THE AMERICAN
JEWISH COMMITTEE

LITIGATION REPORT
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AJC *in the* COURTS

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INTRODUCTION

Since its founding in 1906, The American Jewish Committee (AJC) has been committed to securing the civil and religious rights of Jews. AJC has always believed that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans. As part of this effort, AJC filed its first amicus curiae, or "friend of the court," brief in the U.S. Supreme Court in 1923. In that case, *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), AJC supported a challenge to a Ku Klux Klan-inspired Oregon statute, aimed at Catholic parochial schools, which required that all parents enroll their children in public school or risk a criminal conviction. The Supreme Court's decision was a victory for religious freedom. The Court struck down the law unanimously, ruling that parents have a right to determine where and how their children are to be educated.

Since that time, AJC has been involved in most of the landmark civil- and religious-rights cases in American jurisprudence. These cases have addressed the issues of free exercise of religion; separation of church and state; discrimination in employment, education, housing, and private clubs based on religion, race, sex, and sexual orientation; women's reproductive rights; and immigration and asylum rights. This litigation report describes and summarizes those cases in which AJC has participated recently.

I. SEPARATION OF CHURCH AND STATE

A. Religion in the Public Schools

ADLER v. DUVAL COUNTY SCHOOL BOARD

Background

In 1993, the plaintiffs in this case, students and parents in a Florida school district, challenged the school board's newly issued guidelines allowing religious invocations and benedictions at the public high school's 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 ten of the seventeen 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 it was the students who determined the content of the message, and thus there was no state action implicating the Constitution. The defendants also argued that a graduation ceremony was a limited public forum, and, therefore, prohibiting the students from engaging 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 school graduation policy 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, and 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 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 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. 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 June 2000 decision in *Santa Fe Independent School District v. Doe* in which the Supreme Court held that a school district's policy permitting "a brief invocation and/or message to be delivered during the program 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" violated the Establishment Clause. Despite the similarities between the two cases, on May 11, 2001, the Eleventh Circuit reinstated its en banc judgment, once again upholding the constitutionality of the school board's policy. A petition for review of this most recent decision was filed with the Supreme Court on August 8, 2001. On December 10, 2001, the Supreme Court denied the petition for certiorari.

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."

MELLEN v. BUNTING

Background

The Virginia Military Institute (VMI) is a state military college that employs the "adversative method," which involves physical rigor, mental stress, absence of privacy, detailed regulation of behavior, and indoctrination of a strict moral code. Every evening before cadets are seated for supper and following predinner announcements, a student known as the "cadet chaplain" reads a prayer composed by the VMI chaplain (the "supper prayer"). The daily supper prayer usually begins with addresses such as "Almighty God," "O God," "Father God," "Heavenly Father," or "Sovereign God," and is "dedicated to giving thanks or asking for God's blessing." Although cadets are permitted to "fall out of formation" prior to entering the mess hall so as to avoid participating in the daily prayer, two third-year cadets brought suit in federal district court asserting that the practice violates the Establishment Clause of the First Amendment.

VMI defended the supper prayer on three grounds. First, it claimed that the prayer is constitutional because it is part of a larger secular ceremony, the "Supper Roll Call," and serves a secular purpose. In addition, VMI relied on *Marsh v. Chambers* (1983), in which the Supreme Court upheld the practice of beginning legislative sessions with prayer, as precedent. Finally, VMI claimed that the supper prayer is constitutional under the Supreme Court's academic freedom jurisprudence. More specifically, it claimed that the Supreme Court's ruling in *Keyishian v. Board of Regents of University of New York* (1967), in which the Court held that the university's requiring faculty members to sign a certificate swearing that they were not Communists violated the First Amendment, warrants upholding VMI's supper prayer.

Case Status

On January 24, 2002, a federal district court in Virginia ruled that VMI's daily recitation of a "supper prayer" violated the constitutionally mandated separation of church and state. The district court analyzed the challenged prayer under *Lemon v. Kurtzman* (1971), the much maligned but still valid three-prong test for Establishment Clause violations, rejecting the defendant's contention that *Marsh v. Chambers* controls. In ruling *Marsh* inapplicable, the district court concurred with other courts that *Marsh* has limited application, in part due to the "unique history" of legislative prayer, i.e.,

VMI is essentially requiring cadets to choose between participating in the supper role call and their religious principles, in violation of the First Amendment.

"the First Congress voted to send the draft of the First Amendment to the states in the very same week that they 'voted to appoint and pay a Chaplain for each House' of Congress." The district court also cited the Supreme Court's decision in *Edwards v. Aguillar* (1987), in which the Court stated that *Marsh*'s "historical approach is not useful in determining the proper role of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." The court next addressed defendant's academic freedom claim and found *Keyishian* and related cases to be inapplicable, stating that "to the extent that the Court did suggest a university possesses a right to academic freedom, it did not imply that this right should trump the First Amendment rights of individual citizens."

Turning to the Establishment Clause, the court reiterated the continued viability of the Lemon test in the wake of the Supreme Court's 2000 ruling in Santa Fe Ind. Sch. Dist. v. Doe, in which the Court relied on Lemon to strike down a school district's policy of allowing prayer before high school football games. Lemon holds that to be constitutional, a law (1) must have a secular purpose, (2) must have neither the principal nor primary effect of advancing or inhibiting religion, and (3) must not foster an excessive entanglement between government and religion.

Applying the *Lemon* test to the case at hand, the court concluded that VMI's supper prayers fail all three prongs of the test. First, the court rejected VMI's assertion that the supper prayers serve a constitutionally legitimate secular purpose in that they do not "(1) serve VMI's academic mission of 'developing cadets into military and civilian leaders,' (2) serve institutional or expressive purposes," or "(3) accommodate the religious needs of students, as required by the Free Exercise Clause of the First Amendment." Instead the court found that "[t]he only logical conclusion that can be drawn … is that part of the Institute's educational mission … is religious indoctrination," and "[s]uch a purpose is unconstitutional." In addition, the court stated that "a reasonable fact finder would be compelled to conclude that VMI cadets are led in prayer; they do not study prayer."

Next the court ruled that the "primary effect of the prayers is to advance religion" because of the coercive environment at VMI, together with the fact that cadets who fall out of formation miss the daily announcements and are deprived of a sense of camaraderie shared by their peers. Thus, the court concluded that VMI is essentially requiring cadets to choose between participating in the supper role call and their religious principles, in violation of the First Amendment.

Finally, analogizing to the circumstances in *Santa Fe*, the court held that VMI's supper prayers result in an unconstitutional entanglement between religion and state because the prayers are drafted by the school chaplain and read at the direction of the superintendent.

Defendant appealed to the U.S. Fourth Circuit Court of Appeals to challenge the District Court's holding. The appeal is now pending and a decision is awaited.

AJC Involvement

On August 19, 2002, AJC, along with Americans United for the Separation of Church and State and the Anti-Defamation League, filed an amicus brief in support of plaintiff's assertion that the Virginia Military Institute's supper prayer is unconstitutional, stating, "Religious fanaticism and

ideological proselytizing are engendering animosity and destruction worldwide," and that "in fashioning its American 'citizen-soldiers' VMI should stand at the forefront of preserving the First Amendment right to true religious liberty and freedom of conscience."

Reaffirming our support for an individual's right to personal prayer, even in public institutions, we emphasized that such prayer must be truly voluntary and not coerced in any way. In our brief, we argued that *Marsh v. Chambers* was inapplicable as precedent in this case, because the Supreme Court has never applied the narrow ruling to any other cases and federal circuit courts have uniformly declined to apply *Marsh* to the public school arena altogether. We also relied upon *Lee v. Weisman* in which the Supreme Court held that the recitation of invocations and benedictions by clergy at public school graduation ceremonies was unconstitutional. Last, we asserted that the objectives of VMI's supper prayer failed to satisfy the secular purpose requirement of *Lemon v. Kurtzman*, and thus failed to be a permissible practice in violation of the Establishment Clause.

B. School Aid Programs

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 Governor 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. And while 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:

(1) accept as full tuition and fees the amount provided by the state for each student;

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.

