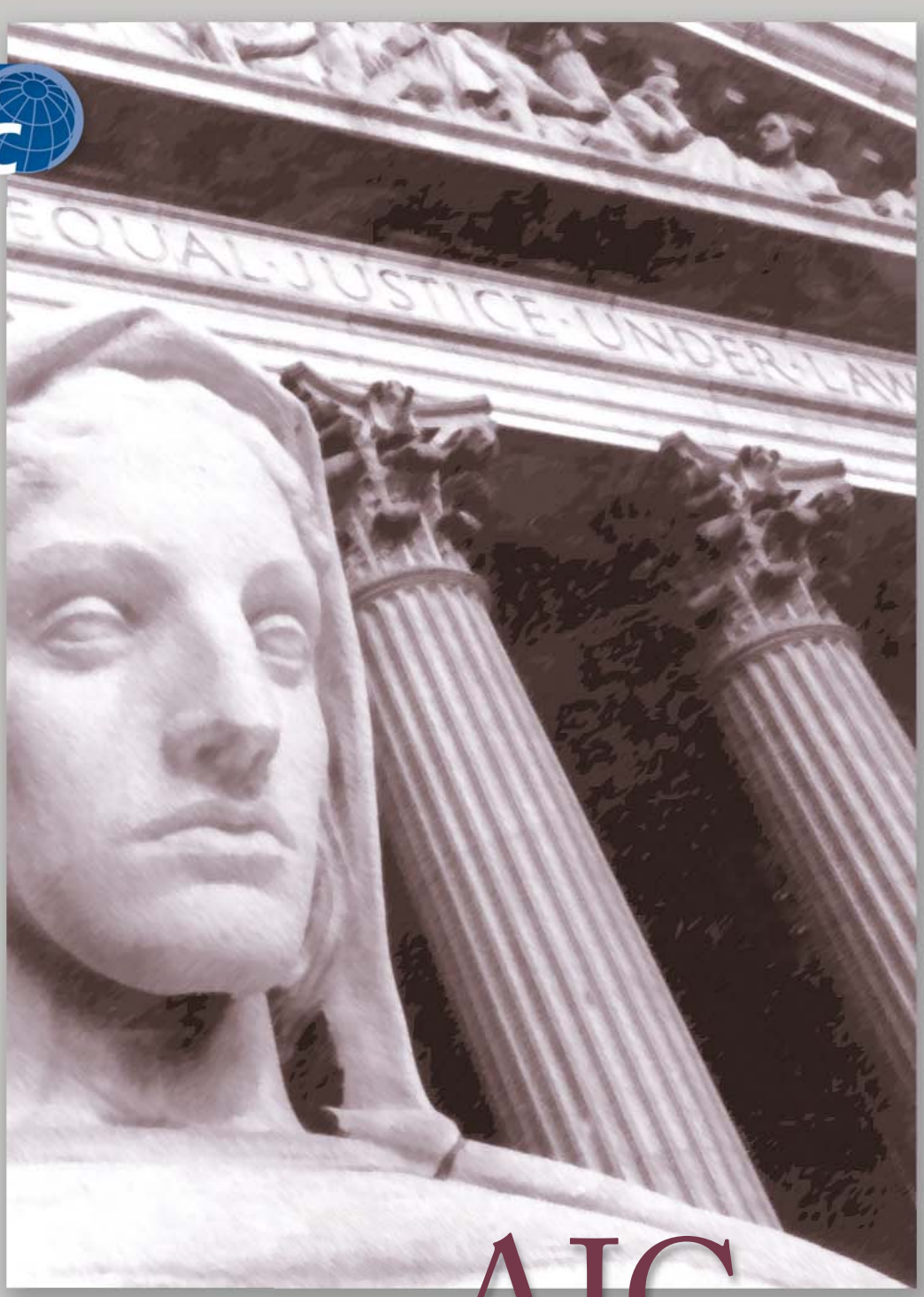

AJC in the Courts

SEPTEMBER 2008

AMERICAN JEWISH COMMITTEE

*The mission of **American Jewish Committee** is:*

—To safeguard the welfare and security of Jews in the United States, in Israel, and throughout the world;

—To strengthen the basic principles of pluralism around the world as the best defense against anti-Semitism and other forms of bigotry;

—To enhance the quality of American Jewish life by helping to ensure Jewish continuity, and;

—To deepen ties between American and Israeli Jews.

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AJC in the Courts

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INTRODUCTION

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

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

The 2008 Litigation Report

I. SEPARATION OF CHURCH AND STATE

AMERICAN ATHEISTS, INC. v. CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY

Background

In anticipation of Detroit's hosting the 2005 Major League Baseball All-Star Game and the 2006 Super Bowl, the City of Detroit Downtown Development Authority (the "DDA") adopted an improvement plan designed to upgrade the facades and parking lots of structures in the Lower Woodward neighborhood of the city (the "Lower Woodward Facade Improvement Plan," or "FIP"). Of the 204 applications submitted for city funds, 123 were approved, and 91 projects were completed. Of those 91, nine involved improvements to three churches, and those grants were the subject of this litigation.

Pursuant to the FIP, the grant recipients contracted with the DDA to pay for and complete the approved projects. The DDA would then reimburse the recipients 50 percent of the costs. The approved church projects included the repair and refurbishment of entry doors, facades, signage, stained-glass windows, and a steeple; the expansion of an entryway; the installation of an irrigation system for a parking lot; landscaping and planters; painting; and fencing. The total cost of the challenged projects was approximately $737,000.

Plaintiffs American Atheists, Inc. brought suit in federal district court in Michigan claiming that the payment of public funds to the churches for the improvement projects violated the First Amendment.

Case Status

On August 8, 2007, Judge Avern Cohn of the U.S. District Court, Eastern District of Michigan, held that the disbursement of funds pursuant to the FIP "is constitutional despite the fact that it allows churches to be the recipients of reimbursement grants." Judge Cohn analyzed the case in light of the approach used by the Supreme Court in *Mitchell v. Helms* (2000), where a plurality of the Court upheld the provision of public funding to religious schools if the funding is seeking to further some legitimate secular purpose and offers aid on the same terms to all who further that purpose, regardless of religious affiliation. After *Mitchell*, the distribution of funds for "bricks and mortar" projects to pervasively religious organizations such as churches, synagogues, and mosques is not per se unconstitutional. Rather, following the narrowest rationale of *Mitchell*, the district court asked whether any of the grants furthered the sectarian activities of the recipients.

Under this paradigm, the court held that some DDA grants caused constitutional problems while others did not. Specifically, grants for the repair and replacement of exterior doors and lighting, the refurbishing of a steeple clock, installation of a concrete ramp, and others of this type do not violate the First Amendment because they "would not lead to governmental indoctrination" since they "lack content, and therefore carry no religious message." The court thus upheld the public funding of these projects, explaining that they "primarily advance the DDA's goal of beautifying the visual landscape." However, the court rejected DDA funding for improvements to the monolithic church sign and stained-glass window containing religious imagery because "a religious image, icon or message displayed in a win-

Government aid to construct and maintain houses of worship not only distorts government but also degrades religion, and runs afoul of the Founders' vision for both.

dow or sign may advance a church's religious mission by advertising the church's identity or services, soliciting attendance, or by disseminating a religious value or theme."

AJC Involvement

In May 2008, AJC joined with a coalition of religious and civil liberties organizations in filing an amicus brief with the Sixth Circuit, urging the appellate court to overturn the district court decision. In the brief, AJC argued that government aid to construct and maintain houses of worship not only distorts government but also degrades religion, and runs afoul of the Founders' vision for both. "[T]he Establishment Clause's prohibition against using public money to maintain churches," the brief argued, "was born as much out of the desire to preserve the independence and robustness of religion as it was out of the aim to protect government from religious encroachments." Further, AJC argued that the decision creates an administratively untenable distinction that requires dividing churches into religious and secular components, a task which is exceedingly difficult and unmanageable.

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

Background

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

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

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

The InnerChange program was operated out of the facility's "Unit E," which was generally regarded as the honor unit and the

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

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

Case Status

On June 2, 2006, a federal district court in Iowa declared the program unconstitutional, holding that "for all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one of its penal institutions." In reaching its decision, the court pointed out that the state funding went directly to a program that was "so pervasively sectarian" that it was impossible to separate the sectarian and nonsectarian aspects of the program, and that "the intensive, indoctrinating, Christian language and practice that makes up the InnerChange program effectively precludes non-Evangelical Christian inmates from participating." In an unorthodox move, the court also mandated that InnerChange reimburse Iowa all funds paid out for the contract.

