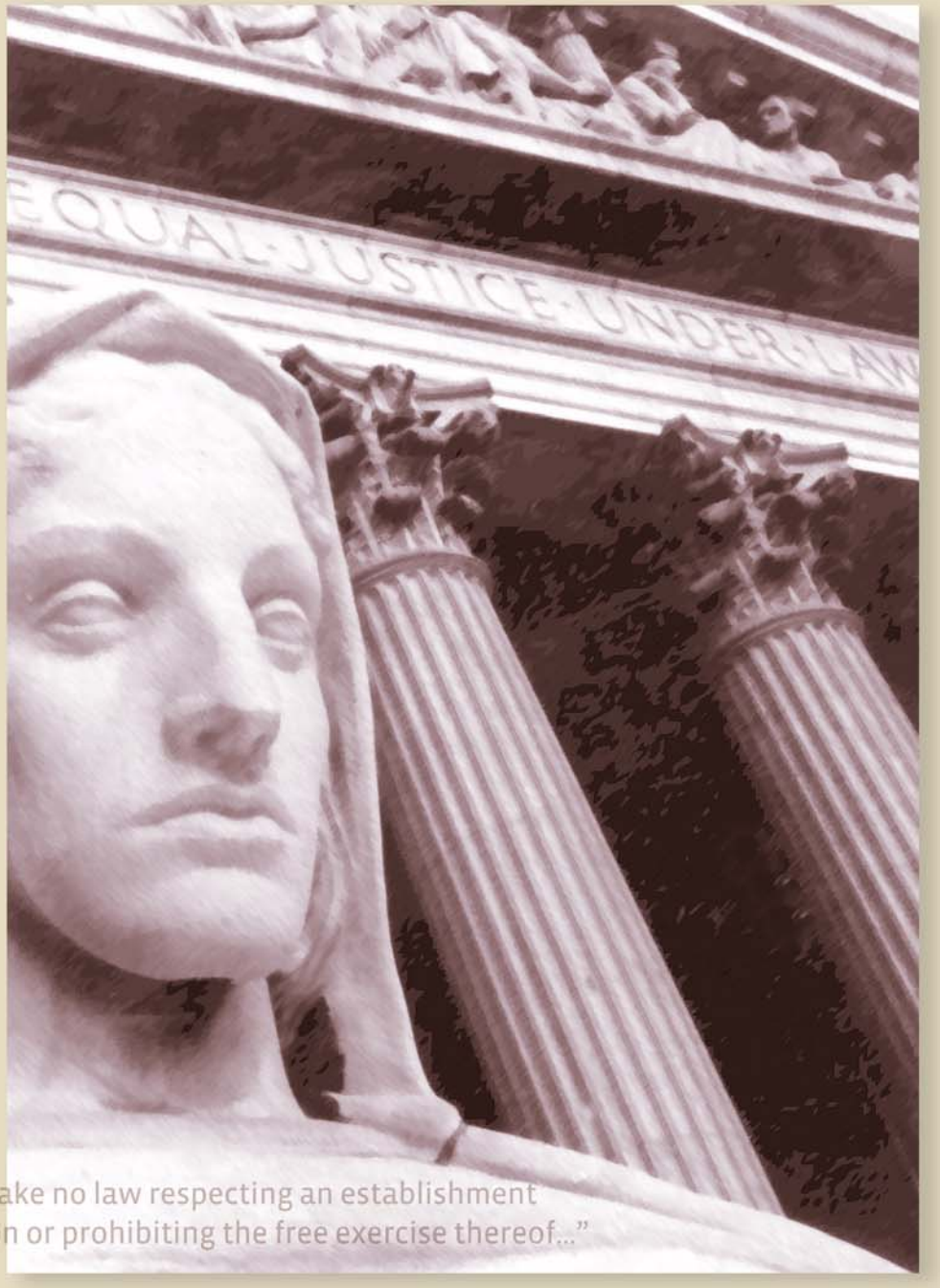


"Congress shall make no law respecting an establishment
of religion or prohibiting the free exercise thereof..."

"We hold these truths to be self-evident,
that all men are created equal..."

AJC in the Courts

THE CENTENNIAL EDITION

AMERICAN JEWISH COMMITTEE

The American Jewish Committee protects the rights and freedoms of Jews the world over; combats bigotry and anti-Semitism and promotes human rights for all; works for the security of Israel and deepened understanding between Americans and Israelis; advocates public policy positions rooted in American democratic values and the perspectives of the Jewish heritage; and enhances the creative vitality of the Jewish people. Founded in 1906, it is the pioneer human-relations agency in the United States.

To learn more about our mission, programs, and publications, and to join and contribute to our efforts, please visit us at www.ajc.org or contact us by phone at 212-751-4000 or by e-mail at contribute@ajc.org.

AJC in the Courts

THE CENTENNIAL EDITION

AMERICAN JEWISH COMMITTEE

This report was prepared by: Jeffrey Sinensky, Legal Director, Kara Stein, Associate Director, Domestic Policy and Legal Affairs, Danielle Samulon, Assistant Director, Domestic Policy and Legal Affairs, Joshua Kunis, Assistant House Counsel, Goldman Fellow Guy Milhalter, and intern Evan Newman.

Publication was made possible by a grant from The Esther A. and Joseph Klingenstein Fund, Inc.

CONTENTS

Foreword

by Carol Nelkin

The year 2006-07 marks the centennial of the founding of the American Jewish Committee. During its long history as the nation's premier human rights organization, AJC has had as one of its bedrock principles a deep commitment to the pursuit of justice. It is therefore not surprising that AJC has also had a long and distinguished history of seeking to protect and preserve the civil and religious rights not only of Jews, but of all Americans, by its presence in the courts.

AJC filed its first amicus curiae, or "friend of the court," brief in the United States Supreme Court in 1923. That case, *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary* (1925), involved a challenge to a Ku Klux Klan-inspired statute aimed at Catholic parochial schools which required all parents to enroll their children in public school or risk criminal conviction. In a victory for religious freedom, the Supreme Court unanimously struck down the law, 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 rights and religious freedom 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.

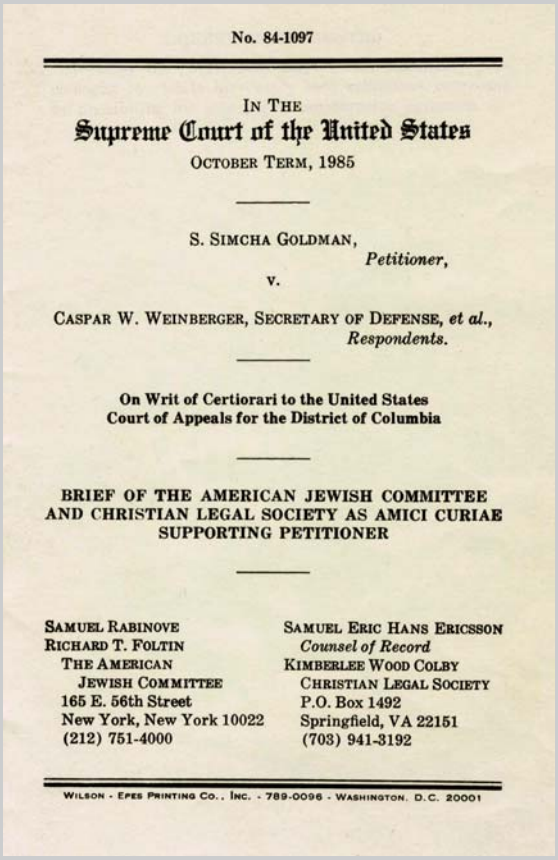
Whatever the pressing issues of the day have been, AJC has been there to make sure our voice is heard in the legal process. Whether the case involved such matters as prayer in the schools, sectarian displays on government property, government aid to religious schools, vouchers, religious freedom in the workplace, affirmative action, school funding equity, family leave, or Holocaust restitution claims, AJC has taken a principled stand and played a respected and important role in helping shape the law by which America is governed.

Most recently AJC has been an active participant in the legal debate being waged in the courts as to where to draw the line between the protection of vital national security interests and the rights of individuals in a democratic society. AJC has participated as amicus curiae in three cases before the Supreme Court addressing the treatment of detainees deemed to be "enemy combatants," urging that the right to counsel and due process must be preserved to insure that American values do not become casualties of the war on terror.

In honor of our centennial celebration, this edition of *AJC in the Courts* contains a tribute to our rich history as well as an up-to-date report of AJC's current activities in the courts.

We welcome your review and your comments.

Carol Nelkin is the chair of AJC's National Legal Committee.



No. 84-1097

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,
Petitioner,
v.
CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE AMERICAN JEWISH COMMITTEE AND CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE SUPPORTING PETITIONER

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SAMUEL ERIC HANS ERICSSON
Counsel of Record
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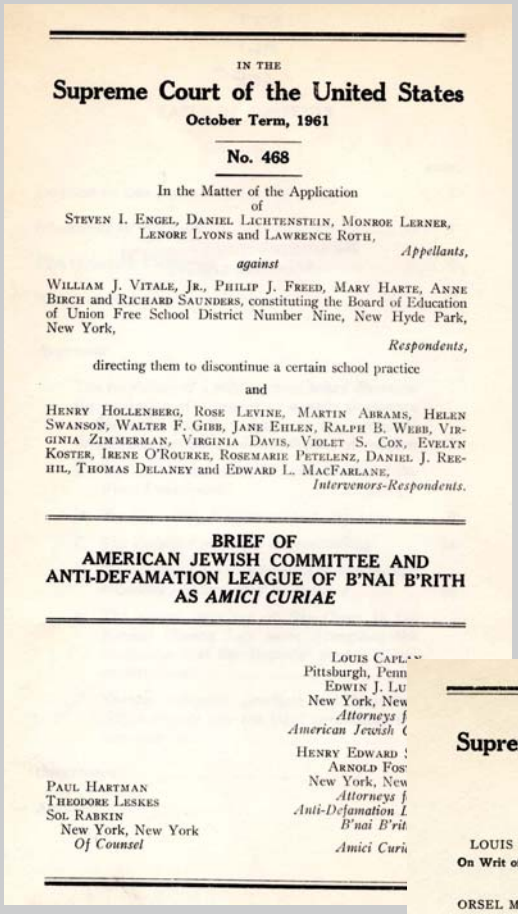
Springfield, VA 22151
(703) 941-3192

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Goldman v. Weinberger:
The Supreme Court disagreed with AJC's position that a commissioned officer and clinical psychologist serving in a military clinic should be allowed to wear his yarmulke on duty, and accepted the government's argument that it would undermine "the uniformity sought by dress regulations." With AJC support, Congress later enacted legislation protecting the right of members of the armed forces to wear religious apparel unless doing so would interfere with their duties.



IN THE
Supreme Court of the United States
October Term, 1961

No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Appellants,
against
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents,
directing them to discontinue a certain school practice
and
HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

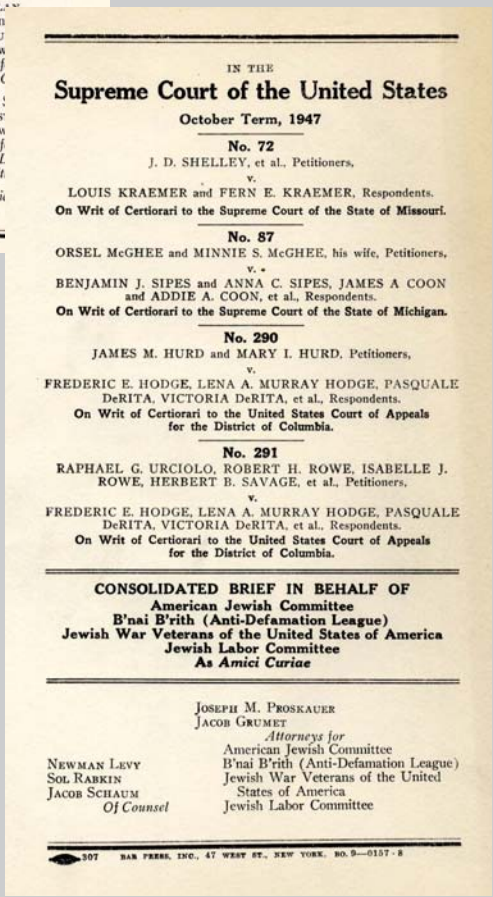
LOUIS CAPL...
Pittsburgh, Penn
EDWIN J. LU...
New York, New
Attorneys f...
American Jewish ...

HENRY EDWARD ...
ARNOLD FOS...
New York, New
Attorneys f...
Anti-Defamation L...
B'nai B'rit...

PAUL HARTMAN
THEODORE LESKES
SOL RABKIN
New York, New York
Of Counsel

Amici Curi...

Engel v. Vitale:
AJC's arguments were victorious in this case where the Supreme Court ruled that New York public schools could not begin their school day with an official prayer.



IN THE
Supreme Court of the United States
October Term, 1947

No. 72
J. D. SHELLEY, et al., Petitioners,
v.
LOUIS KRAEMER and FERN E. KRAEMER, Respondents.
On Writ of Certiorari to the Supreme Court of the State of Missouri.

No. 87
ORSEL McGHEE and MINNIE S. McGHEE, his wife, Petitioners,
v.
BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A COON and ADDIE A. COON, et al., Respondents.
On Writ of Certiorari to the Supreme Court of the State of Michigan.

No. 290
JAMES M. HURD and MARY I. HURD, Petitioners,
v.
FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, VICTORIA DeRITA, et al., Respondents.
On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

No. 291
RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, HERBERT B. SAVAGE, et al., Petitioners,
v.
FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, VICTORIA DeRITA, et al., Respondents.
On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

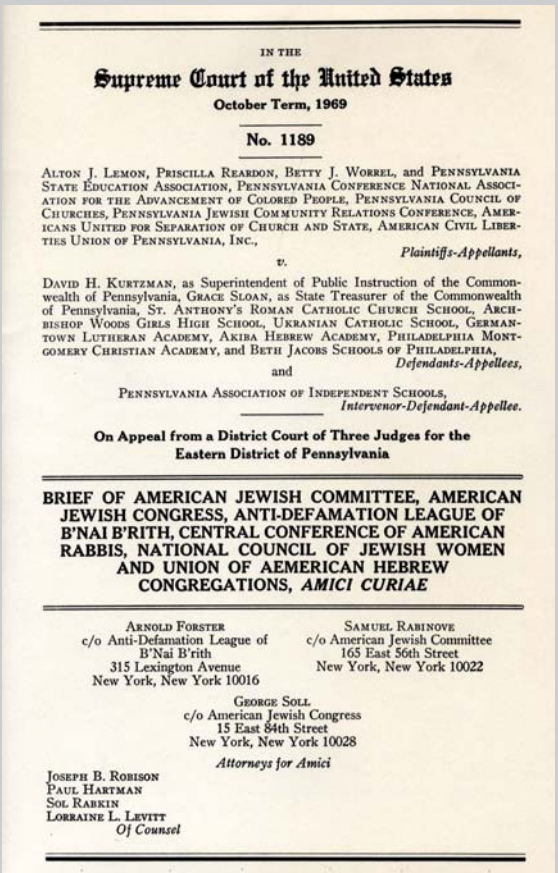
CONSOLIDATED BRIEF IN BEHALF OF
American Jewish Committee
B'nai B'rith (Anti-Defamation League)
Jewish War Veterans of the United States of America
Jewish Labor Committee
As *Amici Curiae*

JOSEPH M. PROSKAUER
JACOB GRUMET
Attorneys for
American Jewish Committee
B'nai B'rith (Anti-Defamation League)
Jewish War Veterans of the United States of America
Jewish Labor Committee

NEWMAN LEVY
SOL RABKIN
JACOB SCHAUM
Of Counsel

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. NO. 9—0157-8

Shelley v. Kraemer:
As AJC urged it to do, the Supreme Court refused to enforce restrictive covenants that prevented African-Americans from owning or occupying property because to do so would violate the Equal Protection Clause of the Fourteenth Amendment.



