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OPPONENTS OF PRIVATE SCHOOL VOUCHER PROGRAMS LITIGATE AT STATE LEVEL: FLORIDA SUPREME COURT DECIDES *FORD V. BROWNING*

by NIGEL D. GRAHAM

After failing to secure a favorable U.S. Supreme Court holding, advocates opposed to private school voucher programs are bringing their battle to state courts across the country. The unfolding tale in Florida is unique to

Florida but underscores the high conflict nature of the private school voucher dispute across the country.

In May of 2008, the Florida Supreme Court heard *Ford v. Browning*, a case concerning proposed state constitutional amendments.¹ The proposed amendments were to be placed on ballots in the November 2008 elections.² Unbeknownst to the Florida voters, these amendments would make the Florida State Constitution safe for private school voucher programs³ even though the Florida Supreme Court had previously struck down a school voucher program in the 2006 case of *Bush v. Holmes*.⁴ The proposed amendments at issue in *Ford v. Browning* were a backdoor way of eviscerating the *Bush v. Holmes* decision.⁵ The Florida Supreme Court ruled against allowing the proposed amendments to appear on ballots.⁶

Private school voucher programs use public funds to pay some or all of the expenses for a student to attend a private school of his or her choice.⁷ Many credit the economist Milton Friedman as the first advocate for school voucher programs.⁸ In 1955 Friedman encouraged such programs based on free market principals – that vouchers would foster competition and choice, thereby improving education.⁹

Currently, there are many groups that support such school voucher programs. One such group is the Association of Christian Schools International.¹⁰ They support voucher programs that “[a]llow parents to choose an education consistent with their religious beliefs” and “[p]rovide access to programs for all children without limit or exception” while not affecting the private school’s curriculum, staff or educational philosophy.¹¹

However, groups such as Americans United for Separation of Church and State (AUSCS) adamantly oppose school voucher programs.¹² According to AUSCS, voucher programs “forc[e] all taxpayers to underwrite religious education.”¹³ They further believe that these programs attempt to “circumvent the Constitution’s prohibition on direct government financial aid to religious educational institutions.”¹⁴

Many in the field of public education also oppose private school vouchers. According to the National Education Association, voucher programs “divert attention, energy, and resources” from public schools.¹⁵ Marc Egan, Director of Federal Affairs for the National School Boards Association, agrees that

voucher programs drain resources from public education.¹⁶ Egan asserts that studies consistently show that these programs fail to raise student achievement.¹⁷ Overall, according to Egan, voucher programs are a “failed public policy.”¹⁸

UNITED STATES SUPREME COURT DECISION BRINGS VOUCHER FIGHT TO STATES

In 2002, the U.S. Supreme Court held in *Zelman v. Simmons-Harris* that private school voucher programs did not violate the Establishment Clause of the Constitution.¹⁹ This decision was a major setback for private school voucher opponents. Some posited that the *Zelman* decision would open the floodgates for voucher programs to proliferate. However, this has not happened.²⁰ In part, this is due to attacks on voucher programs at the state level through more restrictive state constitutions and statutes.²¹

According to Ayesha N. Khan, the Legal Director for AUSCS, the litigation strategy post-*Zelman* is “quite simple” in that they “intend to challenge any voucher program that is legally suspect — because it was enacted improperly, it violates a state constitutional provision, or is otherwise improper.”²² Egan states that while his organization foresaw more fights at the state level post – *Zelman*, the Supreme Court’s holding did not change their approach to fighting voucher programs.²³ This is primarily because his group and others like it have always opposed such programs based upon policy and practical considerations.²⁴ Furthermore, says Egan, while the case for why vouchers are needed changes from year to year, his arguments against vouchers have not changed over the years.²⁵

VOUCHER PROGRAMS STRUCK DOWN BY FLORIDA SUPREME COURT IN 2006

In *Bush v. Holmes*, the Florida Supreme Court struck down a Florida school voucher program.²⁶ The program was called the Opportunity Scholarship Program (OSP).²⁷ Under this program, if a school received a failing grade in two out of four consecutive years, the parents of children attending that school could receive vouchers to send their children to private schools.²⁸

The Florida Supreme Court held that OSP violated the Florida State Constitution.²⁹ Specifically, the court held that the program violated the “uniformity” clause of the Florida Constitution.³⁰ This clause “compels the state to provide a free system of public schools to all children.”³¹ Instead, OSP “diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida’s children.”³²

Additionally, the lower court had found that OSP violated the “no-aid” provision of the Florida Constitution, which prevents state funding from going to houses of worship or religious organizations.³³ However, because the Florida Supreme Court found the program to violate the “uniformity” clause, they neither approved nor disapproved the lower court’s ruling on the “no-aid” provision.³⁴

THE TBRC’S BACKDOOR ATTEMPT AT OVERTURNING *BUSH V. HOLMES*

In fall of 2007, Florida’s Taxation and Budget Reform Commission (TBRC) assembled.³⁵ This unique state-level body is composed of 25 members appointed by Florida’s governor, Speaker of the House, and President of the Senate, and, as set out in the Florida State Constitution, meets only once every 20 years.³⁶ The TBRC has the authority to place amendments directly on the Florida ballot without any necessary endorsements by voters or legislators.³⁷

Two amendments proposed by the TBRC were the cause of controversy and a subsequent Florida Supreme Court hearing. These amendments appeared to be leveled directly at the basis for the *Bush v. Holmes* decision. Amendment 7, also titled “Religious Freedom Amendment” deleted the following language from the Florida State Constitution: “No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”³⁸ Thus, the amendment sought to remove the “no-aid” language from the statute constitution.