On appeal to the Eighth Circuit, a three-judge panel that included retired Supreme Court Justice Sandra Day O'Connor, unanimously affirmed the lower court's opinion, saying the program's efforts at religious instruction amounted to indoctrination and "had the effect of advancing or endorsing religion" in violation of the Establishment Clause. The opinion emphasized that inmates had "no genuine or independent private choice" to receive rehabilitation services other than InnerChange. The recoupment of funds was reversed, however, because "the district court gave no weight to the fact that specific statutes, presumptively valid, authorized the InnerChange funding," and thus provided InnerChange with a good-faith basis for believing the program to be constitutionally permissible. Immediately following the opinion, Iowa halted all government funding to the InnerChange Program, and the program suspended operation in March 2008.

AJC Involvement

AJC filed an amicus brief in the Eighth Circuit together with the Anti-Defamation League, urging affirmance of the court's decision below. The brief pointed out that the state's "subsidy of a sect's religious proselytizing plainly endorses one religion, coerces its observance, and discriminates against those who wish to follow other faiths (or no faith at all)."

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

BORDEN v. EAST BRUNSWICK SCHOOL DISTRICT

Background

Marcus Borden was a respected football coach at East Brunswick High School in New Jersey. For over twenty years, Coach Borden prayed with his students at official pregame dinners and in the locker room prior to each game. At times, Borden himself led the prayers, and at others he invited

clergymen to lead them. Borden characterized these prayers, which often made references to "God" and "Jesus," as saying "grace" and "taking a knee" (a reference to genuflecting, the Christian solemn form of bowing).

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

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

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

Case Status

The district court, without issuing a written opinion, denied the school district's motion for summary judgment on July 25, 2006. The court held that the coach's "taking a knee" with the team or bowing his head was "passive" and did not indicate the endorsement of any religion.

On April 15, 2008, the Third Circuit upheld the school's prohibitions against the coach's prayers and granted summary judgment in favor of the school district, holding that given the coach's history of leading prayers with the team, "a reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams, [but] is instead endorsing religion." In a concurring opinion, Judge Theodore McKee argued that, regardless of the coach's history of leading prayer, any school official who bows his head and takes a knee in prayer is unconstitutionally endorsing religion.

AJC Involvement

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

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

Background

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

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

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

According to the school district, this policy was motivated by a concern that if religious services or instruction were permitted on school premises, schools would be perceived as supporting and endorsing particular faiths and their activities, particularly since school premises cannot be made available for the worship services of all the religions adhered to by the diverse New York City population. The school district also sought to avoid school officials becoming involved in religious matters when enforcing regulations and policies pertaining to the use of school facilities.

Case Status

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

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

In 1998, the Supreme Court denied plaintiffs' petition for certiorari. However, in 2001, the High Court decided the case of *Good News Club v. Milford Central School*, which cast doubt upon the Second Circuit's decision in *Bronx Household*. In *Good News Club*, a Christian children's group was denied permission to meet on public elementary school premises immediately following the school day for the purpose of "singing songs, hearing a bible lesson and memorizing the Scripture," because the local school board deemed the activities to be "the equivalent of religious worship." The Supreme Court found that the denial of

Good News Club's request amounted to unconstitutional viewpoint discrimination because even "something 'quintessentially religious' [may be] … characterized properly as the teaching of morals and character development from a particular viewpoint." With particular relevance to the *Bronx Household* case, in a footnote the court said:

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

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

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

In 2002, the district court issued a preliminary injunction against the enforcement of the board regulations, determining that, based upon the *Good News Club* case, distinguishing religious worship from other religious activities is impermissible. The district court also determined that there would be no Establishment Clause violation resulting from granting the Bronx Household's request because the meetings are held during nonschool hours, are open to the public, and do not involve the participation of school employees.

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

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

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

With that backdrop, on March 23, 2005, the Board of Education amended the challenged regulations to state that "[n]o permit shall be granted for the purpose of holding religious worship services, … [but] permits may be granted to religious clubs for students that are sponsored by outside organi-

zations." Bronx Household was then notified that its use of school premises was prohibited under the revised regulations, and the parties went back to court.

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

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

The school district appealed the granting of the permanent injunction, bringing the controversy before the Second Circuit Court of Appeals again. In a decision released on June 2, 2007, the three-judge panel vacated the permanent injunction, but the judges each filed separate opinions offering distinct rationales. Judge Guido Calabresi believed the case to be ripe for decision and voted to vacate the lower court's permanent injunction because, in his view, the revised regulations are viewpoint-neutral. Conversely, Judge John Walker, Jr., while agreeing that the case is ripe for adjudication, voted to affirm the permanent injunction because he concluded the regulations are viewpoint-discriminatory. Finally, Judge Pierre Leval expressed no opinion on the merits, but voted to vacate the injunction because he believed the case is not yet ripe for adjudication, since the latest iteration of the Board's regulations had not yet been applied to deny the church access. The court remanded the case to district court "for all purposes."

Shortly after this stalemate at the Circuit Court, the Board once again revised its policy, and subsequently denied the most recent Bronx Household application for use of the school. The parties went back to the District Court for the Southern District of New York in November 2007, which then issued its third injunction since 2002 against enforcement of the policy. The school district has appealed this latest ruling to the Second Circuit Court of Appeals, asking the court to again review the constitutionality of its policy.

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

AJC Involvement

AJC filed an amicus brief in support of the Board of Education with the Second Circuit in the last two phases of the Bronx Household litigation. In its most recent brief filed in February 2008, AJC argued that the district court improperly interpreted *Good News Club* in a way that was "tantamount to holding that, if a public school is opened for civic meetings, it also must be opened for use as a church or other place of worship." School districts should not, the brief continued, be compelled to subsidize the religious activities of houses of worship with taxpayer dollars.

On the issue of viewpoint neutrality, the brief argued that the new regulation complies with the Supreme Court's decision in *Good News Club*, because instead of prohibiting any "religious instruction" on school premises, the new regulation is limited to prohibiting "religious worship services." Since there is no secular analogue to religious services, prohibiting holding services on school property cannot constitute viewpoint discrimination. Furthermore, the brief contends, the new regulation is necessary because the regular use of public schools as a Christian church on Sundays constitutes an impermissible endorsement of and entanglement with religion by the government.

COLORADO CHRISTIAN UNIVERSITY v. BAKER

Background

Colorado Christian University, a private religious school, challenged the Colorado Higher Education Scholarship Programs which prohibited students who attend "pervasively sectarian" institutions from receiving state tuition assistance. The State of Colorado generally assists Colorado resident students who attend in-state, private institutions with a choice of scholarship programs. These scholarships, however, are not available to students who attend religious institutions, such as Colorado Christian University, based on the state constitutional prohibition on public funding for religious education.

Colorado Christian claimed that by barring tuition assistance to students who attend their school, the state is violating the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. On this theory, the university filed suit in the U.S. District Court for the District of Colorado. The district court granted summary judgment to the state, concluding that there was no evidence that the challenged statute was motivated by hostility to religion and that Colorado had a legitimate interest in "vindicating" the provision of the Colorado Constitution that forbids appropriating state funds to aid religious institutions.

Colorado Christian University appealed the decision to the Tenth Circuit Court of Appeals.

Case Status

On July 23, 2008, the Tenth Circuit Court of Appeals overturned the district court's ruling. The three-judge panel unanimously ruled that the program violates the Free Exercise Clause because it allows for tuition assistance for some religiously affiliated institutions while denying funding for others. Determining what qualifies as a "pervasively sectarian" school, as opposed to simply a "religiously affiliated" school, requires state administrators to examine a tangle of crite-

ria designed to measure whether the education is intended to be neutrally educational, or is tantamount to religious proselytizing. The Tenth Circuit took issue with this process of determining eligible institutions, holding that it violates the Free Exercise Clause for two reasons: First, the program "expressly discriminates among religions without constitutional justification." Second, administrators are asked to perform an "unconstitutional intrusive scrutiny of religious belief and practice."