IN THE
Supreme Court of the United States
October Term, 1969

No. 1189

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,
Plaintiffs-Appellants,
v.
DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,
Defendants-Appellees,
and
PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AEMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

ARNOLD FORSTER
c/o Anti-Defamation League of B'Nai B'rith
315 Lexington Avenue
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SAMUEL RABINOVE
c/o American Jewish Committee
165 East 56th Street
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GEORGE SOLL
c/o American Jewish Congress
15 East 84th Street
New York, New York 10028
Attorneys for Amici

JOSEPH B. ROBISON
PAUL HARTMAN
SOL RABKIN
LORRAINE L. LEVITT
Of Counsel

Lemon v. Kurtzman,
in which AJC filed an amicus brief, established the analytic test for violations of the Establishment Clause: "the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 583

WALTER M. PIERCE, as Governor of the State of Oregon, and others, Appellants,

against

THE SOCIETY OF THE SISTERS OF THE HOLY NAME OF JESUS AND MARY, Appellee.

No. 584

[illegible] M. PIERCE, as Governor of the [illegible] of Oregon, and others, Appellants,

against

HILL MILITARY ACADEMY, Appellee.

Appeals from the District Court of the United States for the District of Oregon.

BRIEF FOR AMERICAN JEWISH COMMITTEE.

LOUIS MARSHALL, *Amicus Curiae.*

AJC founder and prominent civil rights attorney Louis Marshall authored AJC's first amicus brief in *Pierce v. Society of Sisters,* challenging an Oregon law prohibiting parents from sending their children to parochial schools.

Melvin A. Glasser
62 Halsted Place
Rye, New York

May 21, 1954

Dr. John Slawson
Executive Vice President
American Jewish Committee
386 Fourth Avenue
New York, New York

Dear Dr. Slawson:

You may recall when we lunched together I mentioned to you that Dr. Kenneth Clark and Dr. Otto Klineberg had testified in the South Carolina school segregation case. They had been asked to testify as expert witnesses on the effects of segregation on the personality development of children. Their testimony was based on the findings of the fact-finding studies of the Mid-Century White House Conference on Children and Youth.

By this time you doubtless have seen the full text of the U. S. Supreme Court decision in the school segregation case, with its heavy emphasis on the social and psychological effects of segregation. I understand much of this emphasis came from the White House Conference material. Footnote number 11 of the decision refers to Dr. Clark's White House Conference study and to Chapter VI of the final report "Personality in the Making," edited by Helen Witmer and Ruth Kotinsky.

I understand, very indirectly, that Justice Jackson said informally after the decision was rendered that he was well-impressed with some of the Clark material in the White House Conference Report.

Needless to say I am pleased not only about the decision but about the fact that the Mid-Century White House Conference was able to contribute to the evidence on which the decision was based.

I am sure you and the American Jewish Committee would wish to share in this pleasure, because you will recall that it was the financial assistance and staff advice from the Committee that in part made it possible for us in the White House Conference to undertake and complete this aspect of the work.

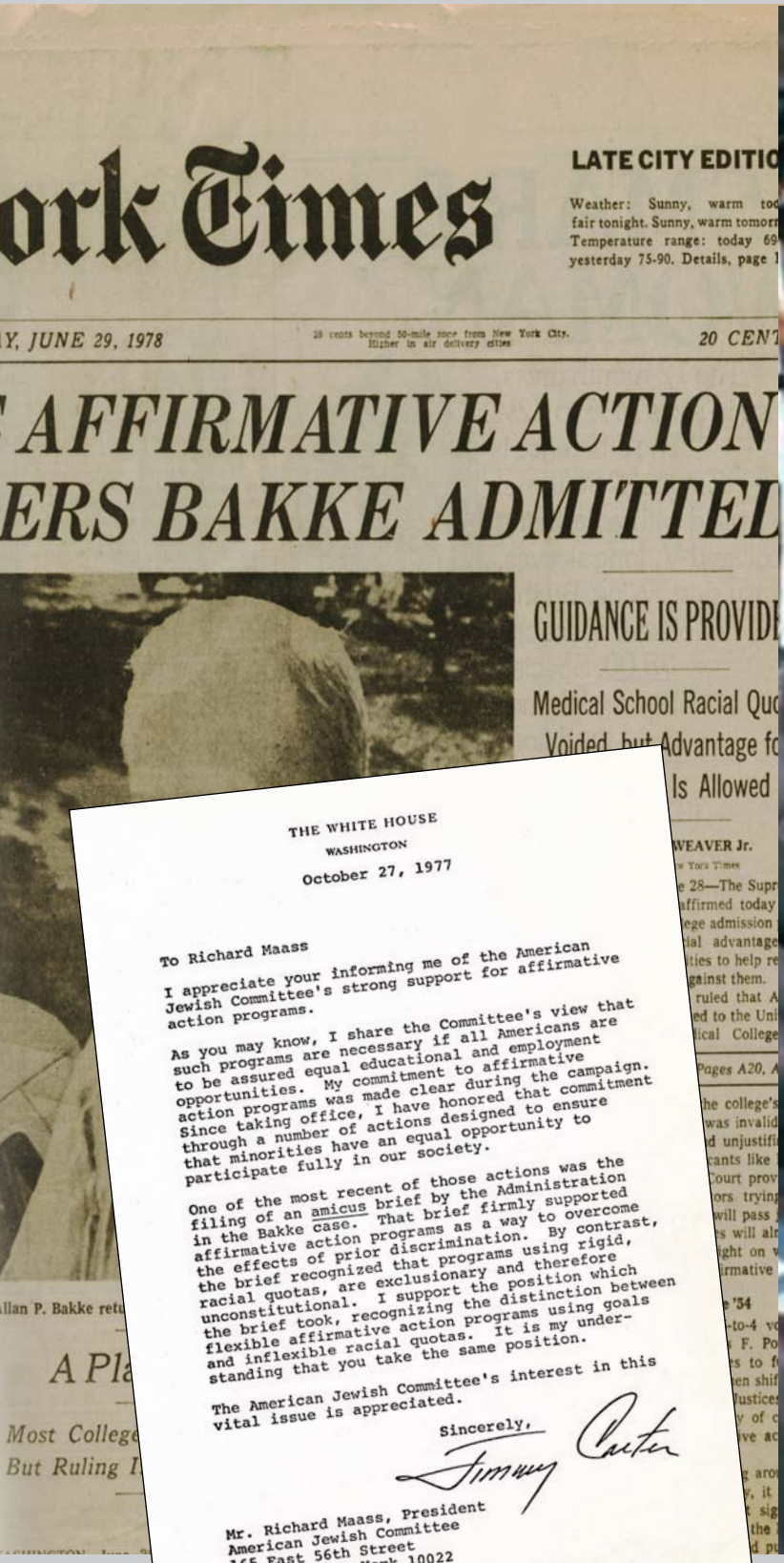
It is not often that we can show such a direct relationship between good research and desirable social action, but when we can it is certainly heartening.

Sincerely yours,

/s/ Melvin A. Glasser

Melvin A. Glasser

AJC sponsored social science research cited by the Supreme Court in its historic *Brown v. Board of Education* decision. Here Melvin Glasser, Executive Director of the Mid-Century White House Conference on Children and Youth, congratulates AJC's John Slawson (l.) on the impact Dr. Kenneth B. Clark's (r.) study had on the court.



ork Times

LATE CITY EDITIO

Weather: Sunny, warm to
fair tonight. Sunny, warm tomorr
Temperature range: today 69
yesterday 75-90. Details, page

Y, JUNE 29, 1978

20 cents beyond 50-mile zone from New York City.
Higher in air delivery cities

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F AFFIRMATIVE ACTION
ERS BAKKE ADMITTED

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THE WHITE HOUSE

WASHINGTON

October 27, 1977

To Richard Maass

I appreciate your informing me of the American Jewish Committee's strong support for affirmative action programs.

As you may know, I share the Committee's view that such programs are necessary if all Americans are to be assured equal educational and employment opportunities. My commitment to affirmative action programs was made clear during the campaign. Since taking office, I have honored that commitment through a number of actions designed to ensure that minorities have an equal opportunity to participate fully in our society.

One of the most recent of those actions was the filing of an amicus brief by the Administration in the Bakke case. That brief firmly supported affirmative action programs as a way to overcome the effects of prior discrimination. By contrast, the brief recognized that programs using rigid, racial quotas, are exclusionary and therefore unconstitutional. I support the position which the brief took, recognizing the distinction between flexible affirmative action programs using goals and inflexible racial quotas. It is my understanding that you take the same position.

The American Jewish Committee's interest in this vital issue is appreciated.

Sincerely,

Jimmy Carter

Mr. Richard Maass, President
American Jewish Committee
165 East 56th Street
New York, New York 10022

AJC's position on affirmative action, at issue in the *Bakke* case, was noted with appreciation by the White House.

THE UNIVERSITY OF MICHIGAN
OFFICE OF THE VICE PRESIDENT
AND GENERAL COUNSEL

Marvin Krislov
Jonathan Alger
Gordon L. Beeman
Jack Bernard
Stan Bies
Thomas J. Blessing
Richard C. Boothman
Richard A. Brandon
Sally J. Churchill
Edward B. Goldman
Mitchell A. Goodkin
Gloria A. Hage
Debra A. Kowich
Alice MacDermott
David J. Masson
Kara M. Morgenstern
Rachel Nosowsky
Daniel H. Sharphorn
Donna J. Snyder
Donica Thomas Varner
Anne K. Williams

March 21, 2003

Alan S. Jaffe
The American Jewish Committee
165 East 56th Street
New York, NY 10022

Dear Mr. Jaffe:

We are writing to express our heartfelt thanks and deepest appreciation for the long hours and hard work you and your colleagues have devoted to working on the amicus brief filed with the Supreme Court in our admissions cases. We are very grateful for your support of the University and higher education on this historic occasion.

We know that your own personal convictions have moved this process forward, and we feel incredibly fortunate to have been able to work with so many dedicated individuals on this project. Your integrity and commitment to excellence is evident in the brief, and we strongly believe that the Court will find it articulate and compelling.

On behalf of the University of Michigan, thank you again for your support and friendship throughout this critical period.

Sincerely,

Marvin Krislov

Jonathan Alger

Thanks, Alan!

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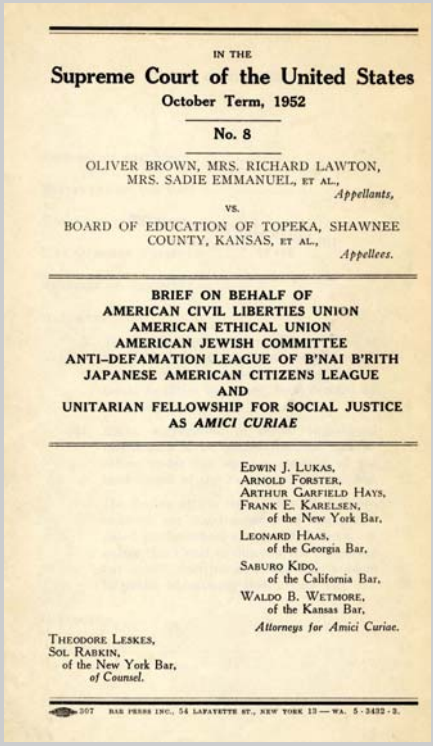
AJC spearheaded a Jewish communal defense of the University of Michigan's efforts to ensure diversity of all kinds in its student body.



IN THE

Supreme Court of the United States

October Term, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL., *Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL., *Appellees.*

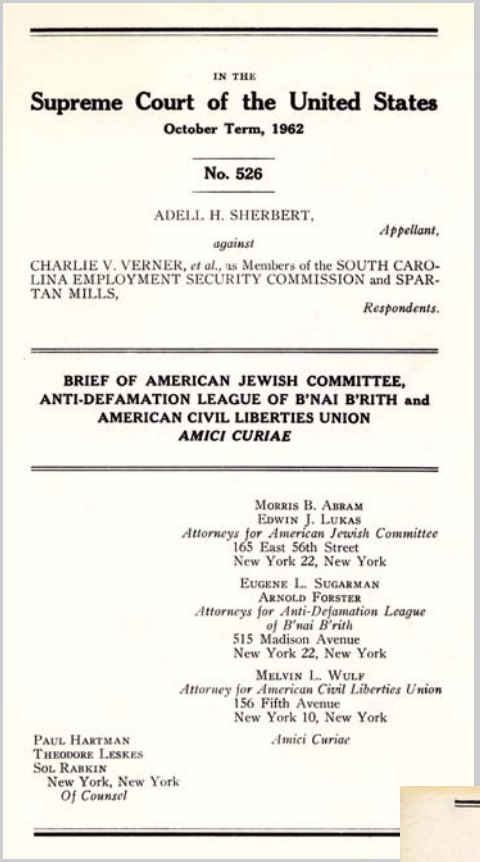
BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AMERICAN ETHICAL UNION AMERICAN JEWISH COMMITTEE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH JAPANESE AMERICAN CITIZENS LEAGUE AND UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE AS *AMICI CURIAE*

EDWIN J. LUKAS,
ARNOLD FORSTER,
ARTHUR GARFIELD HAYS,
FRANK E. KARELSEN,
of the New York Bar,
LEONARD HAAS,
of the Georgia Bar,
SABURO KIDO,
of the California Bar,
WALDO B. WETMORE,
of the Kansas Bar,
Attorneys for Amici Curiae.

THEODORE LESKES,
SOL RABKIN,
of the New York Bar,
of Counsel.

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3.

Brown v. Board of Education of Topeka:
In addition to filing an amicus brief, AJC sponsored social science research cited by the Supreme Court in its 1954 opinion concluding that "in the field of public education the doctrine of 'separate but equal' has no place."



IN THE

Supreme Court of the United States

October Term, 1962

No. 526

ADELL H. SHERBERT, *Appellant,*

against

CHARLIE V. VERNER, *et al.*, as Members of the SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION and SPARTAN MILLS, *Respondents.*

BRIEF OF AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH and AMERICAN CIVIL LIBERTIES UNION *AMICI CURIAE*

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MELVIN L. WULF
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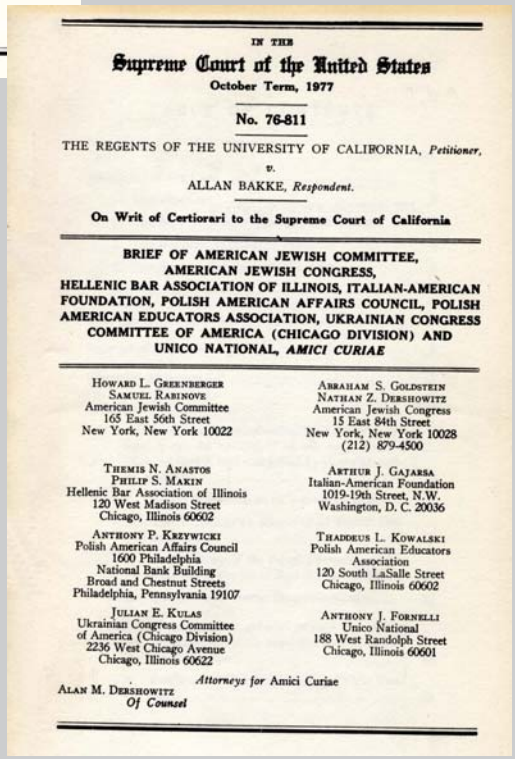
New York 10, New York

Amici Curiae

PAUL HARTMAN
THEODORE LESKES
SOL RABKIN
New York, New York
Of Counsel

Sherbert v. Verner:
AJC filed an amicus brief in this seminal religious liberty case in which the Supreme Court held that a state may not abridge an individual's free exercise of religion unless it can demonstrate a compelling state interest for doing so and that no alternative means would achieve that interest.



