THE AMERICAN
JEWISH COMMITTEE

LITIGATION REPORT
DECEMBER 2003

AJC *in the* COURTS

This report was prepared by Jeffrey Sinensky, Legal Director, Kara Stein, Assistant Director, Domestic Policy and Legal Affairs, and Danielle Samulon, Assistant House Counsel, of The American Jewish Committee, with assistance from Josh Levine, Goldman Fellow in Domestic Policy.

CONTENTS

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. Public Display of the Ten Commandments

GLASSROTH v. MOORE

Background

In November 2000, Judge Roy Moore, a state court judge in Gadsden, Alabama, was elected chief justice of the Alabama Supreme Court, having run a campaign in which his posting of the Ten Commandments in his courtroom figured centrally. Upon ascending to his new position, Chief Justice Moore on his own initiative commissioned the design of a monument reflecting "the moral foundation of the law" and "the sovereignty of God over the affairs of men" for placement in the rotunda of the Alabama State Judicial Building, which houses the State Supreme Court, the Court of Civil Appeals, the state law library, and the Alabama Administrative Office of the Courts. On the night of July 31, 2001, unbeknownst to the other judges on the court, the chief justice had the 5,280-pound granite monument installed in the rotunda and it was unveiled the next day.

The monument, the construction and installation of which were paid for with private funds, consists of a three-foot by three-foot by four-foot cube atop which sit two tablets, tilted so as to appear like an open Bible, on which are inscribed the Ten Commandments as excerpted from the Book of Exodus in the King James Bible, a Protestant version of the Bible. The sides of the cube are engraved with fourteen quotations taken from secular sources, including excerpts from the Declaration of Independence, the National Anthem, the Pledge of Allegiance, and historical figures such as William Blackstone, attesting to the relationship between God's laws and nature's laws. At the unveiling, Chief Justice Moore stated that the monument "serves to remind the Appellate Courts and judges of the Circuit and District Court of this state and members of the bar who appear before them, as well as the people of Alabama who visit the Alabama Judicial Building, of the truth stated in the Preamble to the Alabama Constitution that in order to establish justice we must invoke 'the favor and guidance of Almighty God.'"

Three Alabama attorneys who practice regularly in the Alabama courts and have come into contact with the monument on numerous occasions brought suit in federal district court claiming that the chief justice's actions violate the Establishment Clause of the First Amendment. After a week-long trial at which Moore testified, the court ruled in favor of plaintiffs and ordered the removal of the monument within thirty days. The chief justice appealed that decision to the Eleventh Circuit Court of Appeals.

Case Status

On July 1, 2003, a unanimous three-judge panel of the appeals court rendered its decision affirming the district court's ruling, and ordered Moore to remove the monument. The district court analyzed the challenged action under *Lemon v. Kurtzman* (1971), the much maligned but still valid three-prong test for Establishment Clause violations. *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. The court found that Moore's monument failed the

"[The monument] sends a message of exclusion to many who do not adhere to the particular version of the Ten Commandments depicted."

first prong of the *Lemon* test in that, according to the Chief Justice's own testimony, "his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures." As further evidence that the placement lacked a secular purpose, the court pointed to the chief justice's unveiling speech in which he "described his purpose as being to remind all who enter the building that 'we must invoke the favor and guidance of Almighty God.'" In addition, the court held that the monument ran afoul of the second prong of the *Lemon* test, citing with approval the district court's determination that "a reasonable observer 'would find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity.'"

The court took notice of Moore's claim that "courts are bound by the Constitution, not by another court's interpretation of that instrument," and that he, as chief justice, "is not a ministerial officer; nor is he answerable to a higher judicial authority in the performance of his duties as administrative head of the state judicial system." Recalling the intransigence of Southern governors who attempted to resist judicial desegregation orders, the Eleventh Circuit warned Moore that its order would be enforced, stating that "[t]he rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle." Moore refused to remove the monument, and eight other justices of the state high court subsequently suspended him for his failure to comply. Finally, Alabama officials removed the monument from public display.

The chief justice filed a petition for writ of certiorari with the U.S. Supreme Court, which was denied on November 3, 2003. He was subsequently removed from office by a state ethics panel, which found that Moore had "willfully and publicly defied the orders of a United States district court."

AJC Involvement

AJC joined in an amicus brief, filed by an interfaith coalition with the Eleventh Circuit, asserting that the monument violates the Establishment Clause of the First Amendment in that it offends the freedom of conscience of the nonreligious and those outside the Judeo-Christian tradition, and sends a message of exclusion to many who do not adhere to the particular version of the Ten Commandments depicted in the monument. "That this message of endorsement is expressed in the state's highest court of law exacerbates its effect, as courts of all places should provide equal treatment regardless of religious persuasion," we argued.

B. Religion in the Public Schools

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 pre-dinner 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," "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. Specifically, VMI offered three allegedly secular purposes in defense of the supper prayers: that they "(1) serve VMI's academic mission 'of developing cadets into military and civilian leaders,' (2) serve institutional or expressive purposes, and (3) accommodate the religious needs of students, as required by the Free Exercise Clause of the First Amendment." 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 the Supreme Court's *Lemon* test, and rejected the defendant's contention that *Marsh v. Chambers* (1983) instead controls—a case in which the Supreme Court upheld Nebraska's practice of beginning legislative sessions with a prayer based on the "unique history" of the practice. The court also addressed defendants' 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 Independent School District 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. As to *Lemon*'s first prong, the district court rejected each of VMI's claims finding that the supper prayers have no constitutionally legitimate secular purpose. In addition, the district court ruled that they failed the second *Lemon* prong in that "the primary effect of the prayers is to advance religion." Finally, the court found that VMI's supper prayers result in an unconstitutional entanglement between religion and the state because the prayers are drafted by the school chaplain and read at the direction of the superintendent.

On April 28, 2003, on appeal to the U.S. Fourth Circuit Court of Appeals, a three-judge panel affirmed the district court's decision that VMI's practice of holding daily organized supper prayers violates the First

"The purpose of an official school prayer is plainly religious in nature."

