ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

ALAN J. KARCHER, SPEAKER OF THE NEW JERSEY ASSEMBLY, ET AL.,	)	
Appellees,	)	
v.	)	No. 85-1551
JEFFREY MAY, ET AL.	)	

Pages: 1 through 42

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ALAN J. KARCHER, SPEAKER OF THE NEW JERSEY ASSEMBLY, ET AL., Appellees, v. JEFFREY MAY, ET AL. : No. 85-1551

Washington, D.C.

Thursday, October 6, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

REX E. LEE, ESQ., Washington, D. C.;
on behalf of the Appellees

NORMAN L. CANTOR, ESQ., Trenton, New Jersey;
on behalf of Respondent

C O N T E N T S

PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning on No. 85-1551, Alan Karcher v. Jeffrey May.

Mr. Lee, you may proceed whenever you are ready.

MR. LEE: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents two questions. The first concerns the Article 3 standing of Defendants to defend against constitutional attack, a New Jersey statute which permits one minute of silence during the day, during which they may engage in introspection and contemplation.

And the second issue concerns the constitutionality of that statute on the merits.

Our basic position on standing is that we meet the core Article 3 requirement. That requirement as has been stated by Baker v. Carr is such a personal stake in the outcome as to assure that concrete adverseness which sharpens the presentations of the issues. It is important to analyze that against the background of this one central fact in this case. It was not Messrs. Karcher and Orechio that invoked the Federal judicial machinery in this case. It is the Appellees, themselves, the very ones who are calling standing into question who are the Plaintiffs. But once the suit was brought and the Attorney General and the other executive officers

refused to defend the statute, then it was proper for Messrs. Karcher and Orechio to defend the statute as intervenors in defense of their own reputation as legislators.

That is what they do for a living. They pass legislation. Their job is to pass good legislation, to pass responsible legislation, to pass constitutional legislation. And their reputational stake in life depends on their ability to pass such legislation.

QUESTION: In New Jersey, is that a full-time job, Mr. Lee?

MR. LEE: I honestly don't know, Justice Blackmun whether it is or not.

QUESTION: In some states, it isn't, of course.

MR. LEE: I do not know whether it is in New Jersey or not.

QUESTION: Mr. Lee, wasn't it reasonably clear from the record that Mr. Karcher and Mr. Orechio appeared in their official capacity? They intervened in that capacity.

MR. LEE: They did intervene in their official capacity. That is correct.

QUESTION: And they no longer hold the offices that they held at the time they intervened as Speaker and President, respectively; is that correct?

MR. LEE: At the time that they intervened, they did hold those offices, yes.

QUESTION: Yes, but they no longer do.

MR. LEE: They do not at the present time. That is correct.

QUESTION: And why, under our Federal Rules, are not their successors automatically substituted?

MR. LEE: Necessarily, under the rules apply -- do not apply by their own terms to legislative officers. Those officers -- those rules apply, in our view, to executive officers who do have ongoing responsibilities and, therefore, the language of the rules substituting one for the other makes sense. It does not make sense in the context of legislators. And, in any event, because of their interest as legislators, as the producers of this legislative product, they have standing, core representational standing, reputational standing because of their own interest in their own reputation for their ability to pass legislation and have it upheld as constitutional.

QUESTION: Mr. Lee, would you make --

MR. LEE: They also have standing in their own respect.

QUESTION: Would you make that same argument if they had been defeated and were no longer members of the legislature?

MR. LEE: The argument might be slightly less strong, but I guess, yes, Justice Brennan, I'd make the same argument if they had been defeated.

QUESTION: And if this had happened 25 years ago?

MR. LEE: Well, I think there are -- there comes points of diminishing returns. When the nature of that interest -- as they take new jobs, then they are no longer legislators. Then they do something else for a living. But at the present time, that is what they do for a living. And, certainly that is what they -- they have standing in that respect.

You have to bear in mind, also, that there is a difference between, we submit, the standing -- standing as a plaintiff to attack constitutionality in the first place and standing of defendant. The major standing cases that have raised the stringent requirements, Valley Forge, Worth v. Seldon, Flass v. Cohen and so forth, have all been plaintiff standing cases. And I submit that cases like Chathau, and United States v. Lovett, and Bob Jones v. the United States simply fit in a different category where in those cases, there is no question there was a case in controversy, whether Chathau was going to be deported depended on whether that statute was upheld as constitutional or not. The only problem was that like here there was no party to take the adverse side. Both sides took the same position. And, as a consequence, the House and Senate were permitted to intervene and take the same side.

QUESTION: There is no one else in the case defending the statute; is there?

MR. LEE: That is correct. There was not.

Now, there are differences -- excuse me, Justice Scalia.

QUESTION: I presume that what you say about professional politicians who have chosen to be professional legislators would apply to professional politicians who have chosen to make their career in the Executive Branch. So, it would follow that if we -- even if we apply our Federal Rule that requires the substitution of one executive officer for another, a former executive officer who disagrees with the position being taken by the then current executive officer would continue to have standing to participate in the case?

