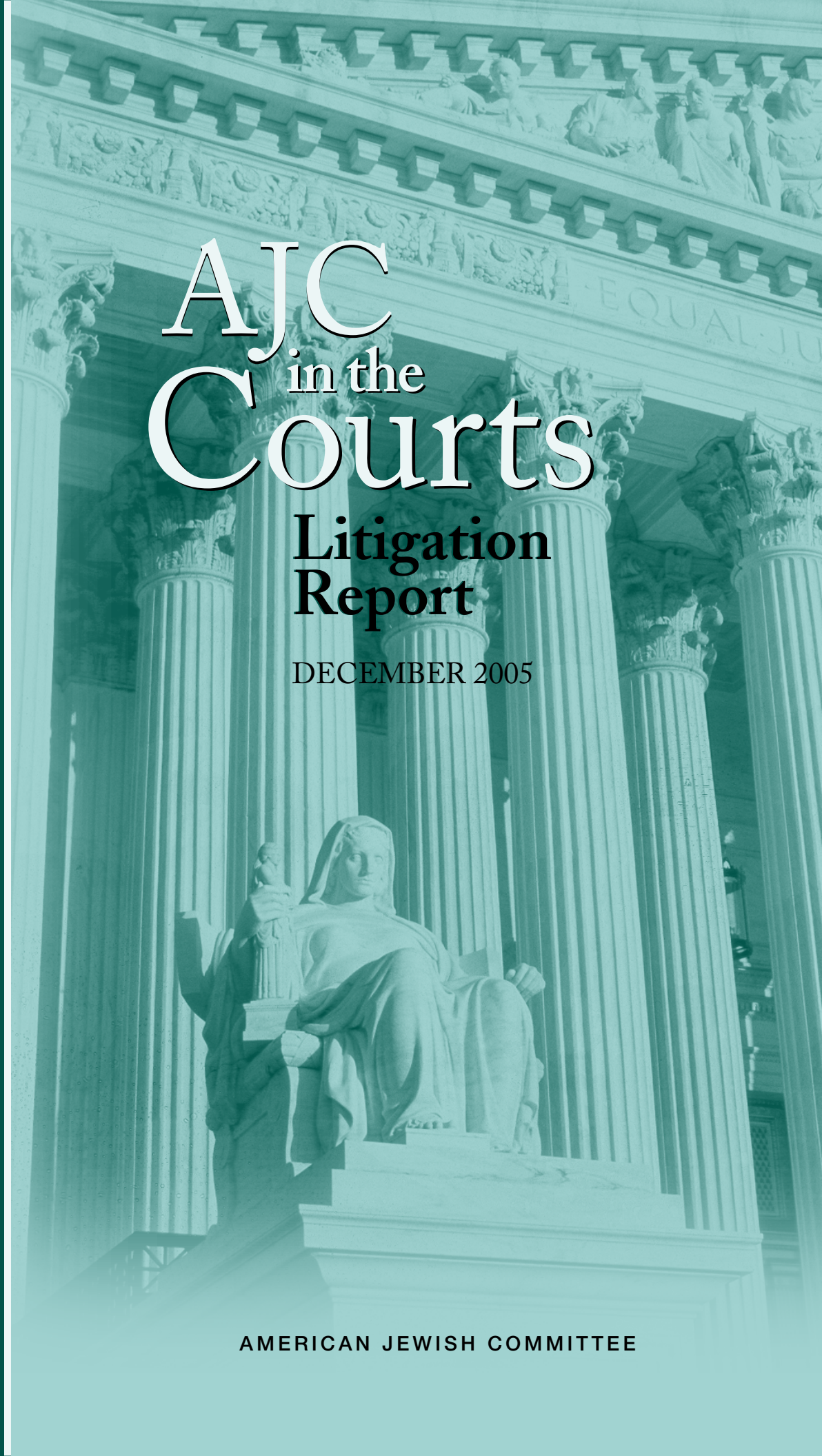

AJC in the Courts

Litigation Report

DECEMBER 2005

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.

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AMERICAN JEWISH COMMITTEE

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INTRODUCTION

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

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

I. SEPARATION OF CHURCH AND STATE

A. Public Display of the Ten Commandments

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY v. McCREARY COUNTY

Background

In Kentucky, the American Civil Liberties Union and concerned individuals sued two counties and a county school district in federal district court alleging that they had erected displays consisting of framed copies of the Ten Commandments in the county courthouses and school classrooms in violation of the First Amendment's Establishment Clause. The plaintiffs sought a declaration that the displays were unconstitutional as well as preliminary and permanent injunctions preventing the counties from continuing the displays.

After the complaints were filed, the counties modified the displays to include excerpts from secular historical and legal documents such as the Declaration of Independence, the preamble to the Kentucky constitution, and the national motto, "In God We Trust." They then filed a motion to dismiss. The district court, instead of granting the defendants' motion, granted the plaintiffs' motion for injunctive relief, ordering that the displays be removed, and the case was appealed to the Sixth Circuit Court of Appeals. The defendants subsequently withdrew their appeal, and instead erected new displays containing the Ten Commandments, along with the *Star-Spangled Banner*, the Declaration of Independence, the Bill of Rights, and other secular historical and legal documents. The courthouse displays also included an explanation entitled "Foundations of American Law and Government Display," detailing how the various documents played a significant role in the founding of the American legal system.

Case Status

In June 2001 the plaintiffs returned to district court and won a supplemental preliminary injunction barring the new displays. This decision was then appealed to the Sixth Circuit, which affirmed the district court's injunction holding the displays to be unconstitutional.

The U.S. Supreme Court subsequently granted certiorari and on June 27, 2005, the High Court affirmed the Sixth Circuit's decision that the display of the Ten Commandments in Kentucky courthouses violated the Establishment Clause. Justice David H. Souter, writing for the 5-4 majority, upheld the continued viability of the secular purpose requirement of the 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. Justice Souter explained that "examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country." The Court refused to adopt an alternative approach to assessing the government's purpose that would be more accepting of its stated secular purpose. The Court emphasized that although a government's proffered purpose will be given deference, it must be "genuine, not a sham, and not merely secondary to a religious objective." The Court also rejected the

The U.S. Supreme Court upheld the continued viability of the secular purpose requirement of the three-pronged test for Establishment Clause violations articulated in* Lemon v. Kurtzman *(1972).

counties' assertion that courts, in assessing purpose in such cases, look only to "the latest news about the last in a series of governmental actions, however close they may be in time and subject," rather than assessing the entire situation. Justice Souter explained that the history and context of a particular case is probative of a government's purpose, and thus it is appropriate for a court to look to history and context in its analysis.

Justice Souter also placed particular emphasis on the religious nature of the displays. He noted the similarity between the Ten Commandments display ruled unconstitutional in *Stone v. Graham* (1980) and the first display installed in the present case, since both exhibited only the text of the Commandments. (The Supreme Court in *Stone* found a Kentucky statute requiring the posting of the Ten Commandments on the walls of each public school classroom in the state to be a violation of the Establishment Clause because the preeminent purpose of the display was plainly religious in nature, and the avowed secular purpose was not sufficient to avoid conflict with the First Amendment.) Justice Souter pointed out that "[w]here the text is set out, the insistence of the religious message is hard to avoid...." The Court concluded that the second version of the display, with its focus on religious passages of other documents, and an accompanying resolution referring to the "embodiment of ethics in Christ" also had an impermissible purpose. As for the third display, the Court rejected its purportedly secular purpose to educate citizens about the foundations of law, noting that "[an observer] would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of the courthouses constitutionally required to embody religious neutrality."

While the court did not find a valid secular purpose in the present case, it did not rule out the possibility that it could find a courthouse display containing the Ten Commandments or another sacred text constitutional. It cited the Supreme Court's own frieze that includes a depiction of Moses holding the tablets, as an example of such a display.