The State of Colorado has not announced whether it plans to pursue an appeal to the U.S. Supreme Court.

AJC Involvement

AJC submitted an amicus brief in coalition with the American Jewish Congress, Americans United for Separation of Church and State, People for the American Way, and other religious and civil liberty organizations supporting Colorado's refusal to provide state-funded assistance grants to "pervasively sectarian" colleges and universities. The brief argued, "States have some latitude to exercise their own discretion and protect free exercise values to a greater degree than is mandated by the federal constitution."

HEIN v. FREEDOM FROM RELIGION FOUNDATION ("FFRF")

Background

In March 2001, President George W. Bush created by executive order the White House Office of Faith-Based and Community Initiatives ("OFBCI") to "make sure that effective faith-based and community organizations compete on an equal footing for Federal dollars, face fewer bureaucratic barriers, and receive greater financial support." To facilitate this goal, representatives of the OFBCI hold conferences, make public appearances, and give speeches throughout the country, funded entirely by Federal money. In the first challenge to the constitutionality of this initiative, the Freedom From Religion Foundation ("FFRF") filed a complaint in federal district court arguing that these practices are tantamount to government endorsement of religion, especially where "faith-based organizations are singled out as being particularly worthy of federal funding because of their religious orientation, and belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." The District Court for the Western District of Wisconsin dismissed the claim.

Resurrecting the case in 2006, however, the Seventh Circuit Court of Appeals confronted a narrower issue than whether the programs broadly violate the First Amendment. Instead, the decision turned on the scope of taxpayer standing and if it encompasses the power to challenge an Executive Branch expenditure that aids religion when the funds were not specifically earmarked by Congress for that purpose. In an opinion authored by Judge Richard Posner, the court found that this challenge did fall within the accepted parameters of individual taxpayer standing, regardless of whether the expenditure is made pursuant to congressional authorization, setting the stage for a squarely raised First Amendment challenge to the OFBCI. Before this could be initiated, though, the Department of Justice appealed the decision to the Supreme Court, which granted certiorari on December 1, 2006.

Colorado may refuse to provide state-funded assistance grants to "pervasively sectarian" colleges and universities since "states have some latitude to exercise their own discretion and protect free exercise values to a greater degree than is mandated by the federal constitution."

Case Status

In a 5-4 decision, the Supreme Court reversed the court of appeals and ruled that the foundation did not have standing. Writing for the plurality, Justice Samuel Alito cited concern that if the court ruled in favor of the foundation and found it had standing, it would open the floodgates to any number of individuals displeased with Executive Branch policies, thereby paralyzing the government. "As a general matter," Alito explained, "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for … standing…. We have consistently held that this type of interest is too generalized and attenuated." Importantly, the court's opinion does not alter the law with respect to taxpayer standing where a challenge is lodged to congressionally authorized expenditures.

At issue was the scope of taxpayer standing and if it encompasses the power to challenge an Executive Branch expenditure that aids religion when the funds were not specifically earmarked by Congress for that purpose.

AJC Involvement

AJC joined with the American Jewish Congress to submit an amicus brief with the Supreme Court in support of FFRF, advocating for judicial recognition of individual taxpayer standing to challenge Executive Branch expenditures on religious programs. *Flast v. Cohen* (1968), the leading prior decision upholding taxpayer standing to challenge government action that allegedly promotes religion, was the focus of the constitutional challenge. All government spending, whether emanating from congressional appropriation or executive discretion, flows from the same source, the American taxpayer's pockets, the brief argued. In addition, it rebutted the claim that "the founders were concerned only with legislative appropriations," pointing out that a "review of the legal materials from the Founding era demonstrates a focus on prohibiting certain outcomes (using governmental power to advance religion …), not with allocating to one branch the power to spend money to advance religion."

HINRICHS v. BOSMA

Background

For 188 years, the Indiana House of Representatives has opened its sessions with a brief prayer or invocation delivered from the speaker's stand by a cleric from the community who is invited and sponsored by a state representative. Prior to the invocation in the House, the cleric receives a letter of confirmation that asks him or her to "strive for an ecumenical prayer." However, in 2005, out of the fifty-three invocations delivered in the House, at least twenty-nine were "offered in the name of … Jesus Christ" and most prayers were "explicitly Christian." The speaker of the house refused to alter the invocation practice, and four Indiana taxpayers who objected to their taxes being used to support such prayers brought a lawsuit, alleging that these are "sectarian Christian prayers, in violation of the Establishment Clause."

Case Status

On November 30, 2005, the district court held that the use of sectarian prayer in the Indiana House of Representatives violated the Establishment Clause and issued a permanent injunction, barring the speaker from permitting sectarian prayers in the Indiana House of Representatives. The district court relied on the Supreme Court case of *Marsh*

v. Chambers (1983), which permitted inclusive, nonsectarian legislative prayers and established the "principles and boundaries" of such practice. After reviewing the *Marsh* decision and other cases interpreting its limits, the court found that where "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief, official legislative prayers would violate the Establishment Clause." The district court further found that the legislative prayers in this case fell outside the boundaries established in *Marsh* because a "substantial majority of the prayers were explicitly Christian, offered in the name of Jesus Christ," and some clearly attempted to proselytize. The court concluded that any future legislative prayer in the House must be nonsectarian and nondenominational.

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

Appealing the district court ruling to the Seventh Circuit Court of Appeals, the speaker argued a stay of the injunction should be granted because the plaintiffs did not have standing to bring this lawsuit. On October 30, 2007, the Seventh Circuit Court agreed, holding that in light of the recent Supreme Court Decision in *Hein v. Freedom from Religion Foundation*, limiting taxpayer standing in Establishment Clause cases, the plaintiffs lacked standing to challenge the constitutionality of the legislative prayer practice as they "have not pointed to any specific appropriation of funds by the legislature to implement the [prayer] program." It is insufficient, the court asserted, to point only to general legislative branch spending as evidence of injury to taxpayers at-large. Since the court decided the case on standing doctrine, the court did not reach a conclusion on the merits of the underlying controversy regarding the constitutionality of sectarian prayer in state legislatures.

AJC Involvement

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

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

SUMMUM v. PLEASANT GROVE CITY

Background

The monuments in the park are government speech and, therefore, the city can make choices about which messages it wishes to convey.

The city of Pleasant Grove, Utah, has maintained a monument of the Ten Commandments donated by the Fraternal Order of Eagles in a city park since 1971. Summum, a religious organization based in Salt Lake City, requested permission from the city to erect in the same park a monument containing the Seven Aphorisms, the central precepts of the Summum religion. These aphorisms include the principle of psychokinesis, the principle of correspondence, and the practice of mummification. Pleasant Grove denied the request to erect the Summum monument on the grounds that it did not meet the criteria required to display a private monument in the park. The criteria, unwritten at the time of the denial of the request, were later codified in a resolution stating that permanent displays must either (a) "directly relate to the history of Pleasant Grove," or (b) be "donated by groups with longstanding ties to the Pleasant Grove Community."

Case Status

Summum filed a complaint in district court asserting violations of the First Amendment's Free Speech Clause and the Utah Constitution's free expression and establishment provisions. The district court denied Summum's request for a preliminary injunction requiring the city to install the display, and Summum appealed. In April 2007, a panel of the Tenth Circuit sided with Summum, issuing an order that Pleasant Grove immediately display the monument. In its ruling, the Tenth Circuit found that the park was a "traditional public forum," or a place historically devoted to expressive activity, and therefore the city's decision should be subject to strict scrutiny by the court. Under this stringent standard, content-based restrictions are considered presumptively invalid, and the city must demonstrate that its restrictions are narrowly tailored to achieve a compelling interest.

After the panel denied its request for a rehearing, the city petitioned the Tenth Circuit for a rehearing *en banc*. Twelve members of the appellate court split 6-6 on the petition, issuing three opinions and resulting in denial of the petition. Judge Carlos Lucero dissented from the denial of rehearing *en banc*, finding that the display of permanent monuments in the park constituted a limited public forum about which the city can make "reasonable content-based, but viewpoint-neutral decisions as to who may install monuments." Judge Michael McConnell, also dissenting, determined that the monuments did not constitute private speech at all, but rather became government speech once the city "exercised total 'control' over [them]" and "bore 'ultimate responsibility' for [their] contents and upkeep." Accordingly, in McConnell's view, viewpoint and content neutrality are not required because the government is the speaker, although the city must still comply with other constitutional restraints, such as the Establishment Clause. In responding to the dissents, Judge Deanell Reece Tacha stressed that "the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis," and contended that Judge McConnell's analysis "would turn essentially all government-funded speech into government speech.… No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text," asserted Tacha.