Amendment. As did the lower court, the Fourth Circuit rejected defendant's argument that *Marsh* was applicable in the present case, and instead applied the *Lemon* test to evaluate the Establishment Clause challenge. In doing so, the court gave special consideration to the principles enunciated in two other school prayer cases, *Lee v. Weisman* (1992) and *Santa Fe,* in which the Supreme Court found the existence of "improper … coercion of religious worship." As in those cases, the court determined that despite the fact that VMI's cadets are college students rather than secondary school children as in *Lee and Santa Fe*, VMI cadets are "plainly coerced into participating in a religious exercise" due to the social pressure and training that are integral to VMI's agenda.

As to the first prong of the *Lemon* test, the court stated that it was "inclined to disagree" with defendant's argument that there was a "secular purpose" for the supper prayer. Citing Supreme Court precedent, the court explained that "the purpose of an official school prayer 'is plainly religious in nature.'" In addition, the court expressed concern that defendant "seeks to obscure the difference between educating VMI's cadets about religion, on the one hand, and forcing them to practice it, on the other." The court next found that while it "recognized and respected a cadet's individual desire to say grace before supper," the practice fails *Lemon*'s second prong in that the "primary effect" of VMI's practice is to promote religion. The court stated that it "sends the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer." Turning finally to *Lemon*'s third prong, the court held that because "VMI has composed, mandated, and monitored a daily prayer for its cadets," the school's sponsorship of the practice "excessively entangles" it with religious activity forbidden by the Establishment Clause.

Defendant subsequently filed a petition for a rehearing en banc, which was denied in August 2003.

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 with the Fourth Circuit in support of plaintiff's assertion that the Virginia Military Institute's supper prayer is unconstitutional, stating that "[r]eligious 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 outside the legislative context 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 First Amendment Establishment Clause.

C. School Aid Programs

COLORADO CONGRESS OF PARENTS, TEACHERS AND STUDENTS v. OWENS

Background

Colorado's school voucher program, the Colorado Opportunity Contract Pilot Program (COCPP), was enacted by the state legislature on April 16, 2003, making it the first state voucher legislation passed since the U.S. Supreme Court declared in *Zelman v. Simmons-Harris* (2002) that taxpayer-supported vouchers for private and parochial schools do not violate the federal Constitution's Establishment Clause.

Under the COCPP, specified school districts are required to enter into "opportunity contracts" with the parents of eligible children, pursuant to which the school district must pay for such children to attend private schools, rather than the public schools they would otherwise attend. Students in grades kindergarten through twelve are eligible to participate if they (1) reside in a school district that has received an academic performance rating of "low" or "unsatisfactory" (even if the specific school they would otherwise attend has an academic rating of "average," "high," or "excellent"), (2) are eligible for a free or reduced-cost lunch under the National School Lunch Act, (3) attended a public school (or had not reached mandatory school attendance age) in the year prior to application, and (4)(a) for grades 4-12, performed at a proficiency level of "unsatisfactory" in at least one academic area on a statewide assessment or college entrance exam, or (4)(b) for grades K-3, lack "overall learning readiness" based on certain risk factors, reside in the attendance area of a school rated "low" or "unsatisfactory," or (for grades 1-3 only) performed below grade level on certain reading assessments.

A student selected for participation in the COCPP must apply for admission to a participating private school, which is then free to apply any of its own admission criteria that do not conflict with voucher program requirements. Private schools are eligible to participate so long as they do not discriminate against "eligible children" on the basis of race, color, religion, national origin, or disability (although the voucher program does not prohibit discrimination on any of those grounds in the admission of other students and in the employment of faculty and staff). Under the program, school districts have no discretion to disallow the participation of a private school that demonstrates compliance with the statutory standards set for the voucher program. Nor does the program limit participation to private schools that are nonsectarian. In fact, the vast majority of the private schools that are eligible to participate in the voucher program are sectarian. Of those located within the eleven school districts required to participate in the voucher program, nearly three-quarters are sectarian.

Once enrolled in a private school under the voucher program, a student is eligible to continue in the program and to receive a publicly subsidized private-school education through grade twelve, regardless of the academic performance ratings of the public schools the student would otherwise attend. The school district of residence of a student attending private school under the program is required to pay for the student's private-school education in an amount that is the lesser of (a) the private

While "religion is a part of our tradition, public funding of religion is not."

school's "actual educational cost per pupil," or (b) 85 percent, 75 percent, or 37.5 percent of the school district's per pupil operating revenues, for students in grades 9-12, 1-8, and kindergarten, respectively. No additional state funding is provided to cover these voucher payments, which school districts must make from funds they otherwise would use to operate the public schools. Pursuant to the voucher legislation, the school district's payments for the private-school education of students participating in the program are to be made by check in four equal installments throughout the school year and are to be made out "in the name of the eligible child's parent." These checks are to be sent by the school district to the participating nonpublic school in which the parent's child is enrolled, and the parent is to then "restrictively endorse the check for the sole use of the participating nonpublic school."

Case Status

In May 2003, a group of Colorado citizens, the Colorado PTA, and others, brought suit in the District Court of Denver County, challenging the voucher legislation as unconstitutional. They charged that the Colorado vouchers program places no restrictions on how participating schools may expend public funds once they receive them and that the vast majority of private schools eligible to participate in the program are sectarian with their primary mission being to inculcate religious values. In addition, plaintiffs argued that the voucher program would drain precious resources from public schools, presenting them with the impossible task of doing more with less.

The complaint specifically alleged that the program violated the Colorado Constitution which, among other things, (1) prohibits the Colorado General Assembly from enacting "local or special laws" with respect to "the management of common schools"; (2) provides that local school boards "shall have control of instruction in the public schools of their respective districts"; (3) provides that "no person shall be required to . . . support any ministry or place of worship, religious sect or denomination against his consent"; (4) prohibits the state and its political subdivisions, including school districts, from ever "paying from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination whatsoever"; and (5) provides that "[n]o appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association."

In July 2003, plaintiffs filed a motion for judgment on the pleadings arguing that the voucher program constitutes "local or special legislation" prohibited by the Colorado constitution, and that it violates the assignment to local school boards of control over the instruction provided with the school district's funds. In doing so, plaintiffs urged the court to swiftly resolve the case in their favor on these less controversial grounds, without having to address the church-state concerns. In November 2003, plaintiffs filed a motion for summary judgment on all of the remaining issues in the litigation, including those based on the Colorado Constitution's religion clauses. Specifically, plaintiffs argued that the vast majority of the nonpublic schools that would receive state funds through the voucher program are "pervasively sectarian institutions and extensions of the religious ministries of the

churches that sponsor them," and that "paying for such religious training is not a permissible use of public funds," pursuant to the Colorado constitution. In support of their motion for summary judgment, plaintiffs further asserted that while "religion is a part of our tradition, public funding of religion is not." Defendants filed cross-motions on all of the above-described issues.

