AJC in the Courts: 2000

Religion in the Public Schools

ADLER v. DUVAL COUNTY SCHOOL BOARD

Background

The plaintiffs in this case, students and parents in a Florida school district, challenged the school board's guidelines allowing prayer at graduation ceremonies. The guidelines provided that the graduating seniors should decide whether or not to have a brief opening or closing message at graduation ceremonies, who should give this message, and what the content of the message should be.

The stated purpose of the guidelines was to allow students alone to direct their graduation message. The words "prayer," "benediction," or "invocation" were not used in the guidelines themselves; however, the introduction made clear that they were written in response to concerns regarding the constitutionality of student-initiated prayers. Moreover, there was no requirement in the guidelines that the message be nonsectarian. There was also some evidence that the motivation behind the guidelines was to allow prayer in graduation ceremonies. (At the relevant school board meeting, several members of the school board openly stated that their desire was to have prayer at these graduations.) In accordance with the guidelines, schools delegated the decision-making to the students. Prayers were given at the commencement ceremonies of 10 of the 17 schools in the district.

The plaintiffs, after being denied a preliminary injunction, moved for summary judgment, asserting that the guidelines failed the three-pronged test articulated in the U.S. Supreme Court's seminal 1972 ruling in Lemon v. Kurtzman. Under Lemon, for a policy or program to pass constitutional muster, it must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion. The plaintiffs contended that: (1) the purpose of the guidelines was not secular, but was rather to permit prayer at graduation ceremonies; (2) by allowing prayer at a school-sponsored event, the school board was endorsing and therefore advancing religion; and (3) excessive entanglement was the inevitable result of allowing prayer at school-sponsored and school-controlled ceremonies. The defendants and intervenor-defendants (a group of students supportive of the guidelines) moved for summary judgment as well. They asserted that there was no Lemon violation because the

school had delegated the authority to the students. The defendants also argued that a graduation ceremony was a limited public forum, and, therefore, to not allow the students to engage in religious speech would violate the Free Exercise and Free Speech Clauses.

Case Status

Relying on the Fifth Circuit Court of Appeals' decision in Jones v. Clear Creek Independent School District II (1992), the district court held that since school officials were not involved in the decision-making process, there was no Lemon violation. Moreover, the court found no coercion problem as described by the Supreme Court in Lee v. Weisman (1992), where the court held that a policy of school-sponsored graduation violates the Establishment Clause when (a) state officials direct the performance of a formal religious exercise and (b) graduating student attendance is "in a fair and real sense obligatory…." The district court also held that since graduation ceremonies are often held away from school grounds and often involve outside speakers, the ceremonies are limited public forums. Therefore, the court concluded, the state could not exclude religious speech with a content-based regulation.

The plaintiffs appealed. On May 6, 1997, a three-judge panel of the Eleventh Circuit Court of Appeals dismissed the plaintiffs' claims for injunctive and declaratory relief because the students protesting the guidelines had graduated, rendering their claims moot. The panel also refrained from ruling on the constitutionality of the guidelines, holding that the plaintiffs had waived their claim for monetary damages by failing to allege any connection between the prayer and their damages.

In May 1998, a new lawsuit (Adler II) was filed in which students with graduation dates from 1998 to 2000 were plaintiffs. Later that month, the Florida district court granted judgment for defendants and the case was again appealed to the Eleventh Circuit.

On May 11, 1999, the Eleventh Circuit reversed the district court and struck down (2-1) the Duval County school system's graduation policy. The court determined that, under either Lemon's "tripartite test" or Lee's "graduation prayer" standard, the Duval County graduation prayer regulations were unconstitutional.

As to the Lemon test and its "secular purpose" prong, the court held that an actual purpose of the policy, "both on its face and based upon the history surrounding its inception," was to permit prayer—including sectarian and proselytizing prayer—at graduation ceremonies. In fact, the board's avowed purpose in adopting its policy was to provide an option that might allow its historical tradition of graduation prayer to survive the prohibitions of the Supreme Court's decision in Lee. The court also found that the policy of permitting prayer at graduation ceremonies had the "primary effect" of advancing religion by placing those attending graduation ceremonies "in the position of participating in a group prayer." In light of the fact that the policy failed the first two parts of the Lemon test, the Eleventh Circuit found no need to engage in an analysis of Lemon's third "entanglement" prong.

The result was the same when the court subjected the Duval County policy to the standard articulated by the Supreme Court in Lee. The Eleventh Circuit noted that although distinguishable from Lee, where the school was involved in the selection of clergy to deliver the prayer, "our review … leads us to the conclusion that the delegation of the decision regarding a 'prayer' or 'message' to the vote of graduating students does not erase the imprint of the state from graduation prayer." In this regard, the court pointed to the fact that the school exerted tremendous control over the graduation ceremonies. The school board rented the facilities for the graduation; told the graduating students what they should wear; decided when the graduating students and audience could sit and stand; decided the sequence of events at the graduation; designed and printed the program for the ceremonies. Thus, the court found that student autonomy to choose the graduation message "fails to erase the overwhelming control that the school exerted over the remainder of the graduation ceremony."

Finally, said the court, the student speakers were considered "state actors" for Establishment Clause purposes. When the state permits individuals to exercise government functions they "must be subject to constitutional limits." Thus, just as a publicly elected school board president could not make a "private decision" to lead children in the recitation of prayer every morning, neither could the senior class's elected representative make a private decision to do the same thing from the graduation podium. As such, the Eleventh Circuit reversed the district court judgment in favor of the school board and remanded the case for further discovery and proceedings consistent with its ruling. However, less than one month later, in June 1999, upon a request by a member of the court, the Eleventh Circuit withdrew and vacated its Adler II decision, and announced that it would rehear the case en banc.

On March 15, 2000, the Eleventh Circuit rendered its en banc decision. The appellate court reversed (10-2) the panel's determination and upheld the school board's guidelines. In so doing, the court said: "The absence of state involvement in each of the central decisions—whether a graduation message will be delivered, who may speak, and what the content of the speech may be—insulates the School Board's policy from constitutional infirmity on its face." The plaintiffs appealed to the U.S. Supreme Court, which, on October 2, 2000, granted certiorari, vacated the judgment, and remanded the case to the Eleventh Circuit for further consideration in light of its decision in Santa Fe Independent School District v. Doe (see below).

AJC Involvement

As a constituent of the National Coalition for Public Education and Religious Liberty (PEARL), AJC joined in briefs in support of the plaintiffs-appellants in the Eleventh Circuit Court of Appeals in both Adler I and Adler II. Other organizations joining in the briefs included Americans United for Separation of Church and State, the Anti-Defamation League, and the American Civil Liberties Union.

In our briefs, we urged reversal of the district court's decisions. We argued that the guidelines circumvented the Supreme Court's holding in Lee v. Weisman and were a

thinly veiled attempt to promote prayer at public high school graduations, in violation of the Establishment Clause. Furthermore, under Eleventh Circuit precedent, government officials may not delegate to citizens any power which, if exercised by the officials, would impermissibly infringe a fundamental liberty guaranteed by the Constitution. Therefore, the school board's delegation to students of the decision-making authority over graduation prayer failed to sever the board's involvement in endorsing prayer at school functions. As our brief pointed out, "[t]he extensive control that schools exercise over graduation ceremonies inevitably presents the state as endorsing the content of messages that are part of the official program."

Freiler v. Tangipahoa Parish Board of Education

Background

In August 1994, the Tangipahoa Parish Board of Education adopted a resolution requiring the statement of a disclaimer whenever the scientific theory of evolution was to be taught in elementary or high school classes. The disclaimer stated, in part, that "the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the biblical version of Creation or any other concept." Several parents of children in the Tangipahoa Parish public schools brought suit in the U.S. District Court for the Eastern District of Louisiana challenging the validity of the resolution under the provisions in the U.S. and Louisiana constitutions barring laws "respecting an establishment of religion."

Case Status

Relying on Supreme Court precedent holding unconstitutional any state act motivated solely by a purpose to advance religion, the district court ruled that the board's mandating the disclaimer constituted an endorsement of religion and thus a violation of the Establishment Clause. The court examined the circumstances surrounding the adoption of the resolution and found that it was an attempted compromise between a policy allowing the theory of creationism to be taught and the teaching of the theory of evolution only in science classes. This context led the court to reject the board's argument that the disclaimer had the secular purpose of urging students to exercise their critical thinking skills. "As hard as it tries to," wrote Judge Livaudais, "this Court cannot glean any secular purpose to this disclaimer."