MR. LEE: That question calls me to question whether my answer to Justice Brennan's question is really the best one or not. Once they are no longer legislators -- I think I would like to withdraw my answer to that question and say that once they are no longer legislators, or once they are no longer in the Executive Branch, then they do not have that concrete stake in the outcome.

QUESTION: But they could have a different job in the Executive Branch.

MR. LEE: That's right, which might give them standing because of their personal stake in the outcome. Certainly, as concrete a stake as was the case in the Price Anderson case or as was in the Scrap case.

In the Bob Jones case, for example, there was nobody on opposite sides by the time the case got to this Court. And this Court simply appointed a respected member of the Bar of this Court to represent one side.

Now, let me make two final suggestions.

QUESTION: Of course, you still haven't met Justice O'Connor's point that even if you assume that that character of standing is adequate, that is not the character on the basis of which these particular individuals intervened. They didn't purport to be vindicating their integrity as legislators. They purported to be there in a representational capacity.

MR. LEE: Yes. Yes.

QUESTION: And that's gone.

MR. LEE: Well, that is correct. The narrow question that she asked was whether the rules applied. My answer was that in our view it applied.

QUESTION: Then extend the question beyond the rule.

MR. LEE: I understand the extension of the question and it is a more difficult, it is a more difficult question. But regardless, you still have, as long as they are legislators, their concrete interest that is just as great as the interest of some that have been sustained by this Court when you had plaintiff standing, not defendant standing, but plaintiff standing as sustaining the jurisdiction of this Court. And we submit that that is sufficient.

Now, we submit two final things for your consideration. The first is that for these reasons, that is enough. And if it is enough -- if it has been enough in comparable instances for plaintiffs, it ought to be enough here under these circumstances for defendants. But that under any circumstances, the ones who have the most to lose from a ruling on justiciability grounds, the arguments that the Plaintiffs are making are the Plaintiffs, themselves. Because it has been very clear for sometime that Plaintiffs -- that no -- that no harm can spawned, no legal consequence can be spawned by unreviewable judgments.

What we now have is two judgments of two Federal courts that have been spawned because of these Defendants, to whose standing no one objected at any time. They are there. They are judgments. Those judgments cannot stand. And in the event that this one must be reversed, then clearly, under the authorities of this case, what must happen is that the judgment of the Court of Appeals must be vacated with instructions to dismiss the complaint.

QUESTION: But if we were to simply hold that the Appellants here had no standing to appeal, that would not necessarily result in the vacation of the Court of Appeals judgment; would it?

MR. LEE: No, but I am not sure it solves the case, either, because they had already appealed by the time there was

any objection made to their being here. This objection was not made until one month after the jurisdictional statement had been filed. And you would still end up with --

QUESTION: But isn't it jurisdictional, Mr. Lee?

MR. LEE: In that event --

QUESTION: I mean may we not so respond to you?

MR. LEE: Yes. I think you can. And maybe you perhaps have an obligation to do so. I guess my real answer to the Chief Justice's question is that would be a complete perversion of Muncie Wier principles to say that it makes a difference whether the appeal has been taken by one or by another. Because the theory of Muncie Wier as I read it is that an appeal can spawn no legal consequences. That it is simply unfair to say to the Plaintiff, "Well, for Article 3 reasons, you cannot go ahead with your appeal."

QUESTION: Well, I take it if your clients had won below in the Court of Appeals and the other side had come up here, and then it was decided that for some reason that these, that the Respondents then, if they didn't want to defend the case, the Court would have appointed somebody to defend from the bottom side.

MR. LEE: I assume so.

QUESTION: But your clients were the Appellants.

MR. LEE: That is correct. That is correct. Nevertheless, the same principle that says that no appeal can

spawn any legal consequences applies under this circumstances. And the same basic underlying principle of fairness.

The final of my two points is this: We think they are standing here --

QUESTION: I'm not sure how that works. It seems to me that whenever you lose below -- well, let's see. If you win below and the other side takes an appeal, you think you can always wash out the whole judgment by simply saying you no longer have any interest in contesting the matter.

MR. LEE: Absolutely not. That is not what I am saying. I sue you; you win. I decide not to appeal. Total victory for you. It is when it becomes moot or for some Article 3 or other reason outside my control the judicial system is unable to go ahead with the case on the same basis that it did below that the Muncie Wier Doctrine comes into play. And that is the difference.

QUESTION: Who noticed the appeal?

MR. LEE: We did.

QUESTION: Who is "we"?

MR. LEE: Messrs. Karcher and Orechio.

QUESTION: Were they the originals?

MR. LEE: They were the original defendants.

QUESTION: They were the original defendants?

MR. LEE: Excuse me, the intervenor defendants.

QUESTION: They were the intervenor defendants. They

signed the notice of appeal.

MR. LEE: Yes, Your Honor.

QUESTION: And, now, they have been replaced.

MR. LEE: As legislators. That is correct. We contend that they are still entitled to maintain their position as the parties who are pursuing this lawsuit.

