THE AMERICAN
JEWISH COMMITTEE

LITIGATION REPORT
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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.

I. SEPARATION OF CHURCH AND STATE

A. Public Display of the Ten Commandments

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY v. McCREARY COUNTY

Background

In this Kentucky case, the American Civil Liberties Union of Kentucky (ACLU) and other individuals sued two counties and a county school district (the cases were consolidated after filing) in federal district court, alleging that they had erected displays consisting of framed copies of the Ten Commandments in the county courthouses and school classrooms, in violation of the Establishment Clause. The plaintiffs sought a declaration that the displays were unconstitutional and also sought preliminary and permanent injunctions preventing the counties from continuing the displays in the future.

After the complaints were filed, the counties modified the displays to include excerpted secular historical and legal documents, and then filed a motion to dismiss. The documents included the Declaration of Independence, the Preamble to the Kentucky constitution, the national motto of "In God We Trust," a page from the Congressional Record of 1983 declaring it the Year of the Bible and including the Ten Commandments, a proclamation by Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation, a proclamation by Ronald Reagan marking 1983 the Year of the Bible, and others. The district court, instead of granting the defendants' motion to dismiss, granted the plaintiffs' motion for injunctive relief, ordering that the displays be removed, and the case was appealed to the Sixth Circuit Court of Appeals. The defendants then withdrew their appeal and erected a new display containing the Ten Commandments, along with several additional secular historical and legal documents in their entirety. These included the *Star-Spangled Banner*, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the national motto, and others. The courthouse displays also included an explanation entitled "Foundations of American Law and Government Display," detailing how the various documents played a significant role in the founding of the American legal system.

Case Status

As a result of these new displays, the plaintiffs returned to district court in June 2001 and won a supplemental preliminary injunction barring them. This decision was then appealed to the Sixth Circuit. In its decision, a three-judge panel of the Sixth Circuit affirmed, 2 to 1, the district court's injunction, holding that the displays violated the Establishment Clause because they did not have a valid secular purpose. The court applied the three-pronged test for Establishment Clause violations, articulated in *Lemon v. Kurtzman* (1972), which held that to be constitutional, a law (1) must have a secular purpose, (2) must have neither the principal nor primary effect of advancing or inhibiting religion, and (3) must not foster an excessive entanglement between government and religion. Any challenged activity must satisfy each prong of this test to be constitutional. When applying this test, the courts further apply the "reasonable observer" test, which analyzes whether viewers of a display may fairly understand that the purpose of the display is to "convey or attempt to convey a message that religion or a particular religious belief is favored or preferred."

In determining whether the display violated the first prong of the *Lemon* test, the court analyzed the U.S. Supreme Court's decision in *Stone v. Graham* (1980), which found a Kentucky statute requiring the posting of a copy of the Ten Commandments on the walls of each public school classroom in the state to be a violation of the Establishment Clause because the preeminent purpose of the display was plainly religious in nature, and the avowed secular purpose was not sufficient to avoid conflict with the First Amendment. The Supreme Court in *Stone* detailed constitutionally permissible uses of the Ten Commandments in the public arena, such as when it serves an educational function by being "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."

In *McCreary*, the Sixth Circuit found that to comply with *Stone*, the historical display "must present the Ten Commandments objectively and integrate them with a secular message." The Sixth Circuit agreed with the district court that "the undisputed evidence in the record concerning the context of the displays demonstrates that" the purposes for the displays were religious. The court also held that the displays "demonstrate that Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition," a purpose that the U.S. Supreme Court held in *Stone* to be insufficient to avoid a First Amendment conflict. Specifically, the Sixth Circuit rejected the state's claim that the Ten Commandments had a "clear influence" on the Declaration of Independence, thereby establishing a connection between the Decalogue and American legal tradition. The appellate court also found that the documents displayed surrounding the Ten Commandments "accentuated the defendants' religious purpose, rather than diminishing it, by posting the Commandments along with 'specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references.'"

The Sixth Circuit further agreed with the district court that the displays violated the second prong of *Lemon*, in that they conveyed a message of endorsement of religion to the reasonable observer. The court noted the "complete lack of any analytic connection between the Ten Commandments and the other patriotic documents and symbols," stating that a "reasonable observer of the displays cannot connect the Ten Commandments with a unifying historical or cultural theme that is also secular." The district court did not address the third prong of *Lemon*, and as a result neither did the Sixth Circuit, noting that failure under any prong invalidates the challenged governmental action.

In October 2004, the U.S. Supreme Court accepted the cases against the two counties for review. A decision as to whether the Court will hear the case against the school board is still pending. In addition to addressing whether the display violates the Establishment Clause, the Supreme Court may also examine whether the fact that the first display was enjoined by the court permanently taints any future display, and also may address the continued viability of the *Lemon* test.

AJC Involvement

AJC plans to join a coalitional amicus brief to be filed with the U.S. Supreme Court in opposition to the public display of the Ten Commandments in *McCreary*.

VAN ORDEN v. PERRY

Background

Thomas Van Orden, a Texas resident, filed suit in federal court asking that the State of Texas be ordered to remove from the grounds of the state Capitol a granite monument of the Ten Commandments. Van Orden complained that the monument violates the First Amendment's mandate of government neutrality toward religion. The monument, which is six feet high and three and a half feet wide, was a gift from the Fraternal Order of Eagles to the state in 1961. The monument displays the Commandments and is surrounded by various symbols etched into the granite, including small tablets with Hebrew script, an American eagle grasping the American flag, two Stars of David, and a symbol representing Jesus Christ.

Since the Capitol's founding in 1888, sixteen other monuments have been erected on the Capitol grounds, which are protected as a National Historic Landmark maintained by the State Preservation Board. Other monuments on the grounds include a plaque commemorating the war with Mexico, a Six Flags over Texas display, a statue of a pioneer woman, a replica of the Statue of Liberty, and a tribute to Texans lost at Pearl Harbor. Van Orden filed suit in federal district court, and the court rejected his claim that the monument violates the Establishment Clause of the First Amendment. Subsequently, Van Orden appealed the decision to the Fifth Circuit Court of Appeals.

Case Status

The State of Texas argued to the Fifth Circuit that the display serves a secular purpose and that a reasonable observer would not conclude the state is seeking to advance, endorse, or promote religion by its display. To buttress this claim, the state argued that the display has been in place without legal challenge for over forty years, that it is part of the state's commemorative display of significant events of Texas history, and that a reasonable observer would see the monument as a recognition of the large role of the Commandments in the development of Texas law. Furthermore, the state argued that the context of the monument's setting is analogous to a museum setting, which would negate any religious endorsement implied by the nature of the Ten Commandments. To buttress this claim, the state pointed out that the curator of the Capitol is a professional museum curator, the Texas State Preservation Board qualifies as a museum as defined by Federal statute, and the board oversees educational programs, brochures, and guided tours of the Capitol Building and monuments.

The plaintiff disagreed, arguing that "[b]ecause the Commandments are a sectarian religious code, their promotion and endorsement by the State as a personal code contravenes the First Amendment." Despite the context of the monument's placement among sixteen other displays, Van Orden argued that the state does not have a secular purpose for the display, and that a reasonable observer would view the display as a state advancement and endorsement of religion, specifically the Jewish and Christian faiths.

In November 2003, the Fifth Circuit Court of Appeals affirmed the lower court's ruling allowing the monument to remain in place. Applying the first two prongs of the *Lemon* test (the plaintiff conceded that the third prong, excessive entanglement, was not at issue in this case), the Fifth Circuit first

"[B]ecause the Ten Commandments are a sectarian religious code, their promotion and endorsement by the State as a personal code contravenes the First Amendment."

held that the state legislature had a valid secular purpose for authorizing the installation, in 1961, of the monument in order "to recognize and commend a private organization for its efforts to reduce juvenile delinquency." The court found that nothing in the legislative record or events attending the monument's installation contradicted this reasoning, and furthermore, many of the other monuments on the Capitol grounds honor contributions made by donors (e.g., a Statue of Liberty replica donated by the Boy Scouts of America).

Secondly, the court held that the monument did not have the primary effect of advancing religion, as seen from the eyes of a reasonable observer, due to the context of the monument's display. The court explained that "the manner in which the seventeen monuments are presented on the grounds portion of the Capitol tour supports the conclusion that a reasonable viewer would not see this display either as a State endorsement of the Commandment[s'] religious message or as excluding those who would not subscribe to its religious statements," and further stated that the monument's placement on the Capitol for over forty years, without the filing of a legal complaint, "adds force to the contention that the legislature had a secular purpose."

Van Orden appealed, and in October 2004, the U.S. Supreme Court accepted the cases for review.

AJC Involvement

AJC plans to join a coalitional amicus brief to be filed with the U.S. Supreme Court in opposition to the public display of the Ten Commandments in *Van Orden*.

B. Religion in the Public Schools

MELLEN v. BUNTING

Background

The Virginia Military Institute (VMI) is a state military college that employs the "adversative method," which involves physical rigor, mental stress, absence of privacy, detailed regulation of behavior, and indoctrination of a strict moral code. Until recently, every evening before cadets were seated for supper and following predinner announcements, a student known as the "cadet chaplain" read a prayer composed by the VMI chaplain (the "supper prayer"). The daily supper prayer usually began with addresses such as "Almighty God," "Father God," "Heavenly Father," or "Sovereign God," and was "dedicated to giving thanks or asking for God's blessing." Although cadets were permitted to "fall out of formation" prior to entering the mess hall so as to avoid participating in the daily prayer, two third-year cadets brought suit in federal district court asserting that the practice violated the Establishment Clause of the First Amendment.

VMI defended the supper prayer on three grounds. First, it claimed that the prayer is constitutional because it is part of a larger secular ceremony, the "Supper Roll Call," and serves a secular purpose. Specifically, VMI offered three allegedly secular purposes in defense of the supper prayers: that they "(1) serve VMI's academic mission 'of developing cadets into military and civilian leaders,' (2) serve institutional or expressive purposes, and (3) accommodate the religious needs of students, as required by the Free Exercise Clause of the First Amendment."

In addition, VMI relied on *Marsh v. Chambers* (1983), in which the U.S. Supreme Court upheld the practice of beginning legislative sessions with prayer, as precedent. Finally, VMI claimed that the supper prayer is constitutional under the Supreme Court's academic freedom jurisprudence. More specifically, it claimed that the Supreme Court's ruling in *Keyishian v. Board of Regents of University of New York* (1967), in which the Court held that the university's requiring faculty members to sign a certificate swearing that they were not Communists violated the First Amendment, warrants upholding VMI's supper prayer.

Case Status

On January 24, 2002, a federal district court in Virginia ruled that VMI's daily recitation of a "supper prayer" violated the constitutionally mandated separation of church and state. The district court analyzed the challenged prayer under the *Lemon* test, and also rejected the defendant's contention that *Marsh v. Chambers* (1983) was the controlling precedent. In *Marsh*, the Supreme Court upheld Nebraska's practice of beginning legislative sessions with a prayer based on the "unique history" of the practice. The court also addressed defendant's academic freedom claim and found *Keyishian* and related cases to be inapplicable, stating that "to the extent that the Court did suggest a university possesses a right to academic freedom, it did not imply that this right should trump the First Amendment rights of individual citizens."

Turning to the Establishment Clause, the federal district court reiterated the continued viability of the *Lemon* test in the wake of the Supreme Court's ruling in *Santa Fe Independent School District v. Doe* (2000), in which the Court relied on *Lemon* to strike down a school district's policy of allowing prayer before high school football games. With regard to the first prong of the *Lemon* test, the district court rejected VMI's claim that the supper prayers served a constitutionally legitimate secular purpose. The district court also ruled that VMI failed the second prong of the *Lemon* test in that "the primary effect of the prayers [was] to advance religion." Finally, the court found that VMI's supper prayers resulted in an unconstitutional entanglement between religion and the state because the prayers were drafted by the school chaplain and read at the direction of the superintendent.