In her concurring opinion, Justice Sandra Day O'Connor stated that the purpose behind the counties' display was irrelevant, as it "conveys an unmistakable message of endorsement to the reasonable observer. " In his dissent, Justice Antonin Scalia took issue with the Court's determination that the First Amendment mandates government neutrality between religion and nonreligion. Instead, he argued that our nation's history and traditions support government endorsement of monotheistic religious beliefs. Scalia concluded that the particular display at issue had a valid secular purpose, and that precedent does not dictate that the Court must look to the displays that preceded the one at issue in the case when making its determination.

AJC Involvement

AJC, together with a coalition of Christian, Jewish, and interfaith organizations, filed an amicus brief with the U.S. Supreme Court in January 2005 in opposition to the public display of the Ten Commandments at issue in this case. The brief asserted that if government displays a sacred text, such as the Ten Commandments, it must rebut a presumption that it endorses the text by evidence of the display's secular meaning. To do so, AJC contended in the brief, the Court of Appeals properly required "a demonstrated analytical or historical connection" between the Commandments and the other displayed secular texts to prove the

Commandments' integration with a secular message, consistent with the requirements articulated in *Stone*. Moreover, the brief explained that in the instant case, it was extremely difficult for the county to meet this requirement, as the original display was solely of the Ten Commandments and the government only began adding secular text in response to litigation, seriously undermining the credibility of the alleged secular message. The brief concluded that when government attempts to rationalize its display of sacred texts by claiming secular purposes and effects, the inevitable tendency is to distort and desacralize the sacred texts.

VAN ORDEN v. PERRY

Background

Thomas Van Orden, a Texas resident, filed suit in federal court asking that the State of Texas be ordered to remove from the grounds of the state capitol a granite monument of the Ten Commandments. Van Orden complained that the monument violates the First Amendment's Establishment Clause. The monument, which is six feet high and three and a half feet wide, was a gift from the Fraternal Order of Eagles to the state in 1961. The monument displays the Commandments and is surrounded by various symbols etched into the granite, including small tablets with Hebrew script, an American eagle grasping the American flag, two Stars of David, and a symbol representing Jesus Christ. Since the capitol's founding in 1888, sixteen other monuments have been erected on the capitol grounds, which are protected as a National Historic Landmark maintained by the State Preservation Board. Other monuments on the grounds include a plaque commemorating the war with Mexico, a replica of the Statue of Liberty, and a tribute to Texans lost at Pearl Harbor.

The State of Texas argued that the display serves a secular purpose and that a reasonable observer would not conclude the state is seeking to advance, endorse, or promote religion by its display. To buttress this claim, the state argued that the display has been in place without legal challenge for over forty years, that it is part of the state's commemorative display of significant events of Texas history, and that a reasonable observer would see the monument as a recognition of the larger role of the Commandments in the development of Texas law. Furthermore, the state argued that the context of the monument's setting is analogous to a museum setting, which would negate any religious endorsement implied by the nature of the Ten Commandments.

Case Status

When the district court rejected his claim, Van Orden appealed the decision to the Fifth Circuit Court of Appeals. In November 2003, the Fifth Circuit affirmed the lower court's ruling allowing the monument to remain in place. The Fifth Circuit first held that the state legislature had a valid secular purpose in installing the monument to honor the Eagles' efforts to reduce juvenile delinquency, that the monument did not have the primary effect of advancing religion, as seen through the eyes of a reasonable observer, due to the context of the monument's display, and that the monument's placement on the capitol for over forty years without legal action "adds force to the contention that the legislature had a secular purpose." Van Orden appealed, and

When government attempts to rationalize its display of sacred texts by claiming secular purposes and effects, the inevitable tendency is to distort and desacralize the sacred texts.

the U.S. Supreme Court accepted the case for review.

On June 27, 2005, the U.S. Supreme Court affirmed the Fifth Circuit's decision, by a vote of 5-4. In his majority opinion, Chief Justice William H. Rehnquist first addressed the applicability of the *Lemon* test. While declining to overrule the test, he wrote that *Lemon* is "not useful in dealing with the sort of passive monument" involved in this case, and instead analyzed the monument in terms of the country's history and the nature of the monument itself.

Turning to the Ten Commandments specifically, Rehnquist noted that similar "acknowledgements of the role played by the Ten Commandments in our Nation's heritage are common throughout America," and cited representations of the Decalogue at the Library of Congress, the National Archives, and the Supreme Court itself. While the chief justice acknowledged that the Decalogue has religious significance, he wrote that it also has "an undeniable historical meaning." However, he explained that simply "having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." While he did acknowledge limits to the display of religious symbols, such as the one struck down in *Stone*, the chief justice wrote that such cases involve displays in public schools, and give no indication that their holdings "extend to a legislative chamber, or to capitol grounds." Finally, Rehnquist noted the "passive use" of the Ten Commandments in the present case, in contrast with its use in *Stone*. Whereas in *Stone*, elementary students were "confronted" with the text every day, the monument in *Van Orden* had been on the grounds of the Texas capitol without complaint for many years and was also easily avoidable to those who found it objectionable.

In his concurring opinion, Justice Stephen G. Breyer, who sided with the majority to strike down the Ten Commandments display challenged in *McCreary*, determined that the Texas monument conveys not only a religious message, but a secular message as well. He stated that "the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage." Comparing *Van Orden* to other Ten Commandments cases where the displays were deemed to be impermissible, Justice Breyer pointed out that the monument is not on the grounds of a public school like in *Stone*, and that there is no history of a religious objective behind the placement of the monument as in *McCreary*. Most persuasive to Justice Breyer was the fact that this monument has been in place for forty years without objection, leading him to conclude that the display in this case does not engender divisiveness, and therefore does not, in his view, violate the basic purpose of the Religion Clauses.

Among the dissenters, Justice John Paul Stevens discussed the problem presented by displaying one version of the Ten Commandments over others. Selecting the King James version, Justice Stevens argued, "invariably places the State at the center of a serious sectarian dispute," and furthermore, indicates that the state prefers a Judeo-Christian message. As such, Justice Stevens found that the monument violates the "first and most fundamental" principle of the Establishment Clause, which "demands [government] religious neutrality."

AJC Involvement

AJC, together with a coalition of Jewish organizations, filed an amicus brief with the

U.S. Supreme Court in December 2004 in opposition to the public display of the Ten Commandments on government property. In the brief, AJC expressed the view that in this case, "the purpose and effect of the display was to urge reverence for, and compliance with, the Ten Commandments." The brief also explained that the display communicates a message of exclusion. It pointed out that "the Commandments are intensely sectarian statements" and the display expresses a preference for the Judeo-Christian tradition over other religions and nonreligion.

B. Religion in the Public Schools

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. The most vocal parent, who described herself as a "six-day biblical creationist," organized a petition, signed by 2,300 Cobb County residents, requesting that the school board identify evolution as a theory, not a fact, and that it ensure the presentation of other theories regarding the origin of life.

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 U.S. Supreme Court precedent indicating

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

the sticker's lack of constitutionality. For example, in *Edwards v. Aguillard* (1987), 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 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 court applied the Supreme Court's three-pronged *Lemon v. Kurtzman* (1972) test. The court found that the state sought to advance several purposes by placing the disclaimer stickers on science textbooks: one, secular and legitimate, and another religious. The school board wanted both to foster critical thinking in the science classroom, specifically as it relates to the theories of origin, while also seeking to placate those constituents who objected to the inclusion of evolution in the curriculum based on their personal and religious beliefs. Accordingly, though it found one purpose for the sticker to be religious in motivation, the court held that the "purpose" prong of *Lemon* had been satisfied by the board's assertion of at least one clearly secular purpose.

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." The case is currently on appeal to the Eleventh Circuit Court of Appeals.

AJC Involvement

In June 2005, AJC filed an amicus brief with the Eleventh Circuit, which was co-authored with 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 those children whose parents objected to the teaching of evolution.

C. School Aid Programs

AMERICAN JEWISH CONGRESS v. CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Background

The Corporation for National and Community Service (the "Corporation") directs the National and Community Service Act (the "Act"), which 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 Corporation pursues this goal by providing "educational opportunity for those who make a substantial commitment to service," though funds may not be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization."