IN THE

Supreme Court of the United States

October Term, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Petitioner,*

v.

ALLAN BAKKE, *Respondent.*

On Writ of Certiorari to the Supreme Court of California

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, HELLENIC BAR ASSOCIATION OF ILLINOIS, ITALIAN-AMERICAN FOUNDATION, POLISH AMERICAN AFFAIRS COUNCIL, POLISH AMERICAN EDUCATORS ASSOCIATION, UKRAINIAN CONGRESS COMMITTEE OF AMERICA (CHICAGO DIVISION) AND UNICO NATIONAL, *AMICI CURIAE*

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American Jewish Committee
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Washington, D. C. 20036

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Ukrainian Congress Committee of America (Chicago Division)
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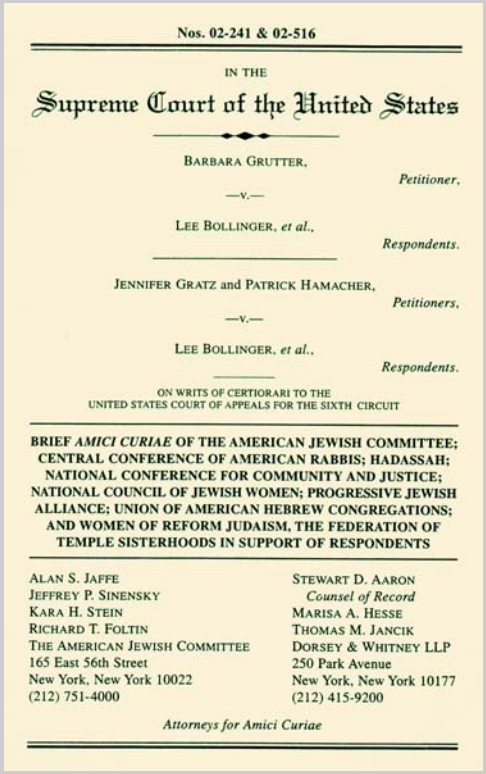
Chicago, Illinois 60622

ANTHONY J. FORNELLI
Unico National
188 West Randolph Street
Chicago, Illinois 60601

Attorneys for Amici Curiae

ALAN M. DERSHOWITZ
Of Counsel

Regents of the Univ. of California v. Bakke:
AJC filed an amicus brief arguing that a University of California at Davis medical school admissions program that reserved sixteen of 100 seats for minority students with a separate admissions process for those seats was an unconstitutional quota. The Supreme Court agreed.



Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER, *Petitioner,*

—v.—

LEE BOLLINGER, *et al.*, *Respondents.*

JENNIFER GRATZ and PATRICK HAMACHER, *Petitioners,*

—v.—

LEE BOLLINGER, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH COMMITTEE; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH; NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE; NATIONAL COUNCIL OF JEWISH WOMEN; PROGRESSIVE JEWISH ALLIANCE; UNION OF AMERICAN HEBREW CONGREGATIONS; AND WOMEN OF REFORM JUDAISM, THE FEDERATION OF TEMPLE SISTERHOODS IN SUPPORT OF RESPONDENTS

ALAN S. JAFFE
JEFFREY P. SINENSKY
KARA H. STEIN
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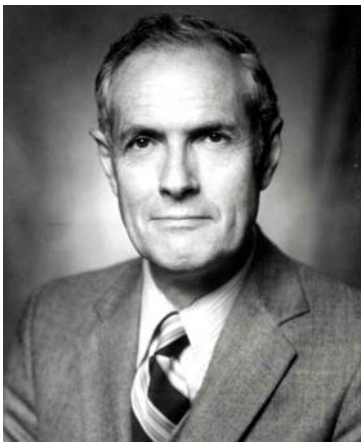
Gratz v. Bollinger and Grutter v. Bollinger:
AJC took the lead in filing an amicus brief on behalf of a number of Jewish organizations defending the programs developed by the University of Michigan to ensure diversity within its student bodies. Importantly, AJC pointed out, the programs considered race as one in a number of factors to achieve diversity.

Remembering Sam Rabinove



by Richard T. Foltin

As this publication reminds us, the American Jewish Committee has had a long and proud history of working through the courts to promote the values and constitutional principles that are our proud heritage as Americans. None of this would have been possible without the hard work and devotion of dedicated individuals, and no individual has been more at the core of AJC's work in this arena than Samuel Rabinove, who served as AJC's legal director from 1966 through 1997, three momentous decades in America's legal history.

The family, friends, and colleagues of Sam Rabinove convened at the headquarters of the American Jewish Committee on September 30, 2002—several months after his too-early passing at the age of 79—to celebrate the life of this man who for over three decades was at the helm of the agency's legal policy and advocacy. For over eight years after I came to AJC in 1984, I was privileged to work closely with Sam as his associate in New York, and continued to do so when I moved to a new AJC post in Washington in 1993. As such, I had a particular sense as to how fitting the happenstance of that September 30 date was for Sam's work and life.

For one thing, the following Monday was the first Monday of October, the day on which the Supreme Court reconvenes each year. I well recall the many occasions when, at that time of year, Sam and I sat down to consider—as Sam's and my successors in AJC's legal division no doubt do now—the cases on the docket in which AJC had a particular interest.

As well, the memorial service fell just after the conclusion of the Jewish cycle of holidays that begins with Rosh Hashana. I felt that Shemini Atzeret, the holiday that closes the festival season, particularly related to Sam. Although Shemini Atzeret follows just after Sukkot, it does not include that holiday's special observances—eating in the *sukka*, waving of the *lulav* and *etrog*. The singular modesty of Shemini Atzeret could not help but suggest a parallel with Sam's quiet and unostentatious dignity.

While I certainly had teachers in law school and in private practice, it was not until I came to AJC that I understood what it meant to have a "mentor." I found in Sam all that that word implies. He was wise, patient, thoughtful, and eager, both to teach and to learn. Above all, he was a role model for what it means to be an attorney representing not only the interests of an organization, but of an entire community.

Sam was imbued with commitment to the issues on which he worked and to which he dedicated his career, concern for the real-life impact of those issues, and respect for others. Especially important for me, he was willing to give a chance to a new associate who—at the time—had more enthusiasm for, than expertise in, the agency's varied agenda.

As the circle of people with whom I came in contact in the course of my work expanded, I was struck by a recurrent phenomenon. From all of them—lawyers and non-lawyers, professionals and lay people, Jews and non-Jews, allies and adversaries—I heard, time and again, the same refrain: "Oh, you work with Sam Rabinove? You're very lucky. He's just terrific!"

They were right. Working with Sam Rabinove and learning from him was the opportunity of a lifetime. Among much else, I learned from him, as I have already said, what it means to be an advocate for a public interest agency and, beyond that, for the public interest—a different calling from that of a lawyer in private practice. Why are the positions we take right, not only legally or constitutionally but morally and pragmatically as well—and how does one communicate to the public not only the position, but also the vision on which it is based in a cogent and comprehensible fashion? Oh, and also, always start with a joke. (I freely admit that I continue to borrow liberally from the jokes that I heard Sam tell.)

With the passage of many years, and with the evolution of our working relationship, I only came to appreciate more and more the soundness of his judgment, his total commitment not just to a job but to a mission of protecting (to use a phrase that Sam often borrowed) "truth, justice and the American way," the support he always provided to his colleagues, and—especially during his last twelve months as AJC's legal director when he struggled in the face of disabling illness to continue the work that he loved—the meaning of courage and grace under difficult circumstances.

Sam and I worked together day upon day, sometimes hour upon hour, and he was never complaining or judgmental, always open-minded and receptive to the views of others; he had a natural calmness that comes to one who is sure of who he is and what he stands for.

Of course, to think of Sam is to think of the battle for religious liberty and the principle of separation of church and state. His nuanced approach was reflected in a monograph he wrote for AJC that was dedicated to elaborating on the importance of religious rights and freedoms, but only after quoting from the French philosopher Blaise Pascal, who said, "Men never do evil so completely and cheerfully as when they do it from religious conviction"—a particularly appropriate reminder in these troubled days.

In many ways, it was Sam's vision that brought AJC to where it is today on religious liberty and other crucial issues. Principled and pragmatic at the same time, he was always there, prodding and molding all of us in the right direction.

When Sam retired, I wrote to him how I looked forward to having the benefit of his counsel for many years to come. And I did have the continued benefit of his counsel after his retirement, albeit for far too short a number of years.

But that story is not yet finished. We should think of Sam in the context of the words of an artist he admired, Woody Guthrie, who invoked John Steinbeck's Tom Joad in the verse of a song:

> Wherever little children are hungry and cry,
> Wherever people ain't free,
> Wherever men are fightin' for their rights,
> That's where I'm a-gonna be, Ma.
> That's where I'm a-gonna be.

Sam Rabinove is our Tom Joad. In the memory of his teaching and his example, we have the benefit of his counsel, and we will have that benefit all the rest of our lives.

Richard Foltin is legislative director and counsel in the Office of Government and International Affairs (Washington, D.C.) of the American Jewish Committee.
This essay is based on remarks delivered at the memorial service for Samuel Rabinove, September 30, 2002.

What They're Saying . . .

"AJC has played an enormously important role in the Supreme Court by filing amicus briefs in almost every important case involving the Constitution and religion and many of the most significant discrimination cases. In many cases, the Supreme Court agreed with the AJC position and appeared to use arguments found in the AJC briefs.

Erwin Chemerinsky
Alston & Bird Professor of Law and Professor of Political Science,
Duke Law School

For years, AJC's amicus curiae briefs have supplied a powerful, clearheaded perspective to courts on a range of critical issues—making AJC a broadly respected voice for the public interest.

Seth P. Waxman
Solicitor General of the United States, 1997-January 2001

My heartfelt congratulations to AJC on its centennial. Your contributions to the field of constitutional law have grown ever more valuable as the challenges to our civil rights and liberties have grown ever more serious.

Nadine Strossen
President, American Civil Liberties Union

For the past hundred years, AJC, through its pathbreaking amicus briefs, has defended the civil and religious rights of all Americans. From the 1920s, when the AJC defended the rights of Catholics to send their children to private schools, to its recent briefs defending affirmative action and religious freedom, the AJC has provided a model of how principled legal arguments can be deployed for the protection of liberty.

Jeffrey Rosen
Legal Affairs Editor, *The New Republic*

Religious liberty has had no better friend at the U.S. Supreme Court than the American Jewish Committee. In case after case, the AJC has been an effective and powerful voice for both "no establishment" and "free exercise"—the twin principles that sustain freedom of religion in America for people of all faiths and none.

Charles C. Haynes
Senior Scholar, Freedom Forum First Amendment Center

Over the years, the AJC has been an indispensable voice for the Free Exercise rights of American Jews and, indeed, of Americans of many faiths. AJC has stood for the principle that religious liberty must be enjoyed by all.

Nathan Diament
Director, Institute for Public Affairs, The Orthodox Union

The American Jewish Committee's amicus briefs have been reliably illuminating and forceful. The AJC has been a "friend of the Court" in the truest sense.

Laurence H. Tribe
Carl M. Loeb University Professor
Harvard Law School

Over the last 100 years the American Jewish Committee has courageously and intelligently advanced the cause of religious liberty and civil rights through our nation's courts. All Americans, no matter their race or their creed, owe the AJC a great debt of gratitude for their outstanding contribution.

James D. Standish
Director of Legislative Affairs,
Seventh-day Adventist Church World Headquarters

Congratulations to the AJC on 100 years of defending the rights of all Americans. Without a doubt, the work we do at the Interfaith Alliance has been directly impacted by the important religious liberty cases in which you have been involved.

The Rev. Dr. C. Welton Gaddy
President, The Interfaith Alliance

AJC, for 100 years, and the Baptist Joint Committee, for seventy years, have worked hard to make religion and houses of worship more secure from governmental meddling than any other place in the world. Congratulations, AJC! I pray you will be around for another century.

J. Brent Walker
Executive Director, Baptist Joint Committee

The AJC's amicus briefs to the Supreme Court in support of our constitutional values are so fine in quality and reasoning as to command attention rarely given to amicus submissions.

Jerome J. Shestack
Former President, American Bar Association
and former Chair, AJC National Legal Committee

If you scan the list of great church-state and civil rights cases of the past century, you find that the American Jewish Committee has been a consistent and courageous witness for religious liberty and equal rights for all Americans. All of us owe a debt of gratitude to AJC for the remarkable freedom we enjoy today.

Melissa Rogers
Visiting Professor of Religion and Public Policy
Wake Forest University Divinity School

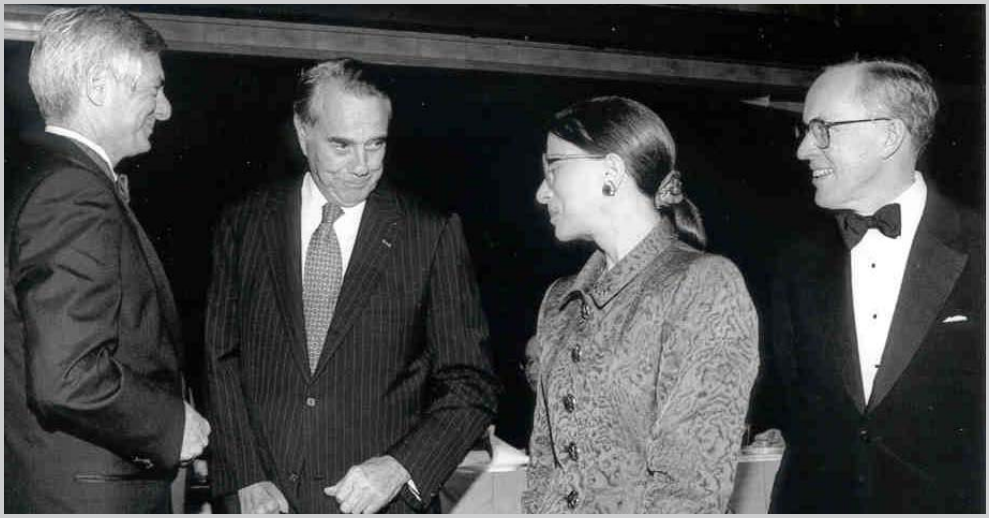
AJC President Jacob Blaustein (l.), Justice Hugo Black (c.), and Irving Engel at AJC's 1950 Annual Meeting.

AJC President Irving Engel (l.) and Honorary President Judge Joseph Proskauer (r.) present Judge Learned Hand with the American Liberties Medallion at AJC's 1955 Annual Meeting.

AJC President Howard Friedman (c.) with Justices Thurgood Marshall (l.) and William Brennan at AJC's 1985 Annual Meeting.

