AJC in the Courts: 2001

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 schools 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.

Separation of Church and State

A. Religion in the Public Schools

ADLER v. DUVAL COUNTY SCHOOL BOARD

Background

The plaintiffs in this case, students and parents in a Florida school district, challenged the school board’s guidelines allowing prayer at graduation ceremonies. The guidelines provided that the graduating seniors should decide whether or not to have a brief opening or closing message at graduation ceremonies, who should give this message, and what the content of the message should be.

The stated purpose of the guidelines was to allow students alone to direct their graduation message. The words "prayer," "benediction," and "invocation" were not used in the guidelines themselves; however, the introduction made clear that they were written in response to concerns regarding the constitutionality of student-initiated prayers. Moreover, there was no requirement in the guidelines that the message be nonsectarian. There was also some evidence that the motivation behind the guidelines was to allow prayer in graduation ceremonies. (At the relevant school board meeting, several members of the school board openly stated that their desire was to have prayer at these graduations.) In accordance with the guidelines, schools delegated the decision-making to the students. Prayers were given at the commencement ceremonies of ten of the seventeen schools in the district.

The plaintiffs, after being denied a preliminary injunction, moved for summary judgment, asserting that the guidelines failed the three-pronged test articulated in the U.S. Supreme Court's seminal 1972 ruling in *Lemon v. Kurtzman*. Under *Lemon*, for a policy or program to pass constitutional muster, it must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion. The plaintiffs contended that: (1) the purpose of the guidelines was not secular, but was rather to permit prayer at graduation ceremonies; (2) by allowing prayer at a school-sponsored event, the school board was endorsing and therefore advancing religion; and (3) excessive entanglement was the inevitable result of allowing prayer at school-sponsored and school-controlled ceremonies. The defendants and intervenor-defendants (a group of students supportive of the guidelines) moved for summary judgment as well. They asserted that there was no *Lemon* violation because the school had delegated the authority to the students. The defendants also argued that a graduation ceremony was a limited public forum, and, therefore, to not allow the students to engage in religious speech would violate the Free Exercise and Free Speech Clauses.

Case Status

Relying on the Fifth Circuit Court of Appeals' decision in *Jones v. Clear Creek Independent School District II* (1992), the district court held that since school officials were not involved in the decision-making process, there was no *Lemon* violation. Moreover, the court found no coercion problem as described by the Supreme Court in *Lee v. Weisman* (1992), where the court held that a school graduation policy violates the Establishment Clause when (a) state officials direct the performance of a formal religious exercise and (b) graduating student attendance is "in a fair and real sense obligatory...." The district court also held that since graduation ceremonies are often held away from school grounds and often involve outside speakers, the ceremonies are limited public forums. Therefore, the court concluded, the state could not exclude religious speech with a content-based regulation.

The plaintiffs appealed, and on May 6, 1997, a three-judge panel of the Eleventh Circuit Court of Appeals dismissed the plaintiffs' claims for injunctive and declaratory relief because the students protesting the guidelines had graduated, rendering their claims moot. The panel refrained from ruling on the constitutionality of the guidelines, holding that the

plaintiffs had waived their claim for monetary damages by failing to allege any connection between the prayer and their damages.

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

On May 11, 1999, the Eleventh Circuit reversed the district court and struck down (2-1) the Duval County school system's graduation policy. The court determined that, under either *Lemon's* "tripartite test" or *Lee's* "graduation prayer" standard, the Duval County graduation prayer regulations were unconstitutional. However, less than one month later, in June 1999, upon a request by a member of the court, the Eleventh Circuit withdrew and vacated its *Adler II* decision, and announced that it would rehear the case en banc.

On March 15, 2000, the Eleventh Circuit rendered its en banc decision. The appellate court reversed (10-2) the panel's determination and upheld the school board's guidelines. In so doing, the court said: "The absence of state involvement in each of the central decisions—whether a graduation message will be delivered, who may speak, and what the content of the speech may be—insulates the School Board's policy from constitutional infirmity on its face."

The plaintiffs appealed to the U.S. Supreme Court, which, on October 2, 2000, granted certiorari, vacated the judgment, and remanded the case to the Eleventh Circuit for further consideration in light of its June 2000 decision in *Santa Fe Independent School District v. Doe,* in which the Supreme Court held that a school district's policy permitting "a brief invocation and/or message to be delivered during the pregame ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition" violated the Establishment Clause. Despite the similarities between the two cases, on May 11, 2001, the Eleventh Circuit reinstated its en banc judgment, once again upholding the constitutionality of the school board's policy. A petition for review of this most recent decision was filed with the Supreme Court on August 8, 2001.

AJC Involvement

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

In our briefs, we urged reversal of the district court's decisions. We argued that the guidelines circumvented the Supreme Court's holding in *Lee v. Weisman* and were a thinly veiled attempt to promote prayer at public high school graduations, in violation of the Establishment Clause. Furthermore, under Eleventh Circuit precedent, government officials may not delegate to citizens any power which, if exercised by the officials,

would impermissibly infringe a fundamental liberty guaranteed by the Constitution. Therefore, the school board's delegation to students of the decision-making authority over graduation prayer failed to sever the board's involvement in endorsing prayer at school functions. As our brief pointed out, "[t]he extensive control that schools exercise over graduation ceremonies inevitably presents the state as endorsing the content of messages that are part of the official program."