QUESTION: They haven't been replaced as legislators.

MR. LEE: Excuse me. Not as legislators. I apologize. I misspoke. Not as legislators. They have been replaced as Speaker of the House and President of the Senate.

QUESTION: Well, you only claimed that for the Speaker, you don't claim it for an individual Member of the House; do you?

MR. LEE: That is correct. Only for the Speaker of the Senate.

QUESTION: So, they are out.

MR. LEE: Now, the final point with respect to standing and then I do want to move on to the merits is that assume that you disagree with us. And it is a close question. There is something to be said for these issues of great national moment that consume for people like my client enormous amounts of resources. And that consume for this Court not small amounts of resources being decided once they are here. I say that without derogating in any way the principles of Article 3, but that if there is a way to decide it without

doing any violence to Article 3, once the case is here, it ought to be done.

You have before you a motion to put on our side of the case the same kinds of parties as are on the other side of the case. Two parents and a teacher. And I would suggest as a possible consideration that you reconsider, if necessary, the motion to intervene filed by those people.

Turning to the merits, there is an interesting parallel in this case between one aspect of Wallace v. Jaffree, and the statute here. I think Justice Stevens particularly will remember because I remember with great discomfort the exchange that he had with Paul Battor over this particular statute that there was one statute, one of the three statutes that was concededly constitutional. Everyone in the case agreed it was constitutional. And, indeed, the fact that everyone agreed that it was constitutional became part of the reason -- became a crucial fact in the decision in Wallace v. Jaffree.

This statute that is at issue today is identical, identical to Alabama Code Section 20 -- 16.1.20 that everyone agreed was constitutional in Wallace v. Jaffree. That Alabama statute provides for, and I am quoting: "A period of silence not to exceed one minute in duration which shall be observed for meditation." Whereas, the present statute provides for a one-minute period of silence to be used so at the discretion of

the individual student before the opening exercises of each day for quiet and private contemplation or introspection.

There is not a nickel's worth of difference between them. Excuse me. There is. There is one difference between them and that is that the Alabama statute is mandatory. The moment of meditation must be used for that purpose, whereas, in New Jersey the student has the option whether to use his or her 60 seconds for introspection or contemplation.

The three-part lemon test squarely vindicates the constitutionality of New Jersey's moment of silence. In this case, there are two purposes and the major focus in this case, as in Wallace v. Jaffree is on purpose.

The first of these purposes, the case for the first of these purposes can be very simply and powerfully stated. And it is as follows: There is a legitimate secular pedological purpose for a moment of silence at the beginning of each day and, second, the statute itself says that that objective, legitimate pedological purpose is its purpose. And that objective purpose is to provide for a moment of introspection and contemplation at the beginning of the day.

Now, under Lynch v. Donnelly, that is the end of the inquiry because Lynch makes a couple of things -- well, cases all the way from really Abington through Mueller make it quite clear, the first thing, that in deciding matters of purpose, a great deal of deference is given to the individual legislature.

And, second, Lynch makes it clear that if there are several purposes and one of them is a non-sham, legitimate purpose, then you are over that hurdle and you go on to effect and entanglement. It is probably best stated by Lynch where the Court said that even where the benefits to religion were substantial we saw a secular purpose and no conflict with the establishment of cause.

How, then, could the District Court possibly hold where you had an objective purpose stated on the face of the statute, no contrary purpose stated on the face of the statute hold that it was unconstitutional. And he did so by saying that the secular purpose was a pretext and that it was really just a pretext for bringing prayer back to the schools. He did so by relying on the hearsay statements from five legislators who said that that was its real purpose, even though other legislators said that the statute means what it says.

QUESTION: That was post-legislative.

MR. LEE: Some of it was post-legislative, Justice White. Actually, most of the post-legislative related to other matters such as what was --

QUESTION: Yes, but there was no record of --

MR. LEE: There was no record, there was -- well, the best that you had, the best that you had was hearsay. Somebody else being there saying, "Yes, I was there and I heard somebody say this." That is the best that you had. But you had equally

good stuff on the other side for other people.

Now, this experience, the District Court's experience with this kind, with this kind of reliance on, quote, "legislative history," demonstrates the consistent-- demonstrates the wisdom of cautions from cases like United States v. O'Brien and other cases against post-legislative statements and hearsay statements, generally. And that if you have got something in the record, you ought to stick to what is in the record.

And what comes from the court's rule in this case is a mystery. Apparently, it would allow for a single legislator veto so that if I were one who disfavored the Moment of Silence Bill, I could simply say, "I favor this bill and the reason I favor it," or I could say I favor it or not. I could simply say, "I think that what this is going to do is bring prayer back to the schools."

Equally outrageous in my opinion was the District Court's consideration of expert opinion on both sides of the fundamental policy issue, whether the Moment of Silence really would make a contribution to school secular purposes, including the transition time from a pre-school mindset to a post-school mindset. It is no surprise that school people were willing to express an opinion on both sides of that issue as to whether you really would get a quieting down effect and a salutary effect from that kind of experience or not.