On appeal to the U.S. Fourth Circuit Court of Appeals, in April 2003, a three-judge panel affirmed the district court's decision that VMI's practice of holding daily organized supper prayers violated the First Amendment. As did the lower court, the Fourth Circuit rejected defendant's argument that *Marsh* was applicable in the present case, and instead applied the *Lemon* test to evaluate the Establishment Clause challenge. In doing so, the court gave special consideration to the principles enunciated in two other school prayer cases, *Lee v. Weisman* (1992) and *Santa Fe*, in which the Supreme Court found the existence of "improper ... coercion of religious worship." In so doing, the court determined that despite the fact that the cadets were college students rather than secondary school children as in *Lee* and *Santa Fe*, the circumstances were such that the cadets were "plainly coerced into participating in a religious exercise" due to the social pressure and training that are integral to VMI's agenda.

As to the first prong of the *Lemon* test, the Fourth Circuit stated that it was "inclined to disagree" with the defendant's

The cadets were "plainly coerced into participating in a religious exercise" due to the social pressure and training that are integral to VMI's agenda.

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

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

Defendant subsequently filed a petition for a rehearing en banc, which was denied in August 2003. Following the denial of a new hearing, defendant filed a petition for a writ of certiorari to the U.S. Supreme Court. This petition was denied in April 2004.

AJC Involvement

On August 19, 2002, AJC, along with Americans United for the Separation of Church and State and the Anti-Defamation League, filed an amicus brief with the Fourth Circuit in support of plaintiff's assertion that the Virginia Military Institute's supper prayer is unconstitutional, stating that "[r]eligious fanaticism and ideological proselytizing are engendering animosity and destruction worldwide," and that "in fashioning its American 'citizen-soldiers' VMI should stand at the forefront of preserving the First Amendment right to true religious liberty and freedom of conscience."

Reaffirming its support for an individual's right to personal prayer, even in public institutions, AJC emphasized that such prayer must be truly voluntary and not coerced in any way. The brief argued that *Marsh v. Chambers* was inapplicable as precedent in this case because the Supreme Court has never applied the narrow ruling outside the legislative context, and federal circuit courts have uniformly declined to apply *Marsh* to the public school arena altogether. It also relied upon *Lee v. Weisman*, in which the Supreme Court held that the recitation of invocations and benedictions by clergy at public school graduation ceremonies was unconstitutional. Last, the brief asserted that the objectives of VMI's supper prayer failed to satisfy the secular purpose requirement of *Lemon v. Kurtzman* and thus failed to be a permissible practice in violation of the First Amendment Establishment Clause.

C. School Aid Programs

COLORADO CONGRESS OF PARENTS, TEACHERS, & STUDENTS v. OWENS

Background

Colorado's school voucher program, the Colorado Opportunity Contract Pilot Program (COCPP), was enacted by the state legislature on April 16, 2003, making it the first state voucher legislation passed since the U.S. Supreme Court declared in *Zelman v. Simmons-Harris* (2002) that taxpayer-

supported vouchers for private and parochial schools do not violate the federal Constitution's Establishment Clause.

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

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

Once enrolled in a private school under the voucher program, a student is eligible to continue in the program and to receive a publicly subsidized private-school education through grade twelve, regardless of the academic performance ratings of the public schools the student would otherwise attend. The school district of residence of a student attending private school under the program is required to pay for the student's private-school education in an amount that is the lesser of (a) the private school's "actual educational cost per pupil," or (b) 85 percent, 75 percent, or 37.5 percent of the school district's per pupil operating revenues, for students in grades 9-12, 1-8, and kindergarten, respectively. No additional state funding is provided to cover these voucher payments, which school districts must make from funds they otherwise would use to operate the public schools. Pursuant to the voucher legislation, the school district's payments for the private-school education of students participating in the program are to be made by check in four equal installments throughout the school year and are to be made out "in the name of the eligible child's parent." These checks are to be sent by the school district to the participating nonpublic school

in which the parent's child is enrolled, and the parent is to then "restrictively endorse the check for the sole use of the participating nonpublic school."

The program "coerces parents to accept religious indoctrination as the price of a state paid private-school education."

Case Status

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

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

In July 2003, plaintiffs filed a motion for judgment on the pleadings arguing that the voucher program constitutes "local or special legislation" prohibited by the Colorado constitution, and that it violates the assignment to local school boards of control over the instruction provided with the school district's funds. In doing so, plaintiffs urged the court to swiftly resolve the case in their favor on these less controversial grounds, without having to address the church-state concerns. In November 2003, plaintiffs filed a motion for summary judgment on all of the remaining issues in the litigation, including those based on the Colorado constitution's religion clauses. Specifically, plaintiffs argued that the vast majority of the nonpublic schools that would receive state funds through the voucher program are "pervasively sectarian institutions and extensions of the religious ministries of the churches that sponsor them," and that "paying for such religious training is not a permissible use of public funds," pursuant to the Colorado constitution. In support of their motion for summary judgment, plaintiffs further asserted that while "religion is a part of our tradition, public funding of religion is not." Defendants filed cross-motions on all of the above-described issues.

As expected, the court ruled on the less controversial issues of special legislation and local control first, and on December 3, 2003, Judge Joseph E. Meyer III of the Colorado District Court struck down Colorado's school voucher program. While the court

was not convinced that the school voucher law constituted impermissible special legislation, the court did hold that by removing control over education from local school boards, the law violated the Colorado constitution. On appeal, the Colorado Supreme Court on June 28, 2004, affirmed the District Court's decision and held that the program violated local control provisions of Colorado's state constitution. In a 4-3 ruling, the court held that the COCCP conflicted "irreconcilably" with the Colorado constitution because the local control provisions were violated by the COCCP's requirement that school districts allocate funds, including those derived from locally-raised tax revenues, to participating non-public schools. The court directed the state to either amend the constitution or enact legislation "that comports with the requirements of the Colorado Constitution."

AJC Involvement

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

AJC joined with a coalition of civil liberties and public education groups, including People for the American Way, the Colorado Education Association, and Americans United for the Separation of Church and State, in filing a brief challenging the legality of the school voucher program. In the brief, it was argued that the program forces Colorado taxpayers to support religious sects or denominations, and furthermore, that the program "coerces parents to accept religious indoctrination as the price of a state paid private-school education." Additionally, we asserted that the voucher program is unconstitutional because it amounts to a taxpayer subsidy of religious indoctrination, and that such programs are bad public policy because they "divert desperately needed funds away from public schools where the vast majority of children will continue to be educated."

HOLMES V. BUSH

Background

Florida's voucher plan, the Opportunity Scholarship Program (OSP), was passed by the Florida legislature on April 30, 1999, and signed into law by Governor Jeb Bush on June 21, 1999. Under the plan, students who are enrolled in or assigned to attend a public school that has received a performance grade category of "F" for two years (during one of which the student was in attendance) will be offered three options other than remaining in their assigned school. First, such students may attend a designated higher-performing public school in their school district. Second, such students may attend—on a space-available basis—any public school in an adjacent school district. Third, such students may attend any private school, including a sectarian school, that has admitted the student and has agreed to comply with the requirements set forth in the voucher plan.

If a student chooses the third option, the state will pay an amount in tuition and fees at a qualifying private school "equivalent" to the "public education funds" that would have been expended on a public education for the student and will continue to do so until the student graduates from high school. Although the amount of school vouchers

The vouchers program will funnel public funds to sectarian schools where they will be used for religious education, worship, and other religious activities.

may not exceed the amount charged by the qualifying private school in tuition and fees, there is nothing in the voucher plan that would prevent a private school from raising its tuition and fees to capture the maximum available return under the voucher plan. While the voucher plan provides that voucher payments will be made by check payable to the student's parents, the checks are mailed to the recipient private school and must be restrictively endorsed over to the school for payment by the parent.

Private schools qualify for receipt of voucher payments if they have admitted an eligible student, agreed to participate in the voucher plan by not later than May 1 of the school year in question, and agreed to comply with certain minimum criteria.

Among other things, to participate in the voucher plan, private schools must:

> (1) accept as full tuition and fees the amount provided by the state for each student;
>
> (2) determine, on an entirely random and religious-neutral basis, which students to accept; comply with prohibitions against discrimination on the basis of race, color or national origin; agree "not to compel any student ... to profess a specific ideological belief, to pray or to worship."

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

Parents are required to notify the state of their intent to request a school voucher for their child by no later than July 1 of the school year in which they intend to use the voucher. The first round of voucher payments was made on August 1, 1999.

Case Status

In June 1999, a group of Florida citizens and organizations brought suit challenging the legislation as unconstitutional. The complaint, filed in the Circuit Court of the Second Judicial Circuit for Leon County, Florida, alleged that the program violates the Florida constitution, which provides (1) that "no revenue of the state ... shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution"; and (2) that "income derived from the state school fund shall ... be appropriated only to the support and maintenance of free public schools." In addition, the complaint asserted that the vouchers program will funnel public funds to sectarian schools where they will be used for religious education, worship, and other religious activities, in violation of the Establishment Clause of the First Amendment.

The Florida Education Association subsequently filed a similar legal challenge to the voucher plan, along with a motion to consolidate the two actions. Also added to the suit, but as defendants, were individual Florida citizens and the Urban League of Greater Miami, which intervened to support the legislation.

The two actions were consolidated by order of the Florida Circuit Court on November 22, 1999. The court determined that it would hold a hearing on the narrow issue of whether the OSP violates the so-called "education provision" of the Florida constitution, which provides in relevant part that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." On March 14, 2000, the Florida

Circuit Court determined that Florida's constitutional provision directing that primary and secondary school education be accomplished through a system of free public schools "is, in effect, a prohibition on the Legislature to provide a K-12 public education any other way." The court thus concluded that the OSP, by providing state funds for some students to obtain a K-12 education through private schools, violated the mandate of the education provision of the Florida constitution.

However, on October 3, 2000, the Florida First District Court of Appeal (a state intermediate appellate court) reversed the trial court's decision on the state constitution's education provision and remanded the case for further proceedings on the church-state issues. The court ruled that nothing in the public education clause "clearly prohibits the Legislature from allowing the … use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." On April 24, 2001, the Supreme Court of Florida denied interlocutory review of the appellate court's decision, and the case was remanded to the trial court.

Plaintiffs subsequently filed a motion for summary judgment asserting that the statute violates the Florida constitution, which states that "no revenue of the state" shall be used "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." On August 5, 2002, Judge Kevin Davey granted the motion and enjoined the defendants from taking any action to implement the Opportunity Scholarship Program for the 2002-03 school year. In his opinion, Judge Davey wrote that the Florida constitution was "clear and unambiguous" in proscribing the use of public money in any sectarian institution. "It cannot be logically, legally, or persuasively argued that the receipt of these funds does not aid or assist the institution in a meaningful way," Davey concluded. "While this Court recognizes and empathizes with the salutary purpose of this legislation—to enhance the educational opportunity of children caught in the snare of substandard schools—such a purpose does not grant this Court authority to abandon the clear mandate of the people as enunciated in the Constitution."