In March 2008, the Supreme Court granted certiorari.

AJC Involvement

AJC joined with Americans United for Separation of Church and State and other leading advocacy organizations to file an amicus brief with the Supreme Court urging reversal of the Tenth Circuit panel decision. In our brief, we argued that the appellate court "erred by inviting the parties to litigate under the Free Speech Clause a case for which the Establishment Clause defines the scope of the rights in question." With respect to free speech analysis, we asserted that the monuments in the park are government speech and, therefore, the city can make choices about which messages it wishes to convey. However, the brief expressed concern that the underlying facts of the case suggested official discrimination against Summum, which the Establishment Clause would prohibit, reminding the court that "even those who take the narrowest view of the Clause's reach support the application of the Clause to forbid religious favoritism."

STALEY v. HARRIS COUNTY

Background

Harris County, Texas, comprising the Houston-Baytown-Sugar Land metropolitan areas, is the third largest county by population in the United States. In 1956, a monument honoring Houston philanthropist William H. Mosher was erected outside the county courthouse. This memorial, conspicuously located facing the main entrance to the building, included a glass-topped case housing an open King James Bible. The Bible and monument were briefly removed during the 1980s following a vandalization incident; however, they were soon restored using money raised in large part by Judge John Devine, a county judge who campaigned for the bench on "a platform of putting Christianity back into government." Judge Devine spearheaded the restoration of the monument and handpicked the passages the Bible would display. These passages were read aloud during a ceremony held at the courthouse commemorating the replacement of the Bible and the refurbishment of the monument, with several Christian ministers leading prayers and songs.

Kay Staley, a local attorney who did business in the Harris County Courthouse, challenged the display in district court as a violation of the Establishment Clause. Ms. Staley argued that the purpose and effect of the Bible and the monument were religious, and thus they should be removed from public property. On August 10, 2004, the district court ruled for the plaintiff, saying that it is clear that "the purpose of the Bible display is to encourage people to read the Bible," and that Harris County should be exercising religious neutrality and "not be seen endorsing Christianity." The district court required Harris County to remove the Bible from the display, and the county appealed the ruling to the Fifth Circuit Court of Appeals.

Case Status

On August 15, 2006, in a 2-1 ruling, the Fifth Circuit concluded that the memorial, taken in context with the actions of government officials such as Judge Devine, constituted an unconstitutional government endorsement of religion. Coincidentally, only four days prior to the commencement of oral arguments before the court, the

entire display—Bible and all—was removed from the courthouse due to renovations. This did not impede the progress of the case, however, as a majority of the panel agreed that setting precedent in the case would serve judicial and community interests by discouraging the refiling of lawsuits on the same issues by the same parties. Since the monument had recently been removed, the court intended the opinion to stand as indicative of the unconstitutionality of the monument should Harris County ever choose to return it to its previous place in the courthouse. Indeed, the extensive renovations that spurred the initial removal of the display in 2006 are scheduled to be complete in 2009, and Harris County has said it plans to redisplay the monument at that time.

The Bible display violated all three purposes underlying the Establishment Clause: to safeguard an individual's freedom of conscience, to protect religion from state interference, and to guard against interreligious and social conflict.

AJC Involvement

AJC joined the Baptist Joint Committee on Religious Liberty in filing an amicus brief urging the Fifth Circuit to affirm the district court decision that the display violates the Establishment Clause. The brief argued that the display violated all three purposes underlying the Establishment Clause: to safeguard an individual's freedom of conscience, to protect religion from state interference, and to guard against interreligious and social conflict.

II. CIVIL RIGHTS AND CIVIL LIBERTIES

A. Gun Control

DISTRICT OF COLUMBIA v. HELLER

Background

The District of Columbia's Firearms Control Regulations Acts effectively bans handguns. Possession of pistols not registered before 1976 is prohibited, as is carrying an unlicensed pistol. Weapons not under the purview of these regulations, such as shotguns and rifles, are subject to another, broader regulation known as the District of Columbia Home Rule, which requires these lawfully owned firearms to be kept "unloaded and disassembled or bound by a trigger lock" while in the home. These regulations, "the D.C. Gun Laws," are considered by many to be the strictest gun control laws in the country.

In 2003, six D.C. residents filed a lawsuit challenging the constitutionality of these laws in the United States District Court for the District of Columbia under the Second Amendment, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The district court dismissed the case on the grounds that the right to bear arms attaches to an organized military group, not to unaffiliated individuals. The six individuals did not claim to be affiliated with any militia group and therefore lacked standing to challenge the laws.

The plaintiffs appealed, and in March 2007 the D.C. Circuit Court of Appeals reversed the decision, holding that the Second Amendment does, in fact, protect an individual right to keep and bear arms. In so finding, the court held that the "right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad)." Further, "[t]he individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia." However, this does not mean that governments cannot impose some form of gun control law, the court noted: "[This] is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols. The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment."

A petition for rehearing *en banc* was denied, and the United States Supreme Court granted certiorari.

Case Status

On June 27, 2008, in a 5-4 ruling, the Supreme Court struck down the D.C. Gun Laws as unconstitutional under the Second Amendment, marking the first time since 1939 that the High Court has directly examined the contours of the Second Amendment. Justice Antonin Scalia, writing for the five-justice majority, upheld the

court of appeals decision that the Second Amendment confers an individual right to bear arms and that the District of Columbia's virtual ban on gun possession infringes on this basic right. The majority emphasized that the decision does not obliterate all gun regulations, such as restrictions on weapon possession near schools or government buildings, waiting periods and background checks before purchasing a gun, and restrictions on gun ownership by individuals with violent criminal histories. Justice Stevens's dissent, joined by Justices Souter, Ginsburg, and Breyer, contended that "[t]he Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature authority to regulate private civilian use of firearms."

The Second Amendment was intended as "a bulwark against federal diminution of state authority over militias, not as an intrusion on the ability of the states and localities to protect their populations."

AJC Involvement

AJC joined sixty-two other religious, civic, community, and civil-rights groups in an amicus brief urging the Supreme Court to recognize the historical context in which the Second Amendment was passed, a history that does not support an unregulated or unlimited individual right to bear arms. Instead, the brief argued, the proper reading of the Second Amendment is "rooted in the protection of individual liberty provided by federalism." In a federal structure, "state and local authority are [viewed as] critical to protecting life, liberty, and property." Accordingly, the brief asserted, the Second Amendment was intended as "a bulwark against federal diminution of state authority over militias, not as an intrusion on the ability of the states and localities to protect their populations."

B. Habeas Corpus

BOUMEDIENE v. BUSH

Background

The writ of habeas corpus, which provides that a prisoner has the right to challenge the basis of his detention, has deep roots in Western legal tradition extending back to the Middle Ages, and is the only specific right incorporated in the Constitution (Art. 1, Sec. 9). For the past few years, Congress and the Supreme Court have been battling over the application of habeas corpus rights to detainees held at Guantanamo Bay. In response to the Court's 2004 *Rasul v. Bush* decision, holding that U.S. courts have jurisdiction to consider legal challenges by the detainees, Congress passed the Detainee Treatment Act of 2005 ("DTA"), which provided that "no court, justice, or judge shall have jurisdiction to hear or consider" applications for habeas corpus or "any other action against the United States" brought by aliens detained at Guantanamo Bay. The DTA stated that the Combat Status Review Tribunals ("CSRTs") would review each case, and that the D.C. Circuit Court of Appeals would have exclusive judicial review over their decisions.

In its 2006 *Hamdan v. Rumsfeld* opinion, the Supreme Court held that the DTA did not strip federal courts of jurisdiction over habeas corpus petitions pending at the time

of its enactment because the procedures of the military commissions held at Guantanamo Bay did not comply with the due process guarantees of the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions. In response to the Court's ruling, Congress passed the Military Commissions Act ("MCA").