In August 1999, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's ruling striking down the disclaimer. While agreeing with the trial court that the disclaimer did not encourage students to think critically, the appellate court held that it did serve the secular purposes of disclaiming an orthodoxy of belief and reducing any offense caused by the teaching of evolution to students and parents. Nonetheless, the appellate court held that the disclaimer did not pass constitutional muster because its primary effect was "to protect and maintain a particular religious viewpoint, namely belief in the biblical version of creation." As such, the disclaimer violated the

Establishment Clause under both Lemon's tripartite test and the endorsement test enunciated by the Supreme Court in Allegheny County v. ACLU (1989).

On January 24, 2000, the Fifth Circuit denied the appellants a rehearing en banc, and on June 19, 2000, the U.S. Supreme Court declined to review the case.

AJC Involvement

AJC joined in the amicus brief filed in the Fifth Circuit by the National Coalition for Public Education and Religious Liberty (PEARL), which urged the affirmance of the district court's decision. In our brief, we argued that in addition to the board's impermissible purpose in adopting the resolution, the resolution also had the impermissible effect of advancing religion by "putting the state's stamp of approval on religious doctrine as a plausible explanation of reality." Furthermore, the brief pointed out, by referring only to the "biblical version of creation" as a plausible competing account of the origins of the human race, the disclaimer unconstitutionally preferred one religious doctrine over others and over other secular accounts.

Santa Fe Independent School District v. Doe

Background

In October 1995, the Santa Fe Independent School District (SFISD) adopted a policy that permitted a "brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Like its policy regarding graduation benedictions, SFISD's football policy did not limit the content of such invocations. However, the policy did include a "fallback" provision such that if "the District is enjoined by court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district." The alternative policy required that invocations delivered at football games be nonsectarian and nonproselytizing.

A group of students enrolled in SFISD schools and their parents brought suit in federal district court, claiming that SFISD's policy regarding invocations at football games violated the Establishment Clause of the First Amendment.

Case Status

The Fifth Circuit Court of Appeals ruled in February 1999 that SFISD's policy regarding invocations at football games was unconstitutional. Two of its own precedents informed the court's decision: Jones v. Clear Creek Independent School District (Clear Creek II, 1992) and Doe v. Duncanville Independent School District (1995). In Clear Creek II, the Fifth Circuit upheld student-initiated, nonsectarian, nonproselytizing prayers at public high school graduations. In doing so, the court pointed to the secular purpose of such prayers in solemnizing graduation ceremonies, the absence of involvement of any

religious institutions, and the requirement that they be nonsectarian and nonproselytizing. Then in Duncanville, the court held that allowing a school district employee (in that case, a coach) to participate in student-initiated prayer at public school basketball games violates the Establishment Clause. The Fifth Circuit distinguished Duncanville from Clear Creek II, in part, by emphasizing that "graduation is a once-in-a-lifetime event that could be appropriately marked with a prayer, that the students involved were mature high school seniors, and that the challenged prayer was to be non-sectarian and non-proselytizing." Finding the illegitimate Duncanville practice more analogous to the policy regarding invocations at graduation and football games at issue here than the Clear Creek graduation policy, the Fifth Circuit struck down SFISD's policy as unconstitutional. SFISD appealed that decision to the U.S. Supreme Court.

On June 19, 2000, the Supreme Court, by a 6-3 vote, decided that SFISD's policy violated the Establishment Clause. Because SFISD chose to expressly endorse only an "invocation," a term that primarily describes an appeal for divine assistance, the Court found that the policy, by its very language, invited and encouraged religious messages. Furthermore, the Court did not view such invocations as private speech, which might be protected under the Free Speech and Free Exercise Clauses, but rather viewed them as officially endorsed religious speech, which the Establishment Clause forbids. According to the Court, the delivery of such a message—on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—cannot be properly characterized as "private" speech.

The Court also rejected the electoral mechanism touted by the school district as an effective safeguard against the appearance of governmental endorsement. The Court emphasized that "this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."

AJC Involvement

AJC, together with organizations including the American Jewish Congress, Americans United for Separation of Church and State, the Anti-Defamation League, Hadassah, the Interfaith Alliance, and the People for the American Way Foundation, filed an amicus brief with the Supreme Court arguing that the First Amendment's proscription against government endorsement of religion applied here where the speaker was, in effect, speaking on behalf of the school and the student speech was an integral part of an official school event.

School Aid Programs

Chittenden Town School District v. Vermont Department of Education

Background

Due to its sparse population and pursuant to state law, the Chittenden School District does not maintain a high school for the provision of secondary education to the residents of the town, but provides tuition for their attendance at high schools elsewhere in Vermont. In May 1996, the Chittenden Town School Board authorized the use of public funds to pay tuition for Chittenden students to attend Mount Saint Joseph Academy, a high school owned and operated under the authority of the Roman Catholic diocese of Burlington. Because it viewed the board's payments to the Catholic school as unconstitutional, the Vermont Board of Education terminated state aid to the Chittenden Town School District. The town then brought suit in Vermont Superior Court seeking a ruling that such payments were constitutional.

Case Status

Analyzing Chittenden's program under the Supreme Court's 1997 Agostini v. Felton ruling, which held that not all direct government aid benefiting the educational function of sectarian schools violates the Establishment Clause, the Superior Court nevertheless struck down Chittenden's policy. As distinguished from the program in Agostini, which sent public school teachers into parochial schools to provide remedial education to disadvantaged children, (1) the Chittenden program provided for public funds to flow "directly to the coffers of Mount Saint Joseph Academy for its unrestricted use," (2) the "Chittenden tuition payments would relieve Mount Saint Joseph Academy of costs it would otherwise bear in educating its students," and (3) "public funds would be used to pay employees of a religious institution, who are bound by their contract to incorporate teachings of the Roman Catholic church into their classes." Therefore, the court ruled, the program created "an actual and direct link" between church and state in violation of the U.S. and Vermont constitutions.

The case was appealed to Vermont's Supreme Court, which, faced with a challenge based upon both the state and federal constitutions, first narrowed the scope of its legal analysis. The court determined that due to the uncertain state of federal Establishment Clause jurisprudence, and because the Vermont constitution was dispositive of the issue presented, it need only decide the dispute under the state constitution. Therefore, the court did not review the case under the First Amendment's Establishment Clause.

The "Compelled Support" Clause of Article 3 of the Vermont constitution provides "… that no person ought to, or of right can be compelled to … support any place of worship … contrary to the dictates of conscience …." There was no dispute between the parties that the word "support" included financial support through the payment of taxes and that the phrase "contrary to the dictates of conscience" included compelled support for a place of worship that offended the religious beliefs of the supporter. Rather, their dispute focused on (1) whether a sectarian school is a "place of worship" as that term is used in Article 3, and (2) whether the Chittenden program constituted "state sponsorship" of religion because the parents—not the school district—chose the religious school.

To determine whether religious education falls within Article 3's prohibition against compelled funding of a "place of worship," the court first looked to prior case law and the

text of the constitutional provision and concluded that Article 3 is "not offended by mere compelled support for a place of worship unless the compelled support is for the ‘worship’ itself." The court then pointed to three historical elements leading to the conclusion that the Chittenden program did violate Article 3. First, in 1806, Vermont repealed its Ministerial Act, which created a tax for the establishment of houses of worship and the hiring of ministers, after it was determined that the act violated the nonsupport provisions of Article 3. Second, the court pointed to the 1785 Virginia Bill for Religious Liberty, which contained a "nonsupport" provision similar to Article 3, and found Virginia’s rejection of public funding of religious education as instructive that Article 3’s prohibition was intended to include religious education. Third, the court looked to the nonsupport language in the Pennsylvania constitution, which is almost identical to Article 3, leading it to the conclusion that the Pennsylvania Quaker insistence on nonsupport for religious institutions was incorporated into the Vermont constitution. Based upon these three historical lessons, the court determined that "no artificial line between religious worship and religious education emerged in Vermont, and Article 3’s nonsupport mandate therefore prohibits compelled funding of religious education."

Finding "no way to separate ‘religious instruction’ from ‘religious worship,’" and because the Chittenden program contained no restrictions on the use of public funds for religious education, the court concluded that the program violated Article 3 of the Vermont constitution. Moreover, it ruled that the independent choice of parents opting to send their children to sectarian schools could not save the program. On this issue the court stated: "If choice is involved in the Article 3 equation, it is the choice of those who are being required to support religious education, not the choice of the beneficiaries of the funding."

On December 13, 1999, the U.S. Supreme Court declined to review the case.

AJC Involvement

AJC joined in an amicus brief filed by the National Coalition for Public Education and Religious Liberty (PEARL) that urged the Vermont Supreme Court to affirm the Superior Court’s decision. In our brief we pointed out that in Committee for Public Education and Religious Liberty v. Nyquist, the U.S. Supreme Court held unconstitutional a New York program that reimbursed parents for tuition expended on parochial school education. Furthermore, the brief argued, "[u]nlike those aid programs benefiting students at religious schools that have satisfied . . . Supreme Court standards in the past, . . . the Chittenden plan would give the green light to publicly funded religious instruction, thereby creating an incentive to organize religious schools where none has existed in the past."