On August 16, 2004, Florida's First District Court of Appeal affirmed the trial court's decision, holding that the no-aid provision of the state's constitution prohibited giving indirect benefits to sectarian schools through the voucher program. The court also ruled that the no-aid provision did not implicate the Free Exercise Clause of either the First Amendment or Florida's state constitution. On November 12, 2004, after granting the state's motion for a rehearing en banc, the First District withdrew its previous opinion and issued a new one, again affirming the decision of the trial court. The appellate court rejected the state's argument that Florida's state constitution imposes no greater restrictions on state aid to religious schools than does the Establishment Clause, and that, as a result, the summary judgment must be reversed on the authority of *Zelman*, in which the Supreme Court held an Ohio parental choice voucher program constitutional under the Establishment Clause.

AJC Involvement

The organizations challenging the voucher plan include the American Jewish Committee, the NAACP, the League of Women Voters, the American Civil Liberties Union,

Americans United for Separation of Church and State, People for the American Way, the American Jewish Congress, and the Anti-Defamation League. AJC is serving as "of counsel" to the plaintiffs.

Regarding the Florida constitution's education provision, in a brief submitted to the trial court, AJC argued that the OSP "makes a mockery of the [Florida] Constitution's choice of a 'system of free public schools' as the means by which the State is to fulfill its mandate of providing an education for Florida children." With regard to the issue of state funding of religious institutions, AJC asserted that the OSP violates Florida constitutional provisions that prohibit the governmental "establishment" of religion, in that it provides a financial benefit to the religious missions of sectarian private schools and the religious institutions that operate them.

LOCKE v. DAVEY

Background

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

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

Case Status

Reversing the district court's ruling in favor of the state, the Ninth Circuit (by a vote of 2 to 1) determined that the HECB's policy, and the state law upon which it rested, violated the Constitution's mandate of neutrality toward religion. Finding that there was no compelling government interest to justify

a policy that it believed discriminated against religion, the Ninth Circuit rejected the arguments put forth by the state, explaining that "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal Constitution."

On February 25, 2004, the United States Supreme Court (by a vote of 7 to 2) overruled the Ninth Circuit's decision and declared that the state had not violated the Free Exercise Clause of the Constitution "by refusing to fund devotional theology instruction" through its Promise Scholarship Program. Chief Justice William Rehnquist, writing for the majority, rejected Davey's contention that the Court should have followed the precedent set forth by the Court in its decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993). In *Lukumi*, the Court struck down a local ordinance aimed at suppressing the practice of Santeria by prohibiting ritual slaughter and making any such activity a crime, arguing that the ordinance was not facially neutral with respect to religion. Unlike *Lukumi*, where "the law sought to suppress ritualistic animal sacrifices of the Santeria religion," here, Rehnquist held that the state has "merely chosen not to fund a distinct category of instruction." He emphasized that in the present case, the state was not imposing "criminal [or] civil sanctions on any type of religious service or rite," nor did it "require students to choose between their religious beliefs and receiving a government benefit." Rather Rehnquist pointed out that since the "program permit[ed] students to attend pervasively religious schools, so long as they are accredited" and allowed aid recipients to take devotional theology courses, the hostility toward religion that was so prevalent in *Lukumi* is absent in *Locke*. To the contrary, the Court found "the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."

Rehnquist added that the distinction made by the state between training for religious professions and secular professions is "not evidence of [animus] toward religion," but rather acknowledgment that, both the United States and state constitutions have historically treated the ministry differently, as compared with other professions. Thus, finding the state's anti-Establishment Clause concerns to be substantial and the exclusion of funding for the "pursuit of devotional degrees … a relatively minor burden of the Promise Scholars," the Court upheld the program as constitutional.

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

AJC Involvement

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

The brief also argues that by "invert[ing] the question in financial aid to religion cases

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

II. RELIGIOUS LIBERTY

A. Conscience Clause Exemptions

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

Background

On November 20, 2000, Catholic Charities of Sacramento, Inc., (Catholic Charities)—a California public benefit corporation that provides "social services to the poor, disabled, elderly, and otherwise vulnerable members of society, regardless of their religious beliefs"—filed a lawsuit in the Sacramento Superior Court challenging the constitutionality of the California Women's Contraception Equity Act (WCEA, the "Act" or "the statute"), which requires that if employers provide group and individual insurance policies with prescription drug benefits to their employees, they must also provide coverage for prescription contraceptive methods. The statute, enacted in response to concerns about the lack of insurance coverage for prescription contraceptive methods, sought "to eliminate" what the legislature found to be "the discriminatory insurance practices that had undermined the health and well-being of women."

Addressing concerns that the act would impermissibly burden the religious freedom of employers opposed to contraception on religious grounds, the legislature enacted a narrow exemption (a "conscience clause"). To qualify for the exemption, an organization must satisfy the following criteria: (1) the inculcation of religious values is the purpose of the entity; (2) the entity primarily employs persons who share the religious tenets of the entity; (3) the entity serves primarily persons who share the religious tenets of the entity; and (4) the entity is a specific type of nonprofit organization pursuant to certain sections of the Internal Revenue Code of 1986, as amended (which exempt from certain tax filings churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order). Catholic Charities conceded that it does not qualify for the religious employer exemption because it does not meet any of the four criteria necessary to do so.

In its suit, Catholic Charities sought declaratory and injunctive relief from the Act, asserting that forcing it to provide "employee health insurance coverage that includes prescription contraceptive methods would facilitate financially the sin of contraception by employees who use the prescription drug benefit to obtain contraception." It argued that "in order to avoid the burden placed upon its beliefs by the Act," it could not simply refuse to offer health insurance coverage for employees, as the act allows, because "the Catholic faith morally obliges employers to provide just employment wages and benefits, which includes adequate health insurance coverage." Thus, it asserted, "the [law] present[s] Catholic Charities with the dilemma of either refusing to provide health insurance coverage for its employees or facilitating the sin of contraception, both of which violate its religious beliefs."

More specifically, Catholic Charities alleged that the act violates the Free Exercise Clause of the U.S. Constitution and that it restricts the organization's constitutionally protected free speech rights, as the "statutes force Catholic Charities to foster concepts and to engage in symbolic speech that sends a message that contraception is

The statute … sought "to eliminate" what the legislature found to be "the discriminatory insurance practices that had undermined the health and well-being of women."

morally, socially, legally and religiously acceptable conduct." The complaint further alleged that the religious employer exemption (the "conscience clause") included in the act is too narrow and thus violates the Establishment Clause of the U.S. and California Constitutions by exempting certain religious employers but not others, thereby favoring certain religions over others. Catholic Charities also asserted that the Act's definition of "religious employer" is vague and difficult to apply.

The Act is constitutional under the U.S. and California Constitutions in that it addresses a "compelling societal need" and is tailored "to limit any burden on free exercise … while preserving the law's compelling objective."

Case Status

At the trial court level, the judge denied Catholic Charities' motion for a preliminary injunction on the grounds that Catholic Charities failed to meet the two requirements for injunctive relief: (1) a likelihood of success on the merits, and (2) imminent harm. Catholic Charities subsequently filed a Writ of Mandate with the California Court of Appeals asking that the appellate court order the lower court to grant the injunction. Holding that the Act does not unconstitutionally infringe on the religious liberty rights of Catholic Charities, the unanimous three-judge panel of the Court of Appeal in September 2001 denied the Writ of Mandate seeking to compel an injunction. The court held that Catholic Charities failed to establish that it is likely to prevail on the merits of its constitutional challenges, and, therefore, the trial court properly denied Catholic Charities' request for a preliminary injunction pending trial. The case was subsequently appealed to the Supreme Court of California, which in March 2004 affirmed the Court of Appeal's decision.

The court held that the act is facially neutral toward religion, and that its terms do not interfere with employers' religious autonomy. It further held that laws intended not to discriminate among religions but to alleviate a governmentally created burden on religious exercise do not necessarily violate the Establishment Clause, even though only a single religion in need of accommodation has been identified. In terms of the applicable standard, the court declined to state whether the "strict scrutiny" test or the "rational basis test" was the applicable standard when reviewing challenges to neutral, generally applicable laws, but did hold that if it had applied the former, the WCEA would have passed strict scrutiny, ruling that the purpose of the law (gender discrimination) constituted a valid compelling interest, and that the WCEA represented the least restrictive means of achieving this goal. As an alternative, the court also applied the rational basis test, and found that the WCEA's exemption for religious organizations, even if not applicable to Catholic Charities, rationally serves the legitimate interest of complying with the rule barring interference in the relationship between a church and its ministers.

Catholic Charities subsequently filed a petitition for certiorari to the United States Supreme Court, which was denied on October 4, 2004.

AJC Involvement

In March 2002, AJC joined in an amicus brief to the Supreme Court of California filed with the Anti-Defamation League in support of the constitutionality of the statute's requiring employers who offer their employees health insurance coverage with prescription drug benefits to also include coverage for prescription contraceptive methods, so long as certain religious institutions are exempted.

In its brief, we argued that the court

should apply the "strict scrutiny" standard when determining the constitutionality of the statute. In *Employment Division v. Smith* (1990), the U.S. Supreme Court held that strict scrutiny does not apply to all Free Exercise challenges. Rather, a law in an area in which the state is free to regulate that is neutral and of general applicability need not be justified by a compelling governmental interest. However, the brief urged the court to apply the "strict scrutiny" standard of review in order to fulfill the California constitution's guarantee of Free Exercise rights. "Applying anything less," it asserted, jeopardizes fundamental Free Exercise rights "expressly guaranteed by the California constitution against unwarranted governmental intrusion." Accordingly, we argued, the Supreme Court's decision in *Smith* should not affect California's independent state constitutional protection of Free Exercise rights. Furthermore, we asserted that the Contraceptive Equity Act is constitutional under the United States and California Constitutions in that it addresses a "compelling societal need" and is tailored "to limit any burden on free exercise as much as possible while preserving the law's compelling objective."

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

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

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

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

RLUIPA also prevents the government from imposing substantial burdens on the religious exercise rights of institutionalized persons, providing in pertinent part, that:

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution … even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person … is in furtherance of a compelling governmental interest,… and … is the least restrictive means of furthering that compelling governmental interest.

Since its enactment, AJC has joined coalitional briefs in support of the statute's constitutionality in cases across the country, in both the institutionalized persons and land use contexts. In the briefs, the agency argues that RLUIPA's purpose—accommodation of the free exercise of religion—is secular; it does not impermissibly advance religion or entangle the government in religious practices, and is not an endorsement of religion, but rather an endorsement of the value and importance of the basic constitutional rights found in the First Amendment. AJC also asserts that the law does not exceed Congress's authority under the Commerce and Spending Clauses of the Constitution. The Commerce Clause gives Congress the exclusive authority to regulate activities within states where the activity has a substantial effect on interstate commerce, while the Spending Clause allows Congress to attach conditions on the receipt of federal funds to further broad policy objectives that benefit the general welfare.

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

1. Religious Land Use

CONGREGATION KOL AMI v. ABINGTON TOWNSHIP

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

As a result of changes to the local zoning ordinances in 1996, the property, which was once located in a district that permitted places of worship by special exception now sits in one that does not. The zoning laws do, however, permit by special exception the use of such property for kennels, riding academies, outdoor recreation facilities, utility facilities, municipal administration buildings, police barracks, libraries, road maintenance facilities, country clubs, train stations, and more. Although the 1996 ordinance does not include religious institutions among those eligible for a special exception, the Abington Township Zoning Hearing Board (the "ZHB"), granted a variance to the Greek Orthodox Monastery of the Preservation of Our Lord (the "Monastery") in 1996, after it leased the property from the Sisters. The variance allowed the monastery to continue the Sisters' prior religious use, which, due to changes in the zoning laws, was now considered "nonconforming." Thus, the congregation believed it was also entitled to continue the nonconforming use, i.e., to use the property as a place of worship.

