Second, what is special about religious employers that would justify such a broad exception?

As to the first question, the church emphasized that the ecclesiastical nature and religious functions of Perich's position put her within the exception's coverage. The exception should apply to all whose job responsibilities include "teaching the faith." This led some of the justices to question the breadth of the ministerial ranks. What about a teacher who teaches solely secular classes but leads students in prayer before meals? What about a teacher who is ordained, but by a denomination

different than the religious employer? And what about churches who consider all members to be ministers?

The government was similarly hard-pressed to propose a legally satisfying definition of "minister." Perich's lawyer suggested that an employee is not a minister if that individual carries out "important secular functions in addition to her religious duties." Chief Justice John Roberts summarily rejected that test, noting that the Pope is a head of state carrying out "important secular functions."

Apart from the legal definition of "minister," the justices seemed equally challenged by the second question. The church ably defended the exception on the facts of this case, but as justices raised scenarios involving whistle-blowing to protect children from abuse, the church acknowledged there may be a need to carve out exceptions to the exception. Several justices expressed incredulity at the government's contention that, in applying anti-retaliation measures, churches are entitled to no greater protection than secular employers like labor unions. Justice Antonin Scalia called this argument "extraordinary." Similarly, Justice Elena Kagan — hardly Scalia's ideological equivalent — found it "amazing" to suggest that the religion clauses have no bearing upon a church's relationship with its employees.

It is difficult to imagine that the Court will find that no ministerial exception exists, but defining its scope is no small task. As Garrett Epps noted in *The Atlantic*, "Too narrow a ministerial exception would bring government into the sanctuary. Too broad an exception will permit religious bodies to operate outside the law."

The broad and diverse range of religious groups who supported *Hosanna-Tabor*, including the BJC, share the concern that if the exception is defined too narrowly, it will expose many religious institutions to far greater liability risks in hiring and firing decisions, entangling courts in decisions about religious doctrine. *Amici* offered constructive criteria for defining ministerial personnel, as well as support for minimizing the government's role in deciding who is fit to serve in ministry.

To be sure, a broadly construed ministerial exception will result in some cases that may offend our notions of civil fairness and equality under the law. But it is inconsistent with fundamental principles of religious liberty and church-state separation for the government to be entangled in religious decisions about who serves in ministry.

It is difficult to imagine that the Court will find that no ministerial exception exists, but defining its scope is no small task.

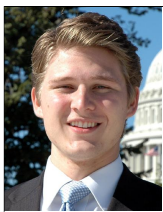
BJC welcomes fall interns

The Baptist Joint Committee is pleased to have two interns working alongside its staff in Washington, D.C., this fall.

Richard Goddard of Lakeland, Fla., graduated from the George W. Truett Theological Seminary with a Master of Divinity degree after earning a Bachelor of Arts degree in Religion from Samford University. The son of Richard and Dianne Goddard, he attends The Rock Community Church in Lakeland. After working with the BJC, Goddard plans to pursue a position in congregational ministry.



Goddard



Hill

Samuel Hill of Sedalia, Mo., is a 2010 graduate of William Jewell College, where he earned a Bachelor of Arts degree in Religion. He is the son of Drew and Suzanne Hill and attends First Baptist Church in Washington, D.C. Hill plans to study law and public affairs at the University of Missouri.

Lawsuit challenges clergy housing tax break

A long-standing tax break for clergy and other “ministers of the gospel” is facing the newest in a string of challenges in federal court.

The Wisconsin-based Freedom From Religion Foundation filed suit on Sept. 13 to challenge the constitutionality of tax deductions that clergy are allowed to claim on their housing expenses.

The tax break, called “a parish exemption,” allows clergy to deduct income that is designated as a housing allowance, including rental payments and mortgage interest. Such allowances are a common way for religious congregations to boost the value of modest clergy salaries.

The suit names Treasury Secretary Timothy Geithner and Internal Revenue Service Commissioner Douglas Shulman. The plaintiffs are Dan Barker and Annie Laurie Gaylor, co-presidents of FFRE, and Anne Nicol Gaylor, a past president and co-founder.