Holmes v. Bush

Background

Florida’s voucher plan, the Opportunity Scholarship Program (OSP), was passed by the

Florida legislature on April 30, 1999, and signed into law by Gov. Jeb Bush on June 21, 1999. Under the plan, students who are enrolled in or assigned to attend a public school that has received a performance grade category of "F" for two years (during one of which the student was in attendance) will be offered three options other than remaining in their assigned school. First, such students may attend a designated higher-performing public school in their school district. Second, such students may attend—on a space-available basis—any public school in an adjacent school district. Third, such students may attend any private school, including a sectarian school, that has admitted the student and has agreed to comply with the requirements set forth in the voucher plan.

If a student chooses the third option, the state will pay an amount in tuition and fees at a qualifying private school "equivalent" to the "public education funds" that would have been expended on a public education for the student and will continue to do so until the student graduates from high school. Although the amount of school vouchers may not exceed the amount charged by a qualifying private school in tuition and fees, there is nothing in the voucher plan that would prevent a private school from raising its tuition and fees to capture the maximum available return under the voucher plan.

The funds necessary to pay for the vouchers will be drawn from each affected school district's appropriated funds and paid directly to recipient private schools. Although the voucher plan provides that voucher payments will be made by check payable to a student's parents, the checks are mailed to the recipient private school and must be restrictively endorsed over to the school for payment by the parent.

Private schools qualify for receipt of voucher payments if they have admitted an eligible student, agreed to participate in the voucher plan by not later than May 1 of the school year in question, and agreed to comply with certain minimum criteria.

Among other things, to participate in the voucher plan private schools must:

accept as full tuition and fees the amount provided by the state for each student; determine, on an entirely random and religiously neutral basis, which students to accept; comply with the prohibitions against discrimination on the basis of race, color or national origin; agree "not to compel any student … to profess a specific ideological belief, to pray or to worship." With respect to this last criterion, the voucher plan does not prohibit a school from requiring a student to receive religious instruction. The plan also does not place any limitation on the uses to which schools can put voucher payments.

Parents are required to notify the state of their intent to request a school voucher for their child by no later than July 1 of the school year in which they intend to use the voucher. The first round of voucher payments was made on August 1, 1999.

Case Status

In June 1999, a group of Florida citizens and organizations brought suit challenging the legislation as unconstitutional. The complaint, filed in the Circuit Court of the Second

Judicial Circuit for Leon County, Florida, alleges that the program violates the Florida constitution, which provides (1) that "no revenue of the state … 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"; and (2) that "income derived from the state school fund shall … be appropriated only to the support and maintenance of free public schools." In addition, the complaint asserts that the vouchers will funnel public funds to sectarian schools where they will be used for religious education, worship, and other religious activities, in violation of the Establishment Clause of the First Amendment.

The Florida Education Association et al. subsequently filed a similar legal challenge to the voucher plan, along with a motion to consolidate the two actions. Also added to the suit, but as defendants, were individual Florida citizens and the Urban League of Greater Miami, which intervened to support the legislation.

The two actions were consolidated by order of the Florida Circuit Court on November 22, 1999. The court determined, sua sponte, that it would hold a final hearing on February 24, 2000, on the narrow issue of whether the OSP violates the so-called education provision of the Florida constitution, which provides in relevant part that ". . . . Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."

On March 14, 2000, the Florida Circuit Court rendered a final ruling on that issue. Rejecting the defendants' argument that the Florida constitution does not clearly prohibit the legislature from providing an education through a private school but rather provides a "floor" for legislative action, the court determined that Florida's constitutional provision directing that primary and secondary school education be accomplished through a system of free public schools "is, in effect, a prohibition on the Legislature to provide a K-12 public education any other way."

The court distinguished prior decisions cited by defendants regarding preexisting Florida programs that authorized state payments for private school education of students with special needs on the grounds that such decisions had not addressed the issue of the constitutionality of such programs.

The court concluded that the OSP, by providing state funds for some students to obtain a K-12 education through private schools, violated the mandate of the education provision of the Florida constitution, and enjoined the defendants from taking any further measures to implement the program.

On October 3, 2000, the Florida First District Court of Appeal (a state intermediate appellate court) struck down the trial court decision, reversing on the issue the trial court addressed and remanding on the issues that the trial court did not address. In the opinion, the appellate court disagreed with the trial court's finding of an implied prohibition on the use of public funds for education through means other than the public school system. Rather, the court ruled that nothing in the public education clause "clearly prohibits the

Legislature from allowing the . . . use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary."

In addition to pursuing the case in the trial court, which must now address whether the program is constitutional under the religion clauses of the Florida and U.S. Constitutions, plaintiffs may appeal the appellate court's decision to the Florida Supreme Court.

AJC Involvement

The organizations involved in the challenge to the voucher plan include the American Jewish Committee, the NAACP, the League of Women Voters, the American Civil Liberties Union, Americans United for Separation of Church and State, People for the American Way, the American Jewish Congress, and the Anti-Defamation League. AJC is serving as "of counsel" to the plaintiffs.

In a brief submitted to the trial court, we characterized the OSP as a "comprehensive, large-scale program of publicly funded education at private schools" which would allow "up to 100% of the students at designated public schools to receive their education at private schools through state-funded vouchers. As such, we argued, the OSP "makes a mockery of the [Florida] Constitution's choice of a 'system of free public schools' as the means by which the State is to fulfill its mandate of providing an education for Florida children."

Mitchell v. Helms

Background

Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 provides federal funds for the distribution of library books, slide, movie and overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, resource materials, computers, and computer software by state and local educational agencies to public and private schools, including sectarian schools, for the purpose of improving student achievement. Chapter 2 also permits a host of programs to be provided that involve public school staff, including the development of technology programs and drop-out and illiteracy prevention programs.

Louisiana's special education program mandates the provision of "free, publicly supported education to every exceptional child who is a resident" of the state. The Jefferson Parish School Board contracted with the Special Education Services Corporation to provide special education services by public school teachers at private schools operated under the authority of the archdiocese of New Orleans. As of October 1997, fourteen publicly employed special education teachers and five teaching assistants worked full-time in nine parochial schools in Jefferson Parish.

Plaintiffs challenged the constitutionality of the state and federal school aid programs as applied in Jefferson Parish, Louisiana.

Case Status

In 1994, the District Court for the Eastern District of Louisiana, which rendered its decision prior to the Supreme Court's 1997 ruling in Agostini v. Felton permitting the sending of public school teachers into parochial schools to teach remedial classes to needy children, ruled that Louisiana's special education program was unconstitutional because it advanced religion and resulted in excessive entanglement between church and state.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the district court's decision, noting that Agostini instructs that "the mere presence of a publicly paid teacher on sectarian school premises will no longer give rise to the presumption that those teachers will inculcate religion in their students" nor "create an impermissible 'symbolic link' between government and religion."

Relying on the Supreme Court's ruling in Meek v. Pittenger, which held Pennsylvania's provision of instructional materials other than textbooks to parochial schools unconstitutional, the Fifth Circuit went on to strike down the federal and Louisiana instructional materials programs that provided direct aid to sectarian schools in the form of slide projectors, television sets, maps and computers, etc.

After the Fifth Circuit denied the U.S. Department of Education's petition for rehearing with respect to the constitutionality of the federal Chapter 2 program in Jefferson Parish, in June 1999 the U.S. Supreme Court agreed to review the case.

On June 28, 2000, the U.S. Supreme Court upheld (4-2-3) Chapter 2 as applied in Jefferson Parish, ruling that it is not a law respecting the establishment of religion simply because many of the private schools receiving aid in the parish are religiously affiliated. According to the plurality opinion authored by Justice Thomas and joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, "if the government seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it's fair to say than any aid going to a religious recipient only has the effect of furthering that secular purpose." The plurality further emphasized the significance of private choice in the constitutional analysis, stating that "if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot grant special favors that might lead to a religious establishment." Although evidence existed that equipment had been, or at the least could easily be, diverted for religious use, the plurality held that such evidence was "not relevant to the constitutional inquiry."

Both the concurring and dissenting justices objected to the plurality's reliance on neutrality as the constitutional test for aid to parochial schools. While agreeing with the plurality's ultimate conclusion, Justice O'Connor, in a concurring opinion joined by Justice Breyer, argued that the plurality's implicit approval of actual diversion of

government aid for the purpose of religious indoctrination is in tension with the Court's precedent. The dissent (Justices Souter, Stevens and Ginsburg) similarly disagreed with the plurality's conclusion that actual diversion of government aid is consistent with the Establishment Clause. However, while the concurrence found the evidence of actual diversion here to be de minimis, the dissent reasoned that the fact of such diversion served to invalidate the program as applied.