(2) determine, on an entirely random and religious-neutral basis, which students to accept;

(3) comply with prohibitions against discrimination on the basis of race, color or national origin;

(4) 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, alleged 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 asserted 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 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 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 "[a]dequate 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 private schools 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 thus 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) reversed the trial court's

decision on the state constitution's education provision and remanded the case for further proceedings on the church-state issues. In its 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."

On April 24, 2001, the Supreme Court of Florida denied interlocutory review of the appellate court's decision, and the case was remanded to the trial court. Plaintiffs subsequently filed a motion for summary judgment asserting that the statute violates the Florida constitution which states that "no revenue of the state" shall be used "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

On August 5, 2002, Judge Kevin Davey granted plaintiff's motion for summary judgment and enjoined the defendants from taking any action to implement the Opportunity Scholarship Program for the 2002-2003 school year. In his opinion, Judge Davey wrote that the Florida Constitution was "clear and unambiguous" in proscribing the use of public money in any sectarian institution. In response, the State of Florida appealed the case to the First District Court of Appeals and plaintiffs petitioned the Florida Supreme Court for direct review. A decision on these issues is awaited.

AJC Involvement

The organizations challenging 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 percent 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." In addition, we asserted that the OSP violates both federal and Florida constitutional provisions that prohibit the government "establishment" of religion, in that it provides a financial benefit to the religious missions of sectarian private schools and the religious institutions that operate them.

SIMMONS-HARRIS v. ZELMAN

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. In the 1999-2000 school year, more than 80 percent of the schools eligible to participate in the program were sectarian, and more than 96 percent of students enrolled in the program used their vouchers for tuition at a religious school.

In 1996, plaintiffs filed suit challenging the constitutionality of the scholarship program, and seeking to prevent its implementation.

Case Status

On appeal from a state trial court decision in favor of defendants, an Ohio Court of Appeals ruled that the scholarship program violated clauses of the U.S. and Ohio Constitutions that prohibit the government "establishment" of religion. In May 1999, the Ohio Supreme Court struck down the voucher program on the narrow, technical ground that the statute violated the "one-subject" rule of the Ohio constitution.

In response to the court's ruling, in June 1999, the Ohio legislature passed new legislation enabling the Cleveland voucher program, but in a separate bill so as to satisfy the court's objections. Plaintiffs again challenged the program as unconstitutional, this time suing in 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 Sixth Circuit resolved the case.

On December 20, 1999, the district court ruled that the program violated the Establishment Clause of the Constitution. 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."

On December 11, 2000, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision, concluding that the voucher program constituted an unconstitutional endorsement of religion and sectarian education in violation of the Establishment Clause. The Sixth Circuit subsequently denied defendants' motion for a rehearing en banc, and defendants filed a petition for writ of certiorari to the U.S. Supreme Court. On September 25, 2001, the U.S. Supreme Court agreed to review the case.

On June 27, 2002, the Supreme Court (by a vote of 5 to 4) held that the school

voucher program does not violate the constitutional separation of church and state. Chief Justice William Rehnquist, writing for the majority, began his opinion with a discussion of the educational crisis in the Cleveland school district. It is undisputed, Rehnquist said, that the voucher program was "enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."

In reaching its conclusion, the Court distinguished between government programs that provide aid directly to religious schools and programs of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." The Court relied on a line of Supreme Court cases where Establishment Clause challenges to neutral government programs that provided individuals, not schools, directly with aid were found constitutional. In *Mueller v. Allen* (1983) (involving a tax deduction for low-income parents with children in any school, including sectarian ones), *Witters v. Washington Dept. of Servs. For Blind* (1986) (holding that a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor did not offend the Establishment Clause), and *Zobrest v. Catalina Foothills School Dist.* (1993) (rejecting an Establishment Clause challenge to a federal program that permitted a sign-language interpreter to assist a deaf student enrolled in a religious school) the Court emphasized that any aid that flows to religious institutions as a result of the independent choices of citizens did not offend the Establishment Clause. Similarly, the Court held the Ohio program is neutral with respect to religion and provides assistance directly to citizens who, in turn, direct government aid to religious schools.

Writing for the dissent, Justice Souter, joined by Justices Stevens, Ginsberg, and Breyer, acknowledged the severe problems faced by Cleveland public schools by stating that if there were an excuse to skirt to the Establishment Clause, it would likely be in the Cleveland school system. Nevertheless, he wrote, "there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these."

Justice Breyer, writing his own additional dissent, also rejected the argument that the parental choice aspect of the Ohio program alleviated the Establishment Clause concerns. Parental choice, he said, does nothing for the taxpayer who does not want to finance religious education. Breyer posited that the decision would ignite divisiveness and religious strife among our nation's many different religious groups—discord that the constitutional separation of church and state was designed to prevent.

AJC Involvement

Having joined in the National Coalition for Public Education and Religious Liberty's (PEARL's) brief in opposition to the voucher program submitted to the Ohio Supreme Court, and having 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 was unconstitutional, AJC then took the lead in filing an amicus brief with the U.S. Supreme Court, urging it to affirm the circuit court's decision striking down the program. In the brief, we asserted that the program "violates bedrock principles embodied in the Establishment Clause" and "cannot be squared with well-established Supreme Court precedents that prohibit the

The program "cannot be squared with well-established Supreme Court precedents that prohibit the unrestricted flow of public funds into the general coffers of pervasively religious primary and secondary schools."

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II. RELIGIOUS LIBERTY

A. Conscience Clause Exemptions

CATHOLIC CHARITIES OF SACRAMENTO, INC. v. THE SUPERIOR COURT OF SACRAMENTO COUNTY

Background

On November 20, 2000, Catholic Charities of Sacramento, Inc. ("Catholic Charities")—a California public benefit corporation that provides "social services to the poor, disabled, elderly, and otherwise vulnerable members of society, regardless of their religious beliefs"—filed a lawsuit in the Sacramento Superior Court challenging the constitutionality of the California Women's Contraception Equity Act (the "Act" or "the statute") which requires that if employers provide group and individual insurance policies with prescription drug benefits to their employees, they must also provide coverage for prescription contraceptive methods. The statute, enacted in response to concerns about the lack of insurance coverage for prescription contraceptive methods, sought "to eliminate," what the legislature found to be "the discriminatory insurance practices that had undermined the health and well-being of women."

However, addressing concerns that the Act would impermissibly burden the religious freedom of employers opposed to contraception on religious grounds, the legislature enacted a narrow exemption (a "conscience clause") that permits only certain religious employers, "for whom contraception is contrary to their religious [beliefs]" to obtain employee health insurance policies that do not cover prescription contraceptive methods.

Pursuant to the Act, to qualify for the exemption, an organization must satisfy the following criteria: (1) the inculcation of religious values is the purpose of the entity; (2) the entity primarily employs persons who share the religious tenets of the entity; (3) the entity serves primarily persons who share the religious tenets of the entity; and (4) the entity is a specific type of nonprofit organization pursuant to certain sections of the Internal Revenue Code of 1986, as amended (which exempt from certain tax filings churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order).

In its suit, Catholic Charities sought declaratory and injunctive relief from the Act, asserting that forcing it to provide "employee health insurance coverage that includes prescription contraceptive methods would facilitate financially the sin of contraception by employees who use the prescription drug benefit to obtain contraception." It argued that "in order to avoid the burden placed upon its beliefs by the Act," it could not simply refuse to offer health insurance coverage for employees, as the Act allows, because "the Catholic faith morally obliges employers to provide just employment wages and benefits, which includes adequate health insurance coverage." Thus, it asserted, "the [law] present[s] Catholic Charities with the dilemma of either refusing to provide health insurance coverage for its employees or facilitating the sin of contraception, both of which violate its religious beliefs." Catholic Charities conceded that it does not qualify for the religious employer exemption because it does not meet any of the four criteria necessary to do so.

More specifically, Catholic Charities alleged that the Act violates the Free Exercise Clause of the U.S. Constitution and

If an "employer chooses to provide employee health insurance coverage with prescription drug benefits, it cannot provide coverage that discriminates against women by excluding prescription contraceptive methods."

that it restricts the organization's constitutionally protected free speech rights, as the "statutes force Catholic Charities to foster concepts and to engage in symbolic speech that sends a message that contraception is morally, socially, legally and religiously acceptable conduct." The complaint further alleged that the religious employer exemption (the "conscience clause") included in the Act is too narrow and thus violates the Establishment Clause of the U.S. and California Constitutions by exempting certain religious employers but not others, thereby favoring certain religions over others. Catholic Charities also asserted that the Act's definition of "religious employer" is vague and difficult to apply.

