AJC in the Courts: 1998

Religion in the Public Schools

ADLER v. DUVAL COUNTY SCHOOL BOARD

Description

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

The stated purpose of the guidelines was to allow students to direct their graduation message. The words "prayer," "benediction," or "invocation" were not used in the guidelines themselves; however, the introduction makes clear that they were written in response to concerns regarding the constitutionality of student-initiated prayers. More-over, there was no requirement in the guidelines that the message be nonsectarian. There was also some evidence that the motivation behind the guidelines was to allow prayer in graduation cere-monies. (At the relevant school-board meeting, several members of the school board openly stat-ed that their desire was to have prayer at these graduations.) In accordance with the guidelines, the schools delegated the deci-sion-making to the students. Ten of the seventeen schools in the district opted for prayers.

The plaintiffs, after being denied a preliminary injunction, moved for summary judgment, asserting that the guidelines failed the three-pronged test articulated in Lemon v. Kurtz-man (1971). They contended that: (1) the purpose of the guidelines was not secular, but rather to find a way to include prayer in graduation ceremonies; (2) by allowing prayer at a school-sponsored event, the school board was endorsing and therefore advancing religion; and (3) excessive entanglement was the inevitable result of allowing prayer at school-sponsored and school-controlled ceremonies. The defendants and intervenor-de-fendants (a group of students supportive of the guidelines) moved for summary judgment as well. They asserted that there was no Lemon violation because the school had delegated the authority to the students. The defendants also argued that a graduation ceremony was a limited public forum, and, therefore, to allow the students to engage in religious speech was not a violation of the Establishment Clause.

Status

Relying on the Fifth Circuit Court of Appeals' decision in Jones v. Clear Creek Independent School District II (5th Cir. 1992), the district court held that since school officials were not involved in the decision-making process, there was no Lemon violation. Moreover, the court found no coercion problem as described by the U.S. Supreme Court in Lee v. Weisman (1992). The district court also held that since graduation ceremonies are often held away from school grounds and often involve outside speakers, the ceremonies are limited public forums. Therefore, the court concluded, the state could not exclude religious speech with a content-based regulation.

The plaintiffs appealed to the Eleventh Circuit Court of Appeals. On May 6, 1997, a three-judge panel

dismissed the plaintiffs' claims for injunctive and declaratory relief because the students protesting the guidelines had graduated, rendering their claims moot. The panel also abstained from ruling on the constitutionality of the guidelines, holding that the plaintiffs had waived their claim for monetary damages by failing to allege any connection between the prayer and their damages.

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

AJC Involvement

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

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

BAUCHMAN v. WEST HIGH SCHOOL

Description

Beginning in October 1994, Rachel Bauchman, a 15-year-old sophomore in a public high school in Salt Lake City, questioned why the songs sung in her public school's a cappella choir class-for which she would receive a letter grade and school credit-were predomi-nantly religious devotionals performed at local churches. Similarly, Rachel and her family objected to the "Christmas Concert," which the school board initially agreed to re-name the "Winter Concert." When the board then reversed itself, Rachel was told she could sit in the school library during Christ-mas Concert rehearsals and would still receive an "A" for the course.

Each spring, the a cappella choir took a singing trip to a different part of the country. The singing on these trips typically focused on fireside cere-monies in which students were asked to witness Jesus Christ and sing Mormon devotionals. Although prior student complaints about the trips had fallen on deaf ears, in the spring of 1995 the school's response to complaints was to exclude all non-Mormon stu-dents from the spring choir trip to San Diego. When the exclusion of non-Mormon students from the trip was questioned, school officials canceled the trip. This led to a marked increase in harassment of Rachel, who was blamed for the cancellation.

Throughout the 1994-95 school year, the choir director frequently engaged in tirades during the choir class about how the Constitution permitted him to teach religious songs and how Jews, of all people, should be tolerant of Mormons. The conflict culminated when the only two songs chosen by the choir director for the 1995 graduation ceremony were religious songs. Rachel was told that attendance at the ceremony was mandatory and that she could not opt out with-out a reduction of her grade.

Status

Initially, PEARL tried to negotiate with the school on Rachel's behalf, but when all avenues for nego-tiation were exhausted, an application for a tem-porary restraining order was filed to pre-vent the two

religious songs from being sung at graduation. Rachel also filed a complaint alleging violations of the First Amendment, the Utah constitution, and the Religious Freedom and Restoration Act (RFRA).

The U.S. District Court for the District of Utah refused to enjoin the singing of the songs, holding that because Rachel was not a graduating senior and had been given the option of not participating in the program, the burden to defendants to change the graduation program and to "forgo the traditional songs of friendship" outweighed Rachel's "burden in being offended." Attorneys for Rachel proceeded with an emergency appeal of the ruling to the U.S. Court of Appeals for the Tenth Circuit. One day before the graduation ceremony, the Tenth Circuit enjoined the school from singing the two songs at the graduation ceremony.