Chief Justice Earl Warren and his wife, Nina (l.), greet AJC Honorary President Jacob Blaustein and his wife, Hilda Katz Blaustein, at AJC's sixtieth Annual Meeting in 1966.

Former Supreme Court Justice and incoming AJC President Arthur Goldberg (l.) and past president Irving Engel (r.) honor outgoing president Morris Abram at an August 1968 Board of Governors meeting.



L. to r.: Bruce Ramer, Senator Robert Dole, Justice Ruth Bader Ginsburg, and AJC President Robert Rifkind at the 1995 Annual Meeting.

President Alfred Moses (l.) presents Justice Harry Blackmun with AJC's American Liberties Medallion at the 1992 Annual Meeting.

Justice Sandra Day O'Connor at AJC's 2001 Annual Dinner with AJC lay leader Nicki Tanner (l.).

L. to r.: Justice Stephen Breyer with AJC Director of Domestic Policy Jeffrey Sinensky, Associate Executive Director Shula Bahat, and Legislative Director Richard Foltin.

AJC and Legal Luminaries

The 2006 Litigation Report

I. SEPARATION OF CHURCH AND STATE

AMERICAN JEWISH CONGRESS V. CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Background

The Corporation for National and Community Service (the "Corporation"), pursuant to the National and Community Service Act (the "Act"), seeks to "meet the unmet human, educational, environmental, and public safety needs of the United States" by engaging Americans of all backgrounds in community service. The AmeriCorps Education Awards Program ("AEAP") is overseen by the Corporation and provides participants with a full-time national service education award for completing a term of service of at least 1,700 hours during a nine-to-twelve-month period. The award, which at the time the suit was initiated was $4,725, could be used toward student loans, college expenses, or expenses of an approved school-to-work program. Additionally, the Corporation provides grants of $400 to all organizations, secular and religious alike, that sponsor participants, to help defer training costs. In 2001, 565 AEAP grantees were placed as teachers in 328 religious schools, though the legislation specified that funds may not be used to "provide religious instruction, conduct worship services, or engage in any form of proselytization."

Case Status

In October 2002, the American Jewish Congress filed suit in the District of Columbia District Court seeking an injunction to bar AmeriCorps participants from teaching in religious schools and to bar the $400 grants to these schools. To bolster its claim, the plaintiff presented evidence at trial that program participants teaching in religious schools integrated religious instruction throughout the school day, led students in prayer several times per day, and placed crucifixes and other religious symbols in their classrooms. In response, the Corporation asserted that participants engaged in such activity only "on their own time" and denied that any individuals received AEAP funding for hours spent on religious activities.

The parties moved for summary judgment, and in July 2004, the district court granted the plaintiff's motion, finding that the AEAP constitutes indoctrination attributable to the government, or results in such indoctrination. The district court found that the AEAP grants violate the Establishment Clause when made to religious schools and participants who teach religion in them, since the public aid is not used "exclusively for secular, neutral, and non-ideological purposes." Additionally, the court held that the awards and grants are not the result of independent and private choice because participants may enroll "only in programs that the Corporation has pre-approved," and some grantee programs require participants to be Catholic or Christian. Finally, the court noted that the Corporation does not adequately monitor its participants' activities, and even if the Corporation could accurately estimate the time participants spend on religious versus nonreligious matters, it would be impossible to distinguish clearly between the two roles the participants play.

On March 8, 2005, the United States Court of Appeals for the District of Columbia reversed the district court's decision, concluding the AEAP does not violate the Establishment Clause. The appellate court, quoting the Supreme Court's decision in *Zelman v. Simmons-Harris* (2002), stated, "When a government program is neutral

towards religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the Establishment Clause is not violated." In this case, the Court of Appeals pointed out that the AmeriCorps awardees are selected without regard to religion. If individual participants choose to teach religious subjects in addition to the secular ones they are required to teach, they do so as a result of "their own genuine and independent private choice." In fact, awardees may only count the time spent teaching secular courses toward their service hours requirement to receive the funding, and they may not wear the AmeriCorps logo when teaching religious courses. Therefore, it is unlikely that a reasonable person would believe the government endorsed the teaching of religious courses. With regard to the $400 grants paid to organizations operating these programs, the appellate court noted the funds are given to defray costs and that similar cash reimbursements given to both religious and secular schools for performing educational services mandated by state law were upheld in the Supreme Court's decision in *Committee for Public Education and Religious Liberty v. Regan* (1980).

Aid given directly to religious institutions must be monitored to ensure that it is not being used for religious purposes.

The appellate court subsequently denied the American Jewish Congress's petition for a rehearing en banc, and on January 9, 2006, the U.S. Supreme Court denied its petition for a writ of certiorari.

AJC Involvement

In November 2004, AJC, along with Americans United for Separation of Church and State, the Anti-Defamation League, and People for the American Way Foundation, filed an amicus brief with the United States Court of Appeals for the District of Columbia, urging that the district court's judgment be affirmed. The brief contended that the AEAP grants are not the result of independent private choice because the government selects the institutions where participants work, and the government regulation is ongoing and has a significant impact on AEAP services used to support religion, thereby conveying the message of governmental endorsement of religion.

Rather than treat the AEAP awards and grants as a program of private choice, we urged in the brief that the "program must be judged under the Establishment Clause standards applicable to aid that is received directly by religious institutions." In such a context, government funds cannot be used for religious purposes. In this case, government aid is being impermissibly used for religious purposes as "30 to 50 percent of AmeriCorps participants placed in religious schools by two of the major AmeriCorps faith-based grantees teach religious subjects." The brief contended that the aid given directly to religious institutions must be monitored to ensure that it is not being used for religious purposes, but in the present case, the Corporation was not carefully monitoring the grants. For these reasons, the brief urged the appellate court to affirm the district court's decision.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE V. PRISON FELLOWSHIP MINISTRIES

Background

The Prison Fellowship, a nonprofit Evangelical Christian organization, created the InnerChange Freedom Initiative ("IFI") in 1997 in order to fulfill a perceived need in state prison systems for a "values-based" rehabilitation program. InnerChange is different from traditional prison rehabilitation programs that generally focus on scientifically based therapeutic prerelease rehabilitation. InnerChange instead finds that the source of criminal behavior is in a person's sins, and rehabilitation requires a miraculous rehabilitation and forgiveness from God. As IFI describes itself in its "White Paper," the goal of InnerChange is to "cure" prisoners by helping them surrender themselves to "God's will" as opposed to merely equipping them for life after incarceration. To this end, participants are required to worship in the name of Jesus Christ at Evangelical devotionals and revivals and must attend regular classes on Christian values derived from the Bible.

In 1999, Iowa's Department of Corrections was experiencing tremendous difficulties in the management of the state's prison system, including overcrowding and budgetary constraints. It was determined by corrections officials that a major source of the department's problems was the lack of an adequate prison rehabilitation program that would facilitate the release of prisoners, thereby easing the system's overcrowding. The department contracted with InnerChange to operate a rehabilitation program at its Newton facility, paying for these services with both government funds and through a surcharge applied to all inmate telephone calls.

The program as implemented in the Newton facility was not mandatory and, in order to participate, inmates had to sign a form that indicated that they had joined of their own free will. Muslim, Jewish, Native American, and other inmates who were not willing or able to participate in Evangelical Christian forms of worship were not able to join the InnerChange program. Those who did try to join were criticized and ridiculed about their religion and were ultimately rejected from the program.

The InnerChange program was operated out of the facility's "Unit E," which was generally regarded as the honor unit and the most pleasant place to serve, and inmates transferred to this facility to participate in InnerChange were placed directly in Unit E. Participating inmates wore different clothing than the rest of the prison population, had increased visitation rights, and received other benefits and perks for their participation in the program, including, most importantly, earning "treatment credits" needed for early parole.

Americans United for Separation of Church and State sued the Prison Fellowship and Iowa state officials, seeking an injunction against the government's funding of InnerChange and a return of the state funds previously paid.

Case Status

On June 2, 2006, a federal district court in Iowa declared the program unconstitutional, holding that "for all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one of its penal institutions." In reaching its

"The intensive, indoctrinating, Christian language and practice that makes up the InnerChange program effectively precludes non-Evangelical Christian inmates from participating."

decision, the court pointed out that the state funding went directly to a program that was "so pervasively sectarian" that it was impossible to separate the sectarian and nonsectarian aspects of the program, and that "the intensive, indoctrinating, Christian language and practice that makes up the InnerChange program effectively precludes non-Evangelical Christian inmates from participating." Somewhat unusually, the district court ordered Prison Fellowship Ministries not only to cease its program at the Newton Correctional Facility, but also decided it should repay the state $1.53 million. The Department of Justice filed an amicus brief, stating that "the United States has a substantial interest in this case" and objecting to the financial remedy imposed by the court. The case is currently on appeal to the Eighth Circuit, with retired Supreme Court Justice Sandra Day O'Connor sitting on the panel. Oral arguments were heard February 13, 2007, and a decision is awaited.

AJC Involvement

AJC filed an amicus brief together with the Anti-Defamation League, urging affirmance of the court's decision below. The brief stressed that under Supreme Court precedent, it is clear that the facts found by the district court indicate a violation of the Establishment Clause. The brief points out that the state's "subsidy of a sect's religious proseltyzing plainly endorses one religion, coerces its observance, and discriminates against those who wish to follow other faiths (or no faith at all)."

BORDEN V. EAST BRUNSWICK SCHOOL DISTRICT

Background

Marcus Borden was a respected football coach at East Brunswick High School in New Jersey. For over twenty years, Coach Borden prayed with his students at official pregame dinners and in the locker room prior to each game. At times, Borden himself led the prayers, and at others he invited clergymen to lead them. Borden characterized these prayers, which often made references to "God" and "Jesus," as saying "grace" and "taking a knee" (a reference to genuflecting, the Christian solemn form of bowing).

In 2005, after receiving complaints about Borden's conduct, the school district issued guidelines that affirmed the right of students to engage in "voluntary team prayer," but forbade teacher participation in any such prayers. Thereafter, Borden began to encourage his players to engage in "voluntary team prayer," instructing the team captains to poll players about their willingness to participate in student-led prayer.

Having been directed to cease his participation in the prayers, Borden filed suit in the federal district court of New Jersey, alleging that he had a First Amendment right to participate in the "time honored tradition" of "taking a knee" with his team in order to strengthen team unity prior to a game. The school board responded that the coach's conduct was chargeable to the state as his employer and was clearly religious in nature. Thus, they contended, they must regulate the coach's conduct to prohibit a constitutional violation.

Case Status

The district court, without issuing a written opinion, denied the school district's motion for summary judgment on July 25, 2006. The court said in the proceedings that the coach's "taking a knee" with the team or bowing his head is "passive" and does not indicate the endorsement of any religion. The court did not discuss the history of the coach's involvement with prayer at pregame meetings or his history of leading or sponsoring religious prayers.

The case is currently on appeal to the Third Circuit.

AJC Involvement

AJC filed an amicus brief with the Third Circuit together with other religious and civil rights organizations including the Hindu American Foundation, the ACLU, the American-Arab Anti-Discrimination League and others. The brief seeks to belie Borden's claim that his kneeling and bowing were merely showing respect for his players' beliefs by highlighting Borden's decades of overtly religious conduct. It also stresses that given Borden's history of active engagement in team prayer, allowing his conduct would give it the school district's imprimatur, and therefore would have a coercive impact on students of minority religions. Indeed, rather then uniting the community as Borden claims, the brief points to student athletes who felt coerced into participating in prayer for fear that they would lose playing time, and to Jewish cheerleaders whose objections led to the posting of virulently anti-Semitic remarks on a popular student "blog" site. "The irony here," the brief concludes, "is that Borden's encouragement of prayer, which he claims was meant to foster 'unity,' had the opposite effect—whipping the student body into a virtual frenzy of divisiveness."

THE BRONX HOUSEHOLD OF FAITH V. BOARD OF EDUCATION OF NEW YORK

Background

The Bronx Household of Faith is a New York-based Evangelical Christian church that does not own or operate its own facilities. In 1994, Bronx Household sought for the first time to rent space in a local public middle school on Sunday mornings to conduct its activities, including its worship services.

Student athletes felt coerced into participating in prayer for fear that they would lose playing time.

Community School District No. 10 denied Bronx Household's request on the grounds that the congregation sought to use the school premises for religious worship, contrary to regulations then promulgated by the New York City Board of Education, which provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

According to the school district, this policy was motivated by a concern that if religious services or instruction were permitted on school premises, schools would be perceived as supporting and endorsing particular faiths and their activities, particularly since school premises cannot be made available for the worship services of all the religions adhered to by the diverse New York

City population. The school district also sought to avoid school officials becoming involved in religious matters when enforcing regulations and policies pertaining to the use of school facilities.

Case Status

In 1995, Bronx Household sued the school district alleging violations of the Free Exercise, Free Speech, and Equal Protection Clauses of the U.S. Constitution as well as the Religious Freedom Restoration Act ("RFRA"). The district court held in favor of defendants, finding that the school district's policy of disallowing religious services on school premises in order to limit access to school property primarily to educational activities was reasonable and legitimate.

On appeal, the Second Circuit Court of Appeals upheld the district court's ruling, drawing a distinction between religious worship and other forms of speech with a religious viewpoint. The appellate court found that while defendants had made the premises available after school hours to meetings involving discussions of religious materials or religious viewpoints, "[t]he school has never been made available for worship services to any outside group." The court held this distinction to be viewpoint neutral and reasonable.

In 1998, the Supreme Court denied plaintiffs' petition for certiorari. However, in 2001, the High Court decided the case of *Good News Club v. Milford Central School*, which cast doubt upon the Second Circuit's decision in *Bronx Household*. In *Good News Club*, a Christian children's group was denied permission to meet on public elementary school premises immediately following the school day for the purpose of "singing songs, hearing a bible lesson and memorizing the Scripture," because the local school board deemed the activities to be "the equivalent of religious worship." The Supreme Court found that the denial of Good News Club's request amounted to unconstitutional viewpoint discrimination because even "something 'quintessentially religious' [may be] … characterized properly as the teaching of morals and character development from a particular viewpoint." With particular relevance to the *Bronx Household* case, in a footnote the court said:

> Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure "moral and character development." In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.

The court also rejected the school's argument that granting the club's application would be a violation of the Establishment Clause because children would understand the school to have endorsed the group's activities.

In light of the *Good News Club* decision, Bronx Household again requested use of the New York City public school for its Sunday activities. After the school district board again denied that request, Bronx Household filed a new complaint with the district court, arguing that under the reasoning of *Good News Club*, the board's denial was unconstitutional.

In 2002, the district court issued a preliminary injunction against the enforcement of the board regulations, determining that, based upon the *Good News Club* case, distinguishing religious worship from other religious activities is impermissible. The district court also determined that there would be no Establishment Clause violation resulting from granting the Bronx Household's

request because the meetings are held during nonschool hours, are open to the public, and do not involve the participation of school employees.

The Second Circuit affirmed the district court's ruling in a 2-1 decision, reasoning that the district court did not abuse its discretion in finding that it was likely that Bronx Household would succeed on the merits. Noting the similarities between the activities in *Good News Club* and in *Bronx Household*, the court stated "[w]e find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club*." However, the court of appeals limited its ruling by stating:

> We decline to review the trial court's further determinations that, after *Good News Club*, religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts.