The MCA was designed to strip federal courts of jurisdiction to hear habeas corpus petitions by individuals held at Guantanamo Bay regardless of when pending. Under the procedures of the MCA, an individual being held at Guantanamo Bay cannot petition federal courts for habeas review but instead such challenges are governed by the Detainee Treatment Act of 2005 ("DTA"), which provided a circumscribed set of procedures for reviewing a prisoner's status as an "enemy combatant."

Case Status

In February 2007, a panel of the D.C. Circuit reviewed the habeas corpus petitions of two detainees and upheld, by a vote of 2-1, the authority of Congress through the MCA to strip detainees held at Guantanamo Bay of their habeas corpus rights, even those whose petitions were pending at the time of the statute's enactment. In reaching this decision, the appellate court addressed the question of whether the MCA violates the Suspension Clause of the Constitution (Art. I, Sec. 9, Clause 2), which states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it." Supreme Court precedent dictates that the Suspension Clause protects habeas corpus as it existed as common law in 1789, when the Judiciary Act created the federal courts and gave them jurisdiction over habeas corpus petitions. In *Johnson v. Eisentrager* (1950), the Supreme Court concluded that common law had never provided the right to habeas corpus to aliens held by the government outside its sovereign territory. A majority of the D.C. Circuit reasoned that although the military base at Guantanamo Bay is controlled by the United States, it is under Cuban sovereignty, and concluded that the MCA is not an unconstitutional suspension of habeas corpus.

In a 5-4 decision issued on June 12, 2008, with Justice Anthony Kennedy writing for the majority, the Supreme Court found that the petitioners did, in fact, have a constitutional right to have their detention reviewed in the federal court system. Based on historical analysis of the writ of habeas corpus, the Court agreed that the right extended to petitioners, despite their being captured and detained outside American territory, and if Congress intends to restrict the right in some way, there must be an adequate substitute that provides the prisoners meaningful opportunity to show their captivity is wrongful. Here, where Congress attempted to replace habeas procedures with the DTA, the Court found that the substitute "falls short of being a constitutionally adequate substitute" because it failed to offer "the fundamental procedural protections of habeas corpus." The opinion, however, stopped short of defining exactly what minimum protections would be necessary to be a constitutionally acceptable substitute.

AJC Involvement

Joining a coalition of nongovernmental organizations including the Constitution Project, Human Rights Watch, and People for the American Way, AJC submitted an amicus brief urging the Supreme Court to recognize and enforce the habeas corpus

The fair and just treatment of detainees is the surest method of confronting the continuing threat of international terrorism while promoting liberty as well as national security for all Americans.

rights of the detainees. The fair and just treatment of detainees, the brief argued, is the surest method of confronting the continuing threat of international terrorism while promoting liberty as well as national security for all Americans. This is best accomplished by ensuring that the Executive Branch cannot claim unlimited powers unchecked by either Congress or the Judiciary.

C. Immigration

LOZANO v. CITY OF HAZLETON

Background

In 2006, the small town of Hazleton in northeastern Pennsylvania enacted several restrictive employment and housing ordinances aimed at dealing with a problem some considered to be created by the presence of "illegal aliens." Two of the ordinances in particular, the Illegal Immigration Relief Act ("IIRA") and the Tenant Registration Ordinance ("TRO") became the subject of litigation when a group of Latino residents, together with businesses, property owners, and other organizations, filed suit in the U.S. District Court for the Middle District of Pennsylvania challenging their validity.

The IIRA prohibits both the employment and harboring of undocumented aliens anywhere in the city of Hazleton. The employment section provides that any business that hires undocumented aliens will have its local business permit revoked. The harboring provision fines any landlord who knowingly rents housing to undocumented aliens.

The TRO requires that all prospective tenants must first obtain an "occupancy permit" from the city, which is only available to citizens and lawful residents. Any landlord who rents property to someone who does not have an occupancy permit may be fined $1,000 "for each Occupant that does not have an occupancy permit, and $100 per Occupant per day for each" successive day the rental unit remains occupied without the permit.

Case Status

The plaintiffs sought a declaratory judgment that the IIRA and the TRO violate the Supremacy, Due Process, and Equal Protection Clauses of the United States Constitution. They also asserted that the ordinances violate the plaintiffs' privacy rights, civil rights under 40 U.S.C. 1981, and the Fair Housing Act. In addition, they asserted a number of state law claims.

In an opinion issued July 26, 2007, Judge James Munley of the U.S. District Court struck down the ordinances on the grounds that they violate the Supremacy Clause of the United States Constitution, and are thus preempted by federal immigration law. In addition, the court ruled that the ordinances violated the plaintiffs' constitutional rights to procedural due process.

The Supremacy Clause provides that the U.S. Constitution, together with all federal laws and treaties, shall be the "supreme Law of the Land … any Thing in the Constitution of Laws of any State to the Contrary Notwithstanding." Thus, when a state or local law interferes or contradicts federal law, either expressly or implicitly, the federal law prevails. Specifically, the court ruled that Congress intended federal immigration laws to be comprehensive and, therefore, an infe-

rior government like the city of Hazleton may not place additional burdens on immigrants that are not permitted by federal law. Since the federal government has sole discretion over immigration policy and lawmaking, Hazleton's attempt to impose residency status requirements on employment and housing was unlawful.

The court also addressed whether the ordinances at issue violate the procedural protections of the Due Process Clause found in the Fourteenth Amendment of the United States Constitution. This clause prohibits the deprivation of "life, liberty or property" without due process of law. With regard to both the employment and housing provisions, the court determined that "the ordinances impinge on both … property and liberty interests [of those charged with violations] and provide only illusory process." The court determined that the procedural due process rights of employees were violated because they did not give alleged illegal immigrants a fair opportunity to challenge the allegations against them. Emphasizing that "notice is the cornerstone to due process," the court pointed out that the "IIRA fails to require that anyone provide notice to an employee when a complaint is filed or at any time during the proceedings." The court added, that "when a complaint is filed, the employer could merely fire the employee and avoid the hassle of determining the employee immigration status." The court also found "inadequate notice" with regard to employers in the fact that they are not advised of what "identity" documents are needed for a hearing because IIRA "does not specify the nature of this information."

The city of Hazleton has appealed the district court's decision to the Third Circuit Court of Appeals, seeking to overturn its ruling on the validity of the ordinances.

AJC Involvement

In April 2008, AJC, along with the American Jewish Congress, the National Council of Jewish Women, Interfaith Workers Justice, and others, filed an amicus brief with the U.S. Circuit Court of Appeals for the Third Circuit. The brief provides an historical account of anti-immigration measures throughout American history and demonstrates how fear, stereotyping, and scapegoating contributed to the passage of Hazleton's disputed ordinances, and advocates instead for humane treatment of immigrants, founded upon considerations of basic human dignity and principles of justice and mercy.

Fear, stereotyping, and scapegoating contributed to the passage of Hazleton's disputed ordinances. There should be humane treatment of immigrants, founded upon considerations of basic human dignity and principles of justice and mercy.

NEGUSIE v. MUKASEY

Background

During a bloody, protracted conflict between Ethiopia and Eritrea lasting from1970 to 2000, Daniel Girmai Negusie, a resident and citizen of Eritrea, was conscripted into military service by the Eritrean military. He refused to go to the front, however, and was instead sent to a naval base. After a short period there, he was arrested, placed in solitary confinement, and forced to perform hard labor in deplorable conditions. Eventually he was forced to act as a camp guard under constant threat of physical punishment and death. Following two years at this camp, Negusie seized an opportunity to escape and fled to the United States in a shipping container, where he applied for asylum.

Prior to 1980, the U.S. had no general law of asylum. Following World War II, Congress passed piecemeal legislation establish-

ing asylum standards for refugees from particular countries or regions. The Refugee Act of 1980 was the nation's first comprehensive legislation relating to asylum and was intended to make U.S. law conform to international standards. Under the Refugee Act, refugees may remain in the U.S. by obtaining either a grant of asylum or withholding of removal. In order to receive either type of relief, an alien must be "unable or unwilling to return to … [his home] country because of persecution or a well-founded fear of persecution." However, not all aliens who demonstrate a well-founded fear of future persecution are eligible for asylum or withholding of removal. Congress has excluded from eligibility any alien who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."

An investigation into the voluntariness of the asylum seeker's action is not only required under current immigration statutes, but also is an essential element of a sound, humane immigration policy.