On June 7, 1995, graduation day, various radio shows described how the court order would be circumvented by students. Students told school officials that they knew there would be an uprising. Prior to the ceremony, students distributed the lyrics to one of the songs-"Friends"-to all audience members. After the choir sang two replacement songs, the choir remained standing and sang "Friends" in defiance of the Tenth Circuit's order.

In the fall of 1995, the district court turned to the merits of Rachel's complaint against West High School's administrators, the choir director, and the school district. Stating that the complaint neither distinguished between the defendants nor alleged any specific connection between the choir director and the other defendants, the court ruled that "the facts as pleaded . . . do not state a cause of action against any of the individual defendants except perhaps [the choir director]," whom the court held was shielded by the qualified immunity covering public employees.

The district court also found Rachel's complaint lacking as to her constitutional claims. Applying the Supreme Court's Lemon test for Establishment Clause violations, the court concluded that the choir director's selection of the musical curriculum and his selection of explicitly religious sites for some performances appeared to have a "primarily secular purpose"-"to teach musical appreciation, to broaden the students' understanding of musical culture, and to increase the students' awareness of culture and diversity." In light of these "secular purposes," the court held that Rachel's complaint contained no factual allegations that would support a finding that the choir's activities had the primary effect of advancing religion. Finally, the court found no excessive entanglement by the state with religion because, "due to the nature of choral music," any selection will inevitably have some involvement with religion. Therefore, the court ruled, there was no Establishment Clause violation.

As to her other claims, the court ruled that the Free Exercise and Free Speech Clauses and RFRA were satisfied by Rachel's being excused from participation in any choir activities offensive to her religious beliefs. The court further held that the relevant provisions of the Utah constitution are not self-executing and therefore could not serve as the basis for viable causes of action.

The district court's ruling was appealed and the case was argued before the Tenth Circuit Court of Appeals on Nov. 20, 1996. In a 2-to-1 decision, the Tenth Circuit agreed with the district court that Rachel had failed to allege sufficient facts to state a claim for denial of her constitutional rights and affirmed its dismissal of her case.

After noting the "muddled" state of Establishment Clause jurisprudence, the Tenth Circuit applied what it called a "refined" analysis of the three-prong Lemon v. Kurtzman test for Establishment Clause violations. Instead of ascertaining whether the defendants' conduct in this case had a secular purpose, had the primary effect of advancing religion, or fostered an excessive entanglement between government and religion, the inquiry mandated by Lemon, the court focused on whether it had the purpose or effect of conveying a message that "religion or a particular religious belief is favored or preferred." Citing the "plausible" secular purposes for the choir director's selections put forth by the district court in support of its dismissal of Rachel's complaint, the court determined there was no Establishment Clause violation under the "endorsement" analysis. Especially troubling was the court's pointing to the "historical tension" in Salt Lake City between the state and the Mormon Church in concluding that in that context a reasonable observer would not perceive that the choir's activities advanced or endorsed religion.

Rachel's attorneys filed for a rehearing, asking the entire Tenth Circuit to reconsider the case, but that request was denied. A petition for certiorari was then filed asking the U.S. Supreme Court to review the case. In June 1998 that petition was denied.

AJC Involvement

AJC joined in an amicus brief filed by PEARL in the Tenth Circuit Court of Appeals, which was joined by the Presbyterian Church (U.S.A.), the Unit-ed Church Board for Homeland Ministries of the United Church of Christ, the Anti-Defamation League, the General Conference of Seventh-Day Adventists, and the Union of American Hebrew Congregations. The brief ar-gued that "a court is not permitted . . . to dismiss a complaint because it does not believe the plaintiff's allegations." The district court's dismissal of Rachel's complaint "sets an unwar-ranted and dangerous precedent that clearly signals those who would seek to preserve their religious liberties that they will receive an unwel-come reception in the courts within [the Tenth] Circuit."

BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT v. GRUMET

Description

In 1977, the Satmar Hasidim incorpo-rated Kiryas Joel as an inde-pendent village carved out of the town of Monroe, some forty miles northwest of New York City. In 1989, the state legisla-ture passed a bill, which was signed by Governor Mario Cuomo, authorizing the village to form its own public school district, coterminous with the village. The Monroe-Woodbury Central School District, from which the Kiryas Joel Village School District in effect seceded, actually supported the establish-ment of the new district. (There was a long and bitter history of tension and conflict between the Monroe-Wood-bury Central School District and the Hasidim, relat-ing to the education of the Ha-sidic children.)

Most of the Hasidic chil-dren are educated in their own private religious schools. The purpose of the new district was to provide publicly financed special education for handi-capped Hasidic pupils. Previously, the twenty-one learning-disabled children of the village had received special educational services, taught by public school teachers from Mon-roe-Woodbury Central School District, in an annex to a Kiryas Joel yeshiva. But that arrange-ment ceased in 1985 when the U.S. Supreme Court ruled in Aguilar v. Felton that publicly funded em-ployees could not teach in reli-gious schools. There-after, the children received special educa-tion in the public schools. How-ever, their par-ents contended that this experi-ence was ex-tremely trau-matic for them because of their obvi-ous cultur-al differences from the other chil-dren in the public school. Thus the special school dis-trict was established.