AJC Involvement

AJC joined in the National Coalition for Public Education and Religious Liberty's (PEARL's) amicus brief filed with the Fifth Circuit which argued that, in view of the many documented church-state violations in the Jefferson Parish school district, Louisiana's special education program violated the Establishment Clause on its face and in its implementation. The brief further argued that (1) the program lacked sufficient safeguards to prohibit major Establishment Clause violations, (2) the provision of equipment represented an impermissible direct subsidy to religious schools, and (3) the extent of documented church control of funds and equipment represented an unacceptable level of entanglement prohibited by the Establishment Clause.

As we did in the Fifth Circuit, AJC subsequently joined with a coalition of organizations in an amicus brief to the Supreme Court opposing the provision of computers and other equipment to parochial schools as violative of the Establishment Clause. In arguing that the Jefferson Parish program resulted in an impermissible subsidy of religion, our brief focused on the ease with which religious institutions could use the equipment for sectarian purposes, thereby diverting public resources in furtherance of their sectarian agendas.

Simmons-Harris v. Goff

Background

The Ohio Pilot Scholarship Program was enacted in response to an educational and fiscal crisis in the Cleveland City School District so severe that the U.S. District Court for the Northern District of Ohio ordered the state to take over the administration of the district. As part of the Pilot Scholarship Program, the state was required to provide financial aid to students residing within the Cleveland City school district by setting up a scholarship program to enable students to attend "alternative schools." Scholarship recipients received a fixed percentage (depending on income level) of the tuition charged by the alternative school of their choice up to $2500. Once a scholarship recipient had chosen a school, the state delivered a check payable to the recipient's parents, who then had to endorse the check over to the school. Approximately 80 percent of the schools eligible to participate in the program were sectarian.

Plaintiffs filed suit challenging the constitutionality of the scholarship program and seeking to prevent its implementation.

Case Status

On appeal from a trial court decision in favor of defendants, the Ohio Court of Appeals struck down the scholarship program, ruling that it violated the establishment clauses of the U.S. and Ohio constitutions.

In May 1999, the Ohio Supreme Court struck down Cleveland's school voucher program on narrow, technical grounds. In doing so, however, the court stated that the Pilot Scholarship Program did not run afoul of the church-state separation requirements of either the U.S. or Ohio constitutions. Rather, the court found the statute to be violative of the "one-subject" rule of the Ohio constitution.

In determining that the voucher program did not violate the Establishment Clause, the court employed the U.S. Supreme Court's Lemon v. Kurtzman analysis. As to Lemon's first prong, the court found that the school voucher program had a secular legislative purpose, since it did "nothing more or less than provide scholarships to certain children residing within the Cleveland School District to enable them to attend an alternative school." The court next addressed the primary effect of the statute and whether it advanced or inhibited religion. In Agostini v. Felton, the Supreme Court established three criteria to evaluate whether government aid has the effect of advancing religion: (1) whether the program results in governmental indoctrination; (2) whether the program's recipients are defined by reference to religion; and (3) whether the program creates an excessive entanglement between government and religion. Among the factors to be considered in determining whether a government program results in indoctrination is whether a "symbolic link" between government and religion is created. The Ohio Supreme Court found that the link between government and religion created by the voucher program was "indirect" in that it was premised upon the "genuinely independent and private choices" of individual parents. The court concluded that to the extent children were indoctrinated by sectarian schools receiving tuition dollars from the voucher program, it was not the result of direct government action.

As to whether the program recipients were "defined by reference to religion," the court noted that the voucher program provided scholarships to students to attend private schools that admit their students according to a list of priorities that included "students whose parents are affiliated with any organization that provides financial support to the school …." Thus, a student whose parents belonged to a religious group that supported a sectarian school was given priority over other students—a clearly unconstitutional practice. The court, however, determined that this objectionable portion of the statute could be severed from the remainder of the statutory scheme while still allowing the balance of the statute to stand on its own.

The court next examined whether the statute had the effect of advancing religion by excessively entangling church and state. The court noted that the primary beneficiaries of the aid provided by the state were the children, not the sectarian institutions. Given the indirect nature of the aid, the resulting relationship between the sectarian schools and the state was "attenuated and permissible."

Moving beyond the church-state issues, the court then focused on Article II of the Ohio constitution, which states "no bill shall contain more than one subject, which shall be clearly expressed in its title." To violate this "one-subject rule," a statute must encompass various topics that lack a "common purpose or relationship" so that there is no "discernible, practical, rational or legitimate reason for combining the provisions in one act." Here, the omnibus appropriations bill consisted of over 1,000 pages, of which the school voucher provision comprised only ten pages. In addition, the bill encompassed a range of issues, including the residency of certain elected officials, contracts for the private operation of correctional facilities, and a mandate that the files of the legislative ethics committee be confidential. Thus, the court concluded that since none of the aforementioned provisions had anything to do with the school voucher program, there was "considerable disunity in subject matter" within the statute, in violation of the one-subject rule.

In June 1999, the Ohio legislature passed new legislation enabling the Cleveland voucher program, but in a separate bill so as to satisfy the Ohio Supreme Court's objections. Plaintiffs again challenged the program as unconstitutional, suing in a federal district court in Ohio. In August 1999, the district court issued a preliminary injunction temporarily halting the voucher program based upon the judge's determination that the program would most likely be found to violate the Establishment Clause. However, the judge stayed part of his order so that returning students could attend their sectarian schools, but new students would not be permitted to use public funds to do so. When the Sixth Circuit Court of Appeals did not respond to state officials' request to stay the district court's order, they asked the U.S. Supreme Court to lift the injunction. On November 5, 1999, the Supreme Court issued a stay, thereby allowing the program to continue until the case is resolved by the Sixth Circuit.

On December 20, 1999, the district court ruled that the program violates the Establishment Clause of the Constitution. In so holding, the court agreed with the Ohio Supreme Court that the program passed the first prong of the Lemon test in that it had a secular purpose, and also found that it did not foster an excessive entanglement between church and state. However, the court disagreed with the Ohio Supreme Court as to whether the program had the impermissible effect of advancing religion, finding that it did so both by resulting in government indoctrination of religious beliefs and by creating an incentive to attend religious schools.

In reaching this conclusion, the court compared the program to the tuition reimbursement program struck down by the U.S. Supreme Court in Committee for Public Education and Religious Liberty v. Nyquist (1979), and found the two to be factually indistinguishable. As in Nyquist, the vast majority of eligible/participating schools under the Ohio program were religiously affiliated. Thus, by the very nature of the program, the court stated, "parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because the sectarian schools overwhelmingly predominate." Also as in Nyquist, grants made to sectarian schools were unrestricted, in no way guaranteeing the separation between the schools' secular and educational functions or ensuring that

state financial aid only supported the former. The aid provided, the court reasoned, thus "directly benefits the religious functions of participating sectarian institutions," and therefore "has the effect of advancing religion through government-supported religious indoctrination."

The court distinguished the program from those held constitutional in post-Nyquist cases in which students could redeem their vouchers at any school of their choice. Under the Ohio program, the court stated, because voucher students "may only redeem their vouchers at schools which have registered and are authorized to participate in the Program . . . the vast majority of [which] are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution." Thus, the court concluded, the program impermissibly created incentives for students to attend religious schools.

The case is now on appeal to the Sixth Circuit, which heard oral argument in June 2000.

AJC Involvement

AJC joined in the National Coalition for Public Education and Religious Liberty's (PEARL's) brief submitted to the Ohio Supreme Court in which we argued that "[t]he Ohio Pilot Scholarship Program violates the bedrock Establishment Clause prohibition against government financing of religious activities." Citing Supreme Court precedent, our brief pointed out that unrestricted state aid to religious institutions was unconstitutional and that the mere fact that a statute benefited secular as well as sectarian schools did not establish that it was "neutral" toward religion. Moreover, the state's attempt here to avoid a constitutional violation by funneling aid through parents elevated form over substance. The pilot program's provision of checks to parents rather than to religious schools was a "transparent fiction," since the state mailed grant checks to parents for use at approved schools and the parents were then required to endorse the check over to the schools. Because it made state funds available to religious schools for an unrestricted range of sectarian activities, the brief argued, Cleveland's pilot program was constitutionally invalid.