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 at least 1,700 hours of service during a nine-to-twelve-month period in a national service position. The award is currently $4,725, and may 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.

Case Status

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 in December 2003, and in July 2004 the district court granted the plaintiff's motion. The question before the court was whether the government funding of the challenged portions of 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 grants have an impermissible religious content because the Corporation does not adequately monitor its participants' activities. Furthermore, even if the Corporation could accurately estimate

the time participants spend on religious versus nonreligious matters, it would be impossible to clearly distinguish 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 & Religious Liberty v. Regan* (1980).

The "program must be judged under the Establishment Clause standards applicable to aid that is received directly by religious institutions."

After a rehearing was denied, petitioners filed a petition for a writ of certiorari with the U.S. Supreme Court.

AJC Involvement

In November 2004, AJC, along with Americans United for Separation of Church and State, 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. In the brief, quoting *Zelman*, it was argued that the AEAP is not a "true private-choice program," which "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 brief contends that the AEAP grants are not the result of independent private choice, because the government selects the institutions where participants work, the government regulation is ongoing and has a significant impact on AEAP services used to support religion, and the choices are made by those delivering the religious education, thereby possibly conveying the message of governmental endorsement of religion.

The brief asserts 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 contends that the aid given

directly to religious institutions must be monitored to ensure it is not being used for religious purposes, but in the present case, the Corporation is not carefully monitoring the grants. For these reasons, the brief urges the appellate court to affirm the district court's decision and hold the AEAP in violation of the Establishment Clause.

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; comply with prohibitions against discrimination on the basis of race, color or national origin; agree "not to compel any student ... to profess a specific ideological belief, to pray or to worship."

With respect to this last criterion, the voucher plan does not prohibit a school from requiring a student to receive religious instruction. The plan also does not place any limitation on the uses to which schools can put voucher payments. The first round of voucher payments was made on August 1, 1999.

Case Status

In June 1999, a group of Florida citizens and organizations brought suit challenging the legislation as unconstitutional. The complaint, filed in the Circuit Court of the Second Judicial Circuit for Leon County, Florida, alleged that the program violates the Florida constitution. The complaint asserted that the vouchers program will funnel public funds to sectarian schools where they will be used for religious education, worship, and other religious activities, in violation of the Establishment Clause of the First Amendment.

The Florida Education Association subsequently filed a similar legal challenge to the voucher plan, along with a motion to

consolidate the two actions. Individual Florida citizens and the Urban League of Greater Miami intervened to support the legislation and were joined as defendants.

The two actions were consolidated by order of the Florida Circuit Court on November 22, 1999. The court determined that it would hold a hearing on the narrow issue of whether the OSP violates the "education provision" of the Florida constitution, which provides in relevant part that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." On March 14, 2000, the Florida Circuit Court determined that Florida's constitutional provision directing education 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 (a state intermediate appellate court) reversed the trial court's decision on the state constitution's education provision and remanded the case for further proceedings on the church-state issues. The court ruled that nothing in the public education clause "clearly prohibits the Legislature from allowing the … use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." On April 24, 2001, the Supreme Court of Florida denied interlocutory review of the appellate court's decision, and the case was remanded to the trial court.

Plaintiffs subsequently filed a motion for summary judgment asserting that the statute violates the Florida constitution, which states that "no revenue of the state" shall be used "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." On August 5, 2002, Judge Kevin Davey granted the motion and enjoined the defendants from taking any action to implement the 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.

On August 16, 2004, Florida's First District Court of Appeal affirmed the trial court's decision, holding that the no-aid provision of the state's constitution prohibited giving indirect benefits to sectarian schools through the voucher program. The court also ruled that the no-aid provision did not implicate the Free Exercise Clause of either the First Amendment or Florida's state constitution.

On November 12, 2004, after granting the state's motion for a rehearing en banc, the First District withdrew its previous opinion and issued a new one, again affirming the decision of the trial court. The appellate court rejected the state's argument that Florida's state constitution imposes no greater restrictions on state aid to religious schools than does the Establishment Clause and that, as a result, the summary judgment must be reversed on the authority of *Zelman*. The court also maintained its previous position that the no-aid provision does not violate the Free Exercise clause of the U.S. Constitution, looking to *Locke v. Davey* (2004), which held that the provision in the State of Washington's constitution prohibiting the use of public funds to support religious instruction or exercise did not

violate the Free Exercise clause.

Pursuant to the Florida constitution, the Florida Supreme Court has the jurisdiction to review lower court decisions when a state statute is declared unconstitutional. Accordingly, the First District requested that Florida's Supreme Court decide whether the Florida OSP violates the Florida constitution. On June 7, 2005, the court heard oral arguments in the case, and a decision is awaited.

AJC Involvement

AJC has been involved with the case since its early stages, as it joined as "of counsel" to the plaintiffs, and submitted a brief in opposition to Florida's voucher program at the trial court level. Most recently, in February 2005, AJC, along with the NAACP, the American Civil Liberties Union, Americans United for Separation of Church and State, People for the American Way, and the American Jewish Congress, 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, AJC 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.

With regard to defendant's federal free exercise argument, maintaining that a private school voucher program that excluded sectarian schools violated the U.S. Constitution, AJC asserted that this view was not presented in the appeal, but if it were, it would be foreclosed by the U.S. Supreme Court's decision in *Locke*, in which the Court held "that treating religious education differently from secular education is 'not evidence of hostility towards religion,' but rather the product of federal and state constitutional views that legitimately treat religion differently." Therefore, Florida would not be prohibited from excluding sectarian schools from the voucher program.

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.

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 religion founded in Brazil, based on a merging of Christian theology and South American beliefs. UDV, a recognized religion in Brazil, was founded in the United States in 1993 in New Mexico and currently has approximately 130 members. The Internal Revenue Service has granted UDV tax-exempt status. 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 which 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, also 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 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

Subsequently, 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"). On August 12, 2002, the United States Court for the District of New Mexico enjoined the federal government from prohibiting or penalizing the use of hoasca, a controlled substance, by UDV.

The district court rejected UDV's assertion that hoasca is not covered under the CSA. However, the district court granted UDV's motion for a preliminary injunction after determining that UDV demonstrated a prima facie case that the burden of the government's regulation on UDV's religious

freedom violates the RFRA. RFRA 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.

For the preliminary hearing before the district court, the government stipulated that its actions substantially burdened UDV's religious exercise rights, but then sought to show that its actions furthered a compelling interest in the least restrictive manner. In meeting its burden to show a compelling interest, the government offered three reasons for disallowing the use of hoasca, even for religious use: (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. Furthermore, the district court held that the Convention did not apply to hoasca. Therefore, the district court held that the government did not meet its burden under RFRA.

The district court then addressed the granting of a preliminary injunction, which requires a four-pronged showing by movant, including: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will result if the injunction is denied; (3) that the threatened injury outweighs the injury to the other party caused by granting the injunction; and (4) that the injunction is not adverse to the public interest. Finding that UDV demonstrated a substantial likelihood of success on the merits, as well as other factors, and determining that failure to uphold religious rights protected by federal law would be adverse to the public interest, the district court enjoined the government from prohibiting or penalizing sacramental hoasca use by UDV members. The district court also required UDV members to identify themselves to the Drug Enforcement Agency ("DEA").

The government subsequently sought an emergency stay of the preliminary injunction, pending appeal, which the Tenth Circuit Court of Appeals granted. On appeal, the Court of Appeals 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 turned to the consideration of 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 negative effects and a strong incentive to prevent the tea's use outside of a religious context, since the church considers such use to be sacrilegious. The Tenth Circuit agreed with the district court, finding that the government failed to meet its burden of proof by demonstrating a compelling interest. The Court of Appeals also considered whether the Convention prohibits the import and distribution of hoasca, but concluded that it did not need to resolve the question since the government's asserted obligations conflicted with its obligations under RFRA. Finding that the government failed to meet its burden under RFRA and concluding that

The Court of Appeals focused on the government's assertion of compelling interests in barring UDV from using hoasca in its ceremonies . . . and agreed with the district court, finding that the government failed to meet its burden of proof.