Oral arguments on the first set of issues were held on November 12, 2003.

AJC Involvement

The American Jewish Committee is serving as "of counsel" to the plaintiffs in the lawsuit, contending that giving taxpayer money to low-income families so their children can attend private schools unconstitutionally enriches sectarian schools.

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;
>
> (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.

The vouchers program 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.

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 program 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 hearing 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 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.

However, 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. 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 the motion and enjoined the defendants from taking any action to implement the Opportunity Scholarship Program for the 2002-03 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. "It cannot be logically, legally, or persuasively argued that the receipt of these funds does not aid or assist the institution in a meaningful way," Davey concluded. "While this Court recognizes and empathizes with the salutary purpose of this legislation—to enhance the educational opportunity of children caught in the snare of substandard schools—such a purpose does not grant this Court authority to abandon the clear mandate of the people as enunciated in the Constitution."

The state of Florida appealed the case to the First District Court of Appeal, oral arguments were heard in March 2003, and a decision 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.

Regarding the Florida Constitution's education provision, in a brief submitted to the trial court, we argued that 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." Most recently, with regard to the issue of state funding of religious institutions, we asserted that the OSP violates Florida constitutional provisions that prohibit the governmental "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.

LOCKE v. DAVEY

Background

Because of his grades and other qualifications, in August 1999 Joshua Davey won a state-funded "Promise Scholarship," available to low and middle-income high school students in Washington state to apply toward the first two years of their college education. Recipients are permitted to apply the funds ($1,125 for the 1999-2000 school year and possibly $1,542 for 2000-01) toward any expenses related to their education. With his scholarship funds, Davey enrolled in the fall of 1999 in Northwest College, a private institution affiliated with the Assembly of God, whose mission includes educating students from a "distinctly Christian" point of view, and declared a double major in pastoral ministries and business management and administration, intending to enter the clergy upon graduation.

In October 1999, the Washington Higher Education Coordinating Board (HECB), which administers the Promise Scholarship, advised schools that students pursuing degrees in theology are not eligible for the scholarship. The HECB policy defines "eligible student" to mean one who "(a) Graduates from a public or private high school

"It is hardly a novel or radical idea in American political thought that paying for theological training is outside the purview of government."

located in the state of Washington; and (b) Is in the top ten percent of his or her 1999 graduating class; or (c) Is in the top fifteen percent of his or her 2000 graduating class; and (d) Has a family income less than one hundred thirty-five percent of the state's median; and (e) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and (f) Is not pursuing a degree in theology." This policy is in accordance with Washington's Revenue Code, which provides that "[n]o aid shall be awarded to any student who is pursuing a degree in theology." Following this announcement, Davey decided to forego the scholarship and to pursue his theology studies. He subsequently brought suit in federal district court in Washington asserting that the state had violated his Free Exercise rights.

Case Status

Reversing the district court's ruling in favor of the state, the Ninth Circuit (by a vote of 2-1) determined that the HECB's policy, and the state law upon which it rested, violated the Constitution's mandate of neutrality toward religion. "A law targeting religious beliefs as such is never permissible," said the appellate court. Citing the U.S. Supreme Court's rulings in *McDaniel v. Paty* (1978), in which it struck down a Tennessee law disqualifying members of the clergy from serving as delegates to the state constitutional convention, and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), striking down a local ordinance aimed at suppressing the practice of Santeria by prohibiting ritual slaughter, the court stated that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"

The court also relied on *Rosenberger v. Rector and Visitors of Univ. of Va*. (1995), in which the Supreme Court held that a university could not provide funding for student publications generally, but deny such funding to a religious student publication, stating that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." "Therefore," said the Ninth Circuit, "once the state of Washington decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis."

The Ninth Circuit also found no compelling government interest to justify a policy that it believed discriminated against religion. The state asserted that not funding religious education, and thereby complying with the Washington State Constitution's prohibition that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment...," was just such an interest. Furthermore, the state argued, while Davey may have a constitutional right to study theology, the state is under no constitutional obligation to fund this pursuit. The Ninth Circuit rejected these arguments, explaining that "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise of the federal Constitution."

On May 19, 2003, the Supreme Court granted certiorari, agreeing to review the Ninth Circuit's ruling in favor of plaintiff. Oral arguments are scheduled for December 2003.

AJC Involvement

AJC, together with a group of religious and educational organizations, filed an amicus brief with the Supreme Court in July 2003 urging reversal of the Ninth Circuit's decision. The brief supports the state's right to maintain a stricter separation between church and state than that required by the federal Constitution. The Ninth Circuit, the brief argues, "did not respect the settled tradition of allowing states limited discretion to determine whether to fund religious enterprises even where that funding is compatible with the federal Establishment Clause." Moreover, the brief notes that Davey was not penalized for being religious; rather, the state was simply refusing to pay for his ministerial training. "It is hardly a novel or radical idea in American political thought that paying for theological training is outside the purview of government," the brief notes.

The brief also argues that by "invert[ing] the question in financial aid to religion cases from 'is the aid permissible' to 'is the aid compulsory,'" the Ninth Circuit "cast into doubt the viability of the constitutions of over half the states." Indeed, "it is a settled feature of American law that government refusal to subsidize speech or other activity is not the equivalent of a penalty for engaging in constitutionally protected activity." Upholding the Ninth Circuit's "fundamental restructuring" of the legal framework for deciding Establishment Clause cases, the brief argues, "would startle generations of judges, lawyers, politicians and academics."

D. State Funding of Faith-Based Social Service Programs

FREEDOM FROM RELIGION FOUNDATION, INC. v. MCCALLUM

Background

Since December 1999, Faith Works Milwaukee, Inc., has been operating as a long-term residential program available to male drug and alcohol addicts in Milwaukee, Wisconsin. The Wisconsin Department of Corrections contracted with Faith Works to operate a halfway house providing supervised residential care and related services to offenders upon referral by a parole or probation officer. In November 1999, the Department contracted with Faith Works for the provision of five beds over a nine-month period for an amount not to exceed $49,961. In the summer of 2000, the contract was extended and the cap raised to $85,000, and in 2001 the department contracted with Faith Works for up to an additional $25,000 of services.

