Feisty justices hear faith-based case: Who has standing to file First Amendment suits

News in the March 20, 2007 issue

The Supreme Court heard oral arguments February 28 in a case that, on the surface, is about technical issues but could end up having significant ramifications for the way courts handle church-state cases. At stake is the ability of federal courts to hear cases challenging whether a government action favors one religion over another or religion over nonreligion.

An inquisitive and at times combative court heard both sides in *Hein v. Freedom from Religion Foundation*. The case concerns the legal question of who has standing to file lawsuits in cases dealing with the First Amendment's religion clauses.

This case was the first time the justices dealt with President Bush's faith-based initiative—his attempt to expand the government funding of social services through churches and religious charities. A ruling will come before the court adjourns in June.

The Wisconsin-based Freedom from Religion Foundation sued the White House Office of Faith-Based and Community Initiatives, headed by director Jay Hein. The suit claimed that the office and its actions violate the Constitution's ban on government establishment of religion.

A federal district court dismissed the suit, saying the plaintiffs did not have proper standing as taxpayers. But the Seventh U.S. Circuit Court of Appeals reversed that ruling. The appeals court said the foundation had taxpayer standing to challenge the practice because government money was being used to promote religion, even though Congress did not specifically appropriate the money to any religious groups.

The Supreme Court has long held that taxpayers do not generally have standing to sue the government over how it disburses funds because the connection between individual taxpayer contributions and expenditures is too remote. Individuals who

sue the government must prove specific injury from the governmental act.

In 1968 the court made an exception to the rule. In *Flast v*. *Cohen*, justices said the exception was reasonable because of the special history of the First Amendment's establishment clause, which bars government support for religion.

The *Hein* case turns on the scope of that exception. The taxpayer-standing exemption created by the precedent is important, Justice Stephen Breyer said, partly because "there'd be no other way to bring such a challenge." Solicitor General Paul Clement, arguing for the government, countered that the *Flast* decision should apply to government expenditures that have a clear connection to congressional taxing power.

Justices Breyer and Antonin Scalia responded by following that principle to a rhetorical extreme, asking Clement if taxpayers would have standing to challenge the building and operation of a government-sanctioned church if it was done entirely by executive-branch action.

Chief Justice John Roberts, who appeared amenable to Clement's argument, challenged foundation attorney Andrew Pincus. "I don't understand, under your theory, why any taxpayer couldn't sue our [Supreme Court] marshal for standing up and saying, 'God save the United States and this honorable court.' Her salary comes from Congress." Pincus responded that *Flast* requires religion funded by government expenditures to be more than "incidental" in order to justify taxpayer standing for a lawsuit.

Two key justices in the case—Justice Anthony Kennedy and the court's newest member, Justice Samuel Alito—questioned Pincus closely. Kennedy seemed concerned about whether taxpayer standing under Flast would, as the government asserts, "open up the floodgates" to frivolous First Amendment suits. *–Associated Baptist Press*