Status

The special school district was chal-lenged from the very begin-ning. The State Education De-partment refused to support its creation. The executive director of the New York State School Boards Association, Louis Grumet, and its president, Al-bert Hawk, brought suit to chal-lenge the district's constitutionality. The trial court declared the legislation establishing the district unconstitutional and the Appellate Division affirmed. The case was then ap-pealed to New York State's highest court, the Court of Appeals.

In 1993, the Court of Appeals affirmed the decision to strike down the legislation. The major-ity based its decision on the test articulated in Lemon v. Kurtz-man, that a governmental action must have a secular purpose, its primary effect must be one that "neither enhances nor inhibits religion," and it must not foster "an excessive entanglement with religion." The court found that the creation of the school district had the "pri-mary ef-fect" of advancing reli-gion by creat-ing a "symbolic un-ion of church and state." Justice Kaye, in a concur-ring opinion, assert-ed that the creation of a separate school district violated the Establish-ment Clause be-cause it was not nar-rowly tai-lored to fit a com-pel-ling interest. She argued that there were far more moder-ate measures to sat-isfy the govern-ment's purpose, such as furnish-ing special-educa-tion ser-vices at a neutral site.

The school district appealed to the U.S. Supreme Court. On June 27, 1994, the Supreme Court affirmed the decision of the New York Court of Appeals, by a vote of 6-3. The majority held that the legislature acted in an "anomalous casespecific" way for the benefit of a religious sect. The Court further held that the creation of the school district was an unconstitutional delegation of political power to a religious group. The Court suggested that the distinct needs of the handicapped Satmar children could be met within the limits of the Establishment Clause by the provision of spe-cial services to those children at a neutral site near one of the village's religious schools.

Shortly after the Supreme Court's decision, the New York State legislature passed a law allowing municipalities wholly contained within one school district to operate their own school districts, subject to cer-tain restrictions. This law cir-cumvented the Supreme Court decision, enabling the Kiryas Joel Village School District to continue to operate. The New York State School Boards Asso-ciation once again brought suit in state court to challenge this new law. The New York State Supreme Court upheld the constitutionality of the new law. The New York State School Boards Association appealed that deci-sion and in August 1996 the State Appellate Division declared the new law unconstitutional. The court called the law a "subter-fuge" tailored to bene-fit only the Hasidim of Kiryas Joel. Thus, the court said, the law singles out a particular religious group for preferential treatment and is therefore un-con-stitution-al.

The school district appealed to the New York State Court of Appeals and obtained an auto-matic stay, enabling the school district to continue operating, pending the outcome of the appeal.

On May 6, 1997 the Court of Appeals unanimously struck down the second attempt by the legislature to create a school district for Kiryas Joel. The court said that the 1994 law violated one of the core principles of the Constitution: the division between government and religion. Judge Carmen Beauchamp Ciparick, writing for the court, said the 1994 law "operates not as a generally applicable, religion-neutral law but has the same non-neutral effect of singling out Kiryas Joel for special treatment that caused this court and the Supreme Court to strike down" the previous law.

Undeterred, the legislature attempted again in 1997 to pass a constitutionally valid law permitting the establishment of the Kiryas Joel school district. Mindful of the courts' suspicion of the prior legislation because it benefited only Kiryas Joel, under this broader third law the affluent community of Stony Point in Rockland County also qualified and would be allowed to establish a school district separate from that of the poorer surrounding town of Haverstraw.

Finding that this third effort was still an invalid act of "legislative favoritism," in April 1998 a State Supreme Court justice in Albany struck down the law and chastised the legislature for its continuous attempts to end-run the courts' previous rulings. On appeal, the Appellate Division, noting that the new legislation applied only to two of the state's 1,545 municipalities and had only speculative future application, agreed with the lower court that it was an "impermissible governmental endorsement of this religious community." The appellate court noted, however, a constitutionally viable alternative for defendants in light of the recent Supreme Court decision in Agostini v. Felton, which overruled Aguilar v. Felton. Agostini permitted public-school districts to send teachers into parochial schools to teach remedial classes to needy children. Therefore, under the Supreme Court's most recent Establishment Clause pronouncement, it would be constitutional for Monroe-Woodbury to provide on-site instruction to the special needs children of Kiryas Joel.

AJC Involvement

AJC joined in an amicus brief filed by Americans United for Separation of Church and State in the U.S. Supreme Court in support of appellees, the New York State School Boards Asso-ciation. Also signing onto the brief were the Anti-Defamation League, the American Civil Liberties Union, the National Council of Jewish Women, and the Unitarian Universalist Association. In our joint brief, we argued that the special school district violated the Establishment Clause because the state had delegated governmental power to a religious entity and had singled out one religious group for preferential treatment. We asserted that "this purpose-ful delegation of governmental authority to a religious entity violate[d] core notions of non-establishment of religion going back to our nation's founding."