UDV demonstrated a substantial likelihood of success on the merits as well as other conditions, the Tenth Circuit affirmed the district court's decision. The case was reheard en banc, and the Court of Appeals for the Tenth Circuit again affirmed the district court's ruling and vacated the stay on the injunction that had been in place during the appeal.

On November 1, 2005, the case was argued before the Supreme Court. The Court granted certiorari to examine the question of 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. Amici, the Tort Claimants Committee, have asked the Court to take up sua sponte the issue of RFRA's constitutionality.

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. The brief stated 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. AJC also asserts that the law does not exceed Congress's authority under the Commerce and Spending Clauses of the Constitution. The Commerce Clause gives Congress the exclusive authority to regulate activities within states where the activity has a substantial effect on interstate commerce, while the Spending Clause allows Congress to attach conditions on the receipt of federal funds to further broad policy objectives that benefit the general welfare.

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

1. Religious Land Use

CONGREGATION KOL AMI v. ABINGTON TOWNSHIP

Since its founding in 1994, Congregation Kol Ami (the "congregation" or "Kol Ami") has held worship services and other religious activities at a variety of temporary locations in the greater Philadelphia area. In early 1999, the congregation commenced the purchase of property owned and used as a convent by the Sisters of the Holy Family of Nazareth, a Catholic order of nuns, as its permanent site for a house of worship.

As a result of changes to the local zoning ordinances in 1996, the property is located in a district that no longer permits places of worship by special exception and instead permits places of worship only by variance. Previously, the Abington Township Zoning Hearing Board ("ZHB") granted a variance to the Greek Orthodox Monastery of the Preservation of Our Lord (the "monastery") in 1996, after it leased the property from the Sisters. The variance allowed the monastery to continue the Sisters' prior religious use, which, due to changes in the zoning laws, was now considered "nonconforming." Thus, the congregation believed it was also entitled to continue the nonconforming use of utilizing the property as a place of worship.

Case Status

In January 2000, the congregation initiated proceedings before the ZHB requesting such a variance, or alternatively, the approval of a special exception to use the property as a place of worship, both of which were denied. In April 2001, the congregation filed suit, asserting alleged violations of the U.S. and Pennsylvania Constitutions and

federal and state law, including RLUIPA. The complaint asserted that the township and its officials discriminated "against religious assembly uses, and in favor of nonreligious assembly uses in most of its zoning districts," and that such discrimination targeted "Jewish places of worship" in particular. The complaint further alleged that the township imposed an unreasonable limitation on places of worship within the R-1 District and other residential districts, and that the township's actions "were arbitrary, capricious and unreasonable" and "not justified by any compelling interest." The congregation argued that, via the modification of the township's zoning laws throughout the years, "Abington Township has completely eliminated the possibility of new places of worship from locating in residential districts as permitted, conditional or special exception uses." Since existing churches have been allowed to remain, there are approximately thirty Christian churches located in the township's residential districts and not a single synagogue or other non-Christian place of worship. In fact, including Kol Ami, only two synagogues exist in the entire township of Abington, although twenty percent of the township's population is Jewish.

The court noted that this case "is precisely the type of case contemplated by the drafters in their definition of free exercise under the RLUIPA."

In July 2001, Judge Clarence Newcomer of the U.S. District Court, Eastern District of Pennsylvania, ruled that the township's zoning ordinance was unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution as applied to the congregation by the ZHB, but did not reach the claims under RLUIPA or the Pennsylvania constitution. Since the ZHB refused to consider the congregation as a candidate for a special exception, but permitted the consideration of other similar uses, Judge Newcomer found that the township violated the congregation's constitutional rights to equal protection. Judge Newcomer subsequently issued an order directing the ZHB to hold immediate hearings on Kol Ami's request for a special exception. On August 15, 2001, the ZHB granted the congregation's application for a special exception permit, allowing it to occupy and use the property as a synagogue. The township, however, appealed Judge Newcomer's decision to the Third Circuit Court of Appeals. The Third Circuit heard oral argument on July 29, 2002, and on October 16, 2002, vacated the district court decision and remanded the case for further consideration. The Court of Appeals directed Judge Newcomer to apply a "similarity of uses" comparison in the equal protection analysis prior to assessing the existence of a rational basis for distinguishing between the various uses.

In January 2003, the township moved for partial summary judgment, and plaintiffs filed a renewed motion for summary judgment. In August 2004, the district court granted the motion in part and denied the motion in part, leaving five counts that concerned potential violations of RLUIPA. In its decision, the court upheld RLUIPA against Fourteenth Amendment, First Amendment, and Commerce Clause attacks, finding that a substantial burden was placed on the congregation's free exercise rights to justify withstanding a facial challenge to RLUIPA. The court noted that this case "is precisely the type of case contemplated by the drafters in their definition of free exercise under the RLUIPA."

In September 2004, the district court denied a motion for reconsideration filed by the township, which had argued that the court made an error when it held that

RLUIPA prescribes a broad test for determining when a substantial burden has occurred. The court disagreed, citing its reliance on "Congress's expansion of the concept of 'religious exercise' as defined in RLUIPA," and "case law to support its conclusion that both the ordinance and the denial of a variance are substantial burdens on [the Congregation's] religious exercise rights as defined by RLUIPA." On November 4, 2005, plaintiffs filed for a partial motion for summary judgment in the district court, arguing that the township violated RLUIPA by imposing a "substantial burden" on plaintiffs' religious exercise.

AJC Involvement

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

In addition to filing a brief in support of the congregation, AJC through its Philadelphia Chapter has been actively engaged in supporting the congregation's position in the local community. AJC will continue to monitor this case and to support the congregation's efforts.

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 with the city 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, in February 2001, the commission denied the permit, and an appeal the next month to the City Council was unsuccessful. 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 as it exceeded Congress's enforcement powers under the Fourteenth Amendment, which grants to Congress wide authority to deter and remedy perceived constitutional

violations. The court explained further that RLUIPA was not, as the Justice Department had argued, a codification of existing constitutional law. Rather, the court held, RLUIPA was a redefinition of the First Amendment rights of free speech and free exercise of religion that Congress was purporting to enforce.

Furthermore, to the extent that it found RLUIPA was not a valid exercise of Congressional enforcement powers under the Fourteenth Amendment, the court also rejected the argument that the Commerce Clause provides the requisite authority. The Commerce Clause gives Congress the exclusive authority to regulate intrastate activities where the activity has a substantial effect on interstate commerce, but the district court held that since RLUIPA regulated land use law, rather than commerce, the clause could not be used as the basis for Congress's authority to pass RLUIPA.

The Ninth Circuit Court of Appeals subsequently granted the ECC's petition to appeal. Oral argument was held on October 17, 2005.

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 to uphold the constitutionality of RLUIPA. In the brief, it was 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. AJC is awaiting a decision from the appellate court and will continue to monitor developments.

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

In April 2001, the Guru Nanak Sikh Society of Yuba City (the "society"), California, 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.

In December 2003, Sutter County filed an appeal with the Ninth Circuit Court of Appeals. Oral argument was held on October 17, 2005.

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 the constitutionality of RLUIPA. Focusing on the legislative history of the act, the brief argued that Congress, by 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." AJC will continue to monitor the case as it proceeds on appeal.

KONIKOV v. ORANGE COUNTY, FLORIDA

In this case, a rabbi in Florida sued Orange 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 was violated by the county's land use code. After complaints from neighbors, the county began fining the rabbi for holding religious services in his home without the required permit. The defendants asserted, in addition to other arguments, that the land use code satisfies RLUIPA, but in the event that it does not, 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 pursuant to section (a)(1) of the Act, which requires that burdens on religious exercise be minimally restrictive as well as justified by a compelling interest, nor did it violate section (b)(1) of the Act, which requires that religious assembly be treated on "equal terms" with nonreligious assembly. The court explained that the code's application requirement to oper-

ate 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.