All three plaintiffs receive part of their salaries as housing allowances, but do not qualify for the tax exemption because they are not clergy. That amounts to an unconstitutional government endorsement of religion, they claim, because the parish exemption aids and subsidizes religion by providing ministers with financial benefits not given to secular workers.

“The government is preferring ministers of the gospel over those of us who think religion should be, if not eliminated, limited,” said Dan Barker, co-president of the FFRE.

Barker, a former ordained minister, has claimed the exemption in the past.

Grant Williams, a spokesman for the Internal Revenue Service, declined to comment on any pending litigation.

The parish exemption entered the tax code in 1954, the same year the phrase “under God” was added to the Pledge of Allegiance. The country was deep in the Cold War and providing clergy with a tax break was seen as reinforcing religiosity in the fight against godless communism.

There have been several challenges to the parish exemption in recent years. In 1996, the IRS denied megachurch pastor Rick Warren a \$79,999 deduction he claimed under the law, but Warren won on appeal. In 2002, Congress passed the Clergy Housing Allowance Clarification Act to protect the parish exemption, but limited it to the fair market rental value of a home.

The FFRF filed a similar suit in 2009 in California, but withdrew it earlier this year out of concern that the plaintiffs’ legal standing — as taxpayers — was not strong enough.

After the FFRF began awarding all three plaintiffs a housing allowance within the past year to improve their standing in the case, they hope the new suit demonstrates that they suffer real financial injury when they are denied the exemption.

—Kimberly Winston, Religion News Service

BJC, other groups press Obama on religious hiring

The Baptist Joint Committee and dozens of religious and civil rights organizations challenged President Barack Obama to fulfill a campaign promise to end religious discrimination in federally funded jobs.

“Mr. President, we have been patiently waiting,” said the open letter sent on Sept. 19. “If you have reversed your policy position on the issue of government-funded religious discrimination, we need to know that.”

The coalition of 56 religious, education, civil rights and health organizations expressed “deep concern” about comments Obama made in July that religious organizations have “more leeway” to “hire somebody who is a believer of that particular religious faith.”

The letter also confronts Obama with a statement he made in Zanesville, Ohio, in July 2008: “If you get a federal grant, you can’t use that grant money to proselytize to the people you help and you can’t discriminate against them — or against the people you hire — on the basis of their religion.”

The coalition also listed several instances when the Obama administration failed to take steps “to overturn or otherwise address the troubling hiring discrimination policies adopted by the previous administration.”

For example, they charged, the Obama administration did not respond to a request this summer from 52 organizations that it restore an executive order that bars government contracts from funding positions in which religion is a hiring factor.

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REPORT from the Capital

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Partner with the Baptist Joint Committee

As the end of 2011 approaches, many of you are planning to make contributions to the causes and organizations that you hold dear. As a reader of *Report from the Capital*, you are aware of the consistent quality work of the Baptist Joint Committee throughout its 75-year history, and you stay informed on the challenges and opportunities the BJC faces in the fight to defend and extend religious liberty for all.

Your donation ensures that the Baptist Joint Committee continues to be a reliable, trusted voice for religious liberty in the nation's capital and across the country.

When you support the BJC, you amplify your voice by combining it with ours. Your donation supports our work in the national media, at the U.S. Supreme Court, in the halls of Congress and in our education efforts both inside the Beltway and in churches from coast to coast.

You can also honor someone with your gift. Whether you are donat-

ing online or through the mail, simply enclose a note or make a comment in the online donation form to let us

know if the gift is an honorary or memorial gift and who you are recognizing.

We will send the honoree (or, in the case of a memorial gift, someone in his or her family) a letter to let the individual know of the gift, and we will publish recognitions in *Report from the Capital*.

Visit our secure website at BJCOnline.org/donate to make a donation or mail a contribution to 200 Maryland Ave. N.E., Washington, D.C., 20002.

Your gift counts toward your 2011 charitable contributions if it is post-marked or received online by Dec. 31.

If you have any questions about giving, send an e-mail to Lore Lynch at llynch@BJCOnline.org or call our office at 202-544-4226.

Thank you for sustaining our vital work at the intersection of church and state!