In January 2000, the congregation initiated proceedings before the ZHB requesting such a variance, or alternatively, the approval of a special exception to use the property as a place of worship. In April 2001, the congregation filed suit, asserting alleged violations of the U.S. and Pennsylvania Constitutions and federal and state law, including RLUIPA. The complaint asserted that the township and its officials discriminated "against religious assembly uses, and in favor of nonreligious assembly uses in most of its zoning districts," and that such discrimination targeted "Jewish places of worship" in particular. The complaint further alleged that the township imposed an unreasonable limitation on places of worship within the R-1 District and other residential districts, and that the township's actions "were arbi-

The township and its officials discriminated "against religious assembly uses, and in favor of nonreligious assembly uses in most of its zoning districts."

trary, capricious and unreasonable" and "not justified by any compelling interest." The congregation argued that, via the modification of the township's zoning laws throughout the years, "Abington Township has completely eliminated the possibility of new places of worship from locating in residential districts as permitted, conditional or special exception uses." Since existing churches have been allowed to remain, there are approximately thirty Christian churches located in the township's residential districts and not a single synagogue or other non-Christian place of worship. In fact, including Kol Ami, only two synagogues exist in the entire township of Abington, although twenty percent of the township's population is Jewish.

In July 2001, a federal district court agreed, ruling that such disparate treatment violates the constitutional guarantee of equal protection. Judge Clarence Newcomer of the U.S. District Court, Eastern District of Pennsylvania, ruled that the township's zoning ordinance was unconstitutional as applied to the congregation by the ZHB. Relying on the U.S. Supreme Court's decision in *City of Cleburne v. Cleburne Living Center* (1985), Judge Newcomer held that the ZHB's failure to consider the congregation as a candidate for a special exception constituted a denial of the congregation's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. In *City of Cleburne*, the Supreme Court struck down a zoning ordinance that required a special use permit to operate a group home for the mentally retarded in a residential district, but did not require such a permit for apartment houses, boarding and lodging houses, dormitories, hospitals, nursing homes, and other similar uses. Although the defendant city argued that the ordinance was aimed at avoiding concentrations of population and at lessening congestion of the streets, the Court concluded that "these concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit." Likewise, said Judge Newcomer, "[t]here can be no rational reason [in the Kol Ami case, for the Township of Abington] to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club or other similar use to request a special exception under the 1996 Ordinance, but not Kol Ami." Therefore, since the ZHB refused to consider the congregation as a candidate for a special exception, but permitted the consideration of other similar uses, Judge Newcomer found that the township violated the Congregation's constitutional rights to equal protection under the Fourteenth Amendment.

Judge Newcomer subsequently issued an order directing the ZHB to hold immediate hearings on Kol Ami's request for a special exception. On August 15, 2001, the ZHB granted the congregation's application for a special exception permit, allowing it to occupy and use the property as a synagogue. The township, however, appealed Judge Newcomer's decision to the Third Circuit Court of Appeals. A three-judge panel of the Third Circuit heard oral arguments for the case on July 29, 2002, and rendered a decision on October 16, 2002, in which it vacated the district court decision that found Abington Township had violated the Congregation's Equal Protection rights, and remanded the case for further consideration. Rather than comparing the impact of various uses currently permitted by special exception with the congregation's proposed use, the panel directed Judge Newcomer to apply a "similarity of uses" comparison prior

to assessing the existence of a rational basis for distinguishing between the various uses.

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

In October 2002, the Third Circuit vacated the district court's ruling and remanded the case back to the district court judge for further findings. In November 2002, the Third Circuit denied plaintiffs' request to rehear the case en banc, and proceedings began at the district court level in light of the Third Circuit's decision. Among the issues to be addressed by the court was the township's argument that RLUIPA is unconstitutional.

In January 2003, the township moved for summary judgment, arguing in part that RLUIPA is unconstitutional. In November 2003, the congregation completed the sale of the property and pledged their continued commitment to establishing a permanent presence on the former monastery property.

In August 2004, the district court granted the motion in part, but denied the motion in part, leaving five counts that concerned potential violations of RLUIPA. In its decision, the court found that the township's conduct substantially burdened the congregation's religious exercise rights under RLUIPA. The court further upheld RLUIPA against Fourteenth Amendment, First Amendment, and Commerce Clause attacks, finding that a substantial burden was placed on the congregation's free exercise rights. The court noted that this case "is precisely the type of case contemplated by the drafters in their definition of free exercise under the RLUIPA." In September 2004, the district court denied a motion for reconsideration filed by the township, which had argued that the court made an error when it held that RLUIPA prescribes a broad test for determining when a substantial burden has occurred. The court disagreed, citing its reliance on "Congress's expansion of the concept of 'religious exercise' as defined in RLUIPA," and "case law to support its conclusion that both the ordinance and the denial of a variance are substantial burdens on [the Congregation's] religious exercise rights as defined by RLUIPA." The township is now in the process of appealing this decision to the Third Circuit.

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

ELSINORE CHRISTIAN CENTER v. CITY OF LAKE ELSINORE

In this California case, Elsinore Christian Center (ECC or the "church"), a nondenominational church, had been renting space in Lake Elsinore for twelve years before deciding that lack of adequate parking, handicap access, and the size of its building necessitated a move to a new facility in the same area.

In April 2000, the church entered into an agreement to buy the Elsinore Naval and Military School, which it believed was the only building in the area that could satisfy its needs. The school is in an area zoned as C-1 (Neighborhood Commercial District), which requires a Conditional Use Permit (CUP) in order to conduct renovation and use the facility for religious services. The property is currently being leased by a grocery store in what is considered a depressed downtown area.

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

In August 2003, the district court held that while the denial of the permit violated RLUIPA, RLUIPA itself was unconstitutional as it exceeded Congress's enforcement powers under the Fourteenth Amendment, which grants to Congress wide authority to deter and remedy perceived constitutional violations. The court explained further that RLUIPA was not, as the Justice Department had argued, a codification of existing constitutional law. Rather, the court held, RLUIPA was a redefinition of the First Amendment rights of free speech and free exercise of religion that Congress was purporting to enforce.

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

The Ninth Circuit Court of Appeals subsequently granted the ECC's petition to appeal. In August 2004, AJC joined with a coalition of religious and civil liberties organizations in filing an amicus brief with the Ninth Circuit to uphold the constitutionality of RLUIPA. In the brief, it was asserted that the district court erred in holding that RLUIPA was enacted without proper congressional authority. To the contrary, the brief argued that Congress acted well within its constitutional powers in enacting RLUIPA, given the detailed record of religious discrimination in land use regulation by local governments across the U.S., and the proportionate measures that RLUIPA embodies in response to that identified discrimination. The defendants subsequently filed a motion to remand the case to the district court to consider the merits of the substantial burden issue in light of a recent decision in another case. AJC is awaiting a decision from the appellate court and will continue to monitor developments.

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

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

In April 2001, the Guru Nanak Sikh Society of Yuba City (the "society"), California, applied for a conditional use permit to build a Sikh temple. The society owned a 1.89-

acre property on Grove Road, which is in a residential zone designated primarily for large-lot single-family homes. Churches and other religious institutions are allowed in the area only with conditional use permits. Despite approval for the project from county staff, the County Planning Commission unanimously denied the application due to complaints from neighbors fearing increased noise and traffic.

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

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

In December 2003, Sutter County filed an appeal with the Ninth Circuit Court of Appeals. In June 2004, AJC joined with a coalition of religious and civil liberties organizations in filing an amicus brief with the Ninth Circuit, urging the appellate court to uphold the constitutionality of RLUIPA. Focusing on the legislative history of the act, the brief argued that Congress, by passing RLUIPA, "acted well within its power" under the Fourteenth Amendment, "especially given the record of religious discrimination in land use regulation by local governments ... and the proportionate measures that RLUIPA embodies in response." AJC will continue to monitor the case as it proceeds on appeal.

KONIKOV v. ORANGE COUNTY, FLORIDA

In this case, a rabbi in Florida sued the county and members of the county's Code Enforcement Board in federal court, alleging that his right to free exercise of religion under the U.S. Constitution and RLUIPA was violated by the county's land use code. After complaints from neighbors, the county began fining the rabbi for holding religious services in his home without the required permit. The defendants asserted, in addition to other arguments, that the code satisfies RLUIPA, but in the event that it did not, that RLUIPA is unconstitutional.

In January 2004, the United States District Court in Florida granted summary judgment to defendants, holding that the code requirement did not violate the Free Exercise Clause, RLUIPA, the rabbi's equal protection rights, the Establishment Clause of the state and federal Constitutions, the rabbi's freedom of speech rights, or the rabbi's state and federal constitutional freedom of privacy rights. The court also held that the code was not void for vagueness, and that the county board did not conspire

to violate the equal protection rights of the rabbi. The court declined to consider the issue of RLUIPA's constitutionality. Plaintiff subsequently appealed the decision to the Eleventh Circuit Court of Appeals.

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

MURPHY v. ZONING COMMISSION OF NEW MILFORD

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

The Murphys responded by filing suit in federal district court, winning a temporary injunction in July 2001, barring the ZEO from enforcing the letter pending resolution of the case. In the order granting the injunction, the magistrate judge found that the Murphys were likely to prevail on the merits of their claim under RLUIPA. In November 2002, the ZEO moved for summary judgment, arguing that RLUIPA is unconstitutional, and the Murphys subsequently moved for summary judgment as well.

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

The ZEO appealed to the Second Circuit Court of Appeals, and in July 2004, AJC joined in a coalitional amicus brief, arguing that Congress acted well within its Enforcement powers under the Fourteenth Amendment in passing RLUIPA, and emphasizing that RLUIPA was enacted in response to overwhelming evidence that local governments, through their power to regulate land use, were discriminating against both mainstream and nonmainstream religions. Furthermore, the brief pointed out that Congress concluded RLUIPA was needed to stamp out official animus toward religious groups with respect to land use. Oral arguments were held in October 2004, and a decision from the Second Circuit is now pending.

RLUIPA was needed to stamp out official animus toward religious groups with respect to land use.

WESTCHESTER DAY SCHOOL v. VILLAGE OF MAMARONECK

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

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

On September 27, 2004, the Second Circuit vacated the lower court's grant of summary judgment on other grounds, finding that there was not enough evidence to compel the judgment in the school's favor. The case was remanded to the trial court, and AJC will continue to monitor the case as it proceeds.

2. Institutionalized Persons

BENNING v. STATE OF GEORGIA

In December 2002, Ralph Benning, an inmate in Georgia State Prison, filed suit against the state under RLUIPA. Benning asserted that prison officials' refusal to provide him with kosher food, allow him to wear a yarmulke, or otherwise accommodate his religious practices was a violation of RLUIPA. In September 2003, a magistrate judge issued a report and recommendation that Benning's complaint be dismissed, and that RLUIPA be declared unconstitutional under the reasoning of *Madison v. Riter* (see discussion p. 26). In January 2004, the district court judge rejected the magistrate's report and denied the state's motion to dismiss the complaint. The district court judge noted that *Madison* had been subsequently overruled by the Fourth Circuit and adopted the circuit court's reasoning instead. The judge then certified the case for immediate appeal to the Eleventh Circuit Court of Appeals.

In April 2004, AJC joined with a diverse coalition of religious and civil liberties organizations in an amicus brief filed with the Eleventh Circuit to uphold the constitutionality of RLUIPA. AJC will continue to monitor the case as it proceeds on appeal. In the brief, it was asserted that the passage of RLUIPA was a valid use of Congress's

Spending Clause authority because it is in pursuit of the general welfare, its condition on federal appropriations is explicit, and the condition is closely related to the programs to which the funds are dedicated. Furthermore, the brief asserted that RLUIPA is also within the bounds of the Commerce Clause, and that since RLUIPA is a valid exercise of Congress's delegated powers, it does not intrude on the states' sovereignty as guaranteed by the Tenth Amendment.