What is surprising is the District Court was willing to listen to it. Public policy for the State of New Jersey, including school policy, is set by the Legislature of the State of New Jersey. And if that legislature determines, in its wisdom, that the boundary between what happens during the school hours and what happens just before school hours may be marked or that school discipline may be improved by having a moment of silence at the beginning of the school day, then it doesn't matter all of the legislators -- excuse me, all of the school experts in the State of New Jersey think about that issue. Their opinions on that issue should be addressed to the Legislature, itself, and not to a Federal District Court reviewing for a constitutionality. Neither Lemon v. Kurtzman nor any other case has ever held that a statute filed, the establishment clause -- held a statute violate of the establishment clause because the court takes a different view from that of the legislature as to whether the secular objective can be achieved.

The second purpose that is established by this statute is that it provides an accommodation for those students who want to use the moment of silence of prayer. Now, as I read Wallace v. Jaffree, under Wallace v. Jaffree, if the statute provided only that you use it for prayer, it would be unconstitutional. But it doesn't.

QUESTION: Mr. Lee, can I ask you whether you think

it would violate the statute for the teacher during this minute to allow some students to pray out loud? Because it says the students are permitted to observe a one-minute period of silence. I wonder if that would allow some to be silent and others to pray out loud.

MR. LEE: In my opinion, that would be violative of the statute, Justice Stevens.

It is completely permissive -- much of the -- I will just say this and then I will save the rest of the time for my rebuttal. Much of the District Court's difficulty in this case is based on its assumption that the statute is mandatory and not permissive. And they are just plain wrong. The Court of Appeals is right in that respect. It is mandatory on the teacher. The teacher has to permit the student, but the student can use it for whatever. The only requirement is that it be quiet.

Chief Justice, if the Court has no further questions, I would like to save the rest of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

We will hear now from you, Mr. Cantor.

ORAL ARGUMENT OF NORMAL L. CANTOR

ON BEHALF OF RESPONDENTS

MR. CANTOR: Mr. Chief Justice, and may it please the Court:

I will start with the standing issue which is a

threshold issue, of course, in this case. And our basic position, of course, is that the real party in interest that intervened in this litigation was the New Jersey Legislature. And the representatives of that legislature have now determined to withdraw the appeal leaving this Court with no jurisdiction.

I note that Mr. Lee, if I understand him correctly, has abandoned the argument originally made in their brief that Mr. Karcher was in as an individual as well as a representative of the legislature. The record clearly refutes that contention of the brief. As I understand Mr. Lee, he no longer insists on that position.

QUESTION: Well, let us assume that the intervenors had said both as Speakers of the House and as individual legislators, you wouldn't be making -- you still would be making the argument there is no standing.

MR. CANTOR: We would certainly be making the argument that if his sole status today is as individual legislator, then he lacks --

QUESTION: Because I don't -- I suppose we have authority to consider him as an individual legislator, whether he intervened that way or not.

MR. CANTOR: His sole status in this litigation is as a representative of the body. And he is not allowed to switch roles in mid-stream.

QUESTION: Who said so?

MR. CANTOR: This Court said so in Bender v. Williamsport.

QUESTION: Well, we could say something else, too, I suppose now.

MR. CANTOR: That is certainly possible, Mr. Justice White.

QUESTION: I suppose we could reconsider the motion for an intervention here by somebody else, too.

MR. CANTOR: That is certainly possible, Your Honor. You passed on -- the Court passed on that motion quite recently.

QUESTION: Yes.

QUESTION: But there is no motion for intervention here.

MR. CANTOR: There was a motion for intervention here filed by Mr. Lee on behalf of a teacher and student in New Jersey. And that motion was denied.

QUESTION: Yes, but not by the present Speaker of the House. No motion for intervention by the present Speaker of the New Jersey House --

MR. CANTOR: The present leadership of the New Jersey Legislature, both the Speaker of the Assembly and the President of the Senate have notified the Court that they do not wish to prosecute this appeal and they have instructed their counsel to withdraw the appeal. Their counsel so notified the Court in

April of 1986 and the only question is whether Mr. Karcher, in some capacity, is allowed to pursue the appeal despite the wishes of the New Jersey Legislature.

Now, there are several reasons why he, as an individual, cannot pursue the appeal. First of all, because a collective body was the real party in interest, the New Jersey Legislature, it is clear that only that body, itself, or a representative can determine whether to appeal from an adverse judgment. That is the lesson of Bender v. Williamsport School District where an individual member of the school board attempted to bring an appeal before this Court and this Court denied standing because it was the collective school board which was deemed to be the party in interest.

We have a very similar situation with regard to Mr. Karcher's current effort to continue this litigation. He also, we would contend, lacks Article 3 standing as an individual legislator. There is no Supreme Court case which gives standing to an individual legislator to contest the constitutionality of a legislative measure unless there has been action depriving that individual of an actual vote. A disenfranchisement of the legislator.