Following the Second Circuit's decision, Bronx Household applied to use space at P.S. 15 and the school district acquiesced, in compliance with the injunction. However, according to defendants, its initial concerns about permitting Bronx Household to use school property were realized when congregants orally invited neighbors to their services at the school, distributed and mailed flyers advertising the worship services at the school, and created a Web site that identified the school as the location for their services.

With that backdrop, on March 23, 2005, the Board of Education amended the challenged regulations to state that "[n]o permit shall be granted for the purpose of holding religious worship services,… [but] permits may be granted to religious clubs for students that are sponsored by outside organizations." Bronx Household was then notified that its use of school premises was prohibited under the revised regulations, and the parties went back to court.

On November 16, 2005, the district court granted Bronx Household's motion to convert the preliminary injunction into a permanent injunction, emphasizing that it is the First Amendment's "requirement of neutrality that prescribes the outcome in this case." The district court determined that while Bronx Household's Sunday activities included religious worship, the "activities of the Church did not fall within a separate category of speech, are not 'mere religious worship.'" Rather, they "amount to teaching moral values from a religious viewpoint." The court found that prohibiting such activities would constitute unconstitutional viewpoint discrimination.

The district court also evaluated the defendants' Establishment Clause concerns under the three-pronged test set out in *Lemon v. Kurtzman*. It found the school board's regulations to be secular in purpose since they merely allow gathering opportunities for students and the community at large, and that allowing Bronx Household to use school premises would not be seen as an endorsement of religion because the activities take place after school hours, the school board has openly opposed the activities and requires Bronx Household to include a disclaimer in its materials, and the activities include a nonreligious component. Finally, the court reasoned that the Board's regulations would result in excessive entanglement with religion, not due to permitting Bronx Household to use the school property, but rather because the regulations would require a state actor to impermissibly delve into the activities of a religious group to determine whether they constitute worship. Therefore, the court concluded that the new regula-

tions violated the Establishment Clause, and granted plaintiffs' request for a permanent injunction.

The school district has appealed the district court's most recent ruling to the Second Circuit Court of Appeals.

AJC Involvement

The regular use of public schools as a Christian church on Sundays constitutes an impermissible endorsement of and entanglement with religion by the government.

As it did in *Good News Club*, in 2006 AJC filed an amicus brief with the Second Circuit in support of the school district. In it, we assert that the district court improperly interpreted *Good News Club* in a way that is "tantamount to holding that, if a public school is opened for civic meetings, it also must be opened for use as a church or other place of worship." On the issue of viewpoint neutrality, the brief argues that the new regulation complies with the Supreme Court's decision in *Good News Club*, because instead of prohibiting any "religious instruction" on school premises, the new regulation is limited to prohibiting "religious worship services." Since there is no secular analogue to religious "services," there is no risk that such a ban on religious services might pose a substantial threat of viewpoint discrimination. Furthermore, the brief contends, the new regulation is necessary because the regular use of public schools as a Christian church on Sundays constitutes an impermissible endorsement of and entanglement with religion by the government.

HINRICHS V. BOSMA

Background

For 188 years, the Indiana House of Representatives has opened its sessions with a brief prayer or invocation delivered from the speaker's stand by a cleric from the community who is invited and sponsored by a state representative. Prior to the invocation in the House, the cleric receives a letter of confirmation that asks him or her to "strive for an ecumenical prayer." However, in 2005, out of the fifty-three invocations delivered in the House, at least twenty-nine were "offered in the name of … Jesus Christ" and most prayers were "explicitly Christian." No cleric has been "admonished" or "advised" about the content of the prayers, and the speaker of the house has indicated that he does not expect to make any changes concerning the invocations. Four Indiana taxpayers who objected to their taxes being used to support such prayers brought a lawsuit against the speaker, alleging that these are "sectarian Christian prayers, in violation of the Establishment Clause."

Case Status

On November 30, 2005, the district court held that the use of sectarian prayer in the Indiana House of Representatives violated the Establishment Clause, and issued a permanent injunction against the speaker, barring him from permitting sectarian prayers in the Indiana House of Representatives. The district court relied on the Supreme Court case of *Marsh v. Chambers* (1983), which permitted inclusive, nonsectarian legislative prayers and established the "principles and boundaries" of such practice. After reviewing the *Marsh* decision and other

cases interpreting its limits, the court found that "where 'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief,' official legislative prayers would violate the Establishment Clause." The district court found that the legislative prayers in this case fell outside the boundaries established in *Marsh* because a "substantial majority of the prayers were explicitly Christian, offered in the name of Jesus Christ," and some clearly attempted to proselytize. The court concluded that any future legislative prayer in the House must be nonsectarian and nondenominational.

Subsequently, the speaker filed a motion with the district court, arguing that instead of issuing a permanent injunction on sectarian prayer, the court should have "limited the remedy to an injunction against the expenditure of public funds on the sectarian prayer." Additionally, he argued that the injunction was not sufficiently specific. The district court denied the speaker's motions, holding that the permanent injunction is a proper remedy and should not be narrowed as to allow the "unconstitutional practice" of sectarian legislative prayer to continue. The court also found that the injunction was "sufficiently specific" and gave the speaker a "fair notice of what was required" of him.

The speaker then appealed the district court's judgment to the Seventh Circuit Court of Appeals and sought a stay of the injunction from the appellate court. In support of his argument that a stay should be granted, the speaker contended that he would likely succeed on appeal in showing that the plaintiffs did not have standing to bring this lawsuit because substituting nonsectarian legislative prayer for sectarian prayer would not lead to any fiscal benefit to them since the expenditure would be the same. The appellate court denied his motion and held that in order for taxpayers to have standing to bring a lawsuit, it is sufficient for them to show that the injury suffered was that their tax dollars were "being spent in an illegal manner" and that such an injury can be redressed by "ending the unconstitutional spending practice." The case is currently on appeal to the Seventh Circuit Court of Appeals, where oral arguments were heard on September 7, 2006.

AJC Involvement

In June 2006, AJC, in coalition with the Anti-Defamation League and the Indianapolis Jewish Community Relations Council, filed an amicus brief with the Seventh Circuit. In the brief, we argued that the district court's prohibition on sectarian legislative prayer is firmly grounded both in Supreme Court precedent and in this nation's history, and that sectarianism in governmental speech conflicts with our tradition of religious inclusiveness. The brief emphasized that the Founding Fathers of this nation "began the tradition of ecumenical public prayer that continues to this day" and "disapproved of 'sectarian' public prayer." We also argued that it is possible to make a distinction between sectarian and nonsectarian prayers without forcing the legislature to make "theological judgments" that will result in "excessive entanglement of Church and State."

The Founding Fathers of this nation "began the tradition of ecumenical public prayer that continues to this day" and "disapproved of 'sectarian' public prayer."

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. 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. The first round of voucher payments was made on August 1, 1999.

Case Status

In June 1999, a group of Florida citizens and organizations brought suit in a Florida circuit court, the state's trial court, challenging the constitutionality of the OSP. 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.

On November 22, 1999, the circuit court determined that it would hold a hearing on the narrow issue of whether the OSP violates article IX, section 1(a) of the Florida constitution (the "education provision"), which provides in relevant part that "[a]dequate provision shall be made by law for a uniform … system of free public schools that allows students to obtain a high quality education." On March 14, 2000, the circuit court determined that Florida's con-

stitutional provision directing that education be provided 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 by providing state funds for some students to obtain a K-12 education through private schools, the OSP violated the mandate of the education provision of the Florida constitution.

However, on October 3, 2000, the Florida First District Court of Appeal 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 OSP for the 2002-03 school year, writing that the Florida constitution was "clear and unambiguous" in proscribing the use of public money in any sectarian institution. Florida's First District Court of Appeal subsequently affirmed Judge Davey's ruling, a decision it upheld on rehearing en banc in November 2004.

On January 5, 2006, the Supreme Court of Florida affirmed the appellate court's decision, ruling that the OSP violates the Florida constitution's education provision without addressing the church-state issues raised in the litigation. The court held that the OSP "is in direct conflict" with the education provision of the state constitution because, contrary to the language of the provision, the OSP allocates public funds and resources to education "through means other than a system of free public schools." The court stated that the education provision impliedly forbids the state from providing children with free education by paying their tuition at private schools. Thus, held the court, the OSP violates the state constitution by diverting funds from the free public school system to private schools. Furthermore, the court held that the OSP violates the state constitution by paying for children to attend private schools that "are not subject to the uniformity requirements of the public school system."

AJC Involvement

AJC has been involved in this case since its early stages, serving as "of counsel" to the plaintiffs. Most recently, in February 2005, AJC, along with the American Federation of Teachers, Americans United for the Separation of Church and State, the American Civil Liberties Union, People for the American Way, the American Jewish Congress, ADL, and the National School Boards Association filed an amicus brief with the Florida Supreme Court, urging it to uphold the lower court's ruling and strike down as unconstitutional Florida's voucher program.

In its brief, the coalition argued that Florida's constitution specifically mandates the state to educate its children by providing a "system of free public schools." However, "the OSP defeats the purpose by providing

for certain students to receive their publicly funded education in private schools in lieu of the mandated system of free public schools." With regard to the issue of state funding of religious institutions, the brief 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.

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.

SELMAN V. COBB COUNTY

Background

For over twenty years, Cobb County, Georgia, had a policy mandating that the teaching of scientific accounts of the origin of the human species be planned and organized with "respect" for families that held beliefs inconsistent with evolution. Despite a statewide requirement to teach evolution, many teachers avoided the topic and even went so far as to remove sections dealing with evolution from science textbooks. In 2001, the school district created a textbook adoption committee, which studied various science textbooks and recommended the adoption of a new book that included instruction on evolution that would bring Cobb County into compliance with statewide curriculum requirements.

Some parents in the community, upon learning of the proposed instruction on evolution, complained to the school board, expressing concern that the book contained no criticism of evolution, nor mentioned alternate theories. In response, the school board consulted with its legal counsel, who recommended the following language for a disclaimer sticker that would accompany the text:

> This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

In March 2002, the school board unanimously adopted the recommended textbook and required that the disclaimer sticker be adhered to it. Subsequently, parents of students attending Cobb County schools brought this action, arguing that the sticker violated the Establishment Clause.

Case Status

On January 13, 2005, Judge Clarence Cooper of the U.S. District Court, Northern District of Georgia, held that while the inclusion of the sticker was not necessarily religiously motivated, it nonetheless violated the Establishment Clause of the First Amendment because its effect was to convey a message of public endorsement of religion. The judge accordingly ordered the stickers removed from the textbooks.

The court analyzed the case in light of the Supreme Court's ruling in *Edwards v. Aguillard* (1987), where the court stated that a statute requiring balanced treatment of evolution and competing religious theories was unconstitutional, in part because it singled out only one science subject for special treatment. The district court noted the similarities between *Edwards* and the present case, observing that Cobb County singled out evolution for special treatment without an explanation for its isolation, just as the statute rendered unconstitutional in *Edwards* had done.

In its decision, the district court also

applied the Supreme Court's three-pronged test for Establishment Clause violations articulated in *Lemon v. Kurtzman* (1972), which held 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 accepted the school board's assertions that the purpose of the sticker was to foster critical thinking in the science classroom, a legitimate secular purpose, and further held that the board's desire to placate those constituents that objected to the inclusion of evolution in the curriculum based on their personal and religious beliefs was secularly motivated. However, turning to the effects inquiry of the *Lemon* test, the court stated that to be constitutional, the sticker must not convey a message of endorsement of religion to a reasonable observer. It concluded that the disclaimer failed this prong of the test as it "communicates to those who endorse evolution that they are political outsiders, while the sticker communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders." It added that a reasonable observer would be aware that encouraging the teaching of evolution as a theory and not a fact "is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations," and therefore the language of the sticker indicates that the school board was aligning itself with "proponents of religious theories of origin." Thus, the court ordered the stickers removed.

On May 25, 2006, the United States Court of Appeals for the Eleventh Circuit vacated and remanded the case back to the district court because it determined there were evidentiary gaps in the record. The appellate court explained that in concluding "that the adoption and use of the sticker had the effect of advancing and endorsing religion," the district court relied on "a letter from [Creationist parent] Marjorie Rogers and a 2,300 name petition … both asking that the board [of education] place a 'disclaimer' about evolution in the textbooks discussing the subject." However, the appellate court found no evidence in the record to suggest that the letter or the petition were "submitted to the board before it adopted the sticker." In remanding, the appellate court gave the district court discretion to decide "whether to start with an entirely clean slate and a completely new trial or to supplement, clarify, and flesh out the evidence that it has heard [during] the bench trial."

On December 19, 2006, the two parties reached a settlement agreement enjoining the school district from "restoring to the science textbooks of students in the Cobb County schools any stickers, labels, stamps, inscriptions, or other warnings or disclaimers bearing language substantially similar to that used on the sticker that is the subject of this action." Further, the agreement prohibited the school board from taking any of a number of actions that "would prevent or hinder the teaching of evolution," including making oral or written disclaimers about evolution or Charles Darwin, placing statements in textbooks about "creationism, creation science, intelligent design, or any other religious view concerning the origins of life or the origins of human beings," and "excising or redacting materials on evolution in students' science textbooks." The court then dismissed the case with prejudice.

The language of the sticker indicates that the school board was aligning itself with "proponents of religious theories of origin."

AJC Involvement

In June 2005, AJC filed an amicus brief with the Eleventh Circuit, coauthored by Americans United for Separation of Church and State and signed by the Anti-Defamation League. While the brief urged the appellate court to affirm the district court's decision that the disclaimer sticker violated the Establishment Clause, it also argued that the district court erred in concluding that the school board's desire to placate constituents was a secular purpose. Rather, "it has long been settled that where the Constitution forbids the government from acting with a particular purpose—such as advancing religion or discriminating against a particular group—it equally forbids the government from acting on the purportedly 'neutral' ground that it is merely seeking to satisfy constituents who possess the motivation forbidden to the government." AJC further maintained that the appropriate solution in this case would have been for the school board to exempt from certain lessons those children whose parents objected to the teaching of evolution.

II. RELIGIOUS LIBERTY

A. Religious Freedom Restoration Act ("RFRA")

The federal Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 ("RFRA"), which was passed by Congress in 1993, requires that generally applicable laws not substantially burden a person's exercise of religion unless the government can show that the law is in furtherance of a compelling interest and is the least restrictive means of furthering that interest. The statute altered the standard set in 1990 by the U.S. Supreme Court in *Employment Division v. Smith*, where the court held that generally applicable laws may be applied to religious exercise, regardless of whether the government demonstrates a compelling interest for its rule. After RFRA was enacted, there were a series of cases challenging its constitutionality, including *City of Boerne v. Flores*, where the Supreme Court ruled that Congress had exceeded its authority in applying RFRA to the states. Because *Boerne* did not address the issue of RFRA's applicability to the federal government, RFRA remains binding at the federal level.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL V. GONZALES

Background

O Centro Espirita Beneficiente Uniao Do Vegetal ("UDV") is a recognized religion founded in Brazil, based on a merging of Christian theology and South American beliefs. UDV has been practiced in the United States since 1993, particularly in New Mexico, and currently has approximately 130 members. UDV members consume hoasca tea at least twice per month in guided ceremonies as part of their religious practices. Hoasca is a combination of indigenous Brazilian plants that contains dimethyltryptamine ("DMT"), a drug listed in Schedule I of the Controlled Substances Act (CSA), 21 U.S.C. §§810-904. The 1971 United Nations Convention on Psychotropic Substances ("Convention"), of which the U.S. is a signatory, prohibits all use of DMT except for scientific and limited medical purposes.