Case Status

Negusie's asylum claim was denied by an immigration judge on the grounds that he assisted in keeping prisoners in the prison compound where he had reason to know they were being mistreated, and thereby contributed to their persecution. The Board of Immigration Appeals (BIA) subsequently affirmed, holding that the fact that Negusie was compelled to participate under threat of death was immaterial to the question of whether he "assisted" in the persecution. Relying in part on the Supreme Court's 1981 decision in *Fedorenko v. United States*, the Fifth Circuit denied Negusie's petition for review of the BIA decision, ruling that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions," and causing a circuit court split in the reading of the relevant statutory language contained in the Immigration and Nationality Act ("INA"). *Fedorenko* involved the asylum application of a Treblinka camp guard who had willfully failed to disclose his participation in Nazi atrocities in his immigration materials. Thereafter, Fedorenko claimed to have been coerced into serving as a guard. The Supreme Court, applying a now expired 1948 statute, held that "the deliberate omission of the word 'voluntary' from the statute compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." In denying Negusie's petition, the Fifth Circuit implicitly read the INA not to include a *scienter*, or culpability, requirement, which accords with the Second Circuit interpretation, but conflicts directly with that of the First, Eighth, and Ninth Circuits. The Supreme Court has granted certiorari to resolve the split.

AJC Involvement

AJC joined the American Jewish Congress in submitting an amicus brief to the Supreme Court urging the Court to require a finding of culpability when the asylum seeker credibly alleges to have acted under threat of torture or death. The brief contends that an investigation into the voluntariness of the asylum seeker's action is not only required under current immigration statutes, as opposed to the statute at issue in *Fedorenko*, but also is an essential element of a sound, humane immigration policy. Emphasizing the distinction between the 1948 law and existing asylum law, the brief asked the Supreme Court to "[c]onsider the following now familiar scenario: human shields, behind whose protective cover terrorists lurk until ready to kill or maim, assist

persecutors by providing cover, whether by opening their home as camouflage for missile batteries or providing a human phalanx. If they seek asylum in this country, are they persons 'who assisted in the persecution' of civilians? Does it matter whether they were acting under duress or were part and parcel of the terrorist plot? The amici here say it does matter."

D. Reproductive Rights

GONZALES v. CARHART

Background

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

Case Status

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

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

In a 5-4 decision issued on April 18, 2007, the Supreme Court disagreed. With Justice Kennedy authoring the majority opinion, the Court held that it is within the scope of governmental authority to restrict this particular procedure without providing a "health of the mother" exception. Finding that "there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health," the majority held that the restriction passes constitutional muster because it does not "have the purpose or the effect of placing substantial obstacles in the path of a woman seeking an

abortion before the fetus achieves viability." The decision, while not overturning *Roe v. Wade*, does mark the first time since that landmark 1973 case that an abortion regulation that doesn't include a "health of the mother" exception was upheld as constitutionally permissible.

The dissent written by Justice Ginsburg relied on the opinion of leading medical associations that the procedure is an important alternative for doctors in certain situations, and thus argued that a nationwide ban is overly restrictive.

AJC Involvement

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

There is no single moral consensus on the issue of reproductive freedom. Accordingly, the court should protect the liberty of each woman to make choices in keeping with her own belief system, without government interference.

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI v. NIXON

Background

Following a special legislative session called by the governor, the Missouri Legislature passed the Parental Consent for Aiding and Assisting Mandate (known as the "Teen Assistance Ban"). The statute imposes civil penalties on any person who "intentionally causes, aids or assists a minor in obtaining an abortion without parental consent or appropriate court order allowing for a judicial bypass of the consent requirement." On September 15, 2005, Governor Matt Blunt signed the bill into law, and thereafter Planned Parenthood, which provides comprehensive reproductive health services and counseling to minor and adult women, and the Missouri Coalition for Reproductive Choice filed a lawsuit in Missouri state court "seeking temporary restraining orders and injunctive relief from the enforcement of the statute." Plaintiffs asserted several constitutional claims, including that the statute "creates an undue burden upon a minor's right to obtain an abortion" and is "overbroad and, thus, chills legitimate freedom of expression of both the [p]laintiffs and of their patients."

Case Status

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

Ten days later, although expressing "substantial trepidation," Judge Charles Atwell upheld the statute, determining that it could be saved by strict interpretation. Specifically, the court narrowly construed the *scienter* (or "culpability") provision so that a violation would require "purposeful" action, not just "knowing" action. Without this narrowing of the statute's scope, said the court, the law "is substantially overbroad and unconstitu-

tionally chills freedom of expression." Finally, the court explicitly held that the statute cannot prohibit mere counseling or the sharing of information.

Anticipating an appeal, the circuit court issued an injunction preventing enforcement of the statute pending the Missouri Supreme Court's review. The Supreme Court heard the appeal in September 2006 and, while agreeing with the holding of Judge Atwell, arrived at the result using different reasoning. The court held that the "aid or assist" clause of the statute should be read narrowly to exclude speech or expressive conduct. This construction harmonizes the law with the constitution, the court explained, is warranted under First Amendment precedent, and is preferable to the alternative of striking the whole statute because it infringes on a protected category of speech. Thus, the court held that providing information or counseling on abortion is not tantamount to "aiding or assisting," and is therefore not outlawed by this statute.

AJC Involvement

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

E. School Integration

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

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

Background

The Kentucky Case

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

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

To achieve its goals, the 2001 plan

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

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

The Washington State Case

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

Case Status

In 2004, a group of parents brought a lawsuit in federal district court, alleging that the 2001 Jefferson County plan "violate[d] their rights under the Equal Protection Clause." The district court reviewed the 2001 plan under strict scrutiny analysis, the standard to be applied when racial classifications are involved, and held that the school board had established a compelling interest in maintaining integrated schools and that, with the exception of the traditional schools' assignment process, the 2001 plan was narrowly tailored to achieve the state's goals. Therefore, the court denied plaintiffs' request for relief, but ordered the school board to revise the student assignment process for traditional schools. In 2005, the Sixth Circuit Court of Appeals affirmed the district court ruling in toto, without writing its own opinion.

Similarly, a group of parents brought suit in federal district court challenging the legality of the racial component of Seattle's tiebreaker system. The district court upheld the use of the racial tiebreaker under both

state and federal law, and plaintiffs appealed. Sitting *en banc*, the Ninth Circuit in 2005 ruled that the school district's interests in the educational and social benefits of diversity were compelling. In so ruling, the court stressed the importance of public secondary schools in that they serve a "unique and vital socialization function in our democratic society," provide students who are not college-bound their only opportunity to learn in a diverse environment, and serve younger students who are "more amenable to the benefits of diversity." Additionally, the court found that the school district has a compelling interest in avoiding racially concentrated schools, since those schools have lower levels of academic success, and that the school district had demonstrated that without race-conscious measures, segregation would continue. Finally, the court also found that Seattle's system did not constitute a quota "because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interest."

In June 2006, the Supreme Court consolidated the two cases and granted certiorari on the question of to what extent local school boards can consider race in student assignment plans. On June 28, 2007, in a fractured decision with two concurrences and two dissents, the Court struck down both plans as unconstitutional. Applying strict scrutiny, a majority of the Court held that the school districts failed to carry the burden of showing their plains were "narrowly tailored" to achieve a "compelling government interest."

The plurality opinion, authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito, was also joined by Justice Kennedy to the extent it held that neither of the "compelling interests" offered by the school districts were constitutionally satisfactory. First, the districts could not claim to be remedying past discrimination since Seattle was never considered racially segregated and Jefferson County had been designated desegregated years previous. Second, diversity in student body composition, a compelling interest recognized by the Court in its 2003 decision in *Grutter v. Bollinger* upholding the affirmative action program utilized by the University of Michigan's Law School, could not justify the assignment plans at issue here. The program upheld in *Grutter* took into account many factors besides race, and thus admission to the Law School was an individualized determination of "all factors that may contribute to student body diversity." The plurality opinion found that the Seattle and Jefferson County plans, in contrast, were illegitimate because "race, for some students, is determinative standing alone."