Case Status

At the trial court level, the judge denied Catholic Charities' motion for a preliminary injunction, on the grounds that Catholic Charities failed to meet the two requirements for injunctive relief: 1) a likelihood of success on the merits, and 2) imminent harm. Catholic Charities subsequently filed a Writ of Mandate with the California Court of Appeals asking that the appellate court order the lower court to grant the injunction. Holding that the Act does not unconstitutionally infringe on the religious liberty rights of Catholic Charities, the unanimous three-judge panel of the Court of Appeals denied the Writ of Mandate seeking to compel an injunction.

In response to the allegation that the Act violates the Free Exercise Clause of the U.S. Constitution, the appellate court applied the standard established by *Employment Division v. Smith* (1990), in which the U.S Supreme Court held that strict scrutiny does not apply to all free exercise challenges. Rather, an otherwise valid and constitutional law in an area in which the state is free to regulate, that is neutral and of general applicability need not be justified by a compelling governmental interest. Thus, the court concluded the strict scrutiny standard does not apply to the prescription contraceptive coverage statute at issue because the law is otherwise valid, constitutional and "generally applicable and neutral with respect to religion." In any case, the court found the legislature's purpose in enacting the statute—the elimination of gender discrimination in women's health insurance coverage in an area afforded constitutional protection, i.e., reproductive freedom, to be a compelling one, as was the legislature's interest in preserving public health and well-being. As proof of the law's neutrality and general application, the court emphasized that the Act does not require employers to provide prescription contraceptive coverage to their employees, but rather, simply requires that if an "employer chooses to provide employee health insurance coverage with prescription drug benefits, it cannot provide coverage that discriminates against women by excluding prescription contraceptive methods." As to the "religious employer" exemption provided for in the Act, the court concluded that it is neutral and generally applicable to all religions and does not discriminate among religions, as it applies to all faiths in the same manner.

The court also rejected Catholic Charities' contention that the statute restricts its constitutionally protected free speech rights, determining that Catholic Charities had not provided any meaningful argument to explain the manner in which its right to free speech is affected or its "symbolic speech" is compelled. For example, explained the court, the statute does not require Catholic Charities to repeat an objectionable message or to use its own property, to display such a mes-

sage. Nor does the Act require the organization to be publicly identified or associated with another's message.

As to the Establishment Clause, the court applied the three-pronged test set forth in *Lemon* v. *Kurtzman* (1973), which provides that, to withstand an Establishment Clause challenge, a statute must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive entanglement between religion and the state. The court found all three prongs to be satisfied. First, the court determined that the secular purpose of the religious exemption within the statute is to accommodate those who oppose contraception on religious grounds without undermining the public policy goal of eliminating gender discrimination in insurance benefits at the expense of employees who do not share their employer's religious tenets. Second, the court concluded that the primary effect of the exemption does not advance or inhibit religion in that "the ability of the exemption's beneficiaries to propagate their religious doctrine is [no] greater now than it was before the statutory scheme was enacted." Lastly, the court found that the exemption does not result in excessive governmental intrusion into religious affairs as there is no ongoing or continuous supervision by the government of the religious employer and no government interpretation of church doctrines.

Based upon the foregoing analysis, the court held that Catholic Charities failed to establish that it is likely to prevail on the merits of its constitutional challenges, and, therefore, the trial court properly denied Catholic Charities' request for a preliminary injunction pending trial.

The case was subsequently appealed and is currently pending before the Supreme Court of California.

AJC Involvement

In March 2002, AJC joined in an amicus brief to the Supreme Court of California filed with the Anti-Defamation League in support of the constitutionality of the statute's requiring employers who offer their employees health insurance coverage with prescription drug benefits to also include coverage for prescription contraceptive methods, so long as certain religious institutions are exempted.

In our brief, we asserted that the Contraceptive Equity Act is constitutional under the United States and California Constitutions in that it addresses a "compelling societal need" and is tailored "to limit any burden on free exercise as much as possible while preserving the law's compelling objective." In addition, we urged the court to apply the strict scrutiny standard of review in order to fulfill the California Constitution's guarantee of free exercise rights. "Applying anything less," we asserted, jeopardizes fundamental free exercise rights "expressly guaranteed by the California Constitution against unwarranted governmental intrusion." Accordingly, we argued, the Supreme Court's *Smith* decision should not affect California's independent state constitutional protection of free exercise rights.

B. Religious Accommodation

TENAFLY ERUV ASSOCIATION v. BOROUGH OF TENAFLY

Background

Orthodox Jewish law prohibits individuals from carrying any items on the Sabbath other than within a "private domain," typically defined as a dwelling or other enclosed area. An *eruv* is an unbroken perimeter that renders the area it encloses a private domain for purposes of Jewish law, thus enabling the observant to carry within its bounds. Creating an *eruv* has significant real-life implications for the observant in that it grants freedom of movement on the Sabbath to those who would otherwise be homebound. This would include handicapped or incapacitated people who depend on crutches or canes, or parents of toddlers who must be wheeled in baby carriages or strollers, since such activities, absent the *eruv*, are considered "carrying" and are impermissible.

According to Jewish law, an *eruv* must be at least forty inches high and continuous. Since it will generally encompass an area containing many private homes and public thoroughfares, in most instances the *eruv* will take advantage of existing telephone and utility poles and wires; as such, stringing nylon cord to the existing poles is sufficient to create an *eruv*, and is standard procedure. Being that the *eruv* wire is usually at approximately the same height as power lines attached to utility poles, it is rarely noticeable, and thus does not constitute an actual physical barrier. A large number of communities around the United States, including ones in the New York, Washington, D.C., and Los Angeles areas, presently have *eruvim*.

Tenafly, a New Jersey suburb with approximately 14,000 residents, has a racially and religiously diverse population, to which a fledgling Orthodox community has recently been added. This community erected its *eruv* approximately two years ago, after obtaining a license from the local telephone and cable companies to attach a wire to their utility poles, and then approached the mayor with a request that she issue a "ceremonial proclamation." According to newspaper reports, the mayor brought the issue before the town council, which demanded that the group officially apply for a permit for the *eruv*. It did so, and the town council voted 5-0 against granting the application. The mayor then ordered the *eruv*'s removal.

Case Status

In mid-December 2000, a group representing fifteen Orthodox families residing in Tenafly filed a federal discrimination suit against the borough and its mayor (collectively the "Town") for their refusal to grant a permit for the *eruv*. The group, known as the Tenafly Eruv Association, sought a restraining order to prevent the borough from removing the *eruv* it had already erected. On December 15, a New Jersey federal district court granted a temporary restraining order and ordered a hearing to decide whether to grant a permanent injunction.

On August 10, 2001, Judge William G. Bassler rendered his decision in the case, denying the Tenafy Eruv Association's motion for a preliminary injunction that would prohibit the Town from dismantling the *eruv*. In his decision, the judge found that the *eruv* constituted symbolic speech for the purpose of First Amendment analy-

sis, but that the utility poles upon which the *eruv* is strung are a nonpublic forum. Therefore, the court determined, the Town may restrict access to the poles based upon subject matter and speaker identity, so long as its restrictions are reasonable in light of the purpose served by the forum and viewpoint neutral.

The judge also disposed of plaintiff's Free Exercise claim, stating that while "the First Amendment restrains certain governmental interference with religious exercise, it does not require governmental action to facilitate that religious exercise." He then cited the Supreme Court's 1990 decision in *Employment Division v. Smith* for the proposition that government need not allow exceptions to a neutral, generally applicable law to avoid a free exercise violation. Furthermore, the judge stated that accommodating plaintiffs' request for an *eruv* "would amount to granting a sectarian group preferential access to governmental property, and would violate the Establishment Clause" because the controlling local ordinance is a "neutral regulation of general applicability."

Finally, with respect to plaintiff's Fair Housing Act (FHA) claim, the court found the town had not violated the relevant portion of the FHA, which makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... religion ...." Rather than impacting the ability of Orthodox Jews to live in Tenafly, the judge said that the Town's refusal to permit the *eruv* impacted their desire to do so, and as such was not actionable.