AJC also filed an amicus brief in the Sixth Circuit Court of Appeals, urging the appellate court to affirm the federal district court's ruling that the voucher program is unconstitutional. Our brief argued that Nyquist is indeed the controlling case law, and prohibits exactly the kind of unrestricted state funding of pervasively sectarian schools found in the Ohio program. Our brief distinguished Supreme Court decisions subsequent to Nyquist in which the court approved certain forms of limited state aid to religious schools, such as Mueller v. Allen (1983) (involving a tax deduction for low income parents with children in any school, including sectarian ones) and Committee for Public Education and Religious Liberty v. Regan (1980) (involving reimbursements with built-in safeguards to ensure that only secular services were covered), and concluded that unlike the programs at issue in those cases, the Ohio program essentially has the effect of a "direct, unrestricted subsidy of religious education."

Religious Accommodation

Ali v. Alamo Rent-a-Car

Background

In December 1996, Zeinab Ali was directed by her supervisor at Alamo Rent-a-Car to remove the large head-scarf she wore in accordance with her Muslim faith while at work. She objected, but her supervisor insisted and told her that if she persisted in wearing the scarf, he would move her to a position where she did not come into contact with customers. Ms. Ali acquiesced to her supervisor's request, but replaced her traditional scarf with a smaller scarf. Nevertheless, she was transferred her to a part of the facility where she was less visible to customers. A year later, she was laid off due to a reduction in workforce. On July 14, 1999, Ms. Ali brought an action against her former employer in the U.S. District Court for the Eastern District of Virginia alleging a violation of Title VII, which provides that it is a form of unlawful religious discrimination when an employer fails to reasonably accommodate an employee's religious practice unless such accommodation would pose an undue hardship on the employer.

Case Status

On December 7, 1999, the district court dismissed Ms. Ali's complaint for failure to state a cognizable claim under Title VII. The court did so on the grounds that Ms. Ali had not alleged that she had suffered any significant adverse employment action, such as demotion or loss of pay or benefits, as a result of her religious practice. To state a cognizable claim under Title VII, the court held, it is not sufficient for an employee to allege failure to accommodate reasonable religious needs. In addition to such so-called "religious detriment," according to the court, an employee must claim that she has suffered work-related detriment.

Ms. Ali appealed to the U.S. Court of Appeals for the Fourth Circuit. On appeal, Ms. Ali argued that an employer's refusal to accommodate an employee's request to wear a religiously mandated head scarf at work, when so doing would not interfere with her work in the least, gives rise to a Title VII claim even in the absence of demonstrable work-related detriment to the employee. In support of this argument, Ms. Ali cited decisions of several other circuit courts which have held that an employer's needless abridgment of an employee's religious practice was sufficient to give rise to a Title VII claim. In addition, Ms. Ali pointed out that regulations promulgated by the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, make it clear that an employer's obligation to make reasonable accommodations for an employee's religion exists wholly apart from the obligation not to discriminate on religious grounds through adverse personnel action.

A decision is still awaited from the Fourth Circuit.

AJC Involvement

AJC, together with the Metropolitan Washington Employment Lawyers Association and the American Civil Liberties Union (ACLU) of Virginia, filed an amicus brief with the Fourth Circuit in which we argued that an employer's requiring an employee to abandon or compromise her religious principles while at work, while refusing to make any effort at accommodation, is sufficient to invoke the protections of Title VII. Our brief cited the EEOC regulations as well as two U.S. Supreme Court cases, Trans World Airlines, Inc. v. Hardison (1977) and Ansonia Board of Education v. Philbrook (1986), that establish the existence of an independent duty to accommodate under Title VII, making an employer's refusal to accommodate religious beliefs a violation of that statute even in the absence of any explicit threat of adverse employment action.

Missouri v. Pride

Background

Farrel Gene Pride went to trial in Missouri state court on forgery charges in July 1997. Before the jury had been sworn, Pride reminded the court that he was a Seventh-Day Adventist who celebrated the Sabbath between sundown Friday and sundown Saturday and would have a conflict if trial were held on Saturday. When it became clear by Friday afternoon that the trial would not conclude before sundown, the court denied Pride's motion to adjourn the trial until Monday. Forced to choose between observing his Sabbath and exercising his right to testify in his own defense, Pride appeared in court on Saturday. However, one of his fact witnesses, also a Seventh-Day Adventist, refused. Pride appealed the trial court's denial of his motion to adjourn on Friday afternoon until Monday.

Case Status

The Missouri Court of Appeals, Western District, affirmed the trial court's decision, and Pride moved to transfer the case to the Missouri Supreme Court. That court denied the motion for transfer on August 31, 1999, and denied a subsequent application for transfer on October 26, 1999. Pride then appealed to the U.S. Supreme Court, which on March 6, 2000, declined to review the case.

AJC Involvement

AJC joined in an amicus brief filed by the American Civil Liberties Union, the Anti-Defamation League, and the General Conference of Seventh-Day Adventists with the Missouri Supreme Court in support of transferring the case. Our brief argued that the court should accept transfer because of the need to determine the appropriate legal standard where a governmental rule or regulation conflicts with an individual's religious beliefs or practices.

On the federal front, our brief contended that the court of appeals erred in its interpretation of the constitutional standard. While the U.S. Supreme Court has narrowed

the scope of the "compelling interest test" set forth in Sherbert v. Verner, Employment Div. of Oregon v. Smith (1990) made clear that where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason. Likewise, the compelling interest test was not struck down entirely by the Supreme Court's decision in Boerne v. Flores (1997), but rather still applies "where the State has in place a system of individual exemptions." In this case, we argued, the court's normal hours of operation are Monday through Friday, unless an exception is made by order of the court. Therefore, the judge's ability to consider individual requests for variance constitutes a system of exemptions. Contrary to the appellate court's decision, Smith and Boerne uphold the proposition that when the government's discretionary interests collide with an individual's right to exercise his faith, the government must demonstrate a compelling interest before depriving the individual of his right.

In addition to the First Amendment's Free Exercise Clause, also at issue in this case was the Missouri constitution's guarantee that "no person shall, on account of his religious persuasion or belief … be disqualified from testifying." Missouri's free exercise clause seemingly grants broader protections than its federal counterpart, but no Missouri case law sets the boundaries of the state's free exercise provisions. Our brief urged the Missouri Supreme Court to take up this case so that Missouri courts and members of the bar would have sufficient guidance on this issue.

Zoning

City of Chicago Heights v. Living Word outreach full gospel church and ministries, inc.

Background

In order to counter the city's economic decline, the city of Chicago Heights in December 1995 adopted a comprehensive zoning plan that included commercial zones intended to foster economic development. According to the zoning plan, churches could be located anywhere in a residential zone, or in a "B-2 commercial" zone if granted a special use permit. In January 1996, the Living Word Outreach Full Gospel Church purchased a property located within a B-2 commercial zone, but did not apply for a special use permit until after it took possession of the property.

Pursuant to a city ordinance, special use permits were granted where the special use would not "(1) be unreasonably detrimental to or endanger the public health, safety, morals, comfort or general welfare; (2) be injurious to the use and enjoyment of other property in the immediate vicinity or substantially diminish and impair property values in the neighborhood; or (3) impede the normal and orderly development and improvement of surrounding property for permitted uses." The church applied to the city council for a special use permit, but the application was denied because the church was situated in an area zoned for economic development purposes. Despite the denial, the church continued to operate in its new location. When the church failed to heed the city's citations, the city brought suit in Illinois state court to enjoin the church's operations.

Case Status

The trial court rejected the city's request for an injunction, finding that the city's denial of the special use permit was "arbitrary and capricious and not substantially related to the public health, safety or welfare," and that the church had met all the requirements for a permit. In a subsequent order, the court permanently enjoined the city from enforcing the ordinance against the church, and also held that the city's actions violated the First Amendment's Free Exercise Clause. The city appealed those rulings.

In December 1998, the Appellate Court of Illinois, First District, Third Division, held that under the state Religious Freedom Restoration Act (the state RFRA) the usual presumptive validity of zoning ordinances and special uses gives way to a more stringent burden for the city. Because free exercise rights were burdened by the zoning ordinance, the city had to show that its interest in the adoption of the ordinance was compelling and that the ordinance was the least restrictive means of furthering that interest. Despite this more stringent test, the appellate court held that the ordinance was valid because the city had a compelling interest in enforcing its zoning laws and the ordinance served the public health, safety, and morals. Since the ordinance only affected the 40 percent of the city zoned for commercial use, and therefore the church had access to the "majority of the city," the court went on to hold that the ordinance was the least restrictive means of achieving the city's interest.

The church has appealed to the Illinois Supreme Court. Oral arguments were held on September 30, 1999. A decision is still awaited.