Faith Works is a faith-based program designed to meet the needs of recovering alcohol or drug addicts, assisting them in developing into fully functioning members of society. The organization's bylaws provide that the "program seeks to put a holistic, faith-based approach to bring healing to mind, body, heart and soul. While the program is inherently Christian, services will be offered to all persons who seek it, regardless of their faith background." The program is comprised of four components: recovery, employment, family services, and spiritual enrichment and runs approximately nine months to a year.

In addition to the length of the program's duration, Faith Works attributes its success to its promotion of spirituality in participants. Accordingly, residents are required to participate in a "faith-enhanced 12-step A[lcoholics A[nonymous] program," which involves more explicit references to God than the standard AA." While there is no religious qualification for employees and the program has served participants of many different religions, staff members are predominantly Christian and are required, according to the staff manual, to "[grow] in [their] own faith life by regular church attendance, prayer, Bible study and seeking Spiritual direction from a Pastor/Shepard in our faith community." According to a former executive director, "the majority of Faith Works clients are not in a practicing faith when they enter the program but most graduates have some sort of relationship with God when they leave."

The program is among those recommended to offenders by Department of Corrections probation and parole officers. In some cases, participation in Faith Works is offered to an offender as an alternative to the revocation of parole or probation. Department procedures do not allow offenders to choose any program they wish, but an offender who is referred to a treatment program with religious components must (1) be advised of the program's religious content, (2) give their consent to participate in a faith-based program and (3) be offered a nonreligious alternative. None of the offenders referred to Faith Works by the Department have objected to the religious nature of the program.

Case Status

In October of 2000, three Wisconsin taxpayers, joined by the Freedom from Religion Foundation, Inc., brought suit in federal district court against the governor of Wisconsin, the secretary of the Department of Corrections, and others, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, which provides U.S. citizens with a civil remedy for the deprivation of rights, privileges, or immunities guaranteed under the Constitution. Faith Works intervened as a defendant. Plaintiffs argued that the program's contract with the Department of Corrections and its resulting funding stream violated the Establishment Clause of the First Amendment by using public funds for religious purposes.

In January 2002, the court denied plaintiffs' and Faith Works' summary judgment motions on the grounds that the undisputed facts did not demonstrate whether the offenders participating in the program did so as a result of independent, private choice. A trial was subsequently held on that issue and on July 26, 2002, the court found that although a "close question," the offenders did in fact make an independent, private choice to participate in the Faith Works program. As such, the court ruled that the department's contract with Faith Works did not violate the Establishment Clause.

In reaching its decision, the court held that public funding of the program constituted indirect aid "because the program does not receive payments of a set amount from the department but instead receives funding based on the number of offenders enrolled in the program." The court then compared the program to school voucher programs. In the Supreme Court's recent *Zelman v. Simmons-Harris* decision, upholding by a vote of 5-4 Cleveland's school voucher program, the Court distinguished between government programs that provide aid directly to religious schools and voucher programs that involve a "private choice, in which the government aid reaches the religious program 'only as a result of the genuine and inde-

pendent choice of private individuals.'" Participation in the Faith Works program, the district court concluded, was of the same nature as accepting a voucher to enroll in a religious school and thus any religious indoctrination from the program could not be attributed to the state.

Pointing again to *Zelman*, the court rejected plaintiffs' argument that, regardless of the existence or absence of free choice in offenders' choosing to participate in the program, public funding of Faith Works amounted to governmental endorsement of religion and was therefore unconstitutional. The court also cited the decision of a plurality of the Supreme Court in the case of *Mitchell v. Helms*, which upheld public funding of computer equipment for parochial schools: "[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts … an inference that the State itself is endorsing a religious practice or belief.'"

Plaintiffs subsequently appealed the district court's decision to the U.S. Circuit Court of Appeals for the Seventh Circuit, and on April 2, 2003, a three-judge panel affirmed the district court's ruling. The Seventh Circuit, in an opinion authored by Judge Richard A. Posner, held that it did not violate the Establishment Clause for Wisconsin to fund the Faith Works program or for parole officers to recommend the program (along with other, secular options) to parolees. With regard to plaintiffs' argument that the present case differs from *Zelman* in that it involves a direct money-flow from the government rather than a voucher, Judge Posner wrote that "so far as the policy of the Establishment Clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and paying the provider whose services he prefers." The court also dismissed the argument that because Faith Works has such a favorable success rate and is one of the best programs offered, parolees do not truly exercise free choice in selecting it, stating that "quality cannot be coercion," otherwise, "Faith Works, penalized because its secular competitors were unwilling to invest as much in the rehabilitation of offenders, would have an incentive to reduce the quality of its program. … [and] there would be a [subsequent] race to the bottom."

Petitioners' subsequent motion for a rehearing and rehearing en banc were denied on May 22, 2003.

The funds are transmitted directly from the government to Faith Works, in clear violation of the Establishment Clause.

AJC Involvement

On October 22, 2002, AJC together with the Americans United for Separation of Church and State and the Anti-Defamation League, filed an amicus brief on behalf of plaintiffs. The brief argued that the district court erred in treating the department's funding of Faith Works as a voucher program, since no participant receives a voucher or anything like one, and the funds are transmitted directly from the government to Faith Works, in clear violation of the Establishment Clause's long-standing prohibition against "'government sponsorship of, financial support for, and active involvement in religious activities.'" In addition, the brief underscores that "the program does not receive funds 'wholly as a result' of 'genuine and independent private choice[s]' by participating offenders," as they are "strongly influenced to enroll in Faith Works by [Department of Corrections] employees' recommendations" and by the fact that the department has an extremely limited selection of similar treatment providers.

II. RELIGIOUS LIBERTY

A. Conscience Clause Exemptions

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

Background

The court found the legislature's purpose in enacting the statute—the elimination of gender discrimination in women's health insurance coverage—to be a compelling one.

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."

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"). 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). 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.

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."

More specifically, Catholic Charities alleged that the act violates the Free Exercise Clause of the U.S. Constitution and 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 Appeal 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, a 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 "generally applicable and neutral with respect to religion." The court also found the "religious employer" exemption provided for in the act to be neutral and generally applicable to all religions. 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.

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 message. 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

The Contraceptive Equity Act is tailored "to limit any burden on free exercise . . . while preserving the law's compelling objective."