CUTTER v. WILKINSON

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

In September 2003, the Sixth Circuit Court of Appeals reversed the district court's denial of the defendants' motion to dismiss and remanded the case back to the district court for further proceedings. In its opinion, the Sixth Circuit found that portions of the act that prevented government officials from imposing a substantial burden on a prisoner's free exercise of religion violated the Establishment Clause, reasoning that even if the act's purpose is secular, and even if it does not create excessive entanglement with religion, the act conveys a message of religious endorsement. The court held that "RLUIPA's inevitable effect is to give greater freedom to religious inmates, and to induce nonreligious inmates to adopt a religion. An objective observer viewing RLUIPA's text, legislative history, and effect would therefore conclude that the Act conveys a message of religious endorsement." Furthermore, the court held that RLUIPA provides greater protection to prisoners than is required by the Establishment Clause, explaining that "it imposes strict scrutiny where the Establishment Clause requires only a rational-relationship review."

AJC joined in a coalitional amicus brief filed with Sixth Circuit Court of Appeals petitioning the court for a rehearing en banc, arguing in favor of RLUIPA's constitutionality. While in its previous decision the Sixth Circuit had stated that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," we argued that such a rule "not only contradicts Supreme Court precedent governing accommodations of religious exercise, but would wreak havoc on a broad range of religious accommodations." The petition was denied in March 2004. Plaintiffs subsequently filed a petition for a writ of certiorari with the U.S. Supreme Court, and in October 2004, the petition was granted. AJC plans to file a coalitional amicus brief in support of RLUIPA's constitutionality with the U.S. Supreme Court.

The Sixth Circuit's ruling "not only contradicts Supreme Court precedent governing accommodations of religious exercise, but would wreak havoc on a broad range of religious accommodations."

MADISON v. RITER

RLUIPA does not advance religion, but instead facilitates the right of prisoners to free exercise of their beliefs.

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

In January 2003, the district court granted the defendants' motion to dismiss, declaring RLUIPA unconstitutional, finding that it increased the level of protection of prisoners' religious rights only, while excluding other, equally fundamental rights from strict scrutiny review. The district court based its conclusion on its finding that "the principal and primary effect of RLUIPA is to advance religion by elevating religious rights above all other fundamental rights." The court reasoned that in correctional facilities, "[i]ndifference, bigotry, and cost concerns have the same restrictive effect on the freedom of speech, the ability to marry, the right to privacy, and countless other freedoms that RLUIPA proponents left to a lesser level of protection." Citing two 1987 Supreme Court cases, *O'Lone v. Estate of Shabazz* and *Turner v. Safley*, the district court explained that the Supreme Court has already "developed the proper standard to evaluate an inmate's claim that a prison regulation or action of a prison administrator burdens his constitutional rights." That test—the "rational relationship" test—gives more deference to the judgment of government officials than does the more stringent "strict scrutiny" test called for by RLUIPA, which requires the government to prove it has a compelling interest for imposing the constitutional burden at issue, and that the policy is the "least restrictive means of furthering [that] interest." The district court concluded that the rational relationship test in this context "represents [an appropriate] balance between the need to recognize the continuing vitality of the constitutional rights of inmates, and the fact that incarceration necessarily involves a retraction of some rights." It went on to stress the negative impact of using varying standards, stating that "the different standards of review have the effect of establishing two tiers of inmates in the prison system: the favored believer and the disadvantaged nonbeliever."

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

In December 2003, the Fourth Circuit reversed the district court's decision, holding that RLUIPA does not violate the Establishment Clause, and remanded the case back to the district court for further proceedings. The circuit court found that RLUIPA does not advance religion, but instead facilitates the right of prisoners to free exercise of their beliefs. Defendants filed a petition for a writ of certiorari with the U.S. Supreme Court in April 2004. AJC will continue to monitor this case.

III. CIVIL LIBERTIES/DISCRIMINATION

A. Capital Punishment

SIMMONS v. ROPER

Background

In 1993, seventeen-year-old Christopher Simmons and a fifteen-year-old accomplice broke into Shirley Crook's house in St. Louis to commit a burglary. Crook, who was at home, recognized Simmons by chance (they had previously been involved in a car accident). With the help of the accomplice, Simmons bound, gagged, and blindfolded Crook, and later pushed her off a railroad trestle to drown in a river. Simmons was later convicted of first-degree murder and sentenced to death.

While the U.S. Supreme Court ruled in 1988 in *Thompson v. Oklahoma* that the Eighth Amendment prohibits the execution of those who committed capital crimes while under the age of sixteen, this case raises the question of whether the line should be drawn at eighteen, the age of legal maturity in the United States. In 1989, the United States Supreme Court (which had ruled the previous year that execution of persons aged fifteen and younger constituted cruel and unusual punishment) ruled in *Stanford v. Kentucky* that there was not then a national consensus against the execution of those who were sixteen or seventeen years old at the time of their crimes, and therefore declined to bar the execution of such persons. On the same day, they also declined to bar the execution for those who were mentally retarded, on the same grounds. In light of the current case law at the time of his trial, Simmons did not argue that his age was a bar to the imposition of the death penalty in his case, though he did argue that it should be a mitigating circumstance.

The Eighth Amendment's proscription is not static. Rather, the Supreme Court has ruled that "the prohibition against cruel and unusual punishment … recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" In 2002, the United States Supreme Court held in *Atkins v. Virginia* that a national consensus had emerged against the execution of mentally retarded offenders. Hoping to extend the logic behind *Atkins* to the issue of executing those who commit capital crimes while under the age of eighteen, Simmons filed a petition for a writ of habeas corpus with the Supreme Court of Missouri.

Case Status

Subsequent to his conviction and sentencing to death, Simmons failed to have his conviction overturned on appeal. Simmons's petition to the Supreme Court of Missouri was granted on August 26, 2003. The court held, 4 to 3, that despite his previous failure to raise the claim that as a juvenile he was unfit to receive the death penalty, it was not waived, and that the Eighth Amendment bars the execution of individuals under the age of eighteen. Simmons's sentence was then reduced to life imprisonment. Several European Union countries, along with Canada, Mexico, and others, filed amicus briefs urging the Supreme Court of Missouri to overrule Simmons's death sentence. Additionally, former President Jimmy Carter, former Soviet President Mikhail Gorbachev, the American Bar Association, the American Medical Association, and various religious groups filed amicus briefs describing the application of the death penalty to juveniles as "inhuman."

In its decision, the Supreme Court of Missouri cited the test introduced in *Thompson* to determine the current societal

Juveniles lack the psychological maturity and development of adults and the degree of culpability that would place them in the category of those most deserving to be put to death.

standards of decency that takes into account (a) relevant legislative enactments, (b) evidence of how juries view the propriety of execution of groups that have reduced mental capacity, and (c) the views of respected national and international organizations. The U.S. Supreme Court in *Thompson* also made its own judgment as to the propriety of such executions, explaining that these indicators of contemporary standards of decency confirmed their judgment that juveniles under sixteen were not "capable of acting with the degree of culpability that can justify the ultimate penalty."

Using these criteria, the Supreme Court of Missouri concluded in *Roper* that "in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below eighteen since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at eighteen, and that the imposition of the juvenile death penalty has become truly unusual over the last decade."

In January 2004, the United States Supreme Court granted a petition for a writ of certiorari. Oral arguments in the case were heard on October 2004, and a decision is now awaited.

AJC Involvement

AJC's long-standing position that "capital punishment degrades and brutalizes the society which practices it" resulted in the agency's joining an amicus brief in the *Thompson* case in which it argued that the imposition of the death penalty on those who have committed capital crimes while under the age of eighteen was contrary to evolving standards of decency and thus violative of the Eighth Amendment. For the same reasons, AJC joined with a diverse coalition of religious communities to file an amicus brief with the United States Supreme Court asserting this position in the *Simmons* case. In the brief, we urged the court to consider the voices of religious and religiously affiliated institutions when assessing "evolving standards of decency," the standard for reviewing Eighth Amendment claims. We argued that juveniles lack the psychological maturity and development of adults, and thus lack the degree of culpability that would place them in the category of those most deserving to be put to death. The Court considered the views of faith communities, including that of AJC, when it held in 2002, in *Atkins*, that the Eighth Amendment bars execution of persons with mental retardation.

B. Detention of Enemy Combatants

HAMDI v. RUMSFELD

Background

Yasser Hamdi, an American citizen, was captured in Afghanistan in 2001. At the time of his capture, he was allegedly engaged in combat on behalf of the Taliban and carrying an assault rifle, although he contends that he was in Afghanistan to do relief work and did not receive military training. Hamdi was detained at Guantánamo Bay until it was discovered that he was born in Louisiana and had not renounced his American citizenship. He was then transferred to a Navy brig in Norfolk, Virginia, where he was being held as an "unlawful enemy combatant," which the administration asserted allowed the govern-

ment to detain him indefinitely without access to legal counsel, the courts, or contact with family members.

Case Status

Hamdi's father filed a petition for writ of habeas corpus on his behalf, challenging his detention as unlawful by arguing that as an American citizen being held in the U.S., he is entitled to the protections of the Constitution. In May 2002, Judge Robert Doumar of the Eastern District of Virginia ruled that Hamdi has the right to contest his being designated an enemy combatant and to consult with counsel free of government monitoring. On appeal, in July 2002, the Fourth Circuit Court of Appeals reversed and remanded the case to the district court, finding that Judge Doumar had not sufficiently considered the national security implications of his ruling. On remand, the government submitted a two-page affidavit (the "Mobbs Declaration") from a Defense Department official in support of the government's contention that Hamdi was an enemy combatant. After reviewing the affidavit, the judge found that it fell "far short" of supporting Hamdi's detention and that submission of further supporting materials was required, because it was "little more than the government's 'say-so' regarding the validity of Hamdi's classification as an enemy combatant."

On appeal by the government, the Fourth Circuit reversed, holding that the detention of Hamdi without access to counsel was legitimate and that the government need not submit additional materials. It specifically held that Hamdi was not entitled to challenge the facts presented in the Mobbs Declaration, and while acknowledging that courts should not casually deprive citizens of Bill of Rights protections, the appellate court stated that "[t]he risk created by [the district court's] order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role." The case was subsequently appealed to the U.S. Supreme Court.

On June 28, 2004, the Court ruled 6-3 that, at the very least, a citizen designated as an enemy combatant must be given access to a lawyer, told the basis on which he received the designation, and accorded a fair opportunity to challenge it before a neutral decision maker. Justice Sandra Day O'Connor wrote for the plurality, joined by the chief justice, Justice Anthony Kennedy, and Justice Stephen G. Breyer. Justice David H. Souter, joined by Justice Ruth Bader Ginsburg, concurred in the judgment that Hamdi was entitled to due process and access to an attorney, but dissented as to the plurality's holding that Hamdi's detention is authorized by statute. Justice Antonin Scalia, joined by Justice John Paul Stevens, and Justice Clarence Thomas wrote dissenting opinions.

The Court did not define the term "enemy combatant," leaving that determination for the lower courts. Instead, the Court sought in its opinion to answer two questions: a) whether the detention of citizens deemed enemy combatants is authorized; and b) what process is constitutionally due to a citizen who disputes his enemy combatant status.