Amendment 9 altered the provision of the State Constitution that provides the state of Florida with the duty to provide public education.³⁹ The amendment added language to the Constitution making this duty not exclusive to the state.⁴⁰

Ford v. Browning was based on the suit filed seeking an injunction to bar the amendments from being placed on the November 2008 ballots.⁴¹ The Florida Supreme Court heard the case in September 2008.⁴²

In oral argument, Ron Meyer, attorney for the petitioners, argued that the TBRC overstepped and misused its authority.⁴³ He stated that while the TBRC should use its power to address the state's needs by proposing taxation and budget measures, it instead ventured off into educational policy and proposed ballot Amendments 7 and 9.⁴⁴

In a decision handed down on September 15, 2008, the court found that the TBRC had overstepped its authority and the amendments would be struck from the ballots.⁴⁵

In their decision, the Florida Supreme Court stated, "the wisdom or merits of the proposed amendments are not issues before the Court."⁴⁶ Instead, the sole question before the court was whether the TBRC had overstepped its authority to propose the amendments.⁴⁷

SCHOOL VOUCHER LITIGATION CONTINUES ACROSS THE COUNTRY

Florida is not the only state where private school vouchers are a current, controversial issue. In May 2008, an Arizona Court of Appeals in *Cain v. Horne* relied on provisions in the Arizona State Constitution to overturn a voucher program.⁴⁸ Meanwhile the Louisiana legislature enacted a new voucher program in June of 2008.⁴⁹ Additionally, the controversial Washington D.C. school voucher program will be receiving funding from the 2008 federal budget.⁵⁰ There are influential groups on both sides of this issue who have proven that they are willing to litigate any and every private school voucher case that arises. Because the battle is now raging at the state level, there will likely be many more suits in the remaining states that have not already made definitive rulings. Therefore, it appears that litigation over private school voucher programs will continue to be fought in states across the country.

NOTES

1 *Ford v. Browning*, 2008 WL 4191154, at 1 (Fla. Sept. 15 2008).

- 2 *Id.*
- 3 Telephone Interview with Dena Spilker Sher, State Legislative Counsel, Americans United for Separation of Church and State (Oct. 23, 2008).
- 4 *Bush v. Holmes*, 919 So.2d 392, 412 (Fla. 2006).
- 5 Telephone Interview with Sher, *supra* note 3.
- 6 *Id.*
- 7 Patrick J. Wolf, *School Voucher Programs: What the Research Says About Parental School Choice*, 2008 BYU J. PUB. L. 415, 417.
- 8 Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, 2008 BYU J. PUB. L. 557, 558-559 (2008).
- 9 *Id.* at 559.
- 10 Association of Christian Schools International, ACSI's Position on Tax Credits and Vouchers, <http://www.acsi.org/web2003/default.aspx?ID=924༑> (last visited Nov. 7, 2008).
- 11 *Id.*
- 12 Telephone Interview with Sher, *supra* note 3.
- 13 Americans United for Separation of Church and State, Vouchers/Religious School Funding, http://www.au.org/site/PageServer?pagenamesues_vouchers (last visited Nov. 7, 2008).
- 14 *Id.*
- 15 National Education Association, Issues in Education: Vouchers, <http://www.nea.org/vouchers/index.html> (last visited Nov. 7, 2008).
- 16 Telephone Interview with Marc Egan, Dir. of Fed. Affairs, Nat'l School Boards Ass'n (Oct. 15, 2008).
- 17 *Id.*
- 18 *Id.*
- 19 *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-663 (2002).
- 20 Telephone Interview with Egan, *supra* note 16.
- 21 *Id.*
- 22 E-mail from Ayesha N. Khan, Legal Dir., Americans United for Separation of Church and State (Oct. 23, 2008, 15:57 CST) (on file with author).
- 23 Telephone Interview with Egan, *supra* note 16.
- 24 *Id.*
- 25 *Id.*
- 26 *Bush v. Holmes* 919 So.2d 392, 412 (Fla. 2006).
- 27 Steven G. Gey, *School Vouchers and the Problem of the Recalcitrant Constitutional Text*, 37 J.L. & EDUC., 87 at 88 (Jan. 2008).
- 28 *Id.* at 89.
- 29 *Bush v. Holmes* 919 So.2d 392,425 (Fla. 2006).
- 30 *Id.* at 407.
- 31 Fla. CONST. art. IX, § 1(a).
- 32 Gey, *supra* note 27 at 398.
- 33 *Bush v. Holmes*, 886 So.2d 392, 366 (Fla. 2004).
- 34 *Bush v. Holmes* 919 So.2d 392, 413 (Fla. 2006).
- 35 Telephone Interview with Sher, *supra* note 3.
- 36 Fla. CONST. art. XI, § 6.
- 37 *Id.*
- 38 *Ford v. Browning*, 2008 WL 4191154, at 5 (Fla. Sept. 15 2008).
- 39 *Id.* at 6.
- 40 *Id.*
- 41 *Id.*

- 42 Telephone Interview with Sher, *supra* note 3.
- 43 Transcript of Oral Argument, *Ford v. Browning*, 2008 WL 4191154.
- 44 *Id.*
- 45 *Ford v. Browning*, 2008 WL 4191154, at 1 (Fla. Sept. 15 2008).
- 46 *Id.*
- 47 *Id.*
- 48 E-mail from Khan, *supra* note 21, (citing *Cain v. Horne* 183 P.3d 1269).
- 49 Telephone Interview with Sher, *supra* note 3.
- 50 Telephone Interview with Egan, *supra* note 16.