On October 24, 2002, a unanimous three-judge panel of the 3rd Circuit U.S. Court of Appeals overruled the lower court's decision that would have mandated the removal of the *eruv*. The Third Circuit held that because the town had never enforced its own ordinance against the posting of signs, advertisements or other matter "upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or place," and allowed the placement of Christmas holiday displays, church directional signs and lost animal signs, among various other items, removing the *eruv* would represent religious discrimination in violation of the Free Exercise Clause's "mandate of neutrality toward religion." The panel concluded that "the Borough's selective, discretionary application of [its own ordinance]…devalues Orthodox Jewish reasons for posting items on utility poles by judging them to be of lesser import than nonreligious reasons…."

Defendants' petition to rehear the case by the full 3rd Circuit U.S. Court of Appeals was denied on November 25, 2002.

"The Borough's selective, discretionary application of [its own ordinance]… devalues Orthodox Jewish reasons for posting items on utility poles by judging them to be of lesser import than nonreligious reasons…."

AJC Involvement

In November 2001, AJC, together with the Anti-Defamation League, Ethics & Religious Liberty Commission of the Southern Baptist Convention, and Hadassah, joined an amicus brief authored by the Union of Orthodox Jewish Congregations of America on behalf of plaintiffs in their appeal to the Third Circuit. In our brief we argued that the Town's denial of permission to utilize its utility poles for the erection of an *eruv* constituted a denial of appellants' Free Exercise rights guaranteed by the First Amendment and should be subject to strict scrutiny. Furthermore, the Town's denial of permission to affix plastic strips to utility poles for the purpose of the *eruv* while permitting such strips and other items to be placed upon utility poles for other purposes failed to withstand review under a strict scrutiny standard. In addition, citing numerous instances in

which the court has upheld governmental accommodation of religious observances, we asserted that the Town's accommodation of the *eruv* was not barred by the Establishment Clause.

"RLUIPA seeks to ensure that federal funds are in no way used to suppress religious freedom."

C. Religious Land Use and Institutionalized Persons Act (RLUIPA)

MAYWEATHERS v. TERHUNE

Background

After litigating six areas of religious accommodation under the First and Fourteenth Amendments in the U.S. District Court for the Eastern District of California, Muslim prisoners housed at California State Prison, Solano, amended their complaint to include a claim under the then recently enacted Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA" or the "Act"). Plaintiffs alleged that their right to free exercise was violated when they were penalized for taking a one-hour absence from the prison's work incentive program every Friday for religious purposes.

RLUIPA provides, in pertinent part, that:

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution … even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person … is in furtherance of a compelling governmental interest ... and … is the least restrictive means of furthering that compelling governmental interest.

The Act applies to programs or activities that receive federal financial assistance or when "the substantial burden affects, or removal of that burden would affect [] commerce … among the several states…."

Case Status

Defendants filed a motion to dismiss plaintiffs' RLUIPA claim on the grounds that Congress exceeded its authority under the Spending Clause when it enacted RLUIPA. They also argued that RLUIPA violates the Establishment Clause of the First Amendment as well as the Tenth, Eleventh, and Fourteenth Amendments to the United States Constitution, and the Separation of Powers and Commerce Clauses. On July 2, 2001, the district court denied defendants' motion to dismiss, rejecting their arguments that RLUIPA is unconstitutional.

Specifically, the court found that Congress had not exceeded its authority under the Spending Clause of the Constitution which empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." The Supreme Court has stated that "incident to this power … Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal money upon compliance by the recipient with federal statutory and administrative directives" so long as the Act is in pursuit of the general welfare, its requirements are not vague, it is related to a federal interest, and it is not coercive.

Applying Supreme Court precedent to the case at hand, the district court held that the Act was a constitutional attempt by Congress to ensure religious liberty, particularly the religious freedom of the incarcerated, and that RLUIPA's provisions are directly related to the rehabilitation of federal inmates housed in state prisons. The

Court explained that "in essence, RLUIPA seeks to ensure that federal funds are in no way used to suppress religious freedom," and "this goal is analogous to conditioning the receipt of federal education assistance, so as to ensure that federal funds are not used to subsidize racial discrimination."

In addition, the court rejected defendants' argument that RLUIPA violates the Establishment Clause of the U.S. Constitution by "promoting religion over irreligion." The court found that RLUIPA satisfies all three prongs of the *Lemon* test in that it (1) was motivated by the secular purpose of government protection of religious freedom, (2) does not improperly advance or inhibit religion, but rather frees religious groups and individuals to practice as they otherwise would in the absence of state-imposed regulations, and (3) does not "foster an excessive entanglement with religion," but seeks to protect religious liberty from intrusion by the state.

Defendants appealed the decision, and the case is now pending before the U.S. Ninth Circuit Court of Appeals.

AJC Involvement

AJC was instrumental in the effort to enact RLUIPA and hailed its passage by Congress in July 2000. In support of the Act's constitutionality, AJC joined in an amicus brief to the Ninth Circuit with the Anti-Defamation League focusing on the issue of RLUIPA's constitutionality under the Establishment Clause and the Commerce Clause. Our brief argued that RLUIPA does not violate the Establishment Clause because its goal is the permissible and necessary protection of prisoners' free exercise rights. We asserted that RLUIPA's purpose—accommodation of the free exercise of religion—is secular, it does not impermissibly advance religion or entangle the government in religious practices, and RLUIPA is not an endorsement of religion, but rather "an endorsement of the value and importance of the basic constitutional rights found in the First Amendment." With regard to the Commerce Clause, we argued that RLUIPA passes constitutional muster as a permissible exercise of Congress's authority to regulate interstate commerce. Specifically, we asserted that prisons, hospitals and other governmental institutions governed by the Act are "commercial facilities that provide, consume and produce goods and services," which have a direct and substantial effect on commerce.

D. Zoning

CONGREGATION KOL AMI v. ABINGTON TOWNSHIP

Background

Since its founding in 1994, Congregation Kol Ami (the "Congregation"), a Jewish congregation with about 200 member-families, has held worship services and other religious activities at a variety of temporary locations in the greater Philadelphia area. In 1997, the Congregation began searching for a permanent location, giving priority to identifying a site with existing structures readily adaptable to religious use. In early 1999, the Congregation entered negotiations for the purchase of a property (the "Property") owned by the Sisters of the Holy Family of Nazareth (the "Sisters"), a Catholic order of nuns. The Property, which was used continuously as a convent and place of worship from 1957 to 1999, is located in Abington Township (the "Township"), just outside of Philadelphia, and consists of several buildings (including a 250-seat chapel, a library, a meeting hall and a dining room) on a 10.9-acre parcel of land.

The Township's zoning laws have been modified throughout the years. Most recently, the Township enacted the May 9, 1996 Revised Abington Township Zoning Ordinance (the "1996 Ordinance"), as a result of which, the Property, once located in a "V-Residence Zoning District" that permitted religious institutions by special exception, now sits in an "R-1 Zoning District" that does not allow a special exception for places of worship. The 1996 Ordinance does, however, permit, by special exception, the use of R-1 residential property for kennels, riding academies, municipal complexes, outdoor recreation facilities, emergency services, utility facilities, municipal administration buildings, police barracks, libraries, road maintenance facilities, public or private miniature golf courses, swimming pools, ball courts, tennis courts, ball fields, trails, country clubs, train stations, bus shelters and more.

Although the 1996 Ordinance does not include religious institutions among those eligible for a special exception, the Abington Township Zoning Hearing Board (the "ZHB"), granted a variance to the Greek Orthodox Monastery of the Preservation of Our Lord (the "Monastery") in 1996, after it leased the Property from the Sisters. The variance allowed the Monastery to continue the Sisters' prior religious use, which, due to changes in the zoning laws, was now considered "nonconforming." Thus, the Congregation believed it was also entitled to continue the nonconforming use, i.e., to use the property as a place of worship. In January 2000, the Congregation initiated proceedings before the ZHB requesting such a variance, or alternatively, the approval of a special exception to use the Property as a place of worship.