Since hoasca is indigenous to Brazil, American members of UDV rely on Brazilian church members to export the tea to them. In 1999, enforcing the CSA, the United States Customs Service seized a shipment of hoasca bound for UDV in the U.S. and threatened prosecution if UDV would not cease the import of the tea.

Case Status

UDV brought suit alleging government violations of the First, Fourth, and Fifth Amendments of the U.S. Constitution, and the federal Religious Freedom Restoration Act ("RFRA"). During the preliminary hearings, the government conceded that its actions substantially burdened UDV's religious exercise rights, but sought to show that they furthered a compelling interest in the least restrictive manner. In attempting to demonstrate a compelling interest, the government offered three reasons for disallowing the use of hoasca, even for religious purposes: (1) protection of the health and safety of UDV members; (2) potential for diversion from the church to recreational use; and (3) compliance with the Convention. Weighing the parties' interests, the district court found that the government's interests

in a potential health risk and the chance of diversion were equal to UDV's religious interests, and that the Convention did not apply to hoasca because beverages and infusions made from plants and extracts were exempt from the agreement. Accordingly, on August 12, 2002, the district court enjoined the government from prohibiting or penalizing the use of hoasca by UDV.

UDV had demonstrated that the importation ban on hoasca substantially burdened their exercise of religion, while the government failed to demonstrate a compelling interest that would justify this burden.

On appeal, the Court of Appeals for the Tenth Circuit focused on the government's assertion of compelling interests in barring UDV from using hoasca in its ceremonies. First analyzing whether hoasca use poses a health risk, the Court of Appeals declined to disagree with the district court's determination that the government failed to satisfy its burden under RFRA on the issue of the health risk of hoasca. The Court of Appeals then considered whether there was a risk of diversion of hoasca to a nonreligious use. The government cited many factors that would lead to diversion of hoasca to nonreligious users, whereas UDV asserted that hoasca does not have significant potential for abuse or diversion for numerous reasons, including its negative effects and the strong incentive for UDV members to prevent the tea's use outside of a religious context, because the church considers such use to be sacrilegious. The Tenth Circuit agreed with the district court, and affirmed the lower court's decision, finding that the government failed to demonstrate a compelling interest for prohibiting UDV's use of hoasca. The case was subsequently reheard en banc, and the Tenth Circuit again affirmed the district court's ruling.

The government appealed the en banc decision, and the U.S. Supreme Court accepted the case to review whether RFRA requires the government to permit import, distribution, possession, and use of a Schedule I hallucinogenic drug when Congress has found that the substance has high potential for abuse, is unsafe for use under medical supervision, and is prohibited from being imported and distributed by an international treaty.

On February 21, 2006, the U.S. Supreme Court unanimously affirmed the Tenth Circuit's decision. Writing for the court, Chief Justice Roberts held that UDV had demonstrated that the importation ban on hoasca substantially burdened their exercise of religion, while the government failed to demonstrate a compelling interest that would justify this burden. The court rejected the government's argument that the CSA serves the compelling purpose of banning a Schedule I substance with "high potential for abuse," such as hoasca, and that allowing an exception for using the substance for religious sacrament will lead the public to believe that the drug is not harmful. The court stated the government does not sufficiently demonstrate its compelling interest under RFRA by merely invoking the negative characteristics of Schedule I substances. Additionally, the court rebuked the government's opposition to allowing an exception in this case by noting that there is already an exception to the Schedule I ban for the religious use of the hallucinogenic substance peyote by Native American churches. According to the court, if hundreds of thousands of Native Americans are allowed to use such a substance, despite the fact that it has "a high potential for abuse" and "no currently accepted medical use," then there is no reason for rejecting a similar exception for the approximately 130 members of UDV who want to practice their religion simply because hoasca is a Schedule I substance.

The court also rejected the government's "slippery-slope" argument that once an exception is made for one group, it will have to made for everyone, stating that RFRA

alleviates this concern by mandating a "workable test for striking sensible balances between religious liberty and competing prior governmental interests." Finally, the court rejected the government's assertion that it has a compelling interest in banning UDV from importing hoasca in order to comply with the UN Convention. Although the Convention does cover hoasca, it "does not automatically mean that the Government has demonstrated a compelling interest in applying the [CSA], which implements the Convention, to the UDV's sacramental use of [hoasca]."

AJC Involvement

Advocating for the constitutionality of the federal RFRA statute, AJC joined with a diverse coalition of religious groups, including the Becket Fund for Religious Liberty, the Unitarian Universalist Association, and the Hindu American Foundation, to file an amicus brief with the U.S. Supreme Court in September 2005. In the brief, AJC argued that "accommodating religious exercise by removing government-imposed substantial burdens on religious exercise is an essential element of a democratic society."

B. Religious Land Use and Institutionalized Persons Act ("RLUIPA")

As part of its mission to defend the religious freedoms of all Americans, and of Jews in particular, AJC has maintained a consistent campaign against unjustly restrictive local zoning policies that prevent the establishment of religious assemblies and houses of worship in residential areas or otherwise make it impossible for religious groups to practice their faiths. Likewise, AJC believes that legislative action to accommodate the religious exercise rights of prisoners is not only constitutional, but "commendable and sometimes mandatory." In accordance with these principles, AJC was instrumental in securing the passage of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA" or the "Act"), a federal bill that protects religious groups from discriminatory land use laws that encroach on the free exercise of their faiths, and secures the religious liberties of institutionalized persons. 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."

Specifically, RLUIPA combats discriminatory zoning by requiring the state to show a "compelling state interest" before implementing any land use regulation that impacts the use of property for religious observance. The Act provides that:

> [n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly or institution (a) is in furtherance of a compelling interest; and (b) is the least restrictive means of furthering that compelling governmental interest.

RLUIPA also prevents the government from imposing substantial burdens on the religious exercise rights of institutionalized persons, providing 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.

Since its enactment, AJC has joined coalitional briefs in support of the statute's constitutionality in cases across the country,

in both the institutionalized persons and land use contexts. In the briefs, the agency argues that RLUIPA's purpose—accommodation of the free exercise of religion—is secular; it does not impermissibly advance religion or entangle the government in religious practices, and 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.

The following is a summary of AJC's current involvement in RLUIPA land use and institutionalized persons cases.

ELSINORE CHRISTIAN CENTER V. CITY OF LAKE ELSINORE

Elsinore Christian Center ("ECC" or "the church"), a nondenominational church, had been renting space in Lake Elsinore, California, for twelve years before deciding that lack of adequate parking, handicap access, and the size of its building necessitated a move to a new facility in the same area. In April 2000, the church entered into an agreement to buy the Elsinore Naval and Military School, which it believed was the only building in the area that could satisfy its needs. The school is in an area zoned as C-1 (Neighborhood Commercial District), which requires a Conditional Use Permit (CUP) in order to conduct renovation and use the facility for religious services. The property is currently being leased by a grocery store in what is considered a depressed downtown area.

In October 2000, the church filed a request for a CUP, and the city's Planning Commission recommended approval subject to twenty-six conditions, all of which were accepted by the church. Nonetheless, the commission eventually denied the permit and a subsequent appeal of its decision. The church then filed suit in federal district court against the city in May 2001, alleging the city violated its First and Fourteenth Amendment rights, as well as RLUIPA.

In August 2003, the district court held that while the denial of the permit violated RLUIPA, the statute itself was unconstitutional. First, the court maintained that it exceeded Congress's enforcement powers under the Fourteenth Amendment, which grants to Congress wide authority to deter and remedy perceived constitutional violations, because "[b]y vastly expanding the type of exercise protected by the most exacting standard of review, Congress ha[d] effectively redefined the First Amendment right it [was] purporting to enforce." The court rejected also the argument that the Commerce Clause, which allows for federal regulation of activity that substantially affects interstate commerce, provides the requisite authority because RLUIPA regulates land use law, rather than economic conduct.

The Ninth Circuit Court of Appeals agreed to hear the case on interlocutory appeal. On August 22, 2006, it reversed the district court's ruling that RLUIPA was unconstitutional, citing another recent ruling (discussed below) by the Ninth Circuit in *Guru Nanak Sikh Society of Yuba City v. County of Sutter* (9th Cir. 2006). A subsequent petition for rehearing was denied. The church has since filed suit for $1.9 million dollars for loss of membership and costs because it was not able to relocate. The trial is set for July 31, 2007. In addition, the city filed a petition for certiorari in February 2007, and a decision is awaited from the U.S. Supreme Court as to whether it will review the case.

AJC Involvement

In August 2004, AJC joined with a coalition of religious and civil liberties organizations in filing an amicus brief with the Ninth Circuit defending the constitutionality of RLUIPA. In the brief, we asserted that the district court erred in holding that RLUIPA was enacted without proper congressional authority. To the contrary, the brief argued that Congress acted well within its constitutional powers in enacting RLUIPA, given the detailed record of religious discrimination in land use regulation by local governments across the U.S., and the proportionate measures that RLUIPA embodies in response to that identified discrimination.

GURU NANAK SIKH SOCIETY OF YUBA CITY V. COUNTY OF SUTTER

In April 2001, the Guru Nanak Sikh Society of Yuba City, California, ("the society") applied for a conditional use permit to build a Sikh temple. The society owned a 1.89-acre property on Grove Road, which is in a residential zone designated primarily for large-lot single-family homes. Churches and other religious institutions are allowed in the area only with conditional use permits. Despite approval for the project from county staff, the County Planning Commission unanimously denied the application, due to complaints from neighbors fearing increased noise and traffic.

Rather than appeal, the society bought a 28-acre parcel of land in 2002 in an unincorporated area of the county and proceeded to apply for a conditional use permit. This time, the commission approved the permit 4 to 3, but the County Board of Supervisors unanimously reversed the decision after neighbors appealed, citing traffic and property value concerns. In August 2002, the society filed suit against the county and members of the County Board in U.S. district court, alleging, among other things, that the county's actions were a violation of RLUIPA.

In November 2003, the district court found that the county violated RLUIPA, upheld the constitutionality of the Act, and ordered the county to immediately grant the application for a conditional use permit. Specifically, the court held that the restrictions on the ability of municipalities to interfere with the exercise of religion in making zoning decisions, as contained in RLUIPA, were a valid exercise by Congress of its power to enforce the Fourteenth Amendment. Furthermore, according to the court, the County Board's concerns in this case were not a compelling interest that would merit its denial of the society's permit application.

The county filed an appeal with the Ninth Circuit, and on August 1, 2006, the appellate court affirmed the district court's decision, concluding that the county had "imposed a substantial burden" on the society's free exercise of religion rights under RLUIPA, and that Congress had constitutionally enacted RLUIPA. The appellate court found that the county imposed a substantial burden on the society because, in rejecting its permit application, it gave "broad reasons" that "could easily apply to all future applications by [the society]," and because even though Guru Nanak readily agreed to every mitigation effort suggested by the County Planning Division, the county nonetheless, without explanation, found such cooperation insufficient. On the issue of RLUIPA's constitutionality, the appellate court, citing the Supreme Court precedent of *City of Boerne v. Flores* (1997), stated that

Congress acted well within its constitutional powers in enacting RLUIPA, given the detailed record of religious discrimination in land use regulation by local governments across the U.S.

"RLUIPA is a congruent and proportional response to free exercise violations because it targets only regulations that are susceptible, and have been shown, to violate individuals' religious exercise." The county has decided not to appeal to the Supreme Court.

AJC Involvement

In June 2004, AJC joined with a coalition of religious and civil liberties organizations in filing an amicus brief with the Ninth Circuit, urging the appellate court to uphold RLUIPA. Focusing on the legislative history of the Act, the brief argued that Congress, in passing RLUIPA, "acted well within its power" under the Fourteenth Amendment, "especially given the record of religious discrimination in land use regulation by local governments ... and the proportionate measures that RLUIPA embodies in response."

KONIKOV V. ORANGE COUNTY, FLORIDA

After receiving complaints from neighbors, the Code Enforcement Board of Orange County, Florida, ordered a local rabbi to stop holding religious services in his home because he had not been issued the required permit, and then began fining him $50 a day. The rabbi sued the county and members of the county's Code Enforcement Board in federal court, alleging that his right to free exercise of religion under the U.S. Constitution and RLUIPA were violated by the county's land use code because the ordinance placed a substantial burden on his religious exercise and treated his assembly on less-than-equal terms with nonreligious assemblies. In addition, he argued that on its face, the code was void for vagueness because it failed to give fair notice that those wishing to discuss religion in their homes might violate the code. The defendants asserted that the land use code does not violate RLUIPA, but in the event that it does, that RLUIPA is unconstitutional.

In January 2004, the U. S. District Court for the Middle District of Florida granted summary judgment to defendants, holding that the code requirement did not violate the Free Exercise Clause, RLUIPA, the rabbi's equal protection rights, the Establishment Clause of the state and federal Constitutions, the rabbi's freedom of speech rights, or the rabbi's state and federal constitutional freedom of privacy rights. The court also held that the code was not void for vagueness, and that the county board did not conspire to violate the equal protection rights of the rabbi. The court declined to consider the issue of RLUIPA's constitutionality. Plaintiff subsequently appealed the decision to the Eleventh Circuit Court of Appeals.

On June 3, 2005, the Eleventh Circuit rendered its decision affirming in part, reversing in part, and remanding the case to the district court for a decision consistent with its opinion. Reviewing the district court's grant of summary judgment for the defendant de novo, the Court of Appeals concluded that the zoning ordinance did not on its face impose a "substantial burden" on Konikov's religious exercise, nor did it violate RLUIPA's requirement that religious assembly be treated on "equal terms" with nonreligious assembly. The court explained that the code's application requirement to operate a religious organization did not prohibit Konikov from "engaging in religious activity" nor did it "coerce conformity of a religious adherent's behavior," although it did require him to apply for a special exception to run a "religious organization" out of his home.

However, the court held that, as applied to Konikov, the code did violate RLUIPA, because it was implemented in a way that treated religious organizations unequally in comparison to nonreligious organizations. The opinion stated that, "[a] group meeting with the same frequency as Konikov's would not violate the Code, so long as religion is not discussed. This is the heart of our discomfort with the enforcement of this provision." Because defendants had not established a compelling justification for this unequal treatment, the court concluded Orange County's code violated RLUIPA. The court further determined that the code may be void for vagueness because "it prohibits the operation of a 'religious organization' [without an exception, but] does not define the term." This could lead to discrimination in enforcement because of the varying interpretations by enforcement officers of what constitutes a religious organization.

On remand, following the appellate court's ruling, the district court issued an order on January 20, 2006, granting judgment in favor of Konikov on both his as-applied RLUIPA challenge to the code and his claim that the code's regulation of "religious organization[s]" is unconstitutionally vague.

AJC Involvement

In April 2004, AJC joined with a diverse coalition of religious and civil liberties organizations in filing an amicus brief with the Eleventh Circuit defending the constitutionality of RLUIPA. The brief argued that RLUIPA is meant to enable religious assemblies to practice their religion as needed in their communities without being subjected to discriminatory practices, and that therefore RLUIPA is not an endorsement of religion, but rather a necessary and reasonable safeguard of the basic constitutional rights guaranteed by the First Amendment.

C. Conscience Clause Exemptions

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY V. SERIO

Background

The [county's land use] code was implemented in a way that treated religious organizations unequally in comparison to nonreligious organizations.