AJC Involvement

AJC joined in an amicus brief filed in the Illinois Supreme Court supporting the church's right to operate in its present location. Other organizations signing onto the brief include the Anti-Defamation League, the American Jewish Congress Midwest Region, the Catholic Conference of Illinois, the Christian Legal Society, and the Greek Orthodox Diocese of Chicago. Our brief emphasized that the Illinois RFRA was a valid exercise of the Illinois General Assembly's broad authority to enact legislation for the general welfare of Illinois citizens, including the protection of their basic civil liberties. We urged the Illinois Supreme Court to affirm the appellate court's ruling that the city's actions constituted a substantial burden on religious exercise, but to reject the appellate court's perfunctory application of RFRA. For example, the city's permitting meeting halls to locate in similar business districts without special use permits demonstrates the absence of a compelling governmental interest in enforcing the zoning ordinance against the church. Because RFRA mandates the application of a stringent standard where the government interferes with religious exercise rights, the city's interest in enforcing the ordinance against the church "must be genuinely compelling, and there must be no other means of protecting it."

Freedom of Speech

American Coalition of Life Activists (ACLA) v. Planned Parenthood

Background

In 1997, five doctors and two clinics that provided reproductive health services, including abortions, brought an action in federal district court in Oregon seeking injunctive relief and damages from fourteen individual defendants and two organizations. Plaintiffs' complaint stated that the lawsuit "seeks to protect plaintiffs . . . against a campaign of terror and intimidation by defendants that violates the Freedom of Access to Clinic Entrances Act, " which prohibits the use of threats to intimidate any person from receiving or providing reproductive health services. The plaintiffs sought to enjoin the defendants from continuing their "campaign" and, more specifically, from publishing certain documents that plaintiffs contended were actionable as "true threats."

The individual defendants in this action were leaders and active participants in the movement to outlaw abortion, which they believed was equivalent to murder, who advocated the use of violence against abortion providers and contended that the murder of abortion providers was "justifiable homicide." As part of their campaign to stop abortions, defendants issued four "documents" that formed the basis for the lawsuit:

A "Deadly Dozen" poster, listing the names, addresses, and telephone numbers of twelve abortion doctors under the heading "GUILTY of Crimes Against Humanity." Stating that abortion was prosecuted as a "war crime" at the Nuremberg trials, the poster offered a $5000 reward for "information leading to the arrest, conviction and revocation of license to practice medicine." A poster with a photograph of plaintiff Dr. Robert Crist underneath the words "GUILTY of Crimes Against Humanity" and the statement that abortion was prosecuted as a war crime at Nuremberg. The poster listed Dr. Crist's home and work addresses, referred to him as a "notorious Kansas City abortionist," and offered in bold letters a "$500 REWARD," under which it stated in smaller letters "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." A bumper sticker distributed by defendants, stating in large black letters "EXECUTE," and then in red letters "Murderers" and "Abortionists." The "Nuremberg Files," which originally consisted of a box containing identifying information, including photographs, of doctors who provided abortions. The Nuremberg Files were subsequently placed on an Internet Website, which stated at the top, against a backdrop of images of dripping blood: "VISUALIZE Abortionists on Trial." It also indicated that the ACLA was "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. . . . [E]verybody faces a payday someday, a day when what is sown is reaped." The names of 294 individuals then appeared under the headings "ABORTIONISTS: the shooters," "CLINIC WORKERS: their weapons bearers," "JUDGES: their shysters," "POLITICIANS: their mouthpieces," "LAW ENFORCEMENT: their bloodhounds," and "MISCELLANEOUS BLOOD FLUNKIES." The document suggested that the reader "might want to share your point of view with this 'doctor' . . . ." The context for the

lawsuit was the escalation of violence against abortion providers over the last decade, as the debate between those in favor of a woman's constitutional right to end a pregnancy and those opposed to reproductive choice has become more inflamed. In March 1993, the "debate" turned deadly when Dr. David Gunn was shot and killed by Michael Griffin while entering his Pensacola, Fla., clinic. Prior to his murder, Dr. Gunn had been the subject of an old Western-style "wanted poster," distributed in the Florida and Alabama areas where Dr. Gunn worked, featuring personal information about the doctor, including his name, photograph, and address. Dr. George Patterson was subsequently murdered in Mobile, Ala., in August 1993, following the publication of a wanted-style poster containing personal information about him. The violence continued in 1994 when Dr. John Bayard Britton, Dr. Gunn's replacement, and his volunteer security escort, James Barrett, were gunned down outside the Pensacola clinic following the release of an "unWANTED" poster containing Dr. Britton's name, photograph, and physical description. Later that year, John Salvi opened fire at two Massachusetts clinics, killing two clinic workers and wounding five others. Most recently, Dr. Barnett Slepian, a Buffalo, N.Y., physician, was shot and killed by a sniper while standing in the kitchen of his home.

In response to the increasingly aggressive tactics of extremist elements within the antichoice movement, Congress in 1994 enacted the Freedom of Access to Clinic Entrances Act (FACE).

Case Status

The issue before the district court on defendants' summary judgment motion was whether any of the four challenged documents constituted "true threats" actionable under FACE, or whether they were "protected speech" under the First Amendment. According to the Ninth Circuit's interpretation of Supreme Court precedent, a "true threat" has been made when "a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person." To impose liability upon the speaker of a true threat, it is not necessary that the speaker intends or even has the ability to carry out the threat. Moreover, a statement need not be expressly threatening to be actionable. Rather, the "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners."

Because of its concern that the First Amendment's free speech guarantee might be abridged in this case, the Oregon affiliate of the American Civil Liberties Union (ACLU) filed an amicus brief with the district court in which it advanced an alternative analysis for the determination of what constitutes a true threat. Viewing the Ninth Circuit's test as incorporating only an objective component, the ACLU urged the district court to also inquire into the subjective intent of the speaker. The ACLU proposed that:

A challenged statement should be considered a true threat only where:

(1) considering all relevant factual circumstances, a reasonable recipient of the communication would interpret the statement as communicating a serious expression of

an intent to inflict or cause serious harm to the recipient (the "objective test"); and

(2) the speaker intended that the communication be taken as a serious expression of an intent to inflict or cause serious harm to the recipient, thereby intending to place the recipient in fear for his or her safety (the "subjective test").

This proposed analysis, the ACLU argued, would sufficiently protect free speech rights, while allowing for the imposition of liability in order to punish and deter true threats.

The district court rejected the ACLU's analysis and concluded that the existing Ninth Circuit test for true threats sufficiently safeguarded First Amendment rights. Moreover, it found that the only distinction between this case and existing Ninth Circuit case law was the absence of expressly threatening language in the challenged communications here. Given the Ninth Circuit's determination that the "true threats" analysis includes an examination of the factual context in which the alleged threats were uttered, the court held that the lack of expressly threatening language does not require the application of a different legal test. In arriving at this conclusion, the court traced the development of the objective speaker-based test in Ninth Circuit jurisprudence, citing that court's ruling in U.S. v. Gilbert, which held that the "willfulness requirement" was the "determinative factor separating protected expression from unprotected criminal behavior." The district court then reiterated that "'the only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat.'" Finally, the court noted that "[w]hether any given form of written or oral expression constitutes a true threat . . . is a question for the trier of fact under all of the circumstances."

Applying Ninth Circuit law to the facts before it, the district court ruled that three of the challenged documents were actionable as true threats: the Deadly Dozen poster, the Crist poster, and the Nuremberg Files. In contrast, it determined that the challenged bumper sticker was not actionable because the evidence did not show that it could be reasonably interpreted "as a serious expression of an intention to inflict bodily harm" on any of the plaintiffs.

After a three-week trial, in February 1999, the jury returned a verdict in favor of plaintiffs in the amount of $107 million in damages. In conformity with that verdict, the court then issued an order permanently enjoining defendants from intentionally threatening plaintiffs, and from publishing or distributing the documents at issue. The defendants have appealed to the Ninth Circuit, which heard oral arguments in September 2000. A decision is awaited.

AJC Involvement

In October 1999, AJC, the Anti-Defamation League, and Hadassah filed a joint amicus brief in the Ninth Circuit arguing that the standard of the "true threats" applied by the district court was correct. The law is well established, the brief pointed out, that threats—objectively defined as statements that the reasonable speaker would foresee would be

interpreted by the listener to communicate a serious expression of an intent to inflict harm—are not protected by the First Amendment. To focus on the subjective intent of the speaker, as the ACLU suggested, would result in the complete absence of protection from threats, since subjective intent is difficult to know and easy to deny. The brief offered the unique perspective of religiously affiliated groups, who are deeply committed to protecting all of the freedoms contained in the First Amendment, yet are acutely aware of how threats can interfere with constitutionally protected activity. Because of that perspective, we urged the Ninth Circuit to uphold the standard applied by the district court—"political hyperbole is protected speech, making people fear for their lives is not."