In an opinion and order dated March 20, 2001, the ZHB denied the Congregation permission to continue the prior nonconforming religious use of the Sisters' property, despite the fact that it had granted such permission just five years earlier to the Monastery. According to the ZHB, the Congregation's use of the Property would cause more traffic, noise and other neighborhood disruptions than the Sisters' or the Monks' use. In addition, the ZHB concluded that the Congregation could not obtain a special exception because the 1996 Ordinance does not include places of worship in the list of those eligible for a special excep-

tion in an R-1 district.

On April 18, 2001, the Congregation sued Abington Township, alleging violations of the U.S. and Pennsylvania Constitutions and federal and state law, including the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The complaint asserted that the Township and its officials discriminated "against religious assembly uses, and in favor of nonreligious assembly uses in most of its zoning districts," and that such discrimination targeted "Jewish places of worship" in particular. The complaint further alleged that the Township imposed an unreasonable limitation on places of worship within the R-1 District and other residential districts, and that the Township's actions "were arbitrary, capricious and unreasonable" and "not justified by any compelling interest." The Congregation argued that, via the modification of the Township's zoning laws throughout the years, "Abington Township has completely eliminated the possibility of new places of worship from locating in residential districts as permitted, conditional or special exception uses." Since existing churches have been allowed to remain, there are now 26 Christian churches located in the Township's residential districts and not a single synagogue or other non-Christian place of worship. In fact, including Kol Ami, only two synagogues exist in the entire Township of Abington, although 20 percent of the Township's population is Jewish.

Case Status

On July 11, 2001, Judge Newcomer of the U.S. District Court, Eastern District of Pennsylvania, ruled that the Township's zoning ordinance was unconstitutional as applied to the Congregation by the ZHB. Relying on the U.S. Supreme Court's decision in *City of Cleburne v. Cleburne Living Center* (1985), Judge Newcomer held that the ZHB's failure to consider the Congregation as a candidate for a special exception constituted a denial of the Congregation's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. In *City of Cleburne*, the Supreme Court struck down a zoning ordinance that required a special use permit to operate a group homes for the mentally retarded in a residential district, but did not require such a permit for apartment houses, boarding and lodging houses, dormitories, hospitals, nursing homes, and other similar uses. Although the defendant city argued that the ordinance was aimed at avoiding concentrations of population and at lessening congestion of the streets, the Court concluded that "these concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit." Likewise, said Judge Newcomer, "[t]here can be no rational reason [in the Kol Ami case, for the Township of Abington] to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club or other similar use to request a special exception under the 1996 Ordinance, but not Kol Ami." Therefore, since the ZHB refused to consider the Congregation as a candidate for a special exception, but permitted the consideration of other similar uses, Judge Newcomer found that the Township violated the Congregation's constitutional rights to equal protection under the Fourteenth Amendment.

Judge Newcomer subsequently issued an order directing the ZHB to hold immediate hearings on Kol Ami's request for a special exception. On August 15, 2001, the ZHB granted the Congregation's application for a special exception permit, allowing it to

Since the ZHB refused to consider the Congregation as a candidate for a special exception, but permitted the consideration of other similar uses, Judge Newcomer found that the Township violated the Congregation's constitutional rights to equal protection under the Fourteenth Amendment.

occupy and use the Property as a synagogue. The Township, however, appealed Judge Newcomer's decision to the Third Circuit Court of Appeals. A three-judge panel of the Third Circuit heard oral arguments for the case on July 29, 2002, and rendered a decision on October 16, 2002, in which it vacated the district court decision that found Abington Township had violated the Congregation's Equal Protection rights. Rather than comparing the *impact* of various uses currently permitted by special exception with the Congregation's proposed use, the panel directed Judge Newcomer to apply a "similarity of uses" comparison prior to assessing the existence of a rational basis for distinguishing between the various uses.

On October 31, 2002, plaintiffs asked the full Third U.S. Circuit Court of Appeals to rehear the case en banc asserting that the panel's decision is in conflict with U.S. Supreme Court precedent. A decision by the Third Circuit as to whether it will hear the case en banc is expected in the near future.

AJC Involvement

AJC joined in an amicus brief filed by the American Civil Liberties Union with the Third Circuit Court of Appeals arguing that because it categorically denies places of worship the opportunity to apply for a special exception, the ordinance is unconstitutional. The brief states, "because both the prohibited use, that of the Congregation, as well as the permitted uses, such as libraries, country clubs and riding academies, impact the neighborhood in substantially similar ways, the concerns related to these impacts cannot represent a rational basis for distinguishing between them."

In addition to filing a brief in support of the Congregation, AJC's Philadelphia chapter has been actively engaged in supporting the Congregation's position in the local community.

III. CIVIL LIBERTIES/DISCRIMINATION

A. Capital Punishment

ATKINS v. VIRGINIA

Background

Daryl Atkins, who has an IQ of 59, was convicted of capital murder after a jury trial and sentenced to death. The U.S. Supreme Court granted certiorari on the question of whether executing mentally retarded individuals violates the Eight Amendment's prohibition against "cruel and unusual punishment."

In its 1989 decision in Penry v. Lynaugh, which also involved the constitutionality of imposing capital punishment on the mentally retarded, the Supreme Court noted that the Eighth Amendment's proscriptions are not static. Rather, "the prohibition against cruel and unusual punishment ... recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" In order to ascertain the current "standard of decency," courts look to evidence of a national consensus with regard to a particular form of punishment. At the time of the Penry decision, only two states had in place a ban against the execution of retarded persons. Finding *Penry*'s evidence—public opinion surveys showing public opposition to the execution of the mentally retarded—insufficient proof of a national consensus on the issue, the Court declined at that time to find the practice in violation of the Eighth Amendment.

Atkins argued that a national consensus against the execution of the mentally retarded had emerged since the *Penry* decision such that it now violates the Eighth Amendment's prohibition of cruel and unusual punishment. As evidence of a national consensus, Atkins pointed to the fact that since *Penry*, sixteen additional states have banned the execution of the mentally retarded, which, "when combined with the twelve states and the District of Columbia that have prohibited the death penalty altogether, ... [signifies that] the majority of jurisdictions in this country prohibit the execution of the mentally retarded."

A national consensus against the execution of the mentally retarded has emerged… such that it now violates the Eighth Amendment's prohibition of cruel and unusual punishment.

Case Status

On June 20, 2002, thirteen years after the Court in Penry held that there was no national consensus on the issue of executing the mentally retarded, the Supreme Court (by a vote of 6 to 3) ruled that executing mentally retarded individuals constitutes cruel and unusual punishment, in violation of the Eighth Amendment.

The majority opinion, delivered by Justice Stevens, relied on public opinion data and state legislation across the country that bans executing the mentally retarded in finding that a national consensus had developed against it. Today, of the thirty-eight states that have a death penalty, eighteen prohibit the execution of the mentally retarded. "It is not so much the number of these States that is significant, but the consistency of the direction of change," wrote Stevens.

Concluding that there was no reason to disagree with the judgment of the state legislatures, Stevens stated that the characteristics of the mentally retarded undermine two important justifications for the death penalty—deterrence and retribution. The deterrent and retributive goals of the death penalty are not significantly advanced because the mentally retarded have a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses."

The dissenters, Chief Justice Rehnquist, Justice Scalia and Justice Thomas, disputed

"Representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, …all 'share a conviction that the execution of persons with mental retardation cannot be morally justified.'"

that there was a national consensus against executing the mentally retarded. Justice Rehnquist called the decision a "post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." Both Scalia and Rehnquist sharply criticized the majority for looking beyond state legislative action to consider the views of religious organizations and polling surveys, which they charged were not necessarily conducted in accordance with scientific principles.

AJC Involvement

AJC joined in an amicus brief filed by the United States Conference of Catholic Bishops that urged the Court to consider the voices of religious and religiously-affiliated institutions when assessing "evolving standards of decency." The brief was signed by an interfaith coalition of organizations, all of whom agree that executing the mentally retarded violates the Eighth Amendment. In stating its views concerning the execution of persons with mental retardation, AJC emphasized that it opposes capital punishment in general, which it believes is cruel, unjust, and incompatible with the dignity and self-respect of man, and in particular, with respect to the execution of mentally retarded individuals.