A majority of the Court also agreed that the plans were not "narrowly tailored" to satisfy strict scrutiny. Since the plans were only of a "minimal impact"—only fifty-two students ultimately affected in Seattle, and 3 percent of students in Jefferson County—the majority concluded "that other means could have been used to achieve the same ends." Further, the Court found no evidence that Seattle or Jefferson County seriously considered any nonracial plans. Justice Roberts posited that "[i]n design and operation, the plans are directed to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate." Racial balancing, four justices agreed, cannot be an acceptable state interest because it "would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition" of the Constitution's guarantee that "the Govern-

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

ment treat citizens as individuals, not simply components of a racial, religious, sexual or national class."

Concurring in the judgment, Justice Kennedy wrote separately out of concern that the plurality opinion "impl[ied] an all-too unyielding insistence that race cannot be a factor in instances when, in [his] view, it may be taken into account." "A compelling interest exists," he explained, "in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand."

AJC Involvement

AJC led a coalition of interfaith organizations and individuals, including the American Islamic Forum for Democracy, the late Father Robert Drinan, the Sikh Coalition, and the United Church of Christ Justice and Witness Ministries in filing an amicus brief with the Supreme Court supporting the school districts. Speaking from the perspective of a diverse religiously affiliated coalition, the brief recognized that "[t]he assimilation of minorities through integrated schools helps avoid the alienation of religious minorities that has resulted in unrest in other nations." "Integrated public schools," the brief stressed, "are our foremost asset in educating our children to become full participants in our increasingly diverse country."

F. Voting Rights

CRAWFORD v. MARION COUNTY ELECTION BOARD

Background

Pursuant to an Indiana law enacted in 2005, a voter must present a photo identification issued by the federal government or the state in order to cast a ballot. If the voter does not have such identification, he or she must use a provisional ballot that will be counted only if the voter goes to the circuit court or county election board within ten days and either presents a proper ID or signs an affidavit stating that he or she is indigent and cannot obtain an ID without paying a fee.

In recent years, court rulings on voter ID laws similar to the Indiana measures have been mixed. Courts in Arizona, Michigan, and Georgia have all upheld voter ID requirements, while the Missouri Supreme Court recently struck down a similar law. These cases, particularly in an election year, also carry with them wide political ramifications. The issue has split across partisan lines, where Democrats argue these laws disenfranchise elderly and minority voters who skew Democratic, while Republicans contend they are necessary safeguards against voter fraud.

Two different suits were filed challenging the constitutionality of the Indiana law in

district court where they were consolidated and found to be constitutional. A divided Seventh Circuit Court panel agreed, and the United States Supreme Court granted certiorari.

Case Status

The Supreme Court upheld Indiana's law on April 29, 2008, in a 6-3 splintered ruling with Justice John Paul Stevens announcing the judgment of the Court. The plurality opinion rejected arguments that the law imposes unjustified burdens on people who are old, poor, or members of minority groups and less likely to have drivers' licenses or other acceptable forms of identification. Justice Stevens's opinion, joined by Chief Justice John Roberts and Anthony Kennedy said the petitioners had failed to meet the heavy burden required by a "facial challenge." Going further, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito concurred in the judgment, but argued the "law should be upheld because its overall burden is minimal and justified." Two separate dissents, joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer argued that the law should be struck because it "impose[s] nontrivial burdens on the voting rights of tens of thousands of the state's citizens." Importantly, all nine justices agreed that this type of facial challenge need only pass "rational basis" review, as opposed to "strict scrutiny," meaning that states will be given wider berth to legislate on voter ID issues.

AJC Involvement

AJC filed an amicus brief with the Lawyers' Committee for Civil Rights Under Law, the Service Employees International Union, American Federation of State, County, and Municipal Employees, Common Cause, the Jewish Council for Public Affairs, and the National Council of Jewish Women. The brief urged the Court to strike down the law because of the burden it places on particular groups, saying "Indiana's photo ID requirements are the most restrictive voter ID provisions in the Nation," and "millions of otherwise eligible voters, particularly in certain segments of the electorate, fail to possess a government-issued photo ID."

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III. RELIGIOUS LIBERTY

A. Employment Discrimination

CUTLER v. DORN

Background

"The anti-Semitism directed against [Cutler] was not 'mere teasing,'" since "'teasing' fails to capture the true harm these remarks were meant to convey."

In 1999, Jason Cutler, a Jewish police officer, brought suit against the Haddonfield, New Jersey Police Department, alleging that he was subjected to a hostile work environment in violation of the state's Law against Discrimination. In his complaint, Cutler pointed to incidents of "anti-Semitic comments, primarily by his superiors, such as making general slurs about Jewish people, referring to the alleged superior skills and abilities Jews possessed to make money, and other comparable derogatory remarks."

A jury found that the Haddonfield Police Department did subject Cutler to a hostile work environment, and Haddonfield moved for judgment notwithstanding the verdict ("JNOV"). The trial court denied this motion, and the case was appealed.

In February 2007, a panel of the Appellate Division reversed the trial court's denial of Haddonfield's motion for JNOV, finding the discriminatory conduct to be "sporadic and not sufficiently severe or pervasive to create a hostile work environment." Despite precedent finding the existence of a hostile work environment as a result of similar discriminatory comments on the basis of gender and race, the court characterized statements about Cutler's "Jewish nose" and other inflammatory remarks as "teasing," and remarked that "not every offensive utterance will give rise to a hostile work environment."

Cutler appealed the ruling to the Supreme Court of New Jersey, which heard oral arguments in April 2008.

Case Status

On July 31, 2008, the Supreme Court of New Jersey unanimously overturned the Appellate Division's ruling and upheld the jury verdict in Cutler's favor. In doing so, the Court stressed, "it is necessary that our courts recognize that the religion-based harassing conduct that took place for Cutler in this 'workplace culture' is as offensive as other forms of discriminatory, harassing conduct outlawed in this state." This was a direct response to the assertion that the Appellate Division had dismissed the anti-Semitic comments at issue in the case as "teasing," and thus treated the offensive conduct as less serious than those based on racial or sex-based discrimination. The "moniker [teasing]," said the Supreme Court, "undervalues the invidiousness of these stereotypic references and demeaning comments."

AJC Involvement

AJC joined with the Anti-Defamation League and the Jewish Community Relations Council of Southern New Jersey in submitting a letter brief to the New Jersey Supreme Court arguing that "the anti-Semitism directed against [Cutler] was not 'mere teasing,'" and that "'teasing' fails to capture the true harm these remarks were meant to convey." The Supreme Court explicitly relied on our brief in its opinion, pointing to the historical context we provided for the anti-Semitic stereotypes at issue in the case.

STURGILL v. UPS

Background

Todd Sturgill is a Seventh-Day Adventist who was fired from his job as a driver at United Parcel Service ("UPS") when, after UPS repeatedly denied his request for religious accommodation, he refused to work on Friday evening in order to observe the Sabbath. Seventh-Day Adventists, like those of the Jewish faith, observe the Sabbath from sunset on Friday evening to sunset on Saturday. Sturgill had worked for UPS for nineteen years prior to joining the Seventh-Day Adventist Church in May 2004. Anticipating a conflict between his religious and work obligations during the winter months when sunset occurs earlier in the day and deliveries peak during the holiday season, Sturgill filed a formal request in July that UPS accommodate his Sabbath observance. Receiving no response, Sturgill filed another request in September. Later that month, Sturgill's boss called him into his office and told him that he had received a fax from human resources stating that UPS was "unable to provide the requested accommodation, given the substantial impact [to] its operation [*sic*]." The fax also advised Sturgill to apply for a job that did not conflict with his religious practices once one became available and demanded that Sturgill work the hours UPS requested until then.

That UPS decided not to accommodate Sturgill's religious needs surprised him, because he was aware of many occasions on which UPS accommodated secular scheduling preferences, such as the desire to attend poker tournaments or participate in bowling leagues. With the help of coworkers, Sturgill was able to leave work in time for Sabbath observance every Friday until December 17, 2004. On that day, after fruitless requests for help, Sturgill returned to the UPS facility with thirty-five undelivered packages and left one minute before sunset. The following Monday, Sturgill was fired for what UPS called "job abandonment."

Case Status

In June 2005, Sturgill filed suit against UPS in the United States District Court for the Western District of Arkansas under Title VII of the Civil Rights Act. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin and requires employers to reasonably accommodate employees' religious practices unless to do so would cause an undue hardship for the employer.