In 2002, the New York Legislature enacted the Women's Health and Wellness Act ("WHWA" or "the Act"), requiring employers who offer their employees insurance policies that provide prescription drug benefits to include coverage for "contraceptive drugs or devices." The statute was enacted in order to "improve group health insurance benefits for women's preventative health care." The WHWA gives employers two ways of avoiding the requirement to provide contraceptive coverage. First, employers can offer insurance plans with no prescription drug benefits. Second, the WHWA exempts "religious employers" if contraceptives are "contrary to [their] religious tenets." The Act considers an employer to be a religious employer if it meets four 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 nonprofit organization as described in [the Internal Revenue Code]."

Catholic Charities, a "faith-based entit[y]" that provides social services such as health care, counseling, and services to the poor and needy, conceded that it does not qualify for the religious employer exemption

The WHWA achieves a compelling state interest in "eliminating sex discrimination, protecting the fundamental right of reproductive choice, and ensuring access to contraception."

because it does not meet the four criteria necessary to do so. The Act, according to Catholic Charities, thus leaves them with two unacceptable options: decline to provide any prescription drug benefits or offer insurance coverage that includes contraceptives. This, the organization asserts, is because "contraception is contrary to their religious tenets," while it is their "moral obligation to offer their employees fair, adequate and just employment benefits...including prescription drug coverage."

Following the enactment of the WHWA, Catholic Charities filed a lawsuit against the state's Superintendent of Insurance in the Supreme Court of New York, the state's trial court, challenging the constitutionality of WHWA and seeking declaratory and injunctive relief from the Act. More specifically, Catholic Charities alleged that the Act violates the Free Exercise Clause of the U.S. and New York Constitutions, the organization's constitutionally protected free speech rights, and the Establishment Clause of the U.S. Constitution.

Case Status

On December 2, 2003, Judge Dan Lamont of the New York Supreme Court held in favor of defendant and dismissed Catholic Charities's lawsuit. Subsequently, Catholic Charities filed an appeal and on January 12, 2006, New York's Appellate Division affirmed the lower court, holding that "the WHWA and the religious employer exemption violate neither constitutional nor statutory provisions."

On further appeal to the New York Court of Appeals, the state's highest court, the WHWA was again upheld as applied to the plaintiffs. The court held that "substantial deference" is due to the legislature in Free Exercise challenges, and that the party claiming an exemption had the burden of demonstrating that the challenged legislation is an unreasonable interference with religion. Pursuant to this criteria, the court concluded that the First Amendment was not offended because the burden on the plaintiffs' religious exercise, requiring that a health insurance plan that included prescription drugs provide coverage for contraception, was the incidental result of a "neutral law of applicability." The fact that some religious organizations were exempt from WHWA's provisions on contraception, the court reasoned, did not demonstrate that the provisions are not neutral, because to hold that "any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather then promote, freedom of religion."

AJC Involvement

AJC, together with a coalition of Jewish and women's organizations, filed an amicus brief with the New York Court of Appeals in June 2006 in support of the WHWA's constitutionality. In the brief, the coalition argued that the New York Legislature passed the WHWA because it achieves a compelling state interest in "eliminating sex discrimination, protecting the fundamental right of reproductive choice, and ensuring access to contraception." Furthermore, the coalition argued that the incidental burdens on some employers with religious affiliations are justified by these compelling interests.

III. CIVIL LIBERTIES

A. Detention of Enemy Combatants

HAMDAN V. RUMSFELD

Background

Salim Ahmed Hamdan, alleged to be Osama bin Laden's personal driver, was captured in Afghanistan and transferred to the Guantanamo Bay Naval Base in 2002. In 2003, President George W. Bush found "that there is reason to believe that [Hamdan] was a member of Al Qaeda or was otherwise involved in terrorism directed against the United States" and "designated Hamdan for trial by military commission." Following a demand by Hamdan's appointed military counsel for "charges and speedy trial under Article 10 of the Uniform Code of Military Justice ['UCMJ']," a committee established by the Secretary of Defense "ruled that the UCMJ did not apply to Hamdan's detention." Following that ruling, the president ordered that Hamdan be tried by a military commission on charges of conspiracy to commit terrorism, among other crimes.

Unlike a court-martial, a military commission is composed of a tribunal of military officers sitting without a civilian judge or jury. The tribunal may admit evidence that would be inadmissible in a civilian court or a court-martial, prevent the defendant from seeing that evidence, exclude him from attending his own trial, and suspend many of the guarantees for accused persons found in the First and Sixth Amendments.

Case Status

In April 2004, Hamdan filed a petition for writ of habeas corpus in federal district court, challenging his detention and "the lawfulness of … [the] plan to try him for alleged war crimes before a military commission convened under special orders issued by the President." He argued that such a commission would act without necessary congressional approval and would exist pursuant to a unilateral executive order that purports to suspend the right of the accused to seek habeas review before a federal court. Furthermore, he contended, his trial before a military commission violated the Third Geneva Convention, which requires that a prisoner of war be sentenced by the same courts and same procedures that apply to members of the armed forces of the detaining power, in this case, a U.S. court-martial applying the UCMJ.

In November 2004, the district court granted Hamdan's petition in part, holding that "unless and until a competent tribunal determines that Hamdan is not entitled to [prisoner of war] status, he may be tried for the offenses with which he is charged only by court-martial under the [UCMJ]." Furthermore, the court held that the president did not have the inherent authority to appoint military commissions. The secretary of defense was thus enjoined from conducting any further military commission proceedings against Hamdan.

A three-judge panel of the Court of Appeals for the D.C. Circuit reversed the district court's decision, finding that the president's establishment of military commissions was authorized by the Authorization for the Use of Military Force ("AUMF") passed by Congress in November 2001. The AUMF authorized the president to use all necessary and appropriate force against those who were involved in the September 11, 2001, terrorist attacks in order to prevent any future acts of terrorism. The appellate court also rejected Hamdan's argument that he may enforce his individual rights emanating from the Third Geneva

Convention in federal court because treaties such as the Geneva Convention, according to the court, do not create judicially enforceable rights. Rather, "a 'treaty is primarily a compact between independent nations' and 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.'"

The military commission lacked the power to proceed because its procedures violated both the UCMJ and the "four Geneva Conventions signed in 1949."

In November 2005, the Supreme Court granted Hamdan's petition for a writ of certiorari and agreed to hear the case. Oral arguments were scheduled for March 28, 2006, but on December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005 ("DTA"). The DTA, while prohibiting "cruel, inhuman, or degrading treatment" of detainees, also included a provision stating that "[n]o court, justice or judge shall have jurisdiction to hear or consider"applications for habeas corpus or any other actions brought by the detainees at Guantanamo Bay. The government then argued that because the new statute had eliminated the court's jurisdiction, it should no longer hear the case.

On June 29, 2006, the Supreme Court reversed the D.C. Circuit's ruling. Writing for a 5-3 majority (Chief Justice John Roberts did not participate because he was on the appellate panel that rendered the decision in this case prior to his nomination to the Supreme Court), Justice John Paul Stevens wrote that, contrary to the government's assertions, the DTA did not strip the court of jurisdiction to hear a habeas petition filed by an alien detained at Guantanamo. On the merits, the court ruled that neither the AUMF nor the DTA "expand[ed] the President's authority to convene military commissions" and, at most, only gave the president a general "authority to convene military commissions in circumstances where justified under the Constitution … and the … law of war." The court held that the military commission in Hamdan's case lacked the power to proceed because its procedures violated both the UCMJ and the "four Geneva Conventions signed in 1949."

Pursuant to UCMJ Article 36(b), the procedural rules for courts-martial and military commissions should be "uniform insofar as practicable." However, the court found that the military commission, in its procedures, "deviates in many significant respects" from the rules of courts-martial. Unlike courts-martial, the military commission allowed for the introduction of hearsay evidence, evidence obtained through coercion, and unsworn testimony. In addition, the commission, at its discretion, could withhold evidence from the accused and prevent him or her from attending the trial. The court determined that it is not clear why "the danger posed by international terrorism … should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial."

The Geneva Convention provides that in a "conflict not of an international character occurring in the territory of [a signatory state], each Party to the conflict shall be bound to apply, as a minimum, certain provisions protecting '[p]ersons [held in] detention." The court interpreted the phrase "not of an international character" as referring to a conflict not between two nations, such as the conflict between Al Qaeda and the United States. It thus ruled that Hamdan should be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," and that "[t]he commission that the President has convened to try Hamdan does not meet those requirements."

On October 17, 2006, the president signed into law the Military Commissions Act of 2006. Relevant to Hamdan, Section 7

of the act amended the federal habeas statute by stripping jurisdiction from any "court, judge or justice" over habeas petitions, and any other actions filed by aliens who are detained as enemy combatants or are awaiting that determination. On remand in December 2006, the district court held that "Hamdan's statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus…. Hamdan's habeas petition must accordingly be dismissed for want of subject matter jurisdiction."

AJC Involvement

In January 2006, AJC joined with People for the American Way, the Rutherford Institute, and Trial Lawyers for Public Justice in an amicus brief filed with the U.S. Supreme Court focusing on the illegitimacy of the procedures to be employed by the military commissions. The brief argued that the procedure violated the right of the accused to be present at trial and to confront the witnesses against him, which is "one of the fundamental guarantees of life and liberty." The brief further stated that the procedures employed by the military commission in this situation did not conform with Article 36 of the UCMJ, which "makes clear that … military commissions … must provide a fundamentally fair process," and that the UCMJ "cabins the President's discretion to establish procedures for military commissions [and] prohibits the executive branch from trying prisoners in *absentia*."

RUMSFELD V. PADILLA

Background

Jose Padilla was arrested at Chicago's O'Hare Airport in May 2002 by federal agents executing a material witness warrant issued by the United States District Court for the Southern District of New York. He was alleged to have worked with Al Qaeda and plotted to detonate a radiological bomb in the U.S. Padilla was then transferred to New York, where on May 22, 2002, his appointed counsel moved to vacate the material witness warrant. While that motion was pending, on June 9, 2002, President George W. Bush issued an order to Secretary of Defense Donald Rumsfeld, designating Padilla as an "enemy combatant " under the Authorization for Use of Military Force Joint Resolution and directing Rumsfeld to detain him in military custody. Padilla was held thereafter in the Consolidated Naval Brig in Charleston, South Carolina, without formal criminal charges and without access to legal counsel. Although the government eventually permitted Padilla to meet with his lawyers, it asserted that it was not obligated to do so. Two days later, on June 11, 2002, Padilla's appointed counsel filed a petition for habeas corpus in the Southern District of New York.

Case Status

In December 2002, the district court agreed with the government that the president has the authority to detain as "enemy combatants" citizens captured on American soil during time of war. However, in response to the government's contention that only Padilla's immediate custodian was the proper respondent, the court decided that Secretary

"[T]he Executive's asserted power to seize and detain Jose Padilla should be analyzed in light of the deprivation of Padilla's constitutional right to due process."

Rumsfeld was indeed a proper respondent to the petition and that it could assert long-arm jurisdiction over him. In 2003, the Second Circuit Court of Appeals reversed the lower courts on the merits, ruling that "the President lacks inherent constitutional authority as Commander in Chief to detain American citizens on American soil outside a combat zone [because] the Constitution lodges these powers with Congress."

On June 28, 2004, the Supreme Court reversed the Second Circuit's ruling and dismissed the case on jurisdictional grounds. Writing for a 5-4 majority, Chief Justice Rehnquist held that pursuant to the federal habeas statute, the only proper respondent to a habeas corpus petition is the commander in charge of the military facility where the petitioner is being held because "[t]his custodian ... is 'the person' with the ability to produce the prisoner's body before the habeas court." Thus, the majority ruled that in the present case, the only proper respondent was Commander Melanie Marr, the commander of the Navy brig in South Carolina where Padilla was being detained, and not Secretary Rumsfeld. Furthermore, the court held that the Southern District of New York did not have jurisdiction over that custodian because the habeas statute limits district courts to granting habeas relief "within their respective jurisdictions." The court wrote that to allow otherwise would mean that "a prisoner could name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction. The result would [be] rampant forum shopping [and] district courts with overlapping jurisdiction." Since the court ruled that the Southern District did not have jurisdiction, it did not address the merits of whether Padilla's detention was proper.

In accordance with the Supreme Court's decision, Padilla refiled his petition in the U.S. District Court for the District of South Carolina, the district in which he was detained. On February 28, 2005, the district court agreed with the Second Circuit Court of Appeals and held that the U.S. government could not continue to detain Padilla without charging him with a crime. However, on appeal the Fourth Circuit reversed the district court, ruling that it is within the president's authority to detain a U.S. citizen as an "enemy combatant" pursuant to the Authorization for Use of Military Force Joint Resolution enacted by Congress in September 2001.

On October 25, 2005, Padilla again filed a petition for certiorari with the U.S. Supreme Court, and shortly thereafter, the government filed criminal charges against Padilla, rendering him an ordinary defendant instead of an "enemy combatant." Consequently, on April 3, 2006, the High Court denied Padilla's petition. However, in an unusual move, Justice Kennedy, joined by Chief Justice Roberts and Justice Stevens, filed a concurring opinion, agreeing with the court's denial to hear Padilla's case, but warning that if the government again changes Padilla's custody status, the courts, including the Supreme Court, "should act promptly" so that Padilla's rights are not compromised. Justice Ginsburg, in a dissent from the denial of Padilla's petition, stated that this case raises questions of "profound importance to the Nation" and warned that nothing prevents the government from changing Padilla's status once more and declaring him an enemy combatant.

AJC Involvement

After the Supreme Court granted certiorari in 2004, AJC joined with the Association of the Bar of the City of New York and the New York Council of Defense Lawyers in an amicus brief filed with the Supreme Court. In the brief, AJC urged the court to affirm the Second Circuit's ruling, arguing that "the Executive's asserted power to seize and detain Jose Padilla should be analyzed in light of the deprivation of Padilla's constitutional rights to due process and to petition for his freedom through habeas corpus."

B. Reproductive Rights

AYOTTE V. PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND

Background

In June 2003, the New Hampshire legislature enacted the Parental Notification Prior to Abortion Act (the "Act" or "PNPA"). The Act requires healthcare providers to notify parents or guardians forty-eight hours before providing an abortion to an unemancipated minor under the age of eighteen. Pursuant to the statute, written notice is to be "delivered personally to the parent by the physician or an agent" or sent certified mail, return receipt.

The parental notice requirement is waived in only a few circumstances: if (1) "the attending abortion provider certifies … that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the notice"; (2) "the person or persons who are entitled to notice certify in writing that they have been notified"; or (3) a judge deems it in the best interest of the minor. Pursuant to the Act, in order for a judge to waive the parental notification requirement, after conducting a confidential hearing, he or she must find that the minor is capable of giving informed consent or that an abortion without parental notification is in her best interest. The court has seven days from the filing of the petition to render a decision, and a subsequent expedited appeal must be available. Performance of an abortion in violation of the Act can lead to civil and criminal penalties.

Case Status

In November 2003, Planned Parenthood of Northern New England, together with other interested parties, filed a complaint in federal district court in New Hampshire challenging the constitutionality of the PNPA and requesting a permanent injunction against its enforcement.

The district court ruled in favor of plaintiffs and granted the injunction. The court found unconstitutional both the Act's lack of an exception to protect the health of a minor, as well as its narrow exception to prevent death.