Justice Stevens cited the amicus brief in which AJC participated in a footnote of his opinion. He stated, "…representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all 'share a conviction that the execution of persons with mental retardation cannot be morally justified.'"

B. 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 are leaders and active participants in the movement to outlaw abortion, which they believe is equivalent to murder. They advocate the use of violence against abortion providers and contend that the murder of abortion providers is "justifiable homicide." As part of their campaign to stop abortions, defendants issued four "documents" that formed the basis for the lawsuit:

(1) 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 "informa-

tion leading to the arrest, conviction and revocation of license to practice medicine" (sic).

(2) 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."

(3) A bumper sticker distributed by defendants, stating in large black letters "EXECUTE," and then in red letters "Murderers" and "Abortionists."

(4) 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 while entering his Pensacola, Florida, 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, Alabama, 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, New York, physician, was shot and killed by a sniper while standing in the kitchen of his home.

The Freedom of Access to Clinic Entrances Act (FACE) was enacted in 1994, in response to the increasingly aggressive tactics of extremist elements within the anti-choice movement.

Case Status

The issue before the district court on defendants' summary judgment motion was whether any of the four challenged docu-

"Political hyperbole is protected speech; making people fear for their lives is not."

ments 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."

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.

Upon appeal by defendants to the Ninth Circuit, a three-judge panel issued a unanimous opinion on March 28, 2001, vacating the jury's verdict and the district court's injunction and entered judgment for the defendants. Ruling that the defendants' statements are political speech protected by the First Amendment, the appellate court said it was following the U.S. Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.*, in which the Court held that civil liability could not be imposed on individuals who had threatened violence against African Americans who did not observe an economic boycott of white businesses.

In light of the panel's opinion, plaintiffs requested a rehearing en banc. On May 16, 2002, the Ninth Circuit, sitting en banc, reversed (by a vote of 6 to 5) the decision of the three-judge panel and reinstated the jury's verdict. The Court held that the posters and Nuremberg Files both amounted to true threats, correctly defined by the district court as a statement which "a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm," and thus do not receive protection under the First Amendment. In reaching its conclusion, the Court distinguished between speech that advocates violence, which is protected by the First Amendment, and speech that threatens a person with violence, which is not.

Rejecting defendants' argument that the challenged documents should not be considered true threats because they contain no threatening language on their face, the Court pointed to Ninth Circuit precedent dictating that "alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." Considering that the poster format had "acquired currency as a death threat for abortion providers" and the genuine fear suffered by the plaintiffs, the Court held that the posters were not just a political statement, as they imply that the plaintiffs are the next in line to be shot and killed.

The majority also disagreed with the panel's ruling that true threats require the speaker to have the means and intent to carry out the threats, reaffirming that the intent requirement for a true threat is only that the speaker intentionally or knowingly communicate the threat. The Court distinguished this case from *Claiborne Hardware* on the grounds that in *Claiborne* no specific individuals were targeted, there was no indication that the speaker had committed similar prior acts of violence, and there was no indication that the listeners took the statements as a serious threat. Instead, the Court analogized this case to *United States v. Hart* (8th Cir. 2000), in which two Ryder trucks were placed in front of an abortion clinic. Because a Ryder truck had been used in the Oklahoma City bombing, the Court found the placement of the trucks to be a true threat, since they had become a "symbol of something beyond the vehicle."

Defendants appealed the case to the U.S. Supreme Court, and that petition for certiorari is still pending.

AJC Involvement

In October 1999, AJC, the Anti-Defamation League, and Hadassah filed a joint amicus brief in the Ninth Circuit authored by Professor Erwin Chemerinsky of the University of Southern California Law School, arguing that the standard of the "true threats" applied by the district court was correct and should be upheld. "Political hyperbole is protected speech," the brief argues, "making people fear for their lives is not."

In support of plaintiffs' petition for rehearing en banc, AJC joined again in an amicus brief authored by Professor Chemerinsky urging the full court of the Ninth Circuit to rehear the case. Our brief argued that the panel's decision conflicted with both existing Ninth Circuit precedent and Supreme Court precedent on the law of "true threats." First, we pointed out that the panel ignored the firmly established principle that it is for the jury to decide, based upon the totality of the circumstances, whether speech constitutes a true threat. Second, we argued that the panel's ruling that true threats require the speakers personally to have the means and intent to carry out the threats themselves contradicts established Ninth Circuit law. Finally, our brief distinguished *Claiborne Hardware*, which involved statements made to a crowd and was an action brought by individuals who were not the targets of the threats, i.e. the owners of the boycotted businesses. In contrast, this case involves targeted threats at particular individuals and the plaintiffs seeking a remedy are the individuals who were threatened. The brief was resubmitted to the court upon its decision to rehear the case en banc.

BLACK v. COMMONWEALTH OF VIRGINIA

Background

Barry Elton Black was indicted for violating Virginia's "cross burning" statute after an approximately twenty-five-foot-tall cross was burned at an August 1998 Ku Klux Klan rally that he organized and led. Like Black, Richard J. Elliott and Jonathan O'Mara were convicted of violating the statute. In May 1998, Elliott, O'Mara, and a third individual burned a wooden cross on the property of James S. Jubilee, an African American neighbor of Elliott's.

"We tolerate the expression of hatred because the First Amendment guarantees freedom of all expression, but we distinguish from true expression words and expressive conduct that are intended and likely to intimidate."

Virginia's "cross burning" statute ("the statute") provides, in pertinent part, that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Black filed a motion to dismiss the indictment on the grounds that the statute was unconstitutional in that it violated Free Speech rights provided for in the First Amendment.

Case Status

The trial court denied Black's motion to dismiss the indictment, and he appealed to the Virginia Court of Appeals, which upheld the conviction. In November 2001, the Virginia Supreme Court overturned the conviction by a vote of 4-3, the majority agreeing with Black that the statute violated the First Amendment.

As in the *Black* case, the Court of Appeals affirmed the convictions of Elliott and O'Mara, and the Virginia Supreme Court overturned them on the basis that the statute violated the First Amendment. In striking down the statute, the court relied on the U.S. Supreme Court's 1992 decision in *R.A.V. v. City of St. Paul*, which it held directly controlled this case. In *R.A.V.*, the teenaged defendant was convicted of violating St. Paul's bias-motivated crime ordinance (the St. Paul Statute) after he and others burned a cross they constructed out of broken chair legs inside the fenced yard of a black family. The St. Paul statute provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

In a 5 to 4 decision, the Supreme Court struck down the St. Paul statute as facially invalid. Writing for the majority, Justice Scalia began with the principle that under the First Amendment, content-based restrictions on speech are presumptively invalid, but that there are certain categories of speech that have received less First Amendment protection because their "slight social value" is outweighed by the "social interest in order and morality." Examples of such categories of speech are "fighting words," obscenity, and defamation. However, the Court was careful to distinguish between discrimination against categories of speech that are constitutionally proscribable and discrimination based upon the underlying message of the speech.

Applying the principles enunciated in *R.A.V.*, the Virginia Supreme Court held that "[w]hile a statute of neutral application proscribing intimidation or threats may be permissible, a statute [such as the one here] punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment." The court also found the statute to be overbroad because of its designating the act of cross burning as prima facie evidence of an intent to intimidate, stating: "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad."

The three dissenting judges, in addition

to noting the tradition of judicial deference to the legislature, focused on the intent requirement of the statute in finding it constitutional. Specifically, the dissent distinguished the statute struck down in *R.A.V.*, which prohibited all cross burning that "one knows or has reasonable ground to know arouses anger, alarm or resentment," from the Virginia statute, which only prohibited cross burning done with the intent to intimidat—interpreted by the Virginia Supreme Court to mean "to place one in fear of bodily harm"—without regard to racial or other animus.

The State of Virginia appealed the case to the U.S. Supreme Court, which granted certiorari on May 28, 2002. Oral arguments have yet to be heard.

AJC Involvement

AJC joined with the Anti-Defamation League in an amicus brief to the Supreme Court in which it argued that cross burning with the intent to intimidate a targeted individual is expressive conduct outside the scope of First Amendment protection. The brief cited the Court's statement in *R.A.V. v. City of St. Paul* (1992) that "our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." The brief emphasized that the statute only penalized the burning of a cross with the accompanying *mens rea* requirement of an intent to intimidate. We explained that "[a]n act intended to intimidate others is different in kind, and forfeits expressive protection, from an act intended to make a political, or racial, or religious, point.... We tolerate the *expression* of hatred because the First Amendment guarantees freedom of all expression, but we distinguish from true expression words and expressive conduct that are intended and likely to intimidate."