Absent the suspension of the writ of habeas corpus pursuant to Article II of the Constitution (the "Suspension Clause"), express authorization from Congress is required by 18 U.S.C. § 4001(a), which outlines limitations on the detention of citizens, in order to imprison or otherwise detain a U.S. citizen. Without addressing the question of whether such detentions are author-

"A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

ized by the Suspension Clause, Justice O'Connor held that the Congressional resolution—the Authorization for Use of Military Force (AUMF)—empowering the president to "use all necessary and appropriate force" against those persons or nations who committed the attacks of September 11, 2001, constituted express authorization from Congress for Hamdi's detention, satisfying § 4001(a). The Court explained that detention of enemy combatants "for the duration or the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized." Though Hamdi argued that the "war on terror" could continue indefinitely, leading to his indefinite detention, the Court held that his detention was permissible so long as active hostilities continued.

Although determining that Hamdi's detention is authorized by law, Justice O'Connor wrote that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." The Court reaffirmed "the fundamental nature" of a citizen's right to due process and balanced this right against the government's view that discovery into military operations would be an intrusion into sensitive secrets of national defense. Justice O'Connor held that Hamdi must be allowed to challenge his status as an enemy combatant and must receive a meaningful opportunity to challenge his detention. While the Court did not specify in what kind of forum such a hearing must be held (leaving open the possibility of a military tribunal), the Court did allow that the proceedings "may be tailored to alleviate their uncommon potential to burden the Executive." For example, rules regarding the admission of hearsay evidence might be relaxed, and the use of a rebuttable presumption in favor of the government's evidence might be adopted. Finally, Justice O'Connor held that Hamdi "unquestionably has the right to access to counsel" for proceedings challenging his detention.

Justice Souter, with Justice Ginsburg, joined with the plurality in the judgment but wrote separately to argue that Hamdi's detention is unauthorized. Justice Souter wrote that because the AUMF did not clearly authorize the detention or imprisonment of enemy combatants, the Court need not reach the constitutional question of what process is required. Rather, Hamdi's detention violates 18 U.S.C. § 4001(a). Since this position did not command a majority, the justice wrote that "the need to give practical effect to the conclusions of eight members of the Court rejecting the government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose."

Justice Scalia filed a dissenting opinion, joined by Justice Stevens, arguing that absent the suspension of the writ of habeas corpus, citizens can never be held without trial. The justice explained that "[a]bsent the suspension of the writ, a citizen held where the courts are open is entitled either to a criminal trial or to ... release." Justice Scalia was careful, however, to limit his analysis to "citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court," such as Hamdi or Jose Padilla (see discussion on page 33). Justice Thomas also dissented, arguing that Hamdi's detention "falls squarely within the Federal government's war powers, and it lacks the expertise and capacity to second-guess that decision."

On September 22, 2004, the Justice Department announced an agreement that freed Hamdi and allowed him to return to Saudi Arabia, so long as he renounced his American citizenship, agreed not to leave

Saudi Arabia for a certain period of time, and reported any suspicious terrorist activity to Saudi officials. On October 11, 2004, Hamdi arrived in Saudi Arabia.

AJC Involvement

In February 2004, AJC joined with the American Civil Liberties Union, the Trial Lawyers for Public Justice, and the Union for Reform Judaism in an amicus brief filed with the United States Supreme Court, urging reversal of the Fourth Circuit's ruling. In the brief, we asserted that "[d]ue process requires that Hamdi be given a fair opportunity to contest his designation as an enemy combatant." The brief argued that in order to strike the appropriate balance between constitutionally guaranteed civil liberties and national security, American citizens wishing to challenge their designation and detention as "enemy combatants" should be given access to counsel and to the courts.

RASUL v. BUSH; AL ODAH v. UNITED STATES

Background

This case involved fourteen Australians and Kuwaitis who were captured abroad during hostilities in Afghanistan and Pakistan following the attacks of September 11, 2001. These prisoners were being held at the U.S. military base in Guantánamo Bay, Cuba. They claimed they had been wrongly detained by the U.S. for almost two years without being charged and without access to family members or counsel. Each detainee contended that he was not fighting with Al-Qaeda, but rather was there for personal reasons (e.g., education, visiting relatives) or as a humanitarian aid worker and was turned over to U.S. authorities by local bounty hunters. They therefore sought release from detention and access to counsel, among other things.

Case Status

In March 2003, a three-judge panel of the D.C. Circuit Court of Appeals unanimously held that the U.S. Supreme Court's 1950 decision in *Johnson v. Eisentrager*, which held that "constitutional rights … are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens," was controlling. The *Eisentrager* detainees were German citizens captured by U.S. forces in China, tried and convicted of war crimes by an American military commission in Nanking, and detained in occupied Germany. The court then proceeded to analyze whether petitioners in the present cases should be considered to be located within U.S. sovereign territory. The Guantánamo base, approximately forty-five square miles in total area, has been leased by the United States from the Cuban government since 1903. The U.S. has complete jurisdiction over the area (though Cuba retains sovereignty), and the lease agreement also provides that it shall continue indefinitely unless the parties agree otherwise. Relying on the text of the agreement, the circuit court held that "Cuba—not the United States—has sovereignty over Guantánamo Bay." The court also disagreed with the argument that U.S. control over Guantánamo is the equivalent of sovereignty, by pointing out that the German prison where the *Eisentrager* petitioners were being held was under American military control, and yet the Supreme Court rejected the habeas claims asserted in that case. The

court thus concluded that petitioners' habeas claims here must also be rejected.

The Supreme Court granted certiorari to consider "the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba." On June 28, 2004, it ruled that U.S. courts have the jurisdiction to consider challenges to the legality of the detention of aliens captured abroad in connection with hostilities and detained at Guantánamo Bay. Justice Stevens wrote for the 6-3 majority. Justice Kennedy wrote a separate opinion concurring with the judgment, while Justice Scalia wrote a dissent joined by the chief justice and Justice Thomas.

In his majority opinion, Justice Stevens firmly rejected the government's contention that these cases are controlled by *Eisentrager*. The Supreme Court in *Eisentrager* had found six critical facts to support their conclusion that the detainees in that case had no right to seek relief in a U.S. court: The German prisoners were (a) enemy aliens who (b) had never been or resided in the U.S., (c) were captured outside the U.S., (d) were tried and convicted by the military (e) for offenses committed abroad, and (f) were imprisoned abroad at all times. Justice Stevens agreed with the petitioners that the present case is distinguishable from *Eisentrager*, arguing that the Guantánamo detainees differed from the *Eisentrager* detainees because: (a) they are not nationals of countries at war with the U.S., (b) they deny that they have engaged in or plotted acts of aggression against the U.S., (c) they have never been afforded access to any tribunal, and (d) have been imprisoned in territory over which the U.S. exercises exclusive jurisdiction and control. Justice Stevens noted that the *Eisentrager* court made clear that all six of the facts it cited were "relevant only to the question of the prisoners' constitutional entitlement to habeas corpus," and that no statutory entitlement existed.

Justice Stevens then went on to explain that subsequent case law had provided persons detained outside the territorial jurisdiction of any federal district court with a statutory alternative to the constitutional right to habeas review. The court in *Braden v. 30th Judicial Circuit Court of Kentucky* (1973) held that a prisoner's presence within the territorial jurisdiction of the district court is not an "invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas corpus statute (28 U.S.C. § 2241). Justice Stevens wrote that the writ of habeas corpus acts upon the person alleged to hold the prisoner, not the prisoner himself, so that "a district court acts within its respective jurisdiction within the meaning of [the federal habeas corpus statute] as long as the custodian can be reached by service of process." (Internal quotations omitted.)

The second aspect of the Court's holding dealt with whether the federal habeas corpus statute was operable for aliens outside of the United States. Citing the 1903 lease agreement between the U.S. and Cuba, the Court noted that the U.S. exercises "complete jurisdiction and control over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." Noting that the government has conceded that the habeas statute would create federal jurisdiction for citizens held at the base, the Court could find "no reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority" under the federal habeas corpus

statute. "In the end," wrote Justice Stevens, "the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more."

Justice Kennedy, concurring in the judgment, wrote a separate opinion disagreeing with the majority's reliance on *Braden*. Instead, Justice Kennedy held that this case was distinguishable from *Eisentrager*, both because Guantánamo Bay is "in every practical respect a United States territory," unlike China and Germany in *Eisentrager*, and because the Guantánamo detainees are being held indefinitely, without legal proceedings, while in *Eisentrager* the detainees were tried and convicted by a military commission.

Writing for the dissent, Justice Scalia found the majority's reasoning "implausible in the extreme" and called the decision an "irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field." Scalia argued that in order to issue a writ of habeas corpus, a federal district court must have territorial jurisdiction over the detainee. Since "the Guantánamo Bay detainees are not located within the territorial jurisdiction of any federal district court," Scalia wrote, "[o]ne would think that is the end of the case."

On October 20, 2004, on remand to the U.S. District Court for the District of Columbia, the court held that the federal habeas corpus statute, the Criminal Justice Act, and the All Writs Act confer on enemy combatants a statutory right to counsel, and furthermore, that attorney-client privilege shields meetings between detainees and their lawyers, their lawyers' related notes, and legal mail between them.

AJC Involvement

In January 2004, AJC joined with a bipartisan coalition of human rights, legal, and religiously affiliated organizations to file an amicus brief with the United States Supreme Court. In the brief, it urged reversal of the D.C. Circuit's ruling that the detainees at Guantánamo Bay are not entitled to some due process, such as access to counsel and the courts, writing "courts can protect national security without blinding themselves to the claims of those aliens held abroad by U.S. officials." Furthermore, the brief pointed favorably to the way in which Israel seeks to protect civil liberties while addressing grave national security concerns, noting that Israeli courts regularly hear challenges to executive detentions. Significantly, in its decision, the Court cited many of the comparative precedents that AJC had brought to their attention in its brief.

"Courts can protect national security without blinding themselves to the claims of those aliens held abroad by U.S. officials."

RUMSFELD v. PADILLA

Background

Jose Padilla was arrested at Chicago's O'Hare Airport in May 2002 by federal agents executing a material witness warrant issued by the United States District Court for the Southern District of New York ("Southern District"). He was alleged to have worked with Al-Qaeda and plotted to detonate a radiological bomb in the U.S. Padilla was then transferred to New York, where on May 22, 2002, his appointed counsel moved to vacate the material witness warrant. While that motion was pending, on June 9, 2002, the president issued an order to Secretary of Defense Donald Rumsfeld designating Padilla as an enemy

"The Executive's asserted power to seize and detain Jose Padilla should be analyzed in light of the deprivation of Padilla's constitutional rights to due process…."

combatant and directing Rumsfeld to detain him in military custody. He was held thereafter in the Consolidated Naval Brig in Charleston, South Carolina, without formal criminal charges and without access to legal counsel. Although the government eventually permitted Padilla to meet with his lawyers, it asserted that it was not obligated to do so. Two days later, on June 11, 2002, Padilla's appointed counsel filed a petition for habeas corpus in the Southern District.

Case Status

In December 2002, the Southern District held that Rumsfeld was a proper respondent to the petition and that it could assert long-arm jurisdiction over him, though on the merits the court accepted the government's contention that the president had the authority to detain as enemy combatants citizens captured on American soil during time of war. In 2003, the Second Circuit Court of Appeals reversed, ruling (2-1) that the president had exceeded his authority in detaining Padilla as an "enemy combatant," finding that "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a combat zone [because] the Constitution lodges these powers with Congress." The Second Circuit did, however, agree that Rumsfeld was a proper respondent, and that the district court had jurisdiction over him. The Supreme Court granted certiorari in 2004.