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." However, 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, in particular, for some members of the observant community, in that it permits freedom of movement on the Sabbath to individuals 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 thus rendered 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 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 analysis, 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 plaintiff's 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 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."

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 Third 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 Third Circuit Court of Appeals was denied on November 25, 2002. The Supreme Court also declined to review the case in June 2003, leaving in place the Third Circuit's ruling in the Tenafly Eruv Association's favor.

AJC Involvement

In November 2001, AJC, together with the Anti-Defamation League, the 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.

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

MADISON V. RITER

Background

On August 6, 2001, Ira Madison, a prisoner at Virginia's Buckingham Correctional Center and member of the Hebrew Israelite faith, filed suit in U.S. District Court for the Western District of Virginia challenging the prison's refusal to provide him with a kosher

diet in violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA" or the "act").

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

In an August 23, 2002, opinion, the district court denied summary judgment on Madison's First Amendment claim on the grounds that there "was a material factual dispute concerning the sincerity" of his religious beliefs. However, both parties were asked to review and argue the question of RLUIPA's constitutionality, and on January 23, 2003, the district court issued an opinion holding that the section of RLUIPA that pertains to prison officials violates the Establishment Clause of the First Amendment.

The district court based its conclusion on its finding that "the principal and primary effect of RLUIPA is to advance religion by elevating religious rights above all other fundamental rights." The court reasoned that in correctional facilities, "[i]ndifference, bigotry, and cost concerns have the same restrictive effect on the freedom of speech, the ability to marry, the right to privacy, and countless other freedoms that RLUIPA proponents left to a lesser level of protection." Citing two 1987 Supreme Court cases, *O'Lone v. Estate of Shabazz* and *Turner v. Safley*, the district court explained that the Supreme Court has already "developed the proper standard to evaluate an inmate's claim that a prison regulation or action of a prison administrator burdens his constitutional rights." That test—the "rational relationship" test—gives more deference to the judgment of government officials than does the more stringent "strict scrutiny" test called for by RLUIPA, which requires the government to prove it has a *compelling* interest for imposing the constitutional burden at issue, and that the policy is the "least restrictive means of furthering [that] interest." The district court concluded that the rational relationship test in this context "represents [an appropriate] balance between the need to recognize the continuing vitality of the constitutional rights of inmates, and the fact that incarceration necessarily involves a retraction of some rights." It went on to stress the negative impact of using varying standards, stating that "the different standards of review have the effect of establishing two tiers of inmates in the prison system: the favored believer and the disadvantaged nonbeliever."

Madison subsequently appealed the case to the U.S. Fourth Circuit Court of Appeals, and a decision is now pending on the specific issue of RLUIPA's constitutionality.

AJC Involvement

As it has in other cases in support of RLUIPA, on June 9, 2003, the American Jewish Committee joined with a diverse group of organizations including the American Civil Liberties Union and the Becket Fund for Religious Liberty in an amicus brief to the Fourth Circuit. In the brief, we

noted that "federal courts have consistently upheld RLUIPA against a wide range of constitutional challenges," and that the district court's core argument "that the Establishment Clause forbids legislative accommodations of religious exercise if they accommodate only religious exercise" has been rejected in every single reported case where it has been raised, not only against RLUIPA, but against RLUIPA's broader predecessor, the Religious Freedom Restoration Act. The decision also failed to cite or attempt to distinguish the Fourth Circuit precedent that "rejected an Establishment Clause challenge to a law that had the purpose and effect of alleviating burdens on religious exercise, and only religious exercise."

"The government can—and often does—protect a single fundamental right in a particular piece of legislation or regulation, and the right to free religious exercise is no exception."

On the substantive issues, we asserted that RLUIPA satisfies all three elements of the *Lemon* test commonly employed in Establishment Clause cases in that "not only is it permissible for government to accommodate religious exercise, it is commendable and sometimes mandatory." In addition, we asserted that "the government can—and often does—protect a single fundamental right in a particular piece of legislation or regulation, and the right to free religious exercise is no exception." We explained that "[s]uch government actions do not 'prefer' religion over irreligion; instead, they simply protect or reinforce the right to religious exercise, just as they would any other right."

MAYWEATHERS v. TERHUNE

Background

A group of Muslim prisoners housed at California State Prison, Solano, brought suit in the U.S. District Court for the Eastern District of California, alleging that the then recently enacted Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA" or the "act") was violated when they were penalized for taking a one-hour absence from the prison's work incentive program every Friday for religious purposes. (For a detailed description of RLUIPA's pertinent provisions, please see preceding case summary of *Madison v. Riter*).

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 the provisions of RLUIPA are directly related to the rehabilitation of federal inmates housed in state prisons. In addition, the court rejected defendants' argument that RLUIPA violates the Establishment Clause of the U.S. Constitution by "promoting religion over irreligion."

Case Status

Defendants appealed the decision, and on December 27, 2002, a panel of the U.S. Ninth Circuit Court of Appeals affirmed the lower court's ruling and upheld the constitutionality of RLUIPA. As did the district court, the panel determined that RLUIPA was a valid exercise of Congress's power under the Spending Clause in that it satisfies all three requirements for constitutionality prescribed by the Supreme Court. It explained that RLUIPA (1) promotes the general welfare "by ensuring that governments do not act to burden the exercise of religion in institutions," and "by fostering nondiscrimination, [it] follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms"; (2) imposes an unambiguous condition that "federal funds must not substantially burden the exercise of religion absent a showing that the burden is the least restrictive means of serving a compelling government interest;" and (3) requires compliance with federal directives that are related to the federal interest of ensuring that "federal funds do not subsidize conduct that infringes individual liberties," as well as "monitoring the treatment of federal inmates housed in state prisons and ... contributing to their rehabilitation."

The Ninth Circuit panel also rejected the claim that RLUIPA violates the Establishment Clause of the First Amendment. Applying the three-prong test developed in *Lemon v. Kurtzman*, the court determined that (1) RLUIPA's purpose is secular—"to protect the exercise of religion in institutions from unwarranted and substantial infringement"; (2) "the primary effect of RLUIPA neither advances nor inhibits religion" and "merely accommodates and protects the free exercise of religion which the Constitution allows"; and (3) the act "does not foster excessive government entanglement with religion," in that "RLUIPA removes burdens on religious exercise rather than according benefits."