QUIGLEY v. ANTI-DEFAMATION LEAGUE AND ROSENTHAL

Background

In October 1994, Mitchell and Candice Aronson contacted the Denver Regional Office of the Anti-Defamation League (ADL) and reported that they were terrified of their neighbors, William and Dorothy Quigley. The Aronsons informed ADL that they had inadvertently overheard some of the Quigleys' cordless telephone conversations with a radio scanner and had recorded some of those conversations. Based upon what they overheard, and other incidents of reported harassment, the Aronsons believed that their family was the target of an anti-Semitic campaign to drive them out of their neighborhood.

Although the Aronsons wanted to call the police about what they overheard, they were concerned that they may have violated the law by overhearing the cordless telephone calls. Consequently, they contacted ADL expressing their concerns about their neighbors and about their overhearing telephone calls. ADL referred the Aronsons to a criminal defense attorney, who assisted in the drafting of and helping to enact Colorado's ethnic intimidation statute. An attorney experienced in civil law was subsequently brought in as co-counsel for the Aronsons.

The judgment violated the First Amendment's protection of freedom of speech and freedom of association by imposing liability on a public interest organization based on the unratified conduct of its members and volunteers.

In October 1994, when the Aronsons first contacted ADL, inquiries were made by the Aronsons, their attorney and ADL to the Jefferson County District Attorney, the FBI, and the FCC. All parties to whom inquiries were made believed the tapes were legal. The District Attorney informed the Aronsons that if the tapes were furnished to their office, they would be used to investigate possible charges against the Quigleys. The tapes were never furnished to ADL.

Before charges were brought by the Jefferson County District Attorney, the Aronsons filed a civil lawsuit against the Quigleys based on Colorado's ethnic intimidation statute. That lawsuit relied on what the Aronsons and others believed to be incidents targeting the Aronsons, anti-Semitic statements and threats overheard in the Quigleys' telephone conversations.

There was considerable press interest in the Aronsons' lawsuit and their allegations. In order to assist the Aronsons in dealing with the media attention, ADL's Denver regional office held a press conference on December 7, 1994, the day after the Aronsons' civil complaint was filed. ADL's statements to the press at the press conference and a radio call-in show that night were based on its understanding of how the Aronson's private attorneys viewed the matter, the fact that the Jefferson County District Attorney was considering ethnic intimidation charges, the verified civil complaint filed by the Aronsons in court, and what the Aronsons had told ADL.

Shortly after the Aronsons' civil suit was filed against the Quigleys, the Jefferson County District Attorney brought charges against Bill and Dee Quigley for ethnic intimidation, felony menacing, and false reporting. Most of the charges brought by the District Attorney against Bill and Dee Quigley were subsequently dropped.

Soon after the Aronsons' lawsuit was filed, it was learned that the Federal Wiretap Act had been amended, effective October 25, 1994. The new law made it illegal to intercept and record cordless phone conversations and to use or disclose information learned from such interceptions. The Aronsons' taping of the Quigleys' conversations occurred both before and after the effective date of the amended statute.

The Quigleys then filed a counterclaim against the Aronsons for defamation, invasion of privacy, and violation of the federal wiretap act, and named ADL's Regional Director in Denver and ADL as defendants. Although the Aronsons, the Quigleys, the Aronsons' lawyers, the District Attorney and the Sheriff's Department later agreed to settle their claims against each other, the lawsuit continued against ADL and the director of the ADL Denver office.

Case Status

Trial in this case commenced April 3, 2000, and on April 28, 2000, a twelve-person jury found the defendants liable for defamation, invasion of privacy, false light invasion of privacy and violation of the Federal Wiretap Act. The agency's liability under the wiretap act was based on the jury's finding that the Aronsons' attorneys had acted as agents of ADL in filing the Aronsons' civil complaint against the Quigleys, which contained some excerpts of the intercepted conversations, even though no one at ADL had listened to the tapes or read transcripts of the intercepted conversations. The jury awarded $1.5 million damages to the Quigleys to compensate them for economic and noneconomic injury. The jury also awarded $9 million in punitive damages.

The district court refused to set the verdict aside or eliminate or reduce the dam-

ages. ADL has appealed the case to the Tenth Circuit Court of Appeals. The case is now pending.

AJC Involvement

In November 2001, AJC, along with twelve other national organizations that are deeply concerned about the effects of liability on freedom of association and freedom of speech, filed a joint amicus brief with the Tenth Circuit authored by Professor Erwin Chemerinsky.

Addressing the constitutionality of large damage awards against public interest organizations based on the conduct of their volunteers, the brief argued that the judgment violated the First Amendment's protection of freedom of speech and freedom of association by imposing liability on a public interest organization based on the unratified conduct of its members and volunteers. The brief also contended that because the speech was of public concern, the First Amendment precludes liability for revealing the substance of the illegally recorded conversations, without a finding of actual malice.

C. Gender Discrimination

HIBBS v. NEVADA DEPARTMENT OF HUMAN RESOURCES

Background

In 1993, Congress passed the Family and Medical Leave Act (FMLA), which provides eligible employees with twelve workweeks of leave during any twelve-month period to care for "the spouse, son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." Congress enacted the statute upon finding that "due to the nature of the roles of men and women in our society, the primary responsibility for family care taking often falls on women, and such responsibility affects the lives of women more than it effects the working lives of men." The purpose of the FMLA is thus to remedy gender discrimination "by ensuring that leave is available for eligible medical reasons … and for compelling family reasons, on a gender-neutral basis…." The statute authorizes lawsuits by employees "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

In April and May of 1997, William Hibbs, at the time employed by the Welfare Division of the Nevada Department of Human Resources, requested and was granted, pursuant to the FMLA, twelve weeks leave to care for his sick wife to be used intermittently as needed. He later requested and was granted "catastrophic leave," which the Department indicated would be counted against his permitted annual FMLA leave. The last day he reported to work was August 5, 1997.

In October 1997, Hibbs was informed that he had exhausted his annual leave allotment. He requested additional leave and claims that this request was approved, which the Department disputes. In November of 1997, the Department informed Hibbs that he would not be granted further leave. When Hibbs failed to return to work and did not contact the Department to explain his absence, the Department initiated disciplinary proceedings against him. Hibbs was subsequently terminated.

Case Status

Hibbs filed a complaint against the Nevada Department of Human Resources, and the

"Because it is targeted at gender stereotypes that are both a cause and a product of unconstitutional gender discrimination, the FMLA falls squarely within Congress' traditional authority…."

State of Nevada, in federal district court alleging that the Department had, among other things, violated the FMLA. In response to his complaint, the Department asserted that his FMLA claim was barred by the Eleventh Amendment to the U.S. Constitution, which renders states immune from private suit in the federal courts. The district court granted summary judgment in favor of the Department, and Hibbs appealed to the Ninth Circuit. The United States intervened in the suit to support the constitutionality of applying the FMLA to the states.

A unanimous panel of the Ninth Circuit reversed the district court and held that the Eleventh Amendment does not bar suits alleging violations of the FMLA against the states or its agencies. According to the court, "Under the Eleventh Amendment, a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by that state." Since there was no express waiver by the state, the court turned to the issue of abrogation, explaining that "Congress can abrogate state sovereign immunity if it both (1) unequivocally expresses its intent to do so, and (2) acts pursuant to a valid exercise of power."

Finding that the language of the statute sufficiently expressed Congressional intent to abrogate state immunity, the court turned to the question of whether Congress enacted the specific section of FMLA at issue pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. Citing the Supreme Court's decision in *Seminole Tribe of Fla.. v. Florida* (1996), the court explained that Section 5 grants Congress the power to enact "appropriate legislation" to enforce the provisions of the Fourteenth Amendment which provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws."