On November 24, 2004, the First Circuit Court of Appeals affirmed the district court's holding, noting that in addition to the "general undue burden standard, the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health." In reaching its conclusion, the appellate court pointed out that the Supreme Court has considered challenges to the lack of a health exception three times since *Roe v. Wade* (1973), and each time held there must be such an exception for a regulation to pass constitutional muster. Addi-

"In emergency medical situations, the [statute] unconstitutionally threatens the health and lives of young women, and undermines their right to choose an abortion in accordance with religious faiths that place great value on women's health and lives."

tionally, the court rejected defendant's assertion that even if no explicit health exception were contained in the Act, other New Hampshire laws provide the "functional equivalent."

The Court of Appeals also agreed with the district court's holding that the Act's death exception was unconstitutionally narrow in that it failed to meet the standards promulgated by the Supreme Court. More specifically, the court opined that it would not always be "possible for a physician to determine with any certainty whether death will occur before the notice provision could be complied with...."Additionally, the court expressed concern about the possible chilling effect such a provision would have on the willingness of a doctor to perform an abortion when a minor's life is at risk for fear of criminal and civil liability.

In May 2005, the U.S. Supreme Court granted defendant's petition for certiorari, and on January 18, 2006, Justice O'Connor, writing for a unanimous court, vacated the First Circuit's judgment and remanded the case back to the district court, concluding that "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem." The court held that in cases where a statute is constitutionally flawed, it "is not always necessary or justified" to invalidate the statute in its entirety. Rather, a court should attempt to "limit the solution to the problem." In deciding the best remedy for the problems with the statute in question, the court ruled that "the lower courts need not have invalidated the law wholesale." Instead, a lower court could issue an injunction that would prohibit the unconstitutional application of the statute while not entirely striking down the statute. The court remanded the case to the lower court, and on February 1, 2007, the district court stayed the case while the state legislature debates a change in the law that would address the court's concerns.

AJC Involvement

In furtherance of its belief that while "family communication is important and should be encouraged," it must be voluntary, AJC, as a constituent member of the Religious Coalition for Reproductive Choice, filed an amicus brief in the Supreme Court urging it to strike down the PNPA as unconstitutional. As the brief stated, "In emergency medical situations, the [statute] unconstitutionally threatens the health and lives of young women, and undermines their right to choose an abortion in accordance with religious faiths that place great value on women's health and lives."

GONZALES V. CARHART

Background

Federal attempts to enact a ban on the second trimester procedure commonly known as "partial-birth abortion" or "intact dilation and extraction" failed under President Bill Clinton in 1996 and 1998, but Congress was finally successful when President George W. Bush signed the Partial-Birth Abortion Ban Act into law in 2003. Any physician who knowingly performs a partial-birth abortion as defined by the Act may be sentenced up to two years imprisonment. The act contains an exception to save the life of the mother, but does not contain an exception for the preservation of the health of the mother.

Case Status

Four physicians who contend that the procedure is sometimes the safest method and a way to preserve the patient's fertility filed suit on November 3, 2005, the day the statute was signed into law, seeking an injunction for enforcement of the Act. The district court found the law unconstitutional on two separate grounds. First, the court held that Congress's findings that there is a consensus that the challenged procedure is never medically necessary were unreasonable, and thus the lack of an exception to protect the health of the mother was unconstitutional. Second, the court found that the act, in banning the most common late-term abortion procedure, placed an undue burden on the constitutionally protected right to an abortion.

Relying primarily on the Supreme Court's 2000 decision in *Stenberg v. Carhart*, the Eighth Circuit affirmed on appeal. Specifically, the court held that *Stenberg* created a per se rule constitutionally requiring a health exception when "substantial medical authority" recognizes the medical necessity of a particular procedure. Under this rule, congressional fact-finding is not given any special deference, and the court looked to the record to see if the evidence passed the constitutional threshold of "substantial medical authority." The court concluded that the only way to change the per se rule of *Stenberg* would be to prove that there is no longer any "substantial medical authority" that recognizes the medical necessity of partial-birth abortions. Such evidence was not found by the court.

The Supreme Court granted certiorari in February 2006, and oral arguments were heard in November 2006.

AJC Involvement

In September, AJC, as a member of the Religious Coalition for Reproductive Choice, filed an amicus brief in the Supreme Court urging affirmance of the lower court's decision. The brief argued from the perspective of diverse faiths that there is no single moral consensus on the issue of reproductive freedom. Accordingly, we urged the court to protect the liberty of each woman to make choices in keeping with her own belief system, without government interference. In particular, the brief stresses the importance of preserving a woman's choice where her life and health may be at risk.

C. Conscience Clause Exemptions

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI V. NIXON

Background

Following a special legislative session called by the governor, the Missouri Legislature passed the Parental Consent for Aiding and Assisting Mandate (known as the "Teen Assistance Ban"). The statute imposes civil penalties on any person who "intentionally causes, aids or assists a minor in obtaining an abortion without parental consent or appropriate court order allowing for a judicial bypass of the consent requirement." On September 15, 2005, Governor Matt Blunt signed the bill into law, and thereafter Planned Parenthood, which provides comprehensive reproductive health services and counseling to minor and adult women, and the Missouri Coalition for Reproductive Choice filed a lawsuit in Missouri state

court "seeking temporary restraining orders and injunctive relief from the enforcement of the statute." Plaintiffs asserted several constitutional claims, including that the statute "creates an undue burden upon a minor's right to obtain an abortion" and is "overbroad and, thus, chills legitimate freedom of expression of both the [p]laintiffs and of their patients."

Case Status

On November 8, 2005, the circuit court of Missouri, the state's trial court, granted plaintiffs' motion for a preliminary injunction after finding that the plaintiffs showed that the Teen Assistance Ban threatens to cause plaintiffs and their patients an "irreparable harm" by limiting their right to free speech as protected by the Missouri and U.S. Constitutions.

The statute places "an undue burden on the [f]ree [e]xercise rights of both clergy and young women who seek out their counsel."

Ten days later, although expressing "substantial trepidation," Judge Charles Atwell upheld the statute, determining that it could be saved by strict interpretation. Specifically, the court narrowly construed the scienter provision so that a violation would require "purposeful" action, not just "knowing" action. Without this narrowing of the statute's scope, said the court, the law "is substantially overbroad and unconstitutionally chills freedom of expression." Finally, the court explicitly held that the statute cannot prohibit mere counseling or the giving of information.

Anticipating an appeal, the circuit court issued an injunction preventing enforcement of the statute pending the Missouri Supreme Court's review. Oral arguments were heard at Missouri's highest court on September 13, 2006, and a decision is awaited.

AJC Involvement

On March 24, 2006, AJC, together with a coalition of eleven religious and religiously-affiliated organizations, filed a brief with the Supreme Court of Missouri in support of plaintiffs, arguing that the statute unconstitutionally infringes upon the free exercise of religion. The coalition asserted that the statute places "an undue burden on the [f]ree [e]xercise rights of both clergy and young women who seek out their counsel" because it "exposes members of the clergy who provide religious counseling to a Missouri minor woman to civil liability if such counseling includes information about terminating her pregnancy and if she does not have parental or judicial consent to have an abortion." The coalition also urged the court to subject the statute to "heightened scrutiny" because both free speech rights and free exercise of religion rights are affected by the statute.

IV. EQUALITY OF OPPORTUNITY

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. Following a series of lower court decisions, in 1995, the Court of Appeals, New York's highest court, set forth the issue for trial: whether CFE could "establish a correlation between funding and educational opportunity."

Case Status

After a seven-month trial, seventy-two witnesses, and the admission of 4,300 documents into evidence, on January 9, 2001, Judge Leland DeGrasse of the New York State Supreme Court, New York's trial 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 his or her achievement.

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 State 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 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 and reinstated much of the trial court's decision. Writing for the majority, Chief Judge Judith S. 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." The court also gave defendants until July 2004 to ascertain the actual cost of providing a sound basic education in New York City, ensure that every school in the city has the resources necessary to pro-

vide the opportunity for a sound basic education, and ensure a system of accountability to measure whether the implemented reforms actually provide the opportunity for a sound basic education. However, the governor and legislature failed to adopt a plan to address these issues by this deadline.

In light of this failure, the court appointed three referees as a Panel of Special Masters to conduct hearings and determine what measures the defendants should take to follow the court's directives and bring the state's school funding mechanism into constitutional compliance. At the hearings, the state proposed an additional funding of $4.7 billion for New York City schools over a five-year period. On November 30, 2004, the panel called for the state to provide New York City public schools an additional $5.63 billion in operating aid over four years and $9.2 billion for facilities to ensure their students the resources the New York State constitution guarantees them. In February 2005, Judge DeGrasse adopted the panel's recommendation and issued a compliance order. Consequently, the State of New York appealed to the Appellate Division, First Department.

"American Jews have been witness to the striking difference that public education has made in a short period of time, often in just one generation, in the professional, economic, and civic lives of their families."

On March 23, 2006, the Appellate Division vacated Judge DeGrasse's confirmation of the panel's recommendation and directed the governor of New York and the state legislature to provide an amount between $4.7 billion and $5.63 billion in operating aid and $9.2 billion in capital funding for New York City schools. In vacating the lower court's decision, the Appellate Division relied on the separation of powers doctrine and ruled that the court lacks the authority to participate in budget negotiations or to veto the "state's calculations of the cost of a sound basic education." While refusing to rule on the appropriate budget plan, the appellate court directed the state "to act as expeditiously as possible to implement a budget that allows the City students the education to which they are entitled."

In June 2006, CFE filed an appeal with the New York Court of Appeals, seeking "clear and enforceable order that would bring the long-running CFE school-funding case to a close." On November 20, 2006, the Court of Appeals concluded that the state's estimate of the costs of providing a sound basic education to New York City students was reasonable. In particular, the court noted that "[t]he role of the courts is not … to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational." Because it determined that Governor George Pataki's State Education Reform Plan was reasonable, the court vacated the Appellate Division's order that the state provide $9.2 billion for capital improvements.

AJC Involvement

AJC joined in briefs three times during this lengthy litigation to vindicate the rights of New York City schoolchildren. First, AJC joined in an amicus brief filed in 2001 with the Appellate Division in support of plaintiffs in which we stated, "As a community of relatively recent immigrants, American Jews have been witness to the striking difference that public education has made in a short period of time, often in just one generation, in the professional, economic, and civic lives of their families." We next filed an amicus brief with the New York Court of Appeals in 2003 arguing that the Appellate Division's determination that an eighth-grade education sufficed to constitute a sound, basic education was flawed and not supported by the record. In the brief, we contended

that "[t]he continuing failure of the State to correct the deficiencies of schools in New York City and across the State disregards the crucial importance of an educated citizenry to sound public policy and economic growth." Finally, AJC joined with the Alliance for Quality Education in a submission to the Panel of Special Masters in September 2004 urging the panel to prescribe, as necessary to a sound, basic education, adequate funding for smaller class sizes, universal pre-kindergarten, qualified teachers in all classrooms, and updated facilities and learning materials.

MEREDITH V. JEFFERSON COUNTY PUBLIC SCHOOLS and PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT #1

The Kentucky Case

Background

Since 1975, pursuant to a court-ordered decree, the school board of Jefferson County has implemented a student assignment plan in order to "eliminate all vestiges of state-imposed segregation" in the school system. The decree was dissolved in 2000 when a federal court found that the school board had "accomplished the purposes of the [d]ecree."

In 2001, the board voluntarily adopted a new student assignment plan with the goal of maintaining fully integrated public schools in order to "provide substantially uniform educational resources to all students." Integrated schools, the board contended, provide "(1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools, and (4) broader community support for all [district] schools."

To achieve its goals, the 2001 plan included "broad racial guidelines" that required each school to seek a black student enrollment of at least 15 percent and no more than 50 percent. However, under the plan, a student's race is only considered for assignment purposes after other factors, such as "place of residence, school capacity, program popularity, random draw and the nature of the student's choices." Students were assigned to their local school unless it exceeded capacity or lay at the extreme end of the racial guidelines.

In addition to the option of their local school, which most families chose, students also had the option of applying to a magnet school or transferring to another public school within the district. Out of the school district's thirteen magnet schools, four are "nontraditional," offering "specialized programs and curricula," and nine are "traditional," offering a regular curriculum but emphasizing structure, discipline, courtesy, and patriotism. In the traditional schools, under the plan, applicants were divided into four racial categories for admission: black males, black females, white males, and white females. The principal of each traditional school had discretion to draw names from each category in order to stay within the parameters of the guidelines.

Case Status

In 2004, a group of parents brought a lawsuit in federal district court, alleging that the

2001 plan "violate[d] their rights under the Equal Protection Clause." The district court reviewed the 2001 plan under strict scrutiny analysis, the standard to be applied when racial classifications are involved, and held that the school board had established a compelling interest in maintaining integrated schools and that, with the exception of the traditional schools' assignment process, the 2001 plan was narrowly tailored to achieve the state's goals. Therefore, the court denied plaintiffs' request for relief, but ordered the school board to revise the student assignment process for traditional schools. In 2005, the Sixth Circuit Court of Appeals affirmed the district court ruling in toto, without writing its own opinion.

"Integrated public schools are our foremost asset in educating our children to become full participants in our increasingly diverse country."

The Washington State Case

Background

Unlike the Louisville (Jefferson County) schools, Seattle's schools have never been segregated by law. Nevertheless, in the 1960s the Seattle school board voluntarily began exploring measures to end the de facto segregation in its schools caused by the city's housing patterns. In 1977, Seattle became the first major city to adopt voluntarily a comprehensive desegregation program in order to end the de facto segregation within the public school system. According to the plan, students entering the ninth grade may select any high school in the district. If too many students choose a particular school, the district assigns students to that school based on a system of "tiebreakers." First, the district considers whether the applicant has a sibling in the school. Second, if the racial makeup of the student population differs by 15 percent from the racial makeup of the entire school district, it considers the student's race. Third, the district considers the distance between the school and the student's home, and finally, a lottery is used to allocate the remaining seats. The district enacted the plan to "avoid the harms resulting from racially concentrated or isolated schools" and to increase diversity in the classroom.

Case Status

A group of parents brought suit in federal district court challenging the legality of the racial component of the tiebreaker system. The district court upheld the use of the racial tiebreaker under both state and federal law, and plaintiffs appealed.

Sitting en banc, the Ninth Circuit in 2005 ruled that the school district's interests in the educational and social benefits of diversity are compelling. In so ruling, the court stressed the importance of public secondary schools in that they serve a "unique and vital socialization function in our democratic society," provide students who are not college-bound their only opportunity to learn in a diverse environment, and serve younger students who are "more amenable to the benefits of diversity." Additionally, the court found that the school district has a compelling interest in avoiding racially concentrated schools, since those schools have lower levels of academic success. Finally, the court found that the school district had demonstrated that without race-conscious measures, segregation would continue.

Importantly, the court also ruled that the plan was narrowly tailored, stating that the "15 percent plus or minus variance is not a quota because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical

mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interest."

In June 2006, the Supreme Court granted certiorari and decided to hear the Louisville and Seattle cases together. Oral argument was held in December 2006, and a decision is now awaited.

AJC Involvement

AJC led a coalition of interfaith organizations and individuals, including the American Islamic Forum for Democracy, the late Father Robert Drinan, the Sikh Coalition, and the United Church of Christ Justice and Witness Ministries in filing an amicus brief with the Supreme Court supporting the school districts. Speaking from the perspective of a diverse religiously-affiliated coalition, the brief stressed the importance of integration in our country's public school system and argued that "integrated public schools are our foremost asset in educating our children to become full participants in our increasingly diverse country."

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