On June 28, 2004, the Supreme Court reversed the Second Circuit's ruling. Writing for a 5-4 majority, the chief justice held that the only proper respondent to a habeas corpus petition is the commander in charge of the military facility where the petitioner is being held. The federal habeas statute, 28 U.S.C. § 2242, provides that the proper respondent is "the person who has custody over [the petitioner]." Chief Justice Rehnquist noted that the "consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition." Furthermore, according to the majority, "[t]his custodian ... is 'the person' with the ability to produce the prisoner's body before the habeas court." Thus, the majority ruled that in the present case, the only proper respondent is Commander Melanie Marr, the commander of the Navy brig where Padilla is currently detained, and not Secretary Rumsfeld.

The Court furthermore held that the Southern District did not have jurisdiction over that custodian. Section 2241 limits district courts to granting habeas relief "within their respective jurisdictions," which the chief justice held means that "the court issuing the writ [must] have jurisdiction over the custodian." The Court wrote that to allow otherwise "a prisoner could name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction. The result would [be] rampant forum shipping [and] district courts with overlapping jurisdiction." The Court made special mention of *Ex Parte Endo*, a case where a Japanese-American citizen was interned in California by the War Relocation Authority during World War II. After filing her petition in California, the prisoner was moved to Utah, yet the Court ruled that even though her immediate physical custodian was no longer in California, the district court in California had already acquired jurisdiction and could not lose it just because the prisoner was removed. The Court contrasted *Endo* to the present case, where Padilla's petition was not filed with the Southern District until after he was moved to South Carolina. Since the

Court ruled that the Southern District did not have jurisdiction, it did not address the merits of whether Padilla's detention was proper.

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

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

AJC Involvement

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

C. Freedom of Speech

QUIGLEY v. ROSENTHAL AND ANTI-DEFAMATION LEAGUE

Background

In October 1994, Mitchell and Candice Aronson contacted the Denver Regional Office of the Anti-Defamation League (ADL) to report that that they had overheard some of their neighbors', William and Dorothy Quigley's, cordless telephone conversations with a radio scanner and had recorded some of those conversations. Based upon what they overheard, and other incidents of reported harassment, the Aronsons believed that their family was the target of an anti-Semitic campaign to drive them out of their neighborhood. ADL referred the Aronsons to two outside attorneys, who subsequently confirmed with the local district attorney's office, the FBI, and the FCC that the tapes made by the Aronsons were legal.

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

Soon after the Aronsons' lawsuit was filed, it was learned that the Federal Wiretap Act had been amended, effective October 25, 1994. The new law made it illegal to

The judgment violated the First Amendment's protection of freedom of speech and freedom of association by imposing liability on a public interest organization based on the unratified conduct of its members and volunteers.

intercept and record cordless phone conversations and to use or disclose information learned from such interceptions. The Aronsons' taping of the Quigleys' conversations occurred both before and after the effective date of the amended statute. The Quigleys subsequently filed a counterclaim against the Aronsons for defamation, invasion of privacy, and violation of the Federal Wiretap Act, and named ADL's regional director in Denver and ADL as defendants. Although the Aronsons, the Quigleys, the Aronsons' lawyers, the district attorney, and the Sheriff's Department later agreed to settle their claims against each other, the lawsuit continued against ADL and Rosenthal.

Case Status

Trial in this case commenced April 3, 2000, and on April 28, 2000, a twelve-person jury found the defendants liable for defamation, invasion of privacy, and violation of the Federal Wiretap Act. The agency's liability under the Wiretap Act was based on the jury's finding that the Aronsons' attorneys had acted as agents of ADL in filing the Aronsons' civil complaint against the Quigleys, which contained some excerpts of the intercepted conversations, even though no one at ADL had listened to the tapes or read transcripts of the intercepted conversations. The jury awarded $1.5 million damages to the Quigleys to compensate them for economic and noneconomic injury. The jury also awarded $9 million in punitive damages. The district court declined to set the verdict aside, eliminate, or reduce the damages.

ADL subsequently appealed the case to the Tenth Circuit Court of Appeals and on April 22, 2003, a three-judge panel of the court issued a 2 to 1 decision against the Anti-Defamation League. The court upheld the district court's ruling with regard to all claims except for two involving privacy infringement, which it reversed, with no subsequent reduction to the damage awards granted by the trial court.

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

ADL filed a motion for rehearing and a request for rehearing en banc, which were both denied on August 25, 2003. ADL then filed a petition with the United States Supreme Court for a writ of certiorari, which was denied on March 1, 2004.

AJC Involvement

In November 2001, AJC, along with twelve other national organizations that are concerned about the effects of liability on free-

dom of association and freedom of speech, filed a joint amicus brief with the Tenth Circuit authored by Professor Erwin Chemerinsky. In addition, AJC, together with a similar group of national organizations, filed an amicus brief in support of the defendants' motion for a rehearing and request for a rehearing en banc, also authored by Professor Chemerinsky. In December 2003, AJC again joined with other concerned organizations to file a joint amicus with the United States Supreme Court, again authored by Professor Chemerinsky.

Addressing the constitutionality of large damage awards against public interest organizations based on the conduct of their volunteers, we argued that the judgment violated the First Amendment's protection of freedom of speech and freedom of association by imposing liability on a public interest organization based on the unratified conduct of its members and volunteers. We also contended that because the speech was of public concern, the First Amendment precludes liability for revealing the substance of the illegally recorded conversations, without a finding of actual malice. The brief argued that allowing the trial court's decision to stand "will have an enormous chilling effect on the expressive activities of public advocacy groups."

D. Racial Discrimination

UNITED STATES v. NELSON AND PRICE

Background

On August 19, 1991, in Crown Heights, Brooklyn, a Hasidic driver ran over and killed an African-American boy. In what became known as the Crown Heights riots, an angry mob bent on revenge took to the streets and headed toward the largely Jewish commercial district of Crown Heights. Yankel Rosenbaum, a Hasidic scholar visiting from Australia, was identified as a Jew by his Hasidic garb and was stabbed. He later died in the hospital where one of his wounds went undetected.

Lemrick Nelson and Charles Price were acquitted of murder charges in the death of Rosenbaum in state court and were subsequently tried on civil rights charges in federal court. In 1997, a federal court jury convicted Nelson and Price under 18 U.S.C. §245(b)(2)(B) for violating Rosenbaum's civil rights. Section 245 provides in pertinent part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with ... any person because of his race, color, religion or national origin and because he is or has been ... participating in or enjoying any benefit, service, program, facility or activity provided or administered by any State or subdivision thereof; ... and if death results ... shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Nelson and Price appealed their convictions to the Second Circuit Court of Appeals, which heard oral argument in the case in early May 2000.

Case Status

On May 25, 2000, the Second Circuit issued an order requiring the parties in the Nelson/Price case to submit supplemental briefs on the question of the continued constitutional viability of §245(b)(2)(B), in light of a recent Supreme Court ruling in *U.S. v. Morrison* that struck down a portion of the Violence Against Women Act because it

was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." The court heard oral argument in the case in January 2001, and in January 2002 held that the statute at issue was a constitutional exercise of Congress's power under the Thirteenth Amendment, which provides that "neither slavery nor involuntary servitude … shall exist within the United States" and that "Congress shall have the power to enforce" the amendment. Agreeing with arguments set forth in the amicus brief filed by AJC together with other organizations, the Court of Appeals explained that the Supreme Court has interpreted the language of the Thirteenth Amendment to give Congress broad power to enact legislation "necessary and proper for abolishing all badges and incidents of slavery," and has held that, pursuant to this power, Congress may prohibit private racial discrimination. The court relied upon the Supreme Court's decision in *Shaare Tefila Congregation v. Cobb*, in which it held that Jews constitute a "race" for the purpose of a discrimination claim under 42 U.S.C. §1982, which has its constitutional basis in the Thirteenth Amendment.

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

Most probably seeking to avoid another trial, Nelson petitioned the Supreme Court to review the case as to the constitutionality of the federal civil rights statute. On October 7, 2002, the Supreme Court denied Nelson's petition for certiorari. A new trial was held, and on May 14, 2003, a jury convicted Nelson of violating Rosenbaum's federal civil rights by stabbing him. However, it found that the government had not proved that Nelson actually caused Rosenbaum's death, presumably based on reports that Rosenbaum may have died as a result of inadequate treatment at the hospital to which he was sent after the stabbing. Taking into account the time Nelson has already served in prison, together with a reduction in his sentence for good behavior, Nelson was released in June 2004.

AJC Involvement

AJC joined in the amicus brief to the Second Circuit filed by a coalition including the American Jewish Congress, the Anti-Defamation League, and the synagogue agencies of all major denominations, in support of the federal civil rights statute's constitutionality. The brief argued that the statute is constitutional under the Commerce Clause, as an essential part of a larger regulation of economic activity. The brief further argued that Jews constitute a race for the purposes of the Thirteenth Amendment, and that the Thirteenth Amendment provides a constitutional basis for §245(b)(2)(B). The statute as applied to this case is therefore unaffected by *Morrison*, which does not speak to Congress's Thirteenth Amendment powers.

E. School Funding Equity

CAMPAIGN FOR FISCAL EQUITY v. STATE OF NEW YORK

Background

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

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

Case Status

After a seven-month trial, 72 witnesses, and the admission of 4,300 documents into evidence, on January 9, 2001, Justice Leland DeGrasse of the New York State Supreme Court ruled that "New York State has over the course of many years consistently violated the State Constitution by failing to provide the opportunity for a sound basic education to New York City public school students." Pursuant to this ruling, the judge ordered the state to reform its school funding system and issued guiding parameters for such reform.

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

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

The State of New York appealed the trial court's decision, and on June 25, 2002, the Appellate Division, First Department of New York, reversed the lower court's ruling, finding that there was no evidence that students were not being provided with the opportunity of a sound basic education as mandated by the Education Article of the constitution. The court stated that the state's obligation would generally be fulfilled after the students had received an eighth or ninth grade education. According to the court, "the 'sound basic education' standard enunciated" by the New York Court of Appeals "requires the state to provide a minimally adequate educational opportunity, but not

"New York State has over the course of many years consistently violated the State Constitution by failing to provide the opportunity for a sound basic education to New York City public school students."

… to guarantee some higher, largely unspecified level of education, as laudable as that goal might be." The ruling also dismissed a finding that the state's school financing system had violated federal civil rights law because minorities were disparately impacted.

"Public education is the bulwark of our democratic system."

Plaintiffs appealed to the New York Court of Appeals, the state's highest court, and on June 26, 2003, that court reversed (by a vote of 4 to 1) the Appellate Division's ruling. In reinstating much of the trial court's decision, the court took issue with the appellate court's determination that providing children with an eighth grade education was sufficient to meet the state constitution's requirement of a sound basic education. Writing for the majority, Chief Judge Judith Kaye stated that "[w]hile a sound basic education need only prepare students to compete for jobs that enable them to support themselves, the record establishes that for this purpose a high school level education is now all but indispensable." The court also ordered the defendants to, by July 2004, ascertain the actual cost of providing a sound basic education in New York City, ensure that every school in the city has the resources necessary to provide the opportunity for a sound basic education, and ensure a system of accountability to measure whether the implemented reforms actually provide the opportunity for a sound basic education. However, the governor and legislature failed to adopt a plan to address these issues by this deadline.

In light of this, the court appointed three referees as a Panel of Special Masters to conduct hearings and determine what measures the defendants should take to follow these directives and bring the state's school funding mechanism into constitutional compliance. On November 30, 2004, the Panel called for the state to provide New York City public schools an additional $5.63 billion in operating aid over four years and $9.2 billion for facilities to ensure their students the resources the New York State constitution guarantees them. The Panel's recommendations will now be considered by Justice DeGrasse, who will issue a final order in January 2005.