COLES v. CLEVELAND BOARD OF EDUCATION

Description

The Cleveland School Board opens its public meetings with a long prayer on the theory that the practice solemnizes the meetings and reduces divisive-ness. Originally, the prayer was offered by clergymen of various faiths, the vast majority of whom were Christian. When a Chris-tian minister became president of the school board, he person-ally offered the prayer at every meeting. The prayer alternates between supplicating and thank-ing God for directing the work of the board, as well as for assistance in funding school projects. On several occasions, the audience has been asked to say "Amen," or join in prayer, or bow their heads for a mo-ment of silent prayer.

Students are frequently invited to board meetings to be honored for special achieve-ments. One of these students, along with a teacher who attends every board meeting, brought this lawsuit, claiming their con-stitutional rights had been vio-lated by the practice of opening the public meeting with a prayer.

Status

These facts led a federal magis-trate judge to conclude that the board's prayers "go beyond solemnizing the proceedings; they ask attendees to seek God's intervention in their lives." By so doing the board created "a state-sponsored and state-direct-ed religious exercise which, because of [the board's] reason-for-being and very agenda, can-not be separated from the public schools." The magistrate con-cluded that the board prayer occurs in a school setting and thereby violates the Establish-ment Clause by promoting and appearing to endorse religion, and coercing the public to par-ticipate.

The U.S. District Court for the Northern District of Ohio accept-ed the magistrate judge's factual findings but rejected her legal analysis. The court ac-cepted the board's argument that because the purpose of the prayer was not to proselytize but to solemnize acrimonious meet-ings, the practice was permitted by a 1983 U.S. Supreme Court decision, Marsh v. Chambers, permitting prayer in state legis-lative chambers. In Marsh, the Supreme Court held such a practice constitutional, noting that "[t]he opening of sessions of legislative and other delibera-tive bodies with prayer is deeply embedded in the history and tradition of this country." The district court held that prayer at a school-board meeting is more akin to an opening prayer at a legislative session than to prayer in the schools because it is "fundamentally a meeting of adults, open to the public and conducted for the purpose of doing public business." Accordingly, the court found that the board's practice did not violate the Constitution.

The U.S Court of Appeals for the Sixth Circuit is now reviewing the case.

AJC Involvement

AJC joined in PEARL's amicus brief to the Sixth Circuit urging affir-mation of the magistrate judge's legal analysis. The brief argued that the school board meet-ings, at which stu-dents are fre-quently present, are not the equivalent of meetings of de-liberative bodies for the purpose of Establishment Clause analysis. "By declining to review the School Board's practice under the school-prayer cases, the District Court ignored the potential that students attending the school board meetings may conclude . . . that school officials lack neutrality in their attitudes toward religion and that students in attendance are likely to feel pressure to participate in the prayer. . . ." As a consequence, the school board's conduct is constitutionally invalid. PEARL reiterated in the brief that the special impressionability of children makes it all the more carefully maintained.

FREILER v. TANGIPAHOA PARISH BOARD OF EDUCATION

Description

In August 1994, the Tangipahoa Parish Board of Education adopted a resolution requiring the statement of

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

Status

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

AJC Involvement

AJC joined in the amicus brief filed in the Fifth Circuit Court of Appeals by PEARL, which urged the affirmation of the district court's decision. In our brief, we argued that in addition to the board's impermissible purpose in adopting the resolution, the resolution also had the impermissible effect of advancing religion by "putting the state's stamp of approval on religious doctrine as a plausible explanation of reality." Furthermore, the brief pointed out, by referring only to the "biblical version of Creation" as a plausible competing account of the origins of the human race, the disclaimer unconstitutionally preferred one religious doctrine over others and over other secular accounts. The Fifth Circuit has yet to rule on this case.

School Aid Programs

BAGLEY v. MAINE DEPARTMENT OF EDUCATION

Description

A Maine statute allows the state to pay private school tuition for children in towns where there are no public schools to accommodate them, but prohibits the use of state funds to pay tuition at religiously affiliated schools. Parents of students in the rural town of Raymond brought suit claiming that the statute's exclusion of religious schools violates the constitutional guarantee of the free exercise of religion.

Status

In April 1998, a Maine Superior Court judge ruled that the state's refusal to subsidize plaintiffs' religious education did not sub- stantially burden their religious beliefs or practices. In addition, the court noted that if the statute were modified so as to permit tuition payments to sectarian schools, it would violate the Establishment Clause because the "primary effect" would be to subsidize and advance religion. Plaintiffs appealed the Superior Court's decision to the Maine Supreme Court.

AJC Involvement

AJC joined in an amicus brief filed by Americans United for Separation of Church and State with the Maine Supreme Court supporting the constitutionality of a vouchers program that directs that public funds can only be used to subsidize tuition at nonsectarian private secondary schools. Other organizations signing onto the brief included the Anti-Defamation League and People for the American Way Foundation.