QUESTION: Mr. Cantor, under New Jersey law, does a presiding officer of a House and the Legislature, is that person able to bind the entire Legislature for purposes of making it a party to a suit?

MR. CANTOR: The answer to that is, yes, Justice O'Connor. First of all, I would point out that Alan Karcher intervened in this very action through that very device and the Appellants --

QUESTION: And you think that his intervention made the entire legislative body that he represented a party?

MR. CANTOR: There is no question that that was the understanding of everyone involved in this litigation, including the District Court.

QUESTION: And what do you point to in New Jersey law for that authority?

MR. CANTOR: Okay. Well, what -- what the intervenors, what Mr. Karcher, himself, pointed to at the time that he intervened in January of 1983 was both the rules and the custom of the New Jersey Legislature. Their counsel, Mr. Marinari stated to the Federal District Court as the presiding officers of both Houses, they are empowered by the rules of both Houses to represent the House in litigation.

I continue, quote: "It is the presiding officer of each House and in charge of all administrative duties and from that we have been in numerous suites."

QUESTION: So, you take the position that the real intervening party was, in effect, the whole Legislature?

MR. CANTOR: That is correct, Justice O'Connor.

I would make one further point in substantiation of

their contention that the presiding officer can bind the legislative body. And that is we checked up on their custom claim. And we discovered that, indeed, they had intervened in other legislation -- I'm sorry, in other litigation through the action of the presiding officers of the Legislature. We cite a case in note 66 of page 8 of our brief which provides an example and states the history of that litigation. And it was Mr. Karcher, himself, who intervened on behalf of the Legislature in that instance.

QUESTION: You say that the Speaker has the right to represent the Legislature.

MR. CANTOR: That's correct.

QUESTION: The Legislature wasn't sued.

MR. CANTOR: They intervened after --

QUESTION: Well, where did they get right to intervene?

MR. CANTOR: They made a motion and they were granted intervenor status after the Attorney General of the State, who was representing the Commissioner of Education, determined not to defend the statute on the basis --

QUESTION: That should have been the end of the case.

MR. CANTOR: He determined not to defend the statute, but the statute was still enforce. We still had a litigation seeking a declaratory judgment.

QUESTION: But it wasn't against the Legislature.

MR. CANTOR: The original suit was not against the Legislature.

QUESTION: So, how come the Legislature has a right to be represented?

MR. CANTOR: Because in other instances, this Court has indicated, such as in Diamond v. Charles where the Illinois Legislature was present to defend the abortion statute even though they were not originally named.

QUESTION: As a party?

MR. CANTOR: Pardon?

QUESTION: As a party?

MR. CANTOR: They were not originally a named party. I believe they intervened.

QUESTION: I'm not interested in your belief. I am interested in what happened.

MR. CANTOR: I believe -- my recollection, Your Honor, is that the State of Illinois was not a party and intervened to defend the constitutionality of this --

QUESTION: Well, does the Legislature of New Jersey have the right to intervene in any case involving a statute of the State of New Jersey?

MR. CANTOR: I don't have any question but that the Legislature is entitled to intervene when one of its officers, namely, the Commissioner of Education, is sued as a party defendant, refuses the defend the State enactment and the

enactment is there without any defense, it seems to me --

QUESTION: Where do you get that from? A statute of New Jersey?

MR. CANTOR: It is the Legislature, itself --

QUESTION: Is it --

MR. CANTOR: That denominated the Attorney General of the State as the normal party to defend the constitutionality of its enactment.

QUESTION: Did it say normal party or did it say "the" party?

MR. CANTOR: The party. The exclusive party.

QUESTION: That's right. It didn't say anybody else.

MR. CANTOR: That's correct. But, just as the Legislature designated by statute --

QUESTION: So, suppose that somebody attacks the income tax law in New Jersey and the Attorney General says, "I'm not going to defend it." The Legislature can come in?

MR. CANTOR: I would think so, Justice Marshall.

QUESTION: On any legislation?

Wouldn't that upset all the balance --

MR. CANTOR: The Legislature, not any individual legislator.

QUESTION: That makes the Legislature an executive.

MR. CANTOR: When the legislative --

QUESTION: What happened to the executive part? The

legislative can take over the executive?

MR. CANTOR: I don't think that the defense of the constitutionality of a legislative measure is necessarily exclusively an executive act. It certainly normally is, but I have no -- we had no quarrel, the District Court had no quarrel with having the Legislature defend its statute.

QUESTION: Why is the defense of it any more important than the execution of it? I mean if you can say that, you know, where the executive declines to defend it, the legislature can step in to do so. Why can't you say where the executive declines to execute it, the legislature can step in to do so. This doctrine of necessity that you are expounding.

MR. CANTOR: I would think that the Legislature can adopt legislation directing the Attorney General to prosecute or to enforce the measure.

QUESTION: Assuming that New Jersey does have a statute that allows the New Jersey Legislature to litigate, does that bind us as to whether there is Article 3 standing on the part of a legislature to litigate concerning the lawfulness of a statute that it has passed?