Finally, the court disagreed with the state's contention that RLUIPA violates the principle of separation of powers by changing the standard set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that laws that "incidentally burden the free exercise of religious conduct do not offend the First Amendment." Instead, the court concluded that "RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty."

On January 9, 2003, the State of California unsuccessfully petitioned the Ninth Circuit for a rehearing en banc, and then subsequently filed a petition for writ of cer-

tiorari to the United States Supreme Court. On October 6, 2003, the Supreme Court denied the petition for certiorari, allowing the Ninth Circuit decision to stand.

AJC Involvement

RLUIPA does not violate the Establishment Clause because its purpose—accommodation of the free exercise of religion—is secular.

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 purpose—accommodation of the free exercise of religion—is secular, it does not impermissibly advance religion or entangle the government in religious practices, and it 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 exception 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 Clarence 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 Newcom-

Since the Zoning Board refused to consider the congregation as a candidate for a special exception, but permitted the consideration of other similar uses . . . the township violated the Congregation's constitutional rights.

er 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 home 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 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, and remanded the case for further consideration. 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 November 14, 2002, the Third Circuit Court of Appeals denied plaintiffs' request to rehear the case en banc, and proceedings are now ongoing at the district court level in light of the Third Circuit's decision. Among the issues to be addressed by the court is the township's argument that RLUIPA is unconstitutional.

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 1996 ordinance is unconstitutional. The brief states that "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. DISCRIMINATION/CIVIL LIBERTIES

A. Affirmative Action

GRATZ v. BOLLINGER; GRUTTER v. BOLLINGER

Background

In December 1997, a lawsuit was filed challenging the University of Michigan Law School's admissions policy, which states that the school "seek[s] a mix of students with varying backgrounds and experiences who will respect and learn from each other." "Soft variables" that are considered in the admissions process include the enthusiasm of the recommenders, the quality of the applicant's essay, residency, leadership and work experience, and the difficulty of undergraduate course selection. In order to achieve its goal of a diverse student body, the law school also gives special consideration to applicants "from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers," reasoning that "[s]tudents from such racial and ethnic groups 'are particularly likely to have experiences and perspectives of special importance to our mission.'" No seats are reserved or set aside for underrepresented minority students. Instead, the law school seeks to enroll a "critical mass" of minority students, which it defines as a sufficient number of students to ensure that minorities do not feel isolated and are not perceived as token representatives.

A challenge was also lodged to the university's undergraduate admissions policy pursuant to which athletes, children of alumni, minorities and others get "extra points" in admissions considerations. Out of a possible 150 points, applicants who are athletes, who are from a disadvantaged socioeconomic status, or who are members of underrepresented minority groups receive twenty points. In addition, six points are awarded for geographic factors, four points for an alumni relationship, three points for an outstanding essay, and five points for leadership and service skills.

In May 2002, the Sixth Circuit Court of Appeals reversed a district court ruling and upheld the law school admissions policy, determining that Justice Lewis Powell Jr.'s 1978 opinion in *Regents of the University of California v. Bakke* was the controlling legal precedent. Powell's *Bakke* opinion held that race could be used as one factor in admissions decisions because "a diverse student body promotes an atmosphere of 'speculation, experiment and creation' that is 'essential to the quality of higher education.'" In keeping with that principle, the Sixth Circuit stated that the university has a compelling interest in a diverse student body and that the law school's admissions program was narrowly tailored to serve that interest. The federal district court considering the undergraduate policy similarly found that the university had submitted "solid evidence" of the educational benefits resulting from a diverse student body and that the undergraduate admissions program "does not utilize rigid quotas or seek to admit a predetermined number of minority undergraduate students." In December 2002, the Supreme Court agreed to review the law school case and, granting a rare "Rule 11 writ of certiorari" petition, decided to take the undergraduate case as well, despite the absence of appellate review.

"[D]iversity not only provides all students with a richer educational experience, but also prepares them for participation in our pluralistic democracy."

Case Status

On June 23, 2003, the Supreme Court rendered decisions in *Grutter v. Bollinger* (the law school case) and *Gratz v. Bollinger* (the undergraduate case). While the Court in *Gratz* (by a vote of 6 to 3) rejected the admissions program of the undergraduate school, which assigned a specific number of points based upon an applicant's race, it upheld the law school's program (by a vote of 5 to 4) and affirmed Justice Powell's rationale enunciated in *Bakke* that the consideration of race within an individualized assessment of candidates is constitutional.

Writing for the majority in *Grutter*, Justice Sandra Day O'Connor found that the Constitution "does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." In reaching its decision, a majority of the Court for the first time endorsed Justice Powell's *Bakke* opinion by holding "that student body diversity is a compelling state interest that can justify the use of race in university admissions" as long as race is one of a number of factors. O'Connor noted that the Court would strike down a "critical mass" policy that aimed to achieve a specific percentage of a particular group (calling such a practice "patently unconstitutional"). However, she found that the law school's policy instead was aimed at the "educational benefits that diversity is designed to produce," in that "the Law School has a compelling state interest in a diverse student body," as it is "at the heart of the Law School's proper educational mission."

In his dissent, Chief Justice William Rehnquist argued that the law school policy was not a flexible individualized program but a "carefully managed program designed to ensure proportionate representation of applicants from selected minority groups," and therefore unconstitutional. Writing a separate dissent, Justice Clarence Thomas termed affirmative action "the cruel farce of racial discrimination" and argued that when the majority of Blacks are admitted because of affirmative action, "all are tarred as undeserving," regardless of whether affirmative action in fact contributed to their admission.

Chief Justice Rehnquist, writing for the Court in *Gratz*, found that the undergraduate admissions point system did not provide for the "individualized consideration" that Powell's *Bakke* opinion required and the majority in *Grutter* endorsed. Rather than using race as a "plus" factor as part of an individualized assessment, the 20 points automatically assigned on the basis of race made race the decisive factor for virtually every "minimally qualified" minority applicant. "Nothing in Justice Powell's opinion in *Bakke*," Rehnquist wrote, "signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." However, Justice Souter's dissent did not view the undergraduate system as a quota in which seats were set aside for certain races, and stated that by assigning the 20 points to race "the college simply does by a numbered scale what the law school accomplishes in its 'holistic review.'" Justice Ginsburg agreed with Souter that "if honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." She also wrote separately to state her judgment that different standards of review ought to apply to race-based classifications that exclude and those that aim to include, a point also made by Justices Souter and Breyer.