Hill v. Colorado

Background

Abortion protesters who call themselves "sidewalk counselors" brought a First Amendment challenge to a Colorado criminal statute regulating speech-related conduct within a designated area around any health care facility. The statute created a buffer zone with two dimensions—a "floating" buffer zone within a fixed buffer zone—in that it provided:

No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

Case Status

The suit was initiated in the Colorado state courts, where the statute was upheld by the trial court and the Court of Appeals of Colorado. When the Colorado Supreme Court declined to grant certiorari, the petitioners appealed to the U.S. Supreme Court.

On June 28, 2000, the U.S. Supreme Court, by a vote of 6-3, upheld the Colorado statute, ruling that the First Amendment rights of protesters are not abridged by the protection the statute affords unwilling listeners. While the Court had previously recognized a First Amendment "right to persuade," it effectively limited that right where offensive speech is so intrusive that the unwilling audience cannot avoid it. The Court upheld the Colorado statute as a content-neutral time, place, and manner regulation which does not ban a communication based upon message or speaker, but simply regulates where and how the communication may occur.

Moreover, the Court found that the statute is narrowly tailored to serve the state’s significant and legitimate governmental interest in protecting the health and safety of its citizens, which justifies "a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."

Finally, the Court noted that the narrowly tailored statute leaves ample alternative channels for communication, thereby properly balancing the individual's free speech interest with the state's interest.

AJC Involvement

AJC joined in a coalitional amicus brief submitted to the U.S. Supreme Court defending the Colorado statute as a constitutional viewpoint-neutral regulation of forced physical proximity. Other organizations on the brief included the National Abortion and Reproductive Rights Action League (NARAL), the NOW Legal Defense and Education Fund, the American Jewish Congress, The Center for Reproductive Law and Policy, Planned Parenthood Federation of America, and Republicans for Choice.

Gender Discrimination

Brzonkala v. Morrison

Background

While a freshman at Virginia Polytechnic Institute (VPI) in 1994, Christy Brzonkala was raped in her dormitory room by two classmates. One of those classmates, Antonio Morrison, later boasted that he liked to "get girls drunk" and have sex with them. As a result of the attack, Brzonkala became depressed, attempted suicide, and withdrew from school.

In 1995, Brzonkala filed a complaint against her attackers pursuant to VPI's sexual assault policy. At a VPI judicial committee hearing, Morrison admitted that he had sex with Brzonkala against her will. He was found guilty of sexual assault and suspended for two semesters. His appeal to the dean of students was rejected.

Later that year, after VPI was advised that Morrison had hired an attorney and was threatening to sue the school for violating his due process rights, Brzonkala was informed that there would be a rehearing. At the second hearing, Morrison was found guilty of abusive conduct and again suspended for two semesters. On appeal, however, VPI's senior vice president and provost deferred Morrison's suspension until after his graduation and Morrison returned to school in the fall of 1995. Brzonkala then filed a lawsuit in federal court naming Morrison, James Crawford (the other alleged assailant), and VPI as defendants, and asserting claims under Title IX of the Education Amendments of 1972 and the Violence Against Women Act (VAWA).

VAWA provided for a private right of action as follows:

(b) … All persons within the United States shall have the right to be free from violence motivated by gender ….

(c) Cause of Action. A person … who commits a crime of violence motivated by gender

and thus deprives another of the right declared in subsection

(b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and punitive damages, injunctive and declaratory relief and such other relief as a court may deem appropriate.

The legislature's authority to enact VAWA was specifically set forth in the statute, which stated that pursuant to Congress's power under the Constitution's Commerce Clause (Article I, § 8) and Section 5 of the Fourteenth Amendment, "it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender."

VAWA was enacted in 1994 after four years of congressional hearings on the issue of escalating violence against women in the United States. As a result of those hearings, Congress found that (1) domestic violence costs American employers $3-5 billion annually due to absenteeism; (2) approximately 50 percent of rape victims lose their jobs or are forced to quit in the wake of the attack; (3) fear of gender-based violence deters women from taking jobs in certain areas or at certain hours; and (4) fear of gender-based violence deters women from using public transportation. According to the House of Representatives' Report on VAWA, state and federal criminal laws do not "adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." In fact, attorneys general from thirty-eight states wrote to Congress in support of the inclusion of VAWA's civil rights remedy, stating:

The current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds. [VAWA] would begin to meet those needs by … creating a specific federal civil rights remedy for the victims of gender-based crimes.

In addition, studies commissioned by the highest state courts revealed that "crimes disproportionately affecting women are often treated less seriously than comparable crimes against men."

Case Status

Defendants Morrison and Crawford moved to dismiss Brzonkala's complaint on the grounds that she had not stated a claim and that VAWA's civil rights remedy (42 U.S.C.§ 13981) was unconstitutional. The district court granted defendants' motion, ruling that Section 13981 was beyond Congress's authority under the Commerce Clause because the activity it regulated was too remote from interstate commerce. The court also rejected the argument that Section 13981 was authorized under Section 5 of the Fourteenth Amendment (the amendment's "Enforcement Clause"), finding that private individuals'

gender-based violent crimes did not constitute state action and thus did not give rise to an equal-protection concern. Brzonkala appealed to the U.S. Court of Appeals for the Fourth Circuit.

The Fourth Circuit, although ruling that Brzonkala had stated a claim under VAWA, affirmed the district court's ruling and declared the statute's civil rights remedy unconstitutional. Emphasizing that through the enactment of Section 13981 Congress was intruding into matters traditionally the province of the states—e.g., punishing violent crimes such as rape and domestic violence—the court stated: "This case, in fact, draws into sharp relief the sweeping implications for our federal system of government that would follow were we … to extend congressional power under the substantial effects test to the regulation of noneconomic conduct remote from interstate commerce." To find Section 13981 within Congress's Commerce Clause power, said the court, would be to convert federal authority to '"a general police power of the sort retained by States' and to 'conclude that … there will never be a distinction between what is truly national and what is truly local.'" With respect to the Fourteenth Amendment, which prohibits a state from denying any person the "equal protection of the laws," the Fourth Circuit ruled that Congress did not have the authority to enact Section 13981 because the amendment is a restraint on state action, not action taken by private individuals. The court found the purposes of VAWA—to remedy gender-motivated crime committed by private individuals and to fill in the gaps in existing state laws addressing gender-based violence—not sufficiently connected to a state action to give rise to equal-protection concerns. Were the findings supporting the enactment of VAWA sufficient to uphold the statute, the court posited, "then in effect the federal government could constitutionally regulate every aspect of society."

On September 28, 1999, the U.S. Supreme Court granted certiorari in Brzonkala v. Morrison. On May 15, 2000, the Court affirmed the Fourth Circuit's decision and held (5-4) that Congress lacked the power to enact VAWA under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment.

Chief Justice Rehnquist, writing for the majority, concluded that the statute regulates noneconomic, criminal conduct that does not substantially affect commerce, and, as such, does not fall within Congress's power under the Commerce Clause as construed in United States v. Lopez (1995). The Court said that Lopez, which struck down the 1990 Gun-Free School Zones Act, made it clear that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." Gender-motivated crimes of violence, the Court said, "are not, in any sense of the phrase, economic activity."

The Court acknowledged that VAWA, unlike the statute struck down by Lopez, is supported by congressional fact-finding regarding the effects of gender-motivated violence on interstate commerce. But, the Court stated, these findings are "substantially weakened" by the "but-for causal chain" they employ, which "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has

substantial effects on employment, production, transit, or consumption," and thus allow federal regulation of many traditional areas of state concern.

In answer to plaintiff's argument that VAWA should be upheld as an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment, the Court stated that "the Fourteenth Amendment, by its very terms, prohibits only state action." The private civil remedy provision of VAWA, the Court said, "is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias," and is therefore not a valid exercise of the Section 5 enforcement power.

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. He charged that the majority revised the substantial effects test for legislation under the Commerce Clause by discounting its "cumulative effects and rational basis features."

AJC Involvement

In keeping with its earlier support for VAWA as the bill made its way through the legislative process, AJC joined in an amicus brief filed with the U.S. Supreme Court in support of the constitutionality of the statute's civil rights remedy. Our brief argued that Section 13981 was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment because Congress found that the states have violated the rights of women by engaging in purposeful discrimination against them in the operation of their justice systems. As such, VAWA's civil rights remedy was a legitimate remedial action, on a par with previously upheld legislation remedying racially motivated unconstitutional conduct by the states. The brief pointed out that the Supreme Court has already ruled in U.S. v. Guest that a private party can be involved in a Fourteenth Amendment violation when acting in conjunction with state officials. Therefore, as Justice Brennan suggested in Guest, a private party may legitimately fall within the scope of remedial action taken by Congress to cure a constitutional violation by the states—in this case, the inadequacies of the state justice systems in addressing gender motivated violence.