The court held that, as applied to Konikov, the code did violate RLUIPA, as it was implemented in a way that treated religious organizations unequally in comparison to nonreligious organizations.

However, the court held that, as applied to Konikov, the code did violate RLUIPA, as 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.

With regard to the constitutionality of RLUIPA, the court did not address the constitutionality of the "substantial burden" provision because it agreed with the district court's grant of summary judgment on that question. However, the Eleventh Circuit did uphold the constitutionality of the "equal terms" provision, citing *Midrash Sephardi v. Town of Surfside*, where the Eleventh Circuit examined Congress's findings of religious discrimination as well as constitutional principles and upheld the "equal terms" provision as a valid exercise of Congress's authority.

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.

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. 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.

MURPHY v. ZONING COMMISSION OF NEW MILFORD

In this Connecticut case, Robert and Mary Murphy, a married couple, had lived in New Milford for almost thirty years when Robert became ill in 1994. Subsequently, the couple began hosting prayer meetings for about a dozen friends in their home on Sunday afternoons. In 2000, the New Milford Zoning Enforcement Office ("ZEO") began receiving complaints from neighbors because of traffic and parking concerns, and in December 2000 the ZEO issued a cease and desist order charging the Murphys with violations of zoning regulations.

The Murphys responded by filing suit in federal district court, winning a temporary injunction in July 2001 that barred the ZEO from enforcing the cease and desist order pending resolution of the case. In the ruling granting the injunction, the magistrate judge found that the Murphys were likely to prevail on the merits of their claim under RLUIPA. In November 2002, the ZEO

moved for summary judgment, arguing that RLUIPA is unconstitutional, and the Murphys subsequently moved for summary judgment as well.

In September 2003, the court granted the Murphys' motion, holding that the cease and desist letter "unconstitutionally abridges plaintiffs' First Amendment rights to freely exercise their religion and peaceably assemble," and that it "also violates plaintiffs' rights under [RLUIPA] and Connecticut's Act Concerning Religious Freedom." Furthermore, the court upheld the act's constitutionality, holding that it violates neither the First nor the Fourteenth Amendment.

The ZEO appealed to the Second Circuit Court of Appeals. On March 25, 2005, the Second Circuit vacated the permanent injunction and remanded the case with instructions to dismiss the complaint without prejudice, determining the case was not ripe for review. The court stated that the Murphys must first obtain a final judgment from the local zoning authorities prior to seeking federal judicial review.

AJC Involvement

In July 2004, AJC joined in a coalitional amicus brief, arguing that Congress acted well within its enforcement powers under the Fourteenth Amendment in passing RLUIPA. The brief emphasized that RLUIPA was enacted in response to overwhelming evidence that local governments, through their power to regulate land use, were discriminating against both mainstream and nonmainstream religions. Moreover, the brief pointed out that Congress concluded RLUIPA was needed to stamp out official animus toward religious groups with respect to land use.

WESTCHESTER DAY SCHOOL v. VILLAGE OF MAMARONECK

In May 2003, a Jewish day school brought an action in federal district court against the Village of Mamaroneck, alleging that the zoning board's denial of its application to construct new classrooms and other facilities violated the school's rights under RLUIPA. In September 2003, the U.S. District Court for the Southern District of New York granted the school's motion for summary judgment, ruling that the denial of the permit substantially burdened the school's free exercise rights under RLUIPA and that the denial of their application was not based on compelling governmental interests. Though the village had argued that RLUIPA was unconstitutional, the court upheld its constitutionality on the grounds that it is a valid exercise of Congress's enforcement powers under the Fourteenth Amendment as applied to the Free Exercise Clause, and Congress's broad powers under the Commerce Clause. The court furthermore held that RLUIPA does not violate the Establishment Clause or the Tenth Amendment. The Village of Mamaroneck subsequently appealed the decision to the Second Circuit Court of Appeals.

In September 2004, the Second Circuit vacated the lower court's grant of summary judgment on other grounds, finding that there was not enough evidence to compel a judgment in the school's favor and remanded the case to the district court for further deliberations. On April 1, 2005, the district court denied the village's motion for a jury trial because it concluded there were no new issues of fact raised by the Second Circuit's

decision, and defendant's failure to make a timely jury demand was intentional.

AJC Involvement

In April 2004, AJC joined an amicus brief filed by several national Jewish organizations with the Second Circuit Court of Appeals. The brief argued that the lower court correctly ruled that RLUIPA was constitutional in that it provides protection to religious institutions against onerous and unfair application of land use regulations so as to avoid discrimination. Furthermore, the brief asserted that RLUIPA is not an endorsement of religion, but rather a necessary and reasonable safeguard of basic constitutional rights guaranteed by the First Amendment.

2. Institutionalized Persons

BENNING v. STATE OF GEORGIA

In December 2002, Ralph Benning, an inmate in Georgia State Prison, filed suit against the state under RLUIPA. Benning asserted that prison officials' refusal to provide him with kosher food, allow him to wear a yarmulke, or otherwise accommodate his religious practices was a violation of RLUIPA. In September 2003, a magistrate judge issued a report and recommendation that Benning's complaint be dismissed, and that RLUIPA be declared unconstitutional under the reasoning of *Madison v. Riter*. (See discussion, page 25.) In January 2004, the district court judge rejected the magistrate's report and denied the state's motion to dismiss the complaint. The district court judge noted that *Madison* had been subsequently overruled by the Fourth Circuit and adopted the circuit court's reasoning instead. The judge then certified the case for immediate appeal to the Eleventh Circuit Court of Appeals.

On December 2, 2004, the Eleventh Circuit Court of Appeals, reviewing the district court's decision de novo, held that section three of RLUIPA, which mandates the application of "strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons," was properly enacted by Congress. It held the provision to be a valid exercise of Congress's spending power and that it does not violate the Tenth Amendment or the Establishment Clause of the First Amendment.

In concluding that Congress validly exercised its spending power, the court applied the four-prong test set out by the Supreme Court in *South Dakota v. Dole* (1987). The first prong states that "conditions imposed by Congress on the expenditures of federal funds must promote the general welfare." The court did not address this issue, since Georgia did not dispute the satisfaction of the first prong. The second prong requires that the conditions imposed on the state receiving funds "must be unambiguous." The court held that because the states were on clear notice that they could be sued under RLUIPA if they accepted federal funding, the second prong of *Dole* was satisfied. The third prong mandates a showing that the conditions imposed must be "rationally related to a federal interest." The court concluded that there is a valid federal interest, since this provision of RLUIPA ensures that federal funds are implemented without infringing on the religious exercise of prisoners while promoting their rehabilitation, and thus the court concluded that the condition relates to valid federal interests.

The fourth prong of the test provides that

"no condition attached to the receipt of federal funds may violate other provisions of the Constitution." While the court did not address this prong when discussing Congress's spending power, it later explained that RLUIPA does not violate either the Tenth Amendment or the Establishment Clause of the U.S. Constitution. The court then rejected Georgia's contention that RLUIPA violates the Tenth Amendment because it "interferes with a core state function of administering prisons," determining that it does not interfere with the states running their own prisons. Instead, the court explained that RLUIPA mandates that states protect the exercise of religion while entrusting them with the power to determine how to balance these concerns.

Finally, after applying the *Lemon* test, the court held that RLUIPA does not violate the Establishment Clause. It explained that pursuant to the first part of the test, RLUIPA has a secular purpose, that of "protecting the free exercise of religion from unnecessary government interference." Second, RLUIPA does not advance or inhibit religion, nor does it unduly burden a third party, satisfying *Lemon*'s second prong. In so concluding, the court stated that, "failure of prison officials to accommodate religion even in the absence of RLUIPA would not be neutral, it would be hostile to religion." With regard to placing a burden on third parties, the court held that Georgia is not burdened since the state can refuse federal funds if it decides that complying with RLUIPA is too difficult. Additionally, nonreligious prisoners and prison staff are not burdened because RLUIPA permits Georgia to deny the exemption without being in violation of the Act if a requested exemption from a health or safety rule would place other prisoners or staff at risk. As for the third prong of *Lemon*, the court concluded that RLUIPA does not excessively entangle Georgia with religion. Since RLUIPA does not violate any part of the *Lemon* test, the court held that it does not violate the Establishment Clause.