In the Maine Supreme Court, plaintiffs argue that the Establishment Clause mandates neutrality in public

funding, i.e., the equal treatment of religious institutions and individuals. Therefore, parents wishing to enroll their children in sectarian schools pursuant to Maine's reimbursement statute must be treated identically to parents enrolling their children in public or nonsectarian private schools.

Our brief argues that "neutrality" is not the sole or even dominant principle in Establishment Clause jurisprudence. Rather, the Supreme Court has recognized the special dangers where government makes direct money payments to sectarian institutions even pursuant to a "neutral" program that includes nonsectarian recipients. In response to plaintiffs' free-exercise argument, our brief notes that the Free Exercise Clause is applicable solely to government prohibitions that are religiously based. No such prohibition exists here, as the plaintiffs are free to exercise their constitutional right to send their children to any school of their choice, religious or otherwise. The effect of the statute is simply to deny public funding for the exercise of that right.

We are awaiting a decision from the court.

CHITTENDEN TOWN SCHOOL DISTRICT v. VERMONT DEPARTMENT OF EDUCATION

Description

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

Status

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

The case was appealed to Vermont's Supreme Court, which heard oral argument in early 1998 but has not yet rendered a decision.

AJC Involvement

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

GATTON v. GOFF

Description

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

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

Status

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

The court rejected the state's attempt to characterize the program as valid because it "neutrally" dispensed vouchers to sectarian and nonsectarian school students, as well as public and private school students. The court found that far from being neutral in its distribution of benefits, the program is "skewed towards religion," creates an "impermissible incentive for parents to send their children to sectarian schools," and effectively "steers aid to sectarian schools, resulting in what amounts to a direct government subsidy." Since the court construed such government subsidies to be direct and substantial, it held the program had the "primary effect of advancing religion in violation of the Establishment Clause."

Pending its review of the case, the Supreme Court of Ohio granted a stay of the appellate court's decision. The state legislature subsequently increased the allocation of funds and the number of students to be served by the program in the 1997-98 school year.

A decision from the Ohio Supreme Court is currently being awaited.

AJC Involvement

AJC joined in PEARL's amicus brief submitted to the Ohio Supreme Court in which we argued that "[t]he Ohio Pilot Scholarship Program violates the bedrock Establishment Clause prohibition against government financing of religious activities." Citing U.S. Supreme Court precedent, our brief points out that unrestricted state aid to religious institutions is unconstitutional and that the mere fact that a statute benefits secular as well as sectarian schools does not establish that it is "neutral" toward religion. More-over, the state's attempt to avoid a constitutional violation by funneling aid through parents elevates form over substance. The pilot program's provision of checks to parents rather than to religious schools is a "transparent fiction," since the state mails grant checks to parents for use at approved schools and the parents are then required to endorse the check over to the schools. Because it makes state funds available to religious schools for an unrestricted range of sectarian activities, the brief argues, Cleveland's pilot program is constitutionally invalid.

HELMS v. PICARD

Description

Chapter 2 of the federal Elementary and Secondary Education Act of 1965 provides for "block grants" to state and local educational agencies to implement "innovative assistance programs." Chapter 2 services include the distribution of library books, slide, movie and overhead projectors, television sets, tape

recorders, projection screens, maps, globes, filmstrips, cassettes, resource materials, computers, and computer software to public and private schools, including sectarian schools, for the purpose of improving student achievement. Chapter 2 also permits a host of programs to be provided that involve public-school staff, including the development of technology programs and drop out and illiteracy prevention programs.

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

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

Status

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

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

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

In September 1998 the U.S. Department of Education filed a petition for rehearing, asking the Fifth Circuit to reconsider its rulings with respect to the Chapter 2 program in Jefferson Parish, which it describes in its brief as "unquestionably a secular program providing secular educational services to both public and private school children on an equal basis."

AJC Involvement

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

JACKSON v. BENSON

Description

In June 1998, the Wisconsin Supreme Court ruled that the Milwaukee Parental Choice Program (MPCP), begun in 1990 as the nation's first vouchers program, was constitutional. MPCP allows families below a certain income level to send their children to the school of their choice-public, private, or parochial-at state

expense. When originally enacted in 1990 it provided for 15 percent of the public-school population, approximately 1,500 students, to take part in the vouchers program, which at that time encompassed only nonsectarian private schools. In 1995 the law was amended and the program expanded to increase the number of eligible students to 15,000 and open it up to participation by private sectarian schools.

Status

In the first series of court challenges, the MCMP was struck down as violative of the religious establishment provisions of the Wisconsin constitution since it directed payments of money from the state treasury for the benefit of religious seminaries. Neither the Circuit Court for Dane County nor the Court of Appeals considered the issue of the program's validity under the Establishment Clause of the U.S. Constitution. That issue was subsequently addressed by the Supreme Court of Wisconsin, which reversed and upheld the MCMP. Utilizing the U.S. Supreme Court's tripartite test enunciated in Lemon v. Kurtzman, the court ruled that the law did not violate the Establishment Clause because it had a secular purpose, did not have the primary effect of advancing religion, and would not lead to an excessive entanglement between the state and participating sectarian private schools.