MR. CANTOR: I don't think it binds this Court necessarily, but I think if the Legislature designates itself as having a sufficient interest either in its own capacity or as a representative of the potential beneficiaries of the statute, I think that that is a meaningful interest.

QUESTION: Have we ever held that a legislature has standing to litigate the constitutionality of its laws?

MR. CANTOR: I view Diamond v. Charles as saying that.

QUESTION: That's the only case you have.

QUESTION: Well, certainly, there is something to be said, perhaps not in a strict standing sense, for a case in which a plaintiff goes into a Federal District Court and challenges the constitutionality of a statute, to have that case defended on the merits rather than simply have it go by a default judgment.

MR. CANTOR: Absolutely, Mr. Chief Justice.

There has been a claim made that Mr. Karcher might represent the 200th Legislature which went out of existence three and one-half years ago. And I simply want to take a few moments to dispel that notion. First of all, it doesn't conform with reality that he indeed represented the 200th Legislature as opposed to the New Jersey Legislature. It happened to be the 200th Legislature at the time that it intervened, but that was not noted because, of course, it was not deemed significant. The appeal to the Third Circuit was process and funded by the 201st Legislature. And, indeed, now time has gone by and the 202nd Legislature has determined not to appeal. There was never any indication that Mr. Karcher was exclusively a representative of the 200th Legislature. It also

does not conform with reason to suggest that.

The party in interest in the defense of the constitutionality of a state enactment is the current legislature as the policy maker for the State of New Jersey, the shaper of the state's criminal and civil codes. That is the message of Diamond v. Charles, that it is the function of the current legislature to decide whether or not a statute's constitutionality should be maintained by appeal to this Court. The Illinois Legislature determined not to appeal and this Court recognized its status and dismissed the appeal.

QUESTION: Mr. Cantor, if you are right that there was standing, originally, for this case to be decided and if you are also right that there now no longer is standing, why shouldn't we dispose of this case the way we would dispose of a case that originally posed a controversy, which controversy has become moot while it is on appeal. That is simply remand with a direction to vacate the judgment below.

MR. CANTOR: I don't think the analogy to mootness is sound at all. There is an ongoing and very live controversy, the effect of the dismissal of the appeal here will be that the Third Circuit judgment remains very much in force.

QUESTION: Well, controversy between whom? Not a controversy between the parties. A case becomes moot even if it involves a very sensitive public issue, where the party who was raising that public issue happens to have died. You could

make the same statement: The issue is still a very important one. There is a real controversy. Unfortunately, this case is moot. Now, why isn't that the situation here?

MR. CANTOR: Because the dispute is not moot. When a party determines not to pursue an appeal from a judgment, that does not render the prior judgment moot. And that is precisely the situation here. The New Jersey Legislature has determined to acquiesce in the judgment of the Third Circuit. They determined that they can live with it. They can take --

QUESTION: Repeal of the statute?

MR. CANTOR: That is correct, Your Honor. Diamond v. Charles indicates, they had two options. They could have chosen the repeal of the statute or they could have done what they indeed did and that is to acquiesce in the judgment of unconstitutionality.

QUESTION: Mr. Cantor, earlier a question was asked of Mr. Lee whether the legislators in New Jersey have a full-time job.

MR. CANTOR: Yes.

QUESTION: I thought they did not. Am I right?

MR. CANTOR: You are correct, Justice Brennan.

I will make one last point on the issue of standing and it is simply to make a juris prudential -- a statement of constitutional juris prudence. We urge the Court not to reach out to resolve a constitutional issue where the legislative

party in interest has determined to acquiesce in a Circuit Court of Appeals decision.

The Supreme Court adjudication of a constitutional issue is a precious currency which ought not to be expended except where resolution of a constitutional issue is necessary. That was the message of TVA v. Ashwander ever since 1937 and Justice Brandeis's principles of the avoidance of unnecessary constitutional adjudication.

Counsel's suggestion that standing is less important where a defendant rather than a plaintiff is involved simply ignores cases like Bender v. Williamsport School District and Diamond v. Charles, both decided in 1986.

I will turn now to the merits of the dispute and to the determination by the Federal District Court of New Jersey and the Third Circuit Court of Appeals that New Jersey's Minute of Silence law, A10-64, violated the establishment clause.

Our basic contention is that the District Court's approach was eminently sound and that its conclusion was eminently sound. The District Court concluded after five days of trial and scores of exhibits that the actual legislative purpose behind A10-64 was religious. More specifically, a purpose to reinject prayer into the schools in a fashion prohibited by Supreme Court precedent.

Our basic contention here is that that conclusion is amply supported in the record and deserves to be upheld. We

devote considerable attention to enumerating the reasons for that claim at our brief at pages 16 to 26 and 36 to 37. I would simply mention that there were numerous elements of proof. It was not simply isolated statements by a legislator. There were in the legislative history a very clear and dominant focus on the issue of prayer and neglect of any other --

QUESTION: How do we know it was legislative history?