The appellate court did not consider the merits of Benning's complaint and concluded that a determination would be made by the district court on remand. On February 2, 2005, the Eleventh Circuit denied a rehearing en banc. AJC will continue to monitor the case as it proceeds.

"[F]ailure of prison officials to accommodate religion even in the absence of RLUIPA would not be neutral, it would be hostile to religion."

AJC Involvement

In April 2004, AJC joined with a diverse coalition of religious and civil liberties organizations in an amicus brief filed with the Eleventh Circuit to uphold the constitutionality of RLUIPA. In the brief, it was asserted that the passage of RLUIPA was a valid use of Congress's Spending Clause authority because it is in pursuit of the general welfare, its condition on federal appropriations is explicit, and the condition is closely related to the programs to which the funds are dedicated. Moreover, the brief asserted that RLUIPA is also within the bounds of the Commerce Clause, and that since RLUIPA is a valid exercise of Congress's delegated powers, it does not intrude on the states' sovereignty as guaranteed by the Tenth Amendment.

CUTTER v. WILKINSON

The Court concluded, "RLUIPA [properly] protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on government permission and accommodation for exercise of their religion."

In three consolidated cases in the U.S. District Court for the Southern District of Ohio, prisoners claimed that officials of the state's Department of Rehabilitation and Corrections violated RLUIPA by refusing to accommodate their religious beliefs and practices. The defendants include a man who claims he is a minister in the Church of Jesus Christ Christian, which believes that the races should be separated and is affiliated with the Aryan Nation; one who says he is a follower of Asatru, a polytheistic faith that includes Thor in its pantheon of gods; one who says he is a witch in the Wiccan faith; and a man who says he is a Satanist. The men claim that prison officials interfered with their ability to conduct religious services and with their freedom to dress as required by their faiths. Defendants filed a motion to dismiss plaintiffs' RLUIPA claim on the grounds that the Act is unconstitutional, and furthermore that it allows "inmate gangs to claim religious status in order to insulate their illicit activities from scrutiny." The district court denied the motion.

In September 2003, the Sixth Circuit Court of Appeals reversed the district court's denial of the defendants' motion to dismiss and remanded the case back to the district court for further proceedings. In its opinion, the Sixth Circuit stated that "[a]n objective observer viewing RLUIPA's text, legislative history, and effect would therefore conclude that the Act conveys a message of religious endorsement." Furthermore, the court held that RLUIPA provides greater protection to prisoners than is required by the Establishment Clause, explaining that "it imposes strict scrutiny where the Establishment Clause requires only a rational-relationship review." A petition for rehearing en banc was denied in March 2004. Plaintiffs subsequently filed a petition for a writ of certiorari with the U.S. Supreme Court, and in October 2004, the petition was granted.

On May 31, 2005, the Supreme Court overturned the Sixth Circuit's decision and ruled unanimously to uphold the constitutionality of the institutionalized persons provisions of RLUIPA. The Court explained that with regard to institutionalized persons, government maintains control over them in a way that is without comparison in civilian society and which severely limits their free exercise of religion. Therefore, the Court concluded, "RLUIPA [properly] protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on government permission and accommodation for exercise of their religion."

The Supreme Court rejected the argument by prison officials that RLUIPA violates the Establishment Clause because it places greater import on religious observance than other grounds upon which a prisoner might request special privileges. The Court explained that were this "the correct reading of [previous] decisions, all matters of religious accommodations would fall." With regard to concerns by prison officials that prison security would be compromised if they were required to accommodate prisoners' religious observances pursuant to RLUIPA, the Court stressed that such accommodation in state institutions would not supersede their need to maintain safety.

Upon remand, the Sixth Circuit affirmed the district court's decision and found constitutional RLUIPA's provision on institutionalized persons under the Spending Clause of the U.S. Constitution. Moreover, the court determined that the Tenth Amendment was not violated.

AJC Involvement

AJC joined an amicus brief filed with Sixth Circuit Court of Appeals petitioning the court for a rehearing en banc and arguing in favor of RLUIPA's constitutionality. Later, AJC filed a coalitional amicus brief with the Supreme Court in support of RLUIPA's constitutionality. In its brief, AJC argued that "RLUIPA's purpose of alleviating government burdens on prisoners' religious exercise is a permissible secular purpose." AJC also asserted that RLUIPA does not impermissibly advance religion nor is it a government endorsement of religion. As is stated in the brief, "RLUIPA simply permits prisoners some latitude to practice and define their own religious exercise by limiting government interference." Also, AJC contended that in enacting the law, Congress acted well within its authority under the Commerce and Spending Clauses of the U.S. Constitution.

MADISON v. RITER

Ira Madison, a Hebrew Israelite inmate of Buckingham Correctional Center in Virginia, filed suit against prison officials in 2001 in the U.S. District Court in Virginia. Madison argued that prison officials' refusal to provide him with a kosher diet was a violation of RLUIPA and his First Amendment rights.

In January 2003, the district court granted the defendants' motion to dismiss, declaring RLUIPA unconstitutional and finding that it increased the level of protection of prisoners' religious rights only, while excluding other, equally fundamental rights from strict scrutiny review. The district court based its conclusion on its finding that "the principal and primary effect of RLUIPA is to advance religion by elevating religious rights above all other fundamental rights." The court reasoned that in correctional facilities, "[i]ndifference, bigotry, and cost concerns have the same restrictive effect on the freedom of speech, the ability to marry, the right to privacy, and countless other freedoms that RLUIPA proponents left to a lesser level of protection." The district court also examined and criticized the strict scrutiny standard required by RLUIPA.

Madison subsequently appealed the case to the U.S. Court of Appeals for the Fourth Circuit. In December 2003, the Fourth Circuit reversed the district court's decision, holding that RLUIPA does not violate the Establishment Clause, and remanded the case back to the district court for further proceedings. The circuit court found that RLUIPA does not advance religion, but instead facilitates the right of prisoners to free exercise of their beliefs. Defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. The petition was denied on June 6, 2005, following the Supreme Court's decision in *Cutter v. Wilkinson*.

AJC Involvement

In June 2003, AJC joined with a diverse group of organizations in an amicus brief to the Fourth Circuit. In the brief, it was noted that federal courts have consistently upheld RLUIPA, and that the basis for the district court's decision has been rejected in every prior case in which it has been raised. The brief also asserted that RLUIPA is a permissible accommodation of religion under traditional Establishment Clause analysis, and that protecting a single right—even freedom of religion—in a piece of legislation does not prefer that right over others, but simply protects and reinforces that right.

III. CIVIL LIBERTIES/DISCRIMINATION

A. Capital Punishment

SIMMONS v. ROPER

Background

Christopher Simmons was convicted of first-degree murder and sentenced to death for a murder he committed when he was seventeen years old.

The the U.S. Supreme Court held that executing individuals who were under the age of eighteen at the time they committed a capital crime violates the Eighth Amendment's prohibition against cruel and unusual punishment.

While the U.S. Supreme Court ruled in 1988 in *Thompson v. Oklahoma* that the Eighth Amendment's prohibition of cruel and unusual punishment precludes the execution of those who committed capital crimes while under the age of sixteen, this case raises the question of whether the line should be drawn at eighteen, the age of legal maturity in the United States. In 1989, the Supreme Court ruled in *Stanford v. Kentucky* that there was not then a national consensus against the execution of those who were sixteen or seventeen years old at the time of their crimes, and therefore declined to bar the execution of such persons. On the same day, they also declined to bar the execution for those who were mentally retarded, on the same grounds.