Thomson v. Ohio State University Hospital

Background

Mary Ann Thomson worked in the Ohio State University Hospital's Psychiatric Services Department. In November 1995, Ms. Thomson sought leave to care for her ailing father, but her supervisors denied her leave request. As a result, Ms. Thomson had to resign from her position. She then filed suit against the hospital and university seeking to enforce her rights under the Family and Medical Leave Act (FMLA). The defendants sought to have the suit dismissed on the ground that Congress violated the Eleventh Amendment of the Constitution when it authorized individuals to bring suit in federal court to enforce the FMLA against the state and its instrumentalities.

Case Status

The U.S. District Court for the Southern District of Ohio held that the state could not be sued in federal court for violating the FMLA because Congress exceeded its constitutional power in enacting the legislation. Although the Eleventh Amendment provides that states are immune to suit in federal court, a 1996 Supreme Court decision held that Congress could effectively waive the states' Eleventh Amendment immunity if the Legislature acted pursuant to a constitutional provision that gave it the power to do so. While one such potential source is Section 5 of the Fourteenth Amendment, which authorizes Congress to pass legislation enforcing equal protection of the laws, the district court held that Congress exceeded the scope of its Section 5 powers in adopting the FMLA, because the statute was not ". . . proportional to the goal of preventing gender discrimination."

Ms. Thomson appealed to the Sixth Circuit Court of Appeals and oral argument was scheduled for November 3, 2000. However, on July 17, 2000, the Sixth Circuit ruled in a separate case, Sims v. University of Cincinnati, that the FMLA was not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. On September 26, 2000, the Sixth Circuit directed the U.S. Department of Justice (which had intervened on behalf of Ms. Thomson) to file a letter brief "on whether the sole issue presented [in Thomson] is governed entirely by the court's recent decision in [Sims]." On October 6, 2000, the Justice Department filed a letter brief acknowledging that the Sims decision was indeed controlling and that oral argument was therefore unnecessary.

AJC Involvement

AJC joined in an amicus brief filed by the National Partnership for Women and Families in the Sixth Circuit arguing that the FMLA was enacted pursuant to a valid exercise of congressional authority under the Fourteenth Amendment. Other organizations who signed onto the brief included the American Civil Liberties Union–Women's Rights Project, Hadassah, and the National Council of Jewish Women. Our brief argued that the FMLA furthers the purpose of equal protection because it promotes equal employment opportunity for women and men by ensuring that all employees may take leave for compelling family reasons on a gender-neutral basis. The need for such legislation became apparent from the results of Congress's research, which showed that existing employment practices were both disadvantageous to women who had care-giving responsibilities and discriminatory to men who sought time off for family care giving. Therefore, our brief argued, the district court erred in ruling that Congress misjudged the need for new legislation and adopted a statute that was broader than necessary.

Racial Discrimination

United States v. Nelson and Price

Background

On August 19, 1991, in Crown Heights, Brooklyn, a Hasidic driver ran over and killed an

African-American boy. In what became known as the Crown Heights riots, an angry mob bent on revenge took to the streets and headed toward the largely Jewish commercial district of Crown Heights. Yankel Rosenbaum, a Hasidic scholar visiting from Australia, was identified as a Jew by his Hasidic garb and was stabbed. He later died in the hospital where one of his wounds had gone undetected.

Lemrick Nelson and Charles Price were acquitted of murder charges in the death of Rosenbaum in state court and were subsequently tried on civil rights charges in federal court.

Case Status

A federal court jury convicted Nelson and Price under 18 U.S.C. §245(b)(2)(B) for violating the civil rights of Rosenbaum. §245 provides in pertinent part:

Whoever, whether or not acting under color of law, by force or threat or force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with … any person because of his race, color, religion or national origin and because he is or has been … participating in or enjoying any benefit, service, program, facility or activity provided or administered by any State or subdivision thereof; … and if death results … shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Nelson and Price appealed their convictions to the Second Circuit Court of Appeals, which heard oral argument in the case in early May 2000.

On May 15, 2000, the U.S. Supreme Court rendered a decision in the case of U.S. v. Morrison, which involved a challenge to the civil remedy provided for in the Violence Against Women Act ("VAWA") (see discussion above). In its 5-4 ruling in Morrison, the Court continued its recent trend of narrowly interpreting congressional authority to enact legislation under the Commerce Clause (Article I, §8) and section 5 of the Fourteenth Amendment. In striking down the statute, the Court rejected the argument that under the Commerce Clause "Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Court also held that the statute could not be sustained under §5, because it was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."

In light of the Morrison ruling, on May 25 the Second Circuit issued an order requiring the parties in the Nelson/Price case to submit supplemental briefs on the question of the continued constitutional viability of § 245(b)(2)(B). The court has now scheduled oral arguments in the case for January 9, 2001.

AJC Involvement

AJC joined in the amicus brief to the Second Circuit filed by a coalition including the

American Jewish Congress, the Anti-Defamation League, and the synagogue agencies of all major denominations, in support of the statute's constitutionality. The brief argues that the statute in question is constitutional under the Commerce Clause, as an essential part of a larger regulation of economic activity (and therefore distinguishable from the statute struck down in Morrison).

The brief further argues for the constitutionality of the statute under, and places greater focus on, the Thirteenth Amendment. The thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

The Supreme Court has interpreted this language as giving Congress broad power to enact legislation "necessary and proper for abolishing all badges and incidents of slavery," and has held that, pursuant to this power, Congress may prohibit private racial discrimination. Furthermore, in Shaare Tefila Congregation v. Cobb, the Supreme Court held that Jews constitute a "race" for the purpose of a discrimination claim asserted under 42 U.S.C. §1982, which has its constitutional basis in the Thirteenth Amendment.

The amicus brief thus argues that Jews constitute a race for the purposes of the Thirteenth Amendment, and that the thirteenth Amendment provides a constitutional basis for §245(b)(2)(B). The statute as applied to this case is therefore unaffected by Morrison, which does not speak to Congress's Thirteenth Amendment powers.

Reproductive Freedom

Sternberg v. Carhart

Background

In 1997, the Nebraska state legislature enacted Neb. Rev. Stat. § 28-328 prohibiting "partial-birth abortion," which was defined by the statute as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." In layman's terms, "partial-birth abortion" refers to a second trimester abortion procedure known as "dilation and extraction" ("D&X"). The statute contained an exemption where the prohibited procedure is "necessary to save the life of the mother." A physician who performed a partial-birth abortion in violation of the statute was to be guilty of a Class III felony and subject to automatic suspension and revocation of his or her license to practice medicine in Nebraska.

Dr. LeRoy Carhart, a Nebraska physician who performs abortions, challenged the statute on the ground that it placed an undue burden on him and on women seeking an abortion.

More specifically, Dr. Carhart contended that, in addition to banning the D&X procedure, the statute also prohibited the most common second-trimester abortion procedure, known as "dilation and evacuation" ("D&E"). During the D&E procedure, physicians in some instances must employ the same methods as those described in and prohibited by the statute.

Case Status

The challenge reached the Eighth Circuit Court of Appeals, which declared the Nebraska statute unconstitutional on the grounds that it imposed an undue burden on a woman's right to choose to have an abortion. The statute, the court stated, defined the prohibited procedure in such a manner as to encompass and thereby also prohibit the common D&E abortion procedure. As such, it placed an undue burden on the right of women to choose whether to have an abortion. Defendants appealed to the U.S. Supreme Court.

On June 28, 2000, the U.S. Supreme Court decided that the statute violated a woman's fundamental right to choose whether to have an abortion. In so ruling, the Court applied the principles it previously enunciated in Planned Parenthood of Southeastern Pa. v. Casey, in which it held that before fetal viability, a woman has a constitutional right to terminate her pregnancy, and a state law is unconstitutional if it imposes an "undue burden" on her decision to do so. After viability, under Casey, the state may regulate, and even proscribe, abortion, except where "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (emphasis added). In this case, the Court held (5-4) that the Nebraska statute failed to pass constitutional muster for two reasons. First, the statute lacked an exception for the "preservation of the [mother's] … health," a constitutional requirement regardless of fetal viability. Second, the Court echoed the Eighth Circuit in finding that the statute imposed an undue burden on a woman's decision to abort, i.e., that it had the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus, because its prohibition was so broad that it encompassed the most commonly used second trimester abortion procedure, as well as the specific procedure it allegedly seeks to prohibit.

AJC Involvement

AJC was part of a coalition including fifty-three other religious or religiously affiliated organizations that filed an amicus brief with the Supreme Court arguing that the statute violated the Constitution. In the brief, AJC stated that when faced with reproductive health decisions, women and their families, in consultation with their doctors and in accordance with their religious beliefs, must be able to choose the medical procedure that is safest for the woman and best protects her ability to bear future children.