As to the "purpose" prong, the court noted that a state's effort to assist parents in meeting the rising cost of educational expenses, regardless of the type of school their children attend, serves the secular purpose of insuring that the "state's citizenry is well educated." Ruling that the law did not advance religion, it pointed to the Supreme Court's recent decision in Agostini v. Felton as establishing the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion and (2) only as a result of "numerous private choices of the individual parents of school age children." Finally, it found no excessive entanglement with religion since the state "need not, and in fact is not, given the authority to impose a comprehensive, discriminating and continuing state surveillance" over the participating sectarian private schools. The court concluded by noting that the MPCP provides a "neutral benefit directly to children of economically disadvantaged families on a religious-neutral basis."

Plaintiffs appealed to the U.S. Supreme Court, which on November 9, 1998 declined to review the Wisconsin Supreme Court's decision. As a result, Milwaukee students will continue to receive public funds for use at parochial schools pursuant to the MPCP.

AJC Involvement

AJC filed an amicus brief jointly with the American Jewish Congress and the Jewish Council for Public Affairs urging the U.S. Supreme Court to review and reverse the Wisconsin Supreme Court's ruling upholding the MPCP. As the brief notes, "this case presents an opportunity to confront and bring order to the discordant approaches to the First Amendment's Establishment Clause which now co-exist uneasily in this Court's Establishment Clause cases."

The Supreme Court has taken three approaches to the Establishment Clause in recent years: (1) a strict interpretation, enforcing stringent restrictions on government financing and other forms of aid to religion, (2) an interpretation that "equal treatment" is a necessary, but not sufficient, prerequisite for upholding grants of aid which flow, at least indirectly, to pervasively religious institutions, and (3) an interpretation that the Establishment Clause "is merely an equal protection clause," at once requiring equal treatment of all religions vis-ˆ-vis one another and equal, but not preferential, access to subsidies and other government benefits. While AJC is committed to the first interpretation, we argued that only under the last interpretation, which the Wisconsin Supreme Court used to render its decision, could vouchers arguably be constitutional. We noted that the "Establishment Clause imposes special restrictions on government aid to religion and . . . those restrictions are vio-lated by the Wisconsin vouchers program."

Religious Accommodation

BALINT v. CARSON CITY, NEVADA

Description

In February 1995, Lisette Balint, a member of the Worldwide Church of God, was offered a position in the detention section of the Carson City Sheriff's Department. Carson City deputy sheriffs are assigned work shifts (including Saturdays and Sundays) by a system under which the deputies bid for shifts in order of seniority. When Balint informed the department that she could not work during her Sabbath (Saturday) and requested that her schedule be adjusted to accommodate her religious practice, she was informed that there could be no accommodation. She subsequently withdrew her application for employment with the department. Balint then filed suit alleging that in making no effort to accommodate her religious practices, the department had engaged in religious discrimination in violation of Title VII of the Civil Rights Act of 1964.

Status

The U.S. District Court for the District of Nevada granted the department summary judgment and dismissed Balint's case on the ground that the department's bona fide seniority system by which it allocated work shifts extinguished any obligation it had to accommodate Balint's religious practices. The Ninth Circuit Court of Appeals affirmed the district court's ruling.

In reaching their decisions, both courts relied on TWA v. Hardison, a U.S. Supreme Court case which held that employers must reasonably accommodate their employees' religious beliefs so long as such accommodation does not result in "undue hardship" to their business. The district court ruled, and the Ninth Circuit agreed, that "[b]ecause the Department had in place a nondiscriminatory seniority-based system for assigning shifts, it had no duty to accommodate Balint, even if such accommodation would have no more than a de minimis impact."

AJC Involvement

AJC joined in the amicus brief filed by the American Jewish Congress in the Ninth Circuit, which has agreed to rehear the case en banc. The brief points out that the courts' reliance on Hardison is misplaced because while the Supreme Court in Hardison ruled that anything more than a de minimis cost to an employer would constitute undue hardship, it underscored the need for some effort to be made at accommodation. Moreover, fourteen years earlier in EEOC v. Hacienda Hotel, the Ninth Circuit rejected its current reading of Hardison and noted, "[t]he court in TWA addressed the degree of accommodation that was required of an employer within the framework of a seniority system. The court recognized that, at a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs. . . ."

We are now awaiting a decision from the Ninth Circuit."