AJC Involvement

AJC filed an amicus brief with the U.S. Supreme Court in support of the University of Michigan. AJC's brief, which was filed on behalf of a coalition of religious and civil rights organizations, argued that "diversity not only provides all students with a richer educational experience, but also prepares them for participation in our pluralistic democracy," and that "exposure in universities to those of diverse backgrounds and experiences will better equip those graduates who go on to become the leaders of our future." The brief also emphasized AJC's vigorous opposition to quotas, which were employed by elite American universities in the earlier part of the twentieth century to restrict the admission of Jewish students, and distinguished the University of Michigan's policies whereby admissions goals are set to help provide minority students with increased opportunities for higher education. Those joining the brief included Hadassah, the Union of American Hebrew Congregations, and the National Council of Jewish Women.

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 $5,000 reward for "information 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 web site, 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 antichoice movement.

Case Status

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

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 seri-

ous 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 the 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, emphasizing 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.

Defendants appealed the case to the U.S. Supreme Court, but on June 27, 2003, the Court declined to review the case, leaving in place the en banc court's ruling in favor of the plaintiffs.

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 argued, "making people fear for their lives is not."

" Political hyperbole is protected speech," the brief argued, "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 involved 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.

QUIGLEY v. ROSENTHAL AND ANTI-DEFAMATION LEAGUE

Background

In October 1994, Mitchell and Candice Aronson contacted the Denver Regional Office of the Anti-Defamation League (ADL) to report that that they had overheard some of their neighbors', William and Dorothy Quigley's, 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. ADL referred the Aronsons to two outside attorneys, who subsequently confirmed with the local district attorney's office, the FBI, and the FCC that the tapes made by the Aronsons were legal.

Believing their evidence to be lawfully obtained, on December 6, 1994, the Aronsons filed a civil lawsuit against the Quigleys based on Colorado's ethnic intimidation statute. Saul Rosenthal, ADL's Denver regional office director, subsequently held a press conference and participated on a radio call-in show in which he explained that the local district attorney's office was considering ethnic intimidation charges discussed the complaint filed by the Aronsons in court and described what the Aronsons had told ADL.

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 subsequently 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 Rosenthal.

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, 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 declined to set the verdict aside or eliminate or reduce the damages.

ADL subsequently appealed the case to the Tenth Circuit Court of Appeals and on April 22, 2003, a three-judge panel of the

court issued a 2 to 1 decision against the Anti-Defamation League. The court upheld the district court's ruling with regard to all claims except for two involving privacy infringement, which it reversed, with no subsequent reduction to the damage awards granted by the trial court.

Among its arguments, ADL asserted that the organization should not have been found liable for defamation because it had disclosed a matter of "public concern" involving anti-Semitism and civil rights violations. However, the Appellate Court concluded that, unlike previous cases involving matters of public concern, this case concerned private plaintiffs and a nonmedia defendant. The appellate court next rejected ADL's assertion that it should not have been found liable for the actions of the Aronsons' attorneys, who violated the federal wiretap act, among other things. ADL had argued that the lower court failed to properly instruct the jury as to the definition of a principal/agent relationship, which had resulted in its wrongly being found liable for the attorneys' actions. ADL also contended that even if it had violated the Federal Wiretap Act by using the intercepted telephone conversations in a press conference or otherwise, that use was protected free speech under the First Amendment. However, the appellate court disagreed, finding that the privacy concerns at issue outweighed the free speech interests asserted by ADL.

ADL filed a motion for rehearing and a request for rehearing en banc, which were both denied on August 25, 2003. ADL is currently considering whether to appeal the Tenth Circuit's decision.

AJC Involvement

In November 2001, AJC, along with twelve other national organizations that are 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. In addition, AJC, together with a similar group of national organizations, filed an amicus brief in support of the defendants' motion for a rehearing and request for a rehearing en banc, also authored by Professor Chemerinsky.

Addressing the constitutionality of large damage awards against public interest organizations based on the conduct of their volunteers, we 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. We 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.

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.

VIRGINIA v. BLACK

Background

Barry Elton Black was indicted for violating Virginia's "cross burning" statute after an approximately 25-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 for burning a wooden cross on the property of an African American neighbor.

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. (Emphasis added.)

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. 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 to 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, which were subsequently overturned by the Virginia Supreme Court 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*, in which it held invalid St. Paul's hate crime ordinance on the grounds that it discriminated against the underlying message of the speech in violation of the First Amendment.

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 it designated 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."

"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."

Case Status

The State of Virginia appealed the case to the U.S. Supreme Court, and on April 7, 2003, the Court held that while Virginia's statute as written was unconstitutional, states may constitutionally outlaw cross burning done with the intent to intimidate. Writing for the majority, Justice Sandra Day O'Connor found that since cross burning is "a particularly virulent form of intimidation," especially given its pernicious history, it could be singled out for prosecution. The Court closely examined the history of cross burning and that of the Ku Klux Klan, describing how they became "inextricably intertwined" during the Klan's reign of terror in the South during Reconstruction. The Court found that "while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives."

While the Court endorsed laws banning

cross burning with the *intent to intimidate*, it invalidated the specific Virginia statute at issue, holding that allowing juries to interpret cross burning as prima facie evidence of intimidation is unconstitutional on its face. O'Connor explained that the provision was overbroad and encouraged juries to ignore "all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." "The First Amendment does not permit such a shortcut," she wrote. Separately, Justice Clarence Thomas agreed that the act of cross burning with the intent to intimidate could constitutionally be banned, but argued that it is conduct without expressive value and thus should not be considered at all in the context of the First Amendment. According to Thomas, stating that a ban on cross burning infringes expression "overlooks … reality," as the Klan is a "terrorist organization" and "the connection between cross burning and violence is well ingrained."

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 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 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."

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 affects 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

"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's traditional authority."

Division of the Nevada Department of Human Resources, requested and was granted, pursuant to the FMLA, twelve weeks of 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 of 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.

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

Case Status

On December 11, 2001, 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," which it found it had.

The Supreme Court granted certiorari and on May 27, 2003, by a vote of 6 to 3, upheld the FMLA against claims of state immunity. The majority opinion, authored by Chief Justice William Rehnquist, concluded that Congress was within its rights to mandate that states be entitled to the same benefits that the federal FMLA grants to private sector employees. Applying a "heightened scrutiny" analysis as dictated by Supreme Court precedent for gender discrimination cases, the Court assessed the evidence from which Congress found a "pattern of constitutional violations on the part of the states in this area" and determined that the states' reliance on "invalid gender stereotypes" in the administration of leave benefits was unjustified and violated the Fourteenth Amendment.