The Supreme Court held in *City of Boerne v. Flores* (1997), "It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment and its conclusions are entitled to much deference. However, for legislation to be constitutional, there must be a congruence of proportionality between the injury to be prevented or remedied and the means adopted to that end." In two recent cases, the Supreme Court has ruled that Congress overstepped its Section 5 bounds. In *Bd. of Trustees of the Univ. v. Garrett* (2001), the Supreme Court held that the Eleventh Amendment immunizes states from suit by private individuals in federal courts under the Americans with Disabilities Act (ADA). And, in *Kimel v. Fla. Bd. of Regents* (2000), the Court held that state employers could not constitionally be subjected to private suits in federal court under the Age Discrimination in Employment Act (ADEA).

The Fifth Circuit is the only other federal appellate court to consider the constitutionality of the section of the FMLA challenged in *Hibbs*, and determined in *Kazmier v. Widmann* (2000) that the stature was not a valid exercise of Congress's authority to legislate for the enforcement of Fourteenth Amendment provisions. It found the remedy provided for to be incongruent and disproportional with respect to the purported constitutional violation.

The Supreme Court of the United States recently granted certiorari to resolve this circuit split.

AJC Involvement

In October 2002, AJC joined an amicus brief submitted to the U.S. Supreme Court

by a coalition of advocacy organizations led by the National Women's Law Center in support of the FMLA's constitutionality. The brief, authored by former U.S. Solicitor General Walter Dellinger, argues that through the FMLA, "Congress clearly sought to promote equality by eradicating traditional barriers that limit opportunities for both men and women," and that "[b]ecause it is targeted at gender stereotypes that are both a cause and a product of unconstitutional gender discrimination, the FMLA falls squarely within Congress' traditional authority under Section 5 of the Fourteenth Amendment."

The brief also argues that the FMLA is a "congruent and proportional" remedy for sex discrimination in the workplace, and that the history and reasoning of the Supreme Court's Equal Protection decisions applying heightened scrutiny to gender discrimination argue for according Congress more latitude to act and placing a lesser burden of proof on Congress with respect to establishing the record on which it acted. We also explain the importance of the damages remedy in private FMLA actions as providing an incentive to states that is crucial to its effectiveness.

D. 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 went undetected.

Case Status

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. In 1997, a federal court jury convicted Nelson and Price under 18 U.S.C. §245(b)(2)(B) for violating Rosenbaum's civil rights. Section 245 provides in pertinent part:

> Whoever, whether or not acting under color of law, by force or threat of 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"). 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 ("§5"). 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, 2000, 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 heard oral argument in the case in January 2001, and in January 2002 held that the statute at issue was a constitutional exercise of Congress's power under the Thirteenth Amendment which provides that "neither slavery nor involuntary servitude…shall exist within the United States" and that "Congress shall have the power to enforce" the Amendment. Agreeing with arguments set forth in the amicus brief filed by AJC together with other organizations, the court of appeals explained that the Supreme Court has interpreted the language of the Thirteenth Amendment to give 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. The court relied upon the Supreme Court's decision in *Shaare Tefila Congregation v. Cobb*, in which it 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 Court also held that the evidence was sufficient to support the defendants' conviction under the statute. However, the court went on to strike down the conviction of Nelson and Price, concluding that the trial judge had improperly manipulated jury selection in a deal with the lawyers by placing a Jewish man on the jury who had expressed doubts about his ability to be objective in return for an additional black juror. The verdict was vacated and a new trial was ordered.

Presumably seeking to avoid another trial, Nelson subsequently petitioned the Supreme Court to review the case as to the constitutionality of the federal civil rights statute. On October 7, 2002, the Supreme Court denied Nelson's petition for certiorari. A new trial date will therefore most likely be forthcoming.

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 federal civil rights statute's constitutionality. The brief argued that the statute is constitutional under the Commerce Clause, as an essential part of a larger regulation of economic activity. The brief emphasized that the statute is part of a regulatory regime that outlaws certain types of discrimination based on race, religion, and national origin that interferes with the use of a state facility or benefit, distinguishing the statute from the one struck down in *Morrison*.

The amicus brief further argued 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.

E. School Funding Equity

CAMPAIGN FOR FISCAL EQUITY v. STATE OF NEW YORK

Background

In 1993, the Campaign for Fiscal Equity (CFE) filed a complaint in which it charged that the State of New York has for years underfunded the New York City public schools in violation of the New York State Constitution's requirement that the State provide a "sound basic education" to all its children. CFE also claimed that New York's funding system violated federal anti-discrimination laws because it had "an adverse and disparate impact" on minority students.

In 1995, the Court of Appeals, New York's highest court, denied the State's motion to dismiss and set forth the issue for trial as to whether CFE could "establish a correlation between funding and educational opportunity." The Court of Appeals distinguished this case from *Board of Education, Levittown Union Free School District v. Nyquist*, in which it rejected an equal protection challenge to New York's school financing system. By contrast to the claim of inequality made in *Levittown*, CFE's claim rested on the state education clause and the alleged inadequacy of the education provided New York City school children.

Case Status

After a seven-month trial, 72 witnesses, and the admission of 4,300 documents into evidence, on January 9, 2001, Justice Leland DeGrasse of the New York State Supreme Court ruled that "New York State has over the course of many years consistently violated the State Constitution by failing to provide the opportunity for a sound basic education to New York City public school students." Pursuant to this ruling, the judge ordered the State to reform its school funding system and issued guiding parameters for such reform.

Justice DeGrasse concluded that CFE had met the challenge set for it by the Court of Appeals. In his ruling, the judge defined a "sound basic education" as one that gives students "the foundational skills that [they] need to become productive citizens capable of civic engagement and sustaining competitive employment." The judge then held that (1) "the education provided New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York State Constitution" and that "the State's actions are a substantial cause of this constitutional violation," and (2) "the State school funding system has an adverse and disparate impact on minority public school children and that this disparate impact is not adequately justified by any reason related to education."

In ruling that the State's failure to provide New York City students with a sound basic education was a result of its school funding system, the judge rejected the position of the State's experts that increased funding cannot be shown to result in improved student outcomes and that a student's socioeconomic status is determinative of their achievement. As he explained:

> ... poverty, race, ethnicity, and immigration status are not in themselves determinative of student achievement. Demography is not destiny. The amount of melanin in a student's skin, the home country of her antecedents, the amount of money in the family bank account, are not the inexorable determinants of academic success. However, the life experiences ... that are correlated with poverty, race, ethnicity, and immigration status, do tend to depress academ-

The Appellate Division erroneously concluded that "an eighth-grade education is sufficient preparation for productive citizenship in today's complex society."

> ic achievement. The evidence introduced at trial demonstrates that these negative life experiences can be overcome by public schools with sufficient resources well deployed.

The State of New York appealed the trial court's decision, and on June 25, 2002, the Appellate Division, First Department of New York reversed the lower court's ruling. It found that there was no evidence that students were not being provided with the opportunity of a sound basic education as mandated by the Education Article of the Constitution. The court went on to write that the State's obligation would generally be fulfilled after the students had received an eighth or ninth grade education. According to the court, "the 'sound basic education' standard enunciated" by the New York Court of Appeals "requires the state to provide a minimally adequate educational opportunity, but not … to guarantee some higher, largely unspecified level of education, as laudable as that goal might be." The ruling also dismissed a finding that the State's school financing system had violated federal civil rights law because minorities were disparately impacted. An appeal to the New York Court of Appeals is pending.

AJC Involvement

In September 2001, AJC joined in an amicus brief in support of plaintiffs, which began by pointing out that "public education is the bulwark of our democratic system." Because Judge DeGrasse's order did not contain specifics as to a remedy, amici expressed concern that the legislature will be slow in developing remedies and that ultimately such remedies will prove inadequate. Accordingly, we urged the appellate court to mandate that the trial court consult with an independent panel of experts in order to "stipulate specific benchmarks of a sound basic education, ... determine the actual cost of meeting those benchmarks, and ... order defendants to appropriate at least that amount of money for the benefit of the State's schoolchildren." Amici otherwise expressed support for the trial court's ruling.

AJC will soon file an amicus brief with the New York Court of Appeals in which we will argue that the Appellate Division's decision was "legally flawed and contrary to the overwhelming evidence adduced at trial" and that it erroneously concluded that "an eighth-grade education is sufficient preparation for productive citizenship in today's complex society."

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