MR. CANTOR: New Jersey does not keep a record of either the committee hearings or the legislative debates. As a consequence, we were forced to seek various indirect means of showing the legislative history. We did present witnesses-- eye witnesses --

QUESTION: Who were there at the creation?

MR. CANTOR: That's correct.

(Laughter.)

MR. CANTOR: I reiterate that there are a variety of elements of proof in the record below, including the dominant focus of the legislative history, including statements by seven legislators, including the sponsor of the bill and the President of the Senate. There is the utter refutation of the sole asserted secular purpose; namely, that the Minute of Silence law was aimed at creating a calming transition period.

We presented numerous elements aimed at refuting that notion and in Federal District Court, after hearing our proofs, concluded that indeed that was not an actual purpose of the New

Jersey legislation and indeed that asserted secular purpose was a sham. The Third Circuit accepted that determination and I think the record stands very clearly that the sole asserted secular purpose was rejected by the Federal District Court as a sham, a conclusion which was upheld by the Third Circuit.

QUESTION: Mr. Cantor, would you concede that if all we had before us was the language and text of the statute that was passed that it would survive our establishment clause tests?

MR. CANTOR: If the Court refused to look at all beyond the face of the statute, it is conceivable to me that the measure would be upheld.

QUESTION: Do you think that we have given some indication that it is risky or dangerous to try to prove legislative intent by the use of statements of individual legislators in the course of passage?

MR. CANTOR: Absolutely, Your Honor. There is no question that the burden of demonstrating an illicit collective legislative purpose is a heavy burden and a hard burden to satisfy. Nonetheless, statements by legislators are one of the elements of proof of collective legislative intent and that is exactly the way those statements were used in this instance, as one of the indicia of proof.

With regard to your comment about the face of this statute, I think it was clear from the record at the time that

the Federal District Court decided to delve behind the face of the statute that there were considerable indicia of prayer on the face of the statute and in the immediate background of the statute which warranted that inquiry into actual legislative purpose.

For example, there was the term, "contemplation," which as the record demonstrates has a certain religious connotation. There was the selection of the first minute of the school day, a format which mimicked or replicated the traditional time for school prayer.

QUESTION: May I interrupt you there? I don't think that is quite what the statute says. It says, "Before the opening exercises." Why would it not comply with a statute for a principal to say that school exercises shall begin at 9:00 a.m. From 8 until 8:30 the assembly hall will be open and any student who wants to can go in there for a minute for silent contemplation? Why wouldn't that satisfy the statute?

MR. CANTOR: Justice Stevens, no one has interpreted the statute in the fashion that you are suggesting.

QUESTION: But that is what it says.

MR. CANTOR: The District Court specifically asked whether or not that was a plausible reading of the statute. And the record shows that no one --

QUESTION: No, but you are being asked by Justice O'Connor if we just have the statute and nothing else --

MR. CANTOR: Right.

QUESTION: And that is what I am saying. If I just have the statute and nothing else, what I suggest would be clearly in compliance with the statute; wouldn't it? What language would deny the principal --

MR. CANTOR: All I can tell you, Justice Stevens, is that every administrator and every party associated with implementation of this statute interpreted it otherwise, that at the beginning of the school day meant as part of the opening exercises once the school had started.

QUESTION: It doesn't say at the beginning. It says before the beginning. It doesn't say at the beginning of the school day.

MR. CANTOR: I repeat that all I can tell you --

QUESTION: So, they based their interpretation not on what the statute says, but what they thought it meant?

MR. CANTOR: They are the people who were charged with implementing the statute and they were giving their fair interpretation of what the statute intended.

QUESTION: Mr. Cantor, assuming the preponderance of legislative history that you referred to, is there anything in that preponderance of legislative history that is inconsistent with the notion that this was being done by the New Jersey Legislature as an accommodation to religious practice?

MR. CANTOR: Several things, I think, Justice Scalia.

QUESTION: The preponderance of the legislative history would contradict the assertion that this was being done in order to accommodate religious practice? Or, more specifically, how do you -- how would you distinguish this proposal? Assuming that there was some desire to make things easier for the religiously motivated, predominantly in the legislature's mind. Assuming that. How do you distinguish this from what we have upheld; that is the New York Legislature making available release time for those who wished to do so to go to religious instruction?

MR. CANTOR: Okay, I will turn to the issue of accommodation, since you raise it.

QUESTION: That is what I am asking about.

MR. CANTOR: Justice Scalia, first of all to directly answer your question about Zorach v. Clauson, I think there are at least four ways in which Zorach v. Clauson ought to be distinguishable from the instant litigation.

First of all, the degree of impediment to the religious practice was considerably greater in the case of Zorach v. Clauson than it is in the instant case. That is they were talking there about an hour of released time during the week as opposed to one minute per day. That's one suggestion. That the degree of impediment to the religious practice was different.

Secondly, there --

QUESTION: I don't understand what you mean. The degree of impediment. I thought you were going to say that the degree of accommodation was greater. I mean, if anything, here is the state taking out a whole hour as opposed to five minutes a week.