Subsequent to the 2002 Supreme Court ruling in *Atkins v. Virginia* that a national consensus had emerged against the execution of mentally retarded offenders, Simmons filed a petition for a writ of habeas corpus with the Supreme Court of Missouri, focusing on the issue of executing those who commit capital crimes while under the age of eighteen.

Case Status

In 2003, the Supreme Court of Missouri, applying the "evolving standards of decency" test set forth in *Thompson*, held that the Eighth Amendment bars the execution of individuals who committed capital offenses when under the age of eighteen and reduced Simmons's sentence to life imprisonment. "In the fourteen years since *Stanford* was decided," the Court said, "a national consensus has developed against the execution of juvenile offenders."

In January 2004, the U.S. Supreme Court agreed to review the case, and on March 1, 2005, held (5-4) that executing individuals who were under the age of eighteen at the time they committed a capital crime violates the Eighth Amendment's prohibition against cruel and unusual punishment. The majority opinion, written by Justice Anthony M. Kennedy and joined by Justices Stevens, Souter, Ruth Bader Ginsburg, and Breyer, reaffirmed the legal standard of referring to "the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." The High Court discerned the current societal standards of decency by exploring the national consensus, particularly as expressed through legislative enactments and jury practices. It also relied on its own independent judgment.

In surveying the national landscape, Justice Kennedy took note that, "eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below eighteen since Stanford, that five states have legislatively or by case law raised or established the minimum age at eighteen, and that the imposition of the juvenile death penalty has become truly unusual over the last decade." He also considered that since juveniles tend to be immature, irresponsible, and vulnerable to negative influences, juveniles are not the kind of offenders that

should be subject to the death penalty. Finally, the Court observed that international opinion, although not controlling, weighs against the execution of juvenile offenders.

Both Justice O'Conner and Justice Scalia wrote dissenting opinions. Justice O'Conner, like the majority, looked to the current societal standard of decency to determine national opinion on the issue. However, she concluded that, "without a clearer showing that a genuine national consensus forbids the execution of [juvenile] offenders, this Court should not substitute its own 'inevitably subjective judgment'…for the judgment of the nation's democratically elected legislatures."

Similarly, Justice Scalia, joined by Chief Justice Rehnquist and Justice Clarence Thomas, criticized the majority for relying on their own judgment as opposed to the moral consensus of the nation, stating that, "all the Court has done today … is to look over the heads of the crowd and pick out its friends." He opined that the majority conveniently counted nondeath penalty states in reaching its conclusion that there is a national consensus against a juvenile death penalty, even though such decisions are based upon different considerations. In addition, Justice Scalia took issue with the majority's reliance on the laws of other countries, stating that "I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nation and peoples' should weaken that commitment."

AJC Involvement

AJC's longstanding position that "capital punishment degrades and brutalizes the society which practices it" resulted in the agency's joining with a diverse coalition of religious communities to file an amicus brief with the U.S. Supreme Court asserting this position in the *Simmons* case. In the brief, AJC urged the Court to consider the voices of religious and religiously affiliated institutions when assessing "evolving standards of decency," the standard for reviewing Eighth Amendment claims. We argued that juveniles lack the psychological maturity and development of adults, and thus lack the degree of culpability that would place them in the category of those most deserving to be put to death.

B. Detention of Enemy Combatants

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.

Case Status

In December 2002, the Southern District held that Secretary Rumsfeld was a proper respondent to the petition and that it could assert long-arm jurisdiction over him, though on the merits the court accepted the government's contention that the president had the authority to detain as "enemy combatants" citizens captured on American soil during time of war. In 2003, the Second Circuit Court of Appeals reversed, ruling 2-1 that the president had exceeded his authority in detaining Padilla as an "enemy combatant," and finding 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. Writing for a 5-4 majority, Chief Justice Rehnquest held that pursuant to the federal habeas statute, 28 U.S.C. § 2242, 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 is Commander Melanie Marr, the commander of the Navy brig in South Carolina where Padilla is currently detained, and not Secretary Rumsfeld.

Furthermore, the Court held that the Southern District did not have jurisdiction over that custodian because Section 2242 limits district courts to granting habeas relief "within their respective jurisdictions." The Court wrote that to allow otherwise "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.

Justice Kennedy, joined by Justice O'Connor, wrote separately to underscore that the majority's opinion did not affect questions of subject matter jurisdiction, but instead dealt with personal jurisdiction and venue. He argued that the Court should allow an exception to permit jurisdiction in the district from whose territory a petitioner had been moved if the government was not "forthcoming with respect to the identity of the custodian and the place of detention."

In Justice Stevens's dissent, joined by three other justices, he argued that the underlying decisions of Secretary Rumsfeld "have created a unique and unprecedented threat to the freedom of every American citizen," and that consequently an exception to the immediate custodian rule is justified. The dissent also noted, in a footnote, that it agreed with the Second Circuit on the merits that the protracted incommunicado detention of American citizens arrested in the U.S. is unauthorized.

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 is 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. The government was given forty-five days to release him from custody. The court reasoned that Padilla must be released because "[t]o do otherwise would not only offend the rule of law and violate the country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguard our democratic values and individual liberties." Moreover, it is Congress, not the president, that "controls utilization of the war powers as an instrument of domestic policy."

In March 2005, following the district court's decision, the government appealed to the U.S. Court of Appeals for the Fourth Circuit. At the same time, Padilla filed a petition for writ of certiorari with the U.S. Supreme Court requesting that it bypass the appeals court and hear his case. In June 2005, the U.S. Supreme Court denied Padilla's petition. Oral arguments were heard by the Fourth Circuit on July 19, 2005. The Court of Appeals reversed the district court's ruling on September 9, 2005, on the grounds that it was properly within President Bush's authority to detain a U.S. citizen as an "enemy combatant" pursuant to the Authorization for Use of Military Force Joint Resolution. On October 25, 2005, Padilla again filed a petition for certiorari with the U.S. Supreme Court, and a decision is awaited. In November 2005, the U.S. filed charges against Padilla, rendering him a defendant instead of 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."

C. 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 requested.

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.

The Act is unconstitutional in the absence of an exception to preserve the health of the pregnant minor.

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. The district court also held that the "undue burden" test used by the Supreme Court in its landmark abortion rights cases, *Planned Parenthood of S.E. Pa. v. Casey* (1992) and *Stenberg v. Carhart* (2000), is the standard for evaluating facial challenges to the validity of a state law regulating abortion, despite the urging of defendant that the court instead implement the "no set of circumstances" test articulated in *U.S. v. Salerno*, which is customarily used in other types of cases.

On November 24, 2004, the First Circuit Court of Appeals affirmed the district court's decision. It agreed that the "undue burden" test is the proper standard to apply when abortion statutes are facially challenged. While the First Circuit acknowledged that the Supreme Court applied the *Salerno* standard in the abortion context prior to *Casey*, and "has never explicitly addressed the ["undue burden"] standard's tension with *Salerno*," the Court of Appeals emphasized that the majority of circuits have applied the "undue burden" test to such cases since *Casey*. It therefore concluded that the "undue burden" standard supersedes *Salerno* in challenges to abortion legislation.

The First Circuit next affirmed that the Act is unconstitutional in the absence of an exception to preserve the health of the pregnant minor. It noted 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 an exception to protect a woman's health. Additionally, 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 is unconstitutionally narrow. It noted that in addition to a health exception to laws restricting abortion, the Supreme Court has determined that a death exception is essential as well. The appellate court found that the death exception at issue failed to meet the standards promulgated by the Supreme Court, primarily because 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 abortions when a minor's life is at risk for fear of criminal and civil liability.

With regard to the confidentiality of the judicial bypass procedure, the court of appeals acknowledged its importance but declined to rule on the issue, as did the district court, concluding the Act was already unconstitutional on other grounds. The question of confidentiality was not posed to the Supreme Court for review. Defendant subsequently petitioned the U.S. Supreme Court to hear the case, and in May 2005, defendant's petition for certiorari was granted. Oral argument was held on November 30, 2005.