In bringing suit, Sturgill claimed that UPS both denied him reasonable accommodation and discriminated against him in firing him. The jury ruled in favor of Sturgill on the accommodation claim and awarded $300,000 in compensatory and punitive damages, with orders to UPS to reinstate Sturgill. However, the jury ruled against Sturgill on the discrimination claim. In granting Sturgill's subsequent motion for reinstatement, the district court determined that it was reasonable for the jury to find that UPS could have accommodated Sturgill's request without suffering an undue hardship. Further, in upholding the jury's award of compensatory damages, the court pointed to the UPS facility manager's statement that the real reason UPS denied Sturgill's request was "because if they accommodated [Sturgill], then everybody would request Friday off, and if everybody requested Friday off, then they couldn't do their business."

On January 15, 2008, a three-judge panel

of the United States Court of Appeals for the Eighth Circuit affirmed the decision and award in part, and denied and reversed in part. The court agreed that there was evidence sufficient to find a Title VII violation and therefore did not disturb that holding. However, the court found improper the instructions given to the jury at trial defining a reasonable accommodation as one that eliminates all religious conflict to be improper. Rather, the question of what constitutes a reasonable accommodation was a fact-sensitive inquiry unique to each case and therefore should have been reserved for the jury to decide. The court also overturned portions of the jury award tangential to the finding of a Title VII violation, including the granting of punitive damages and injunctive relief, because Sturgill did not establish either individual or corporate malice toward him.

Accommodating Sturgill's Sabbath observance would not cause undue burden on UPS. "It is essential to recognize that Title VII protects religious convictions, not merely religious compromise."

AJC Involvement

In April 2007, together with an interfaith coalition of religious organizations, AJC filed an amicus brief in support of Sturgill's claim. The brief argued that accommodating Sturgill's Sabbath observance would not cause undue burden on UPS, and advocated for the meaningful enforcement of the religious accommodation requirement of Title VII for observant workers. "It is essential to recognize that Title VII protects religious convictions, not merely religious compromise," the brief said.

B. Religious Freedom Restoration Act ("RFRA")

RASUL v. MYERS

Background

Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith are British citizens who were detained by American forces in Afghanistan and transported to the U.S. Naval Base at Guantanamo Bay, Cuba. According to their complaint, "they are not now and have never been members of any terrorist group" and "have never taken up arms against the United States." Rasul, Iqbal, and Ahmed were childhood friends from England, who in 2001 traveled to Pakistan to attend Iqbal's wedding to a woman from his ancestral village. While in the region, the three "crossed the border into Afghanistan in order to offer help in the ongoing humanitarian crisis," and were subsequently swept up by a warlord who later turned them over to U.S. forces, allegedly for a bounty. Plaintiff Al-Harith was in Pakistan to attend a religious retreat and, while attempting to return to England via truck overland through Turkey, was taken forcibly by Afghans and turned over to the Taliban, who released him into the general prison population. He later came under American custody after the fall of Taliban government.

The four men were transported to Guantanamo in early 2002. While there, they claim they were subjected to all kinds of torture, including being threatened with unmuzzled dogs, struck with rifle butts, being "'short shackled' in painful 'stress positions' for many hours at a time," being "intentionally subjected to extremes of heat

and cold," and being "kept in filthy cages for 24 hours a day with no exercise or sanitation." They also asserted repeated and systematic acts of harassment based on their Muslim faith, including forced shaving of their beards, interruption or prohibition of their efforts to pray, the denial of prayer mats and the Koran, mistreatment of the Koran in their presence by guards who kicked it and threw it in a toilet bucket, and being forced to pray with exposed genital areas.

Plaintiffs were released without charges in 2004 and subsequently brought a suit seeking damages in federal district court against U.S. government officials alleging violations of the Alien Tort Statute, the Fifth and Eight Amendments to the U.S. Constitution, the Geneva Conventions and the Religious Freedom Restoration Act ("RFRA").

RFRA, which was enacted in 1993, provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can demonstrate that doing so is (1) "in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling governmental interest." With respect to the breadth of its application, the statute by its own terms covers "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States."

Case Status

On the government's motion, in February 2006, the district court dismissed plaintiffs' international law claims on the grounds that they had failed to exhaust their administrative remedies, and dismissed plaintiffs' constitutional claims on the grounds that the defendants are entitled to qualified immunity, but ordered further briefing on the issue of whether RFRA applies to defendants' actions at Guantanamo. In its supplemental briefing, the government argued that RFRA does not apply extraterritorially and therefore does not apply to Guantanamo, and further argued that, in any case, they are entitled to qualified immunity because the applicability of RFRA to Guantanamo was not sufficiently established when the conduct in question took place.

In May 2006, the district court denied the government's motion to dismiss the RFRA claim, holding that RFRA does apply to the detention facilities at Guantanamo. The government immediately appealed the decision to the Court of Appeals for the D.C. Circuit, which in January 2008 reversed and dismissed the RFRA claim on the grounds that the detainees are not "persons" for the purposes of U.S. law. In so doing, the court interpreted the meaning of "person" in the RFRA statute "consistent with the Supreme Court's interpretation of 'person' in the Fifth Amendment and 'people' in the Fourth Amendment to exclude non-resident aliens." Judge Janice Rogers Brown authored a separate concurrence, agreeing with the result on other grounds, but attacking the majority for limiting the definition of a person, to what, she argued, is "at odds with its plain meaning…. [T]here is little mystery that a 'person' is an individual human being … as distinguished from an animal or a thing."

Plaintiffs are filing a petition to the United States Supreme Court for writ of certiorari.

AJC Involvement

AJC, together with a coalition of interfaith organizations including the National Coun-

cil of Churches, the Baptist Joint Committee for Religious Liberty, and the National Association of Evangelicals, submitted an amicus brief to the D.C. Circuit urging the court to apply a commonsensical interpretation of RFRA's provisions. The statutory text, the brief contended, makes no distinction between citizens and aliens, but instead focuses on the action—and actor—in question. Here, the actor was the American armed forces, who clearly fall under the ambit of RFRA. Accordingly, the brief asserted that RFRA applies to all United States territories and serves to protect the religious liberty of all people, whether citizens or aliens, found on American soil.

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IV. HOLOCAUST RESTITUTION

VON SAHER v. NORTON SIMON MUSEUM OF ART

Background

In February 2007, Marie Von Saher, the heir to one of Europe's most successful art dealers prior to World War II, sued the Norton Simon Museum of Art in Pasadena, California, seeking restitution of several highly valuable pieces of artwork that she claims rightly belong to her. Von Saher's father-in-law, Jacques Goudstikker, a Dutch Jew who was forced to flee Holland when the Nazis invaded, left behind an enormous collection of highly valuable artwork, which was looted and stolen during the subsequent Nazi occupation. The artwork, like so much other Holocaust-era property, was bought and sold throughout the world, obscuring its tainted provenance as Nazi plunder.

A concerted international effort has developed over the last several decades to raise awareness and return Nazi stolen property to its rightful owners. As part of this movement, the State of California enacted a law that extends the statute of limitations to 2010 for families to pursue the recovery of their artwork from museums and galleries. California, like many other states, passed this legislation out of concern that the general statute of limitations for recovery has, through no fault of the victims, expired years or decades ago, and they would be left without legal recourse to seek restitution.

Case Status

Seeking return of her father-in-law's estate under the California statute, Marie Von Saher filed suit asking a California federal district court to recognize her rightful claim to the artwork. The court, however, held that extending the statute of limitations would be a remedy of war injuries through California state law, matters reserved to the federal government, which retains the "exclusive power to make and resolve war." As such, the district court found California's statute of limitations extension unconstitutional. Von Saher appealed to the Ninth Circuit.

AJC Involvement

AJC has joined in an amicus brief with Bet Tzedek Legal Services, the Jewish Federation of Los Angeles, the American Jewish Congress, and the Simon Wiesenthal Center in the Ninth Circuit. The brief argues that preemption is not warranted because "there is simply no federal foreign policy with respect to the recovery of Holocaust era artwork with which [the statute of limitations extension] conflicts…." Further, "California has a legitimate interest in having stolen artwork now in the hands of museums and galleries returned to their rightful owners, particularly where those museums and galleries are located in the State."

"California has a legitimate interest in having stolen artwork now in the hands of museums and galleries returned to their rightful owners, particularly where those museums and galleries are located in the State."

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