AJC Involvement

AJC joined in an amicus brief filed with the Appellate Division in support of plaintiffs, which began by pointing out that "public education is the bulwark of our democratic system." At the same time, we expressed concern that the legislature will be slow in developing remedies and urged the appellate court to mandate that the trial court consult with an independent panel of experts to "stipulate specific benchmarks of a sound basic education, … determine the actual cost of meeting those benchmarks, and … order [appropriation of] at least that amount of money for the benefit of the State's schoolchildren." We subsequently filed an amicus brief with the New York Court of Appeals in which it argued that the Appellate Division's decision was "legally flawed and contrary to the overwhelming evidence adduced at trial" and that it erroneously concluded that "an eighth-grade education is sufficient preparation for productive citizenship in today's complex society." Most recently, we joined with the Alliance for Quality Education to file an amicus brief with the Panel of Special Masters in September 2004 to ensure that the panel takes into account the concerns and objectives of parents, students, and educational advocates when crafting a remedy. Specifically, the brief expresses support for adequate funding for all state public schools, smaller class sizes, universal prekindergarten, qualified teachers in all classrooms, and updated facilities and learning materials.

IV. INTERNATIONAL HUMAN RIGHTS

A. Alien Tort Claims Act

SOSA v. ALVAREZ-MACHAIN

Background

Humberto Alvarez-Machain ("Alvarez"), a Mexican national, brought suit in a U.S. federal court on account of his abduction from Mexico, asserting a claim under the Alien Tort Claims Act (ATCA). Petitioner Alvarez is a medical doctor who was present at the house where an American Drug Enforcement Administration (DEA) agent was tortured and killed in 1985. In 1990, a federal grand jury indicted him in connection with the agent's death, and a warrant was issued for his arrest. According to the Ninth Circuit, the U.S. "negotiated with Mexican government officials to take custody of Alvarez, but made no formal request to extradite him." Rather, they arranged for private individuals to arrest him and transport him to the U.S. to stand trial. Alvarez was subsequently acquitted of the murder charges and brought two suits against Jose Francisco Sosa (his Mexican captor), the U.S., and the DEA agents, which were later consolidated on appeal to the United States Supreme Court.

The ATCA, 28 U.S.C. § 1350, enacted by the First Congress as part of the Judiciary Act of 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." When enacted, the law was intended to provide recourse for three types of substantive offenses that could be said to constitute the "law of nations" at that time: violation of safe-conducts, infringement of the rights of ambassadors, and piracy, the idea being, as the D.C. Circuit Court of Appeals has noted, "to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis."

Case Status

In June 2003, the Ninth Circuit Court of Appeals, sitting en banc, held that Alvarez's abductor, Jose Francisco Sosa ("Sosa"), a private individual acting under the direction of U.S. authorities, could be held liable under the ATCA. In addition to finding that a private right of action existed under the ATCA, the court rejected defendants' argument that it be limited to violations of *jus cogen* norms, "a category of 'peremptory norms' that are 'accepted and recognized by the international community of states as a whole as … norm[s] from which no derogation is permitted,'" e. g., genocide. In contrast to *jus cogen* norms, customary international norms are those to which nations consent to be bound (and thus can decide not to be bound). Because "*jus cogen* norms were not part of the legal landscape when Congress enacted the ATCA," the court held that limiting ATCA claims to such norms would contravene the history, as well as the text, of the statute. The court then refused to hold that Alvarez's transborder abduction constituted a violation of customary international human rights law, but did find his arbitrary arrest and detention to be in violation of the law of nations, and thus actionable under the ATCA.

Sosa appealed to the U.S. Supreme Court, asserting (1) that the ATCA is simply a grant of jurisdiction and does not provide a private right of action upon which

aliens may sue in U.S. federal courts, and (2) if the ATCA does provide a cause of action, it is limited to suits brought for violations of *jus cogen* norms of international law, i.e., those universally condemned and prohibited for all nations. The Supreme Court agreed to review the case, and on June 29, 2004, it unanimously held that, while foreign nationals have a limited right under the ATCA to bring damages suits in U.S. courts for harms inflicted abroad that violate a narrow category of clearly established international law principles, Alvarez's claim of arbitrary arrest did not satisfy that standard.

"Without the ATCA's provision of jurisdiction and a private right of action for foreign victims, the resolution of Holocaust-era claims would have been unlikely if not impossible to achieve."

In an opinion written by Justice Souter, the Court agreed with Alvarez that the ATCA is not simply a grant of jurisdiction, holding that the historical record shows that "Congress would [not] have enacted the [ATCA] only to leave it lying fallow indefinitely," with no possibility of making "some element of the law of nations actionable for the benefit of foreigners." The Court disagreed with Alvarez, however, in terms of the scope of what causes of action are allowed under the ATCA. While Alvarez had argued that the ATCA authorizes courts to create a private cause of action for torts in violation of international law, the Court disagreed, holding that the body of law encompassed by the 1789 statute is "only a very limited set of claims," which included piracy, infringement of the rights of ambassadors, and violation of safe conducts. Souter wrote that "[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the [ATCA] with its reference to tort."

Consequently, Souter advised judicial caution, holding that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted." Alvarez's claim, which was that his arrest was arbitrary, not because it infringed upon the prerogatives of Mexico, but because no applicable law authorized it, was rejected by the Court, which held that if such claims were authorized by the ATCA, such a rule "would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment." The Court concluded that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."

AJC Involvement

In February 2004, AJC joined with the World Jewish Congress in an amicus brief filed with the U.S. Supreme Court. The brief supported the ATCA from the perspective of victims of the Holocaust, asserting that "without the ATCA's provision of jurisdiction and a private right of action for foreign victims, the resolution of Holocaust-era claims would have been unlikely if not impossible to achieve."

The Jacob Blaustein Institute for the Advancement of Human Rights (JBI) also joined in an amicus brief submitted to the Court as part of a coalition of international human rights organizations. The JBI has promoted the ATCA as a means for giving victims of human rights abuses an opportunity to seek redress and hold gross human

rights abusers accountable for atrocities. Through the JBI, AJC has been active in promoting the ATCA as a means for giving victims of human rights abuses an opportunity to seek justice. Over the past five years, JBI has been deeply involved in a number of cases that have relied upon the ATCA as a means to hold gross human rights abusers accountable.

B. Foreign Sovereign Immunities Act

REPUBLIC OF AUSTRIA v. ALTMANN

Background

In August 2000, Maria Altmann, an elderly American citizen and niece of the original owner of six works of art by the well-known Austrian painter Gustav Klimt, filed suit in the United States District Court for the Central District of California against the Republic of Austria and the government-owned Austrian Gallery. She alleged the paintings had been wrongfully appropriated from their rightful heirs and should be returned. The paintings were originally owned by a wealthy Czech sugar magnate, Ferdinand Bloch, who resided in Austria with his wife, Adele Bloch-Bauer, in the early 1900s. In addition to the Klimt paintings, including two commissioned portraits of his wife, Bloch owned other well-known paintings, a valuable porcelain collection, a home, a castle, and a sugar factory.

When the Nazis invaded Austria in 1938, Bloch, who was Jewish and a supporter of anti-Nazi efforts before the annexation of Austria, fled to Switzerland, leaving behind all of his holdings, including the Klimt paintings. (His wife had died several years prior to the Nazi invasion.) Bloch's property was subsequently confiscated and divided up by the Nazis, and the Nazi lawyer liquidating the estate chose a few paintings for his personal collection. The lawyer later gave two of the Klimt paintings at issue to the Austrian Gallery, and sold another to the Austrian Gallery and a fourth to the City of Vienna. He kept one for his personal collection. The whereabouts of the sixth painting were unknown for many years, but it eventually ended up at the Austrian Gallery, where the other five Klimt works are now housed.

Bloch died in Switzerland in 1945, leaving his entire estate to one nephew and two nieces, including plaintiff Maria Altmann, who had also been forced to flee Austria, eventually settling in the United States. Directly after the war, in a practice later declared illegal by the Austrian government, the family was permitted to export some of its looted artwork and other property in exchange for a "donation" of the Klimt paintings. The family later attempted to recover the Klimt works, but their efforts were thwarted by Austrian policies in place at the time that limited the export of Austrian artwork. In 1998, in response to allegations that the Austrian Gallery continued to possess looted art, the Austrian government opened up its archives to permit research into the origins of the national collection, and created a committee made up of government officials and art historians to advise it as to which artworks should be returned and to whom. Despite the discovery of documents that called into doubt the Austrian Gallery's rightful ownership of the Klimt paintings, the committee recommended against returning the six Klimt paintings to Bloch's heirs.

In response to the committee's decision, Altmann and other family members com-

menced a lawsuit in Austria seeking the overturn of the committee's recommendation. However, in order to proceed under Austrian law, the family would have had to pay an initial filing fee of 1.2 percent of the amount in controversy plus additional fees. Because the amount in controversy was approximately $1.6 million, taking into account the family's ability to pay, the Austrian court determined that the family would have to pay an initial filing fee of approximately $135,000. In light of what they viewed as the prohibitive cost of the filing fee, the Bloch heirs abandoned their Austrian lawsuit.

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

Case Status

On August 22, 2000, Maria Altmann filed a lawsuit in Federal District Court in California alleging that "(1) the Nazis took the paintings from her Jewish uncle to 'Aryanize' them in violation of international law; (2) the pre-World War II and wartime Austrian government was complicit in their original takings; (3) the current government, when it learned of the heirs' rights to the paintings, deceived the heirs as to the circumstances of its acquisition of the paintings; and (4) the Republic and the Gallery now wrongfully assert ownership over the paintings." The Republic of Austria in turn urged the district court to dismiss the case for (1) lack of jurisdiction because Austria is immune from suit in the United States courts, pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA), (2) improper venue, (3) failure to join indispensable parties, and (4) forum *non conveniens*. However, on May 4, 2001, the district court rejected Austria's claims, concluding, in part, that the FSIA "applied retroactively to the events of the late 1930s and 1940s, and that the seizure of the paintings fell within the expropriation exception to the FSIA's grant of immunity."

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

On June 7, 2004, the United States Supreme Court ruled that lawsuits regarding Holocaust-era looted art and other stolen property can be brought against foreign governments in U.S. courts. Justice John Paul Stevens, writing for a 6-3 majority, held that FSIA applies to all assertions of sovereign immunity made after its enactment in 1976, regardless of whether the underlying conduct occurred prior to enactment.

The Court declared that this case does not fit into the traditional framework developed for retroactivity cases as set forth in *Landgraf v. USI Film Prods*. In *Landgraf*, the Court held that statutes affecting substantive rights may not operate retroactively absent clear congressional intent, while procedural or jurisdictional statutes may do so. In this case, the Court decided that while FSIA is not simply jurisdictional, there is "clear evidence" in the act that Congress meant for the statute to apply to pre-enactment conduct. For example, the preamble in

Section 1602 states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." The Court reasoned that this language was an unambiguous statement that "[i]mmunity 'claims'—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the Act; those claims are 'henceforth' to be decided by the courts ... regardless of when the underlying conduct occurred." The Court also cited previous cases that have applied FSIA provisions to cases involving pre-1976 conduct.

In a concurring opinion, Justice Scalia stated that the FSIA "affects substantive rights only accidentally, and not as a necessary and intended consequence of the law." In a separate concurrence, joined by Justice Souter, Justice Breyer argued that sovereign immunity has traditionally been applied in reference to a defendant's status at the time of suit, as opposed to a defendant's conduct. In a dissenting opinion, Justice Kennedy, joined by two other justices, argued that the decision ignored Austria's expectations under prior law, and that it undermined the FSIA by suggesting deference to State Department recommendations in future cases.

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

AJC Involvement

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

The American Jewish Committee

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