GOOD NEWS CLUB v.MILFORD CENTRAL SCHOOL

Background

Since August 1992, the Milford (N.Y.) Central School District has operated according to a "Community Use Policy" that allows district residents to use school premises after school hours for the purposes of "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public...." The policy expressly prohibits the use of school premises "by any individual or organization for religious purposes." Pursuant to this policy, a number of organizations have used school premises, including the Boy and Girl Scouts.

The Good News Club (the "Club") is a Christian youth organization, open to children aged 6-12, whose name derives from the "'good news' of Christ's gospel and the 'good news' that salvation is possible through belief in Christ." At Club meetings, among other activities, students pray, recite verse, sing the Club's theme song, are instructed in a moral lesson from the Old or New Testament, and are told a Bible story.

In September 1996, the Club applied for permission to use school facilities for its after-school meetings, stating in its application that its proposed use of the facilities was to have a "fun time of singing songs, hearing [a] Bible lesson and memorizing scripture." The superintendent of schools denied the Club's application, a decision subsequently affirmed by the Milford Board of Education's adoption of a resolution denying the Club's request. The basis for the superintendent's denial was his determination, in consultation with counsel, that the Club's proposed use of school premises was "the equivalent of religious worship ... rather than the expression of religious views or values on a secular subject matter," and thus would contravene the Community Use Policy.

Case Status

In 1997, the Club filed a complaint in federal district court against the school district, asserting deprivation of its First Amendment free speech rights, Fourteenth Amendment right to equal protection and its religious liberty rights under the Religious Freedom Restoration Act. On cross-motions for summary judgment, the district court dismissed the Club's claims and the Club appealed to the Second Circuit Court of Appeals.

Upholding the district court's decision, the Second Circuit held that the district's exclusion of the Club from the use of school facilities was constitutional under the First

Amendment. Relying on its own 1997 holding in *Bronx Household of Faith v. Community School District No. 10*, in which it determined that a school's rejection of a church's request to meet on school premises for the purpose of holding weekly religious services did not constitute unconstitutional viewpoint discrimination, the Second Circuit concluded that because the school district made a proper distinction between the "discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer" its actions did not constitute unconstitutional viewpoint discrimination.

Plaintiffs appealed the case to the U.S. Supreme Court which, on June 11, 2001, by a 6-3 vote, ruled that the school district violated the Club's free speech rights when it excluded the Club from meeting after hours at the school and that no Establishment Clause concern justified that violation. According to the majority opinion, authored by Justice Thomas and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, with Justice Breyer joining in part, by denying the Club access to the school's limited public forum on the ground that the Club was religious in nature, the school district discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. The majority concluded that the Club's activities were no more religious than those at issue in prior Supreme Court cases such as *Lamb's Chapel v. Center Moriches Union Free School District* (1993), in which the Court held that a school district's denial of an evangelical church's request to show a six-part film series concerning family values and child rearing on school premises at night amounted to unconstitutional viewpoint discrimination.

The majority added that permitting the Club to meet on school premises would not have violated the Establishment Clause because the Club's meetings were to be (1) held after school hours, (2) not sponsored by the school, and (3) open to any student who obtained parental consent. Further, the majority found unpersuasive the argument that schoolchildren are more impressionable than others such as university students and adult members of the community, and would, therefore, feel coerced by school officials or perceive the Club's use of school facilities as an endorsement of religion. The majority asserted that the danger of children misperceiving school endorsement of religion under these circumstances is no greater than the danger they would perceive a hostility toward religion if the Club were excluded from the public forum.

In sharp contrast to the majority, the dissenting justices found that to grant the Club's request would result in an Establishment Clause violation. Justices Stevens, Souter, and Ginsburg argued that the majority ignored vast factual differences between *Good News Club* and previous cases cited by the majority as precedent for its finding of viewpoint discrimination here. In his dissent, Justice Stevens pointed out that the Club's activity goes far beyond mere speech about a particular topic from a religious perspective and is "aimed principally at proselytizing or inculcating belief in a particular religious faith." Justice Souter, joined by Justice Ginsburg, in a separate opinion, emphasized that "Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian viewpoint, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion." Recognizing the

"particular impressionability of schoolchildren," and finding the nature of the audience involved crucial to the determination of the existence of an Establishment Clause violation, Justices Souter and Ginsburg stated that the school district's actions were constitutional.