MR. CANTOR: One of our theses is that an accommodation of a religious exercise is usually appropriate only when there is some kind of impediment to the religious practice. If it is simply a facilitation of religious practice when there is no obstacle, then the message is that government is encouraging and endorsing a religious practice.

Therefore, the fact that one hour could not be accommodated within the school context makes it different from one minute which we claim could be accommodated without any special kind of legislation. Indeed, the record shows that there were numerous opportunities for school children in New Jersey to have a minute of silence during the course of the ongoing school day. There was no need, therefore -- there was no impediment existing which would warrant a pure accommodation measure.

QUESTION: Was there any impediment in Zorach v. Clauson to go to Sunday School on Sunday?

MR. CANTOR: No, but that was the whole point. Why was there an accommodation needed. Apparently, school children thought that it was burdensome to have to take the hour at some

other time. It is certainly not burdensome to take the minute in some other context.

QUESTION: What is the second difference?

MR. CANTOR: The second difference is that in Zorach v. Clauson, there was no juxtaposition between public school classrooms and the religious exercise while here, in fact, we are talking about a religious exercise within the school building, within the classroom.

Thirdly, the presence of extensive regulations on the part of the State Commissioner of Education and the City Board of Education --

QUESTION: That goes to entanglement, I presume, and not to religious motivation.

MR. CANTOR: It goes to effects more than to purpose. But I think it is an important distinction because one of our contentions here is that the total absence of any kind of regulations, any kind of implementing guidelines meant that the practice would inevitably be abused.

And, finally, I would suggest that a meaningful secular alternative was provided to the religious exercise in Zorach v. Clauson while that is not the case in this instance. The record says with regard to Zorach that those not released stay in the classrooms.

I give Justice Douglas the benefit of the doubt and I assume that they weren't simply warehoused in the classrooms

and that there was, in fact, a secular educational activity going on. One of our contentions here and one of the reasons why we conclude that even under an accommodation view of the statute as Judge Gibbons took in the Third Circuit, that it is still unconstitutional, that his conclusion was correct, because there were no secular alternatives provided and articulated for these school children, these impressionable school children. They were told that we, the State of New Jersey, are preempting the normal educational program in order to permit students to pray. That was the message. That was the message.

QUESTION: To meditate. Their secular alternative is to think about Ayn Rand or, you know, whatever you like.

MR. CANTOR: What they were told, Justice Scalia, is that there is an opportunity for contemplation or introspection. And this measure was applicable from Kindergarten through 12th grade. I suggest to you that on the face of the statute to tell Kindergarten through 3rd graders that they have an option of contemplation or introspection during the first minute of the school day is to tell them nothing. The only message that they understand is that that is the traditional format for school prayer. They don't understand what contemplation or introspection is unless there are guidelines articulating an alternative secular function.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cantor.

Mr. Lee, you have three minutes remaining.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF APPELLANTS - REBUTTAL

MR. LEE: I also have that many comments, Your Honor.

First, with regard to the suggestion that the case for -- the case for this being anything other than just a newspaper collection of clippings in support of the proposition that the Moment of Silence was in support of prayer, simply cannot withstand the record. And I would simply invite the Court's attention in that respect to two things. One is the opinion, itself, which it is very apparent that that is all that they did was just go through and quote statements from people who had been there.

The best statement in the whole record is the sentence that come from Judge Becker in which he says: "That the evidence as a whole is equivocal at best. The single unambiguous piece of evidence, the statute on its face, attests the secular motives."

And I submit that under this Court's cases, that is all that is needed.

Now, second, with respect to accommodation. The only way that you can sustain the proposition that the difference between a minute and an hour cuts in Zorach's favor is exactly the basis that was just stated. And that is if you say that the only possible accommodation -- the only permissible

accommodation doctrine turns on the removal of an impediment, but that simply -- doctrine simply far outran that particular notion.

Cases like Alan, and Tilton and Epperson, I think have to be explained as accommodation cases and there was no impediment in those cases. And, indeed, in Zorach, itself, you could say that there was an accommodation because the state was requiring attendance at school. But that really falls short, because those students could have attended their religious instruction, as many religious students do throughout the country today, at a time earlier than school.

Zorach v. Clauson simply cannot be squared with an affirmance of the Third Circuit's decision in Karcher v. May. And the two differences are: the one minute and the one hour and the difference between the extent to which you bring the forces of the school into play.

In this case, there are only 60 seconds of the school's attention time that were used, maybe not even school hour time, probably school hour time; whereas in Zorach v. Clauson, it was a full hour and the -- in Zorach v. Clauson --

CHIEF JUSTICE REHNQUIST: Mr. Lee, your time has expired.

MR. LEE: I am sorry. I missed the red light. I apologize, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 10:59 o'clock a.m., the case in the above-entitled matter was submitted.)

C E R T I F I C A T E

Heritage Reporting Corporation hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Alan J. Karcher, Speaker of the New Jersey Assembly, et al., v.

No. 85-1551

Jeffrey May, et al.

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BY Margaret O'Daly