Justice Rehnquist distinguished the present case from recent Supreme Court rulings that immunized states from lawsuits by their employees for age discrimination and disability discrimination, explaining that the FMLA requires a different analysis and outcome. 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 brought under the Americans with Disabilities Act (ADA). And in *Kimel v. Fla. Bd. of Regents* (2000), the Court held that state employers could not constitution-

ally be subjected to private suits in federal court under the Age Discrimination in Employment Act (ADEA). Unlike the legislation in *Garret* and *Kimel*, the Court wrote, the Family and Medical Leave Act was more "congruent and proportional to the targeted violation" than the others and addressed a workplace problem that was persistent and well documented. The Court also "found significant the many other limitations Congress placed on the scope of the measure" in that, among other things, it only required unpaid leave and applied to workers who had worked for the employer for a significant period of time.

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, argued 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's traditional authority under Section 5 of the Fourteenth Amendment." The brief also argued 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.

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.

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.

Case Status

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), in light of a recent Supreme Court ruling in *U.S. v. Morrison* that struck down a portion of the Violence Against Women Act because it was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." 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 under 42 U.S.C. §1982, which has its constitutional basis in the Thirteenth Amendment.

However, while the Court also held that the evidence was sufficient to support the defendants' conviction under the statute, it went on to strike down the convictions, concluding that the trial judge had improperly manipulated jury selection in an effort to achieve a racially and religiously balanced jury. The verdict was vacated and a new trial was ordered. In April 2002, Price pled guilty to the charge of inciting the attack and his sentence was reduced to eleven years and eight months.

Most probably seeking to avoid another trial, Nelson 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 was held, and on May 14, 2003, a jury convicted Nelson of violating Rosenbaum's federal civil rights by stabbing him. However, it found that the government had not proved that Nelson actually caused Rosenbaum's death, presumably based on reports that Rosenbaum may have died as a result of inadequate treatment at the hospital to which he was sent after the stabbing. Taking into account the time Nelson has already served in prison, together with a reduction in his sentence for good behavior, Nelson may be out of prison in less than a year.

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 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 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: 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 schoolchildren.

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.

In deciding 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 academic 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, finding 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 stated that the state's obligation would generally be fulfilled after the students had received an eighth or ninth grade education. According to the

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

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.

Plaintiffs appealed to the New York Court of Appeals, the state's highest court, and on June 26, 2003, that court reversed (by a vote of 4 to 1) the Appellate Division's ruling. In reinstating much of the trial court's decision, the court took issue with the appellate court's determination that providing children with an eighth grade education was sufficient to meet the state constitution's requirement of a sound basic education. Writing for the majority, Chief Judge Judith Kaye stated that "[w]hile a sound basic education need only prepare students to compete for jobs that enable them to support themselves, the record establishes that for this purpose a high school level education is now all but indispensable."

AJC Involvement

AJC joined in an amicus brief filed with the Appellate Division in support of plaintiffs, which began by pointing out that "public education is the bulwark of our democratic system." At the same time, we expressed concern that the legislature will be slow in developing remedies and urged the appellate court to mandate that the trial court consult with an independent panel of experts to "stipulate specific benchmarks of a sound basic education, … determine the actual cost of meeting those benchmarks, and … order [appropriation of] at least that amount of money for the benefit of the State's schoolchildren." We subsequently filed an amicus brief with the New York Court of Appeals in which we argued 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."

F. Sexual Orientation Discrimination

LAWRENCE v. TEXAS

Background

Section 21.06 of the Texas Penal Code made it a Class C misdemeanor for a person to engage "in deviate sexual intercourse with another individual of the same sex." "Deviate sexual intercourse" was defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or … the penetration of the genitals or the anus of another person with an object." John Geddes Lawrence and Tyrone Garner were convicted of this offense after police, responding to a false report of a "weapons disturbance," entered Lawrence's residence and found the two men engaging in sexual conduct in violation of the statute. Lawrence and Garner brought suit in state court challenging the facial constitutionality of Section 21.06 on the grounds that it violated federal and state constitutional provisions guaranteeing equal protection of the laws in that it criminalized conduct which if engaged in by heterosexuals would be legal. They also alleged, relying on U.S. Supreme

Court precedent concerning reproductive rights and consensual heterosexual intimate activity, that the law violated their constitutional right to privacy.

A panel of the Texas Court of Appeals ruled in favor of plaintiffs, but the full appellate court reversed that decision and found that the law "advances a legitimate state interest, namely, preserving public morals." On December 2, 2002, the U.S. Supreme Court agreed to review the case as to the federal constitutional issues it presented.

Case Status

On June 26, 2003, the Supreme Court (by a vote of 6 to 3) struck down the Texas law as unconstitutional. Justice Anthony Kennedy, writing for the Court, said that making it a crime for two persons of the same sex to engage in consensual intimate sexual conduct violated their substantive due process rights, thus categorically overruling the Court's contrary decision seventeen years earlier in *Bowers v. Hardwick* (1986). The Court erred in *Bowers*, Kennedy wrote, by not appreciating the extent of the liberty at stake: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse." Rather, the penalties and purposes of such statutes "touch ... upon the most private human conduct, sexual behavior, and in the most private of places, the home. [They] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." The liberty protected by the Constitution, the Court wrote, allows adults to choose to "enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."

AJC Involvement

AJC joined in an amicus brief filed by a coalition of interfaith organizations that, while holding differing views as to the morality of private sexual conduct between consenting adults of the same sex, are unanimous in opposing laws criminalizing such conduct. "The State seeks to justify this criminal law as a means of enforcing morality," the brief pointed out, "and the Texas court invoked the moral views of religious bodies in support of the law." The brief argued that the Texas court failed to recognize that many religious bodies are in fact on record as opposing laws that criminalize such conduct. As such, "the moral views of religious bodies in the United States do not provide a valid basis" for upholding the Texas sodomy statute.

The American Jewish Committee

The Jacob Blaustein Building
165 East 56 Street
New York, NY 10022

The American Jewish Committee publishes in these areas:

Hatred and Anti-Semitism Pluralism Israel
American Jewish Life International Jewish Life Human Rights

www.ajc.org