Zoning

KUHL v. BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONTCLAIR AND B'NAI KESHET MONTCLAIR JEWISH CENTER

Description

B'nai Keshet Montclair Jewish Center, a Reconstructionist congregation, had been sharing space in the First Baptist Church community house in Montclair for seven years when, after a long and exhaustive search, it located and entered into a contract to purchase property located in a mixed residential and institutional use area for a permanent home. In November 1993, the congregation applied to the Montclair Board of Adjustment for a use variance to allow a house of worship, religious school, and related activities on the property. A neighborhood group objected to the variance application, claiming that construction of the synagogue would increase area traffic and ultimately reduce property values.

Status

After twenty-six hearings, the Montclair Board of Adjustment approved a use variance for the construction of a permanent home for B'nai Keshet on the property. The board's ruling was based on its finding that the proposed use was inherently beneficial and in furtherance of the general welfare and thus satisfied the requirements for the grant of a use variance under New Jersey zoning law. The board subsequently granted the congregation's application for site plan approval and bulk variances.

In 1995, the objecting neighbors filed a complaint seeking to reverse the board's grant of the variances and site plan approval. A New Jersey Superior Court judge rejected plaintiffs' claim that houses of worship are not inherently beneficial uses under the zoning statute and that a finding to the contrary would violate the Establishment Clause. In upholding the board's rulings, the court stated: "Identifying the general welfare benefits of religious uses and according such uses the same benefits as are granted other inherently beneficial uses in no way violates either the United States or the New Jersey constitutions."

Plaintiffs appealed to the Appellate Division, which in 1997 upheld the board's grant of B'nai Keshet's zoning variance. In affirming the superior court judge's decision, the appellate court wrote: "The contention that houses of worship should not be treated as inherently beneficial uses is without merit. There is direct benefit to the general population from the proposed facility. That it may be run by a religious organization does not detract from the inherent benefits it provides by promoting the morals and general welfare of the community."

On March 10, 1998, the New Jersey Supreme Court dismissed plaintiffs' appeal of the lower courts' rulings.

AJC Involvement

AJC joined with the American Civil Liberties Union of New Jersey, the American Jewish Congress, and the Montclair Clergy Association in an amicus brief submitted to the Appellate Division on behalf of B'nai Keshet. In addition to arguing that the lower courts correctly applied the zoning law's "inherently beneficial use" doctrine, our brief took the position that the Free Exercise Clauses of the U.S. and New Jersey constitutions and the Religious Freedom and Restoration Act compelled affirmance of the judgments because they preclude any substantial burden on the exercise of religion that is not the least restrictive means of achieving a compelling state interest. The board's grant of the use variance with carefully sculpted con-ditions demonstrated the existence of less restrictive means in this case.

Discrimination/Civil Liberties

Affirmative Action TAXMAN v. BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY

Description

Sharon Taxman, a white business-educa-tion teacher, and Debra Williams, an African-American business-education teacher, were hired by the Piscataway Township Board of Education on the same day. Evaluations revealed that the teachers were equal in performance. Although there were other African-American teachers in the school, Ms. Williams was the only African-American business-education teacher. The other eight teachers in the department were white.

Due to budgetary constraints, the school district was forced to lay off one teacher in the department and Ms. Taxman and Ms. Williams had the least seniority. Because both teachers were equal in every respect, the board invoked its affirmative action policy to break the tie as to which teacher would be laid off. The policy, in effect since 1975, provided that "when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended." Previous situations involving ties had been resolved by drawing lots. In this instance, however, Ms. Taxman was laid off and placed on a preferred list for rehiring. She was rehired two years later.

Upon her dismissal, Ms. Taxman filed a complaint with the Equal Employment Opportunity Commission. The Justice Department decided to challenge the board's actions in federal court and Ms. Taxman was granted permission to intervene.

Status

In 1993, the District Court for the District of New Jersey ruled that the school board had acted illegally in firing Ms. Taxman. The court based its decision on two U.S. Supreme Court cases that, according to the court, held that an affirmative action policy is to be upheld only if (1) its purpose is to remedy past discrimination by the employer or to correct a manifest imbalance in the workforce and (2) it does not unnecessarily trammel the rights of nonminority employees. Because there was no evidence of past discrimination or manifest imbalance in the Piscataway school system, the board's professed purpose of promoting racial diversity was held legally insufficient to justify the policy. The court further held that even if the goal were permissible, the plan unnecessarily trammeled the rights of white employees. Accordingly, the court granted judgment in favor of the United States and Ms. Taxman.

On appeal, the Third Circuit Court of Appeals held that while race could be considered in employment decisions to remedy past discrimination or racial imbalance, Piscataway's schools had no history of racial discrimination or underrepresentation of minorities. Therefore, the court held, the board's favoring Ms. Williams was illegal.

The U.S. Supreme Court then agreed to review the case during its 1997 term, but in November, just weeks before the scheduled oral argument, the parties abruptly settled. Much of the settlement funds paid to Ms. Taxman came from civil rights groups who were concerned about the impact of a broad anti-affirmative action ruling from the Supreme Court.