AJC Involvement

AJC filed an amicus brief in the Supreme Court in opposition to the constitutionality of the PNPA. Joining the Religious Coalition for Reproductive Choice, a group of religious organizations, AJC advocated for the religious and reproductive rights of minors. 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."

AJC has long supported an individual's right to reproductive choice. With specific regard to parental notification or consent, AJC opposes any such legal requirements, and has taken the position that while "family communication is important and should be encouraged," it must be voluntary. Additionally, AJC believes that were parental notification mandated in every situation, it "could exacerbate hostile and violent family situations." The agency further maintains that even if parental notification statutes contain a judicial bypass mechanism, such regulations place substantial burdens on pregnant minors and should be opposed.

D. School Funding Equity

CAMPAIGN FOR FISCAL EQUITY v. STATE OF NEW YORK

Background

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

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

inequality made in *Levittown*, CFE's claim rested on the state education clause and the alleged inadequacy of the education provided New York City schoolchildren.

Case Status

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

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

> ... poverty, race, ethnicity, and immigration status are not in themselves determinative of student achievement. Demography is not destiny. The amount of melanin in a student's skin, the home country of her antecedents, the amount of money in the family bank account, are not the inexorable determinants of academic success. However, the life experiences ... that are correlated with poverty, race, ethnicity, and immigration status, do tend to depress academic achievement. The evidence introduced at trial demonstrates that these negative life experiences can be overcome by public schools with sufficient resources well deployed.

The State of New York appealed the trial court's decision, and on June 25, 2002, the Appellate Division, First Department of New York, reversed the lower court's ruling, finding that there was no evidence that students were not being provided with the opportunity of a sound basic education as mandated by the Education Article of the Constitution. The court stated that the state's obligation would generally be fulfilled after the students had received an eighth or ninth grade education. According to the 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 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 ordered the defendants to, by July 2004, 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 provide 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, the court appointed three referees as a Panel of Special Masters to conduct hearings and determine what measures the defendants should take to follow these directives and bring the state's school funding mechanism into constitutional compliance. 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. On February 14, 2005, Justice DeGrasse adopted the panel's recommendation. Judge DeGrasse issued a Compliance Order in March 2005, and on August 5, 2005, the State of New York appealed the Compliance Order to the Appellate Division, First Department.

AJC Involvement

AJC joined in an amicus brief filed with the Appellate Division in support of plaintiffs, and subsequently filed an amicus brief with the New York Court of Appeals in which it argued that the Appellate Division's decision was "legally flawed and contrary to the overwhelming evidence adduced at trial." In addition, AJC joined with the Alliance for Quality Education to file an amicus brief with the Panel of Special Masters in September 2004 to ensure that the panel takes into account the concerns and objectives of parents, students, and educational advocates when crafting a remedy. Specifically, the brief expresses support for adequate funding for all state public schools, smaller class sizes, universal pre-kindergarten, qualified teachers in all classrooms, and updated facilities and learning materials.

AJC joined an amicus brief to ensure that the panel takes into account the concerns and objectives of parents, students, and educational advocates when crafting a remedy.

IV. INTERNATIONAL HUMAN RIGHTS

Foreign Sovereign Immunities Act

REPUBLIC OF AUSTRIA v. ALTMANN

Background

In August 2000, Maria Altmann, an elderly American citizen and niece of the original owner of six works of art by the well-known Austrian painter Gustav Klimt, filed suit in the United States District Court for the Central District of California against the Republic of Austria and the government-owned Austrian Gallery. She alleged the paintings had been wrongfully appropriated from their rightful heirs and should be returned. The paintings were originally owned by a wealthy Jewish Czech sugar magnate, Ferdinand Bloch, who fled Austria for Switzerland when the Nazis invaded in 1938, leaving behind all of his holdings. Bloch's property was subsequently confiscated and divided up by the Nazis, and six Klimt paintings ended up in the Austrian Gallery.

Bloch died in Switzerland in 1945, leaving his estate in part to plaintiff Maria Altmann, who now resides in the United States. Directly after the war, in a practice later declared illegal by the Austrian government, the family was permitted to export some of its looted artwork and other property in exchange for a "donation" of the Klimt paintings. The family later attempted to recover the Klimt works, but their efforts were thwarted by Austrian policies in place at the time that limited the export of Austrian artwork. In the late 1990s, despite the discovery of documents that called into doubt the Austrian Gallery's rightful ownership of the Klimt paintings, Bloch's heirs were unable to recover the paintings. Altmann and other family members commenced a lawsuit in Austria. However, in order to proceed under Austrian law, the family would have to pay an initial filing fee of 1.2 percent of the amount in controversy plus additional fees. Because the amount in controversy was high, the initial filing fee was viewed as prohibitive, and the Bloch heirs abandoned their Austrian lawsuit.

Case Status

On August 22, 2000, Maria Altmann filed suit in California. The Republic of Austria urged the district court to dismiss the case on numerous counts, including lack of jurisdiction, arguing that Austria is immune from suit in the United States courts pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA). However, on May 4, 2001, the district court rejected Austria's claims, concluding, in part, that the FSIA "applied retroactively to the events of the late 1930s and 1940s, and that the seizure of the paintings fell within the expropriation exception to the FSIA's grant of immunity."

Defendants appealed the case to the U.S. Court of Appeals for the Ninth Circuit, and on December 12, 2002, a three-judge panel of the court unanimously upheld the lower court's ruling, although upon slightly narrower grounds with regard to FSIA. Defendants subsequently filed a motion for a rehearing en banc, which was denied. On September 30, 2003, the Supreme Court granted the petition for a writ of certiorari as to the limited question of whether the expropriation exception of FSIA affords "jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952."

On June 7, 2004, the United States Supreme Court ruled that lawsuits regarding

Holocaust-era looted art and other stolen property can be brought against foreign governments in U.S. courts. Justice Stevens, writing for a 6-3 majority, held that FSIA applies to all assertions of sovereign immunity made after its enactment in 1976, regardless of whether the underlying conduct occurred prior to enactment.

The Court declared that this case does not fit into the traditional framework developed for retroactivity cases as set forth in *Landgraf v. USI Film Prods*. Instead, the Court decided that while FSIA is not simply jurisdictional, there is "clear evidence" in the act that Congress meant for the statute to apply to pre-enactment conduct. Looking to the language of the preamble in Section 1602, the Court reasoned that "[i]mmunity 'claims'—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the Act; those claims are 'henceforth' to be decided by the courts ... regardless of when the underlying conduct occurred." The Court also cited previous cases that have applied FSIA provisions to cases involving pre-1976 conduct.

The case was subsequently remanded to the district court for further deliberation. On September 9, 2004, the Central District of California denied a motion by the Austrian government to dismiss the lawsuit based on another jurisdictional challenge, allowing the suit to proceed.

On May 18, 2005, the Republic of Austria and Maria Altmann agreed to end their litigation in district court and submit the dispute to binding arbitration in Austria. Pursuant to the agreement, the case will be dismissed and the decision of the arbitration panel will be final, without any right of appeal.

AJC Involvement

As part of our ongoing commitment to assist Jewish victims and survivors of the Holocaust as well as their heirs with restitution claims, AJC joined with Bet Tzedek Legal Services to file an amicus brief with the Supreme Court supporting the family's attempt to recover artwork confiscated by the Nazis from the Republic of Austria. The brief stated that "[t]here is simply no reasoned ground for the Court" to reject "any possible retroactive effect of the FSIA to events and causes of action arising prior to its enactment in 1976." Moreover, the brief argued that the Court's jurisprudence concerning the retroactive effect of jurisdictional statutes such as the FSIA, as well as the fact that "no contrary result is dictated by international law nor by any compelling foreign policy interests," dictated that the case should not be barred on jurisdictional grounds.

Lawsuits regarding Holocaust-era looted art and other stolen property can be brought against foreign governments in U.S. courts.

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