AJC Involvement

AJC joined in the American Jewish Congress's amicus brief filed with the Supreme Court on behalf of Sharon Taxman arguing that the case represented an inappropriate use of affirmative action, even as AJC noted its conviction that affirmative action remains a necessary response to the effects of systematic racial discrimination. Our brief argued that under Title VII racial preferences in employment must be carefully scrutinized and may only be used in limited circumstances. Where there is no history or pattern of racial discrimination or any evidence of racial imbalance, the application of an affirmative action policy designed to achieve diversity was inappropriate. The brief further argued that the use of a diversity-based affirmative action policy is particularly inappropriate in a layoff decision, where the burden is borne by a single individual as opposed to a diffuse group of people and that burden consists of the loss of one's livelihood

Census 2000

U.S. DEPARTMENT OF COMMERCE v. U.S. HOUSE OF REPRESENTATIVES

Description

Article I, Section 2 of the U.S. Constitution requires Congress to conduct an "actual enumeration" of the population every ten years "in such Manner as they shall by law direct." Despite this constitutional mandate to obtain an "actual enumeration," no census has been wholly successful in achieving that goal. According to the Census Bureau, the 1990 census missed 8.4 million people and double counted 4.4 million others. Compounding the consequences of the undercount is the fact that certain groups were missed more often than others. Nationally, the 1990 census missed 12.2 percent of Native Americans living on reservations, 5 percent of persons of Hispanic origin, 4.4 percent of African Americans, and 2.3 percent of Asian Americans.

Because census information is used to guide the annual distribution of hundreds of billions of dollars, to reapportion congressional seats, and to draw legislative districts, the census is at the core of our democratic system of government. Following the 1990 undercount, bipartisan legislation passed unanimously by

Congress directed the secretary of commerce to contract with the National Academy of Sciences to "study and report on means by which the government could achieve the most accurate population count possible." The result was "The Plan for Census 2000," unveiled by the Bureau of the Census in 1996, which combines a more aggressive enumeration effort with modern scientific sampling techniques in order to address the pervasive undercount of people of color.

The U.S. House of Representatives, through former speaker Newt Gingrich, filed suit challenging the constitutionality and legality under the Census Act of the use of statistical sampling in Census 2000.

Status

In August 1998, a special three-judge panel of the U.S. District Court for the District of Columbia concluded that the Census Act barred the utilization of scientific sampling to produce the population counts that determine how to reapportion Congress. Because it found statistical sampling violative of the Census Act, the court did not reach the issue of its validity under the Constitution.

The court's ruling turned on its interpretation of provisions of the Census Acts of 1957 and 1976. While the 1957 act provided that "except for apportionment purposes," the secretary of commerce may, where he deems appropriate, authorize the use of the statistical method known as sampling," in 1976 Congress changed the language of the law so that, "except for . . . purposes of reapportionment," the commerce secretary "shall" authorize the use of sampling. The Commerce Department argued that by changing the wording to make all other sampling mandatory, rather than optional, Congress had effectively removed the prohibition against it for reapportionment purposes and it was now optional in that context.

The district court disagreed with the Commerce Department's interpretation of the statutes. It noted that "common sense concerning the subject matter of the exception dictates that the 'except' clause must [still] be read as prohibitory." The court emphasized that it was a "cardinal principle" of statutory interpretation that "dramatic departures" from past practices should not be read into statutes without a definitive signal from Congress. According to the court, if Congress had such an intent, it would have made that intent explicit in the statute, or at least some members would have identified or mentioned it at some point in the legislative history. Due to the pivotal role the census plays in the balance of power in Congress between political parties and among states, the Court found that "it borders on the absurd that Congress would enact such a momentous change in such an oblique fashion." Because of the "straightforward means" available to Congress to accomplish that goal, the court declined to ascribe to Congress the "indirect route that defendants advance."

The Justice Department appealed the district court's ruling to the Supreme Court, which has scheduled oral argument in the case for November 30, 1998.

AJC Involvement

AJC joined in an amicus brief filed by the Lawyers' Committee for Civil Rights Under Law with the Supreme Court arguing that the secretary of commerce-without violating either the Census Act or the Constitution-may employ statistical sampling to determine the population for purposes of congressional apportionment. Our brief agrees with the Commerce Department's analysis of the 1976 amendment to the Census Act and asserts that the language of the statute made it clear that Congress was giving the secretary the authority to use sampling for all aspects of the decennial census.

The district court, however, made no attempt to arrive at a construction of the 1976 act that would harmonize the statute's specific authorization for the secretary to employ statistical sampling with its reapportionment exception. The brief further argues that the Constitution not only permits the secretary to use sampling procedures in conducting the census, but-given the scientific and demographic evidence before him-it is the only feasible way for him to carry out the constitutional mandate to achieve a true "enumeration."

Family Leave

THOMSON v. OHIO STATE UNIVERSITY HOSPITAL

Description

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

Status

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

Ms. Thomson appealed to the Sixth Circuit Court of Appeals.

AJC Involvement

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

We are awaiting a decision by the Sixth Circuit.