Disagreeing with both the majority and dissent as to the conclusiveness of their findings, Justice Breyer, in his concurrence, reasoned that because the legal action that brought the case to the Supreme Court was the district court's decision to grant the school district's motion for summary judgment, the Supreme Court "cannot fully answer the Establishment question raised by the case." He explained that because of the specific procedural posture of the case, there may still be disputed "genuine issues" of "material fact" that remain to be resolved such as how a reasonable child participant would understand the school's role. Thus, he emphasized that the majority's holding means only that, *viewing the disputed facts as favorable to the Club*, the school district had not shown an Establishment Clause violation. Justice Breyer indicated, however, the possibility remains for the school district to make an evidentiary showing upon remand to the lower courts that might indicate a different conclusion than the one reached by the majority here.

AJC Involvement

In January 2001, AJC joined with Americans United for Separation of Church and State, the American Civil Liberties Union, the New York Civil Liberties Union, and People for the American Way Foundation and filed an amicus brief with the U.S. Supreme Court in support of the school district. In the brief, we asked the Court to delineate the margins of its holding in *Lamb's Chapel* and argued that this case was fundamentally different from that case.

Unlike the situation in *Lamb's Chapel*, which involved the use of a public school during the evening hours for similar uses by scores of community groups, this case involved children aged 6-12, escorted by their teachers immediately upon conclusion of the school day, on a weekly basis for the entire school year, to participate in a class taught by two adults in a format indistinguishable from their usual classroom instruction. This would cause a reasonable child to perceive school endorsement if the Club's request were granted. Accordingly, we argued, the school properly denied the Club's request in order to comply with the First Amendment's Establishment Clause.

B. School Aid Programs

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 Gov. 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 students were 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 may not exceed the amount charged by a 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.

The funds necessary to pay for the vouchers will be drawn from each affected school district's appropriated funds and paid directly to recipient private schools. Although the voucher plan provides that voucher payments will be made by check payable to a 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 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 religiously neutral basis, which students to accept;
3. comply with the prohibitions against discrimination on the basis of race, color or national origin;
4. agree "not to compel any student ... to profess a specific ideological belief, to pray or to worship."

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

Parents are required to notify the state of their intent to request a school voucher for their child 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 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 et al. 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, sua sponte, that it would hold a final hearing on February 24, 2000, 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 rendered a final ruling on that issue. Rejecting the defendants' argument that the Florida constitution does not clearly prohibit the legislature from providing an education through a private school but rather provides a "floor" for legislative action, the 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 distinguished prior decisions cited by defendants regarding preexisting Florida programs that authorized state payments for private school education of students with special needs on the grounds that such decisions had not addressed the issue of the constitutionality of such programs.

The court 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, and enjoined the defendants from taking any further measures to implement the program.

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. In its opinion, the appellate court disagreed with the trial court's finding of an implied

prohibition on the use of public funds for education through means other than the public school system. Rather, 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. Upon remand, defendants filed a motion requesting that the trial court judge recuse himself from the case for partiality—the judge's son was allegedly engaged to the daughter of a high-ranking executive of a plaintiff in the case. The judge refused to recuse himself. However, upon review of defendants' motion by the Florida First District Court of Appeal, the court determined that the trial court judge should recuse himself. In light of this decision, a new trial court judge was assigned to the case and is expected to soon address the issue of whether the program is constitutional under the religion clause of the Florida constitution.

AJC Involvement

The organizations involved in the challenge to 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.

In a brief submitted to the trial court, we characterized the OSP as a "comprehensive, large-scale program of publicly funded education at private schools" which would allow "up to 100% of the students at designated public schools to receive their education at private schools through state-funded vouchers." As such, we argued, 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."

SIMMONS-HARRISv. ZELMAN

Background

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

endorse the check over to the school. Approximately 80 percent of the schools eligible to participate in the program were sectarian.

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

Case Status

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

In May 1999 the Ohio Supreme Court struck down the voucher program on narrow, technical grounds. In doing so, however, the court stated that the Pilot Scholarship Program did not run afoul of the church-state separation requirements of either the U.S. or Ohio constitutions. Rather, the court found the statute to be violative of the "one-subject" rule of the Ohio constitution.

In response to the court's ruling, in June 1999 the Ohio legislature passed new legislation enabling the Cleveland voucher program, but in a separate bill so as to satisfy the court's objections. Plaintiffs again challenged the program as unconstitutional, suing in a federal district court in Ohio. In August 1999, the district court issued a preliminary injunction temporarily halting the voucher program based upon the judge's determination that the program would most likely be found to violate the Establishment Clause. However, the judge stayed part of his order so that returning students could attend their sectarian schools, but new students would not be permitted to use public funds to do so. When the Sixth Circuit Court of Appeals did not respond to state officials' request to stay the district court's order, they asked the U.S. Supreme Court to lift the injunction. On Nov. 5, 1999, the Supreme Court issued a stay, thereby allowing the program to continue until the Sixth Circuit resolved the case.

On December 20, 1999, the district court ruled that the program violates the Establishment Clause of the Constitution. In so holding, the court agreed with the Ohio Supreme Court that the program passed the first prong of the *Lemon* test in that it had a secular purpose, and also found that it did not foster an excessive entanglement between church and state. However, the court disagreed with the Ohio Supreme Court as to whether the program had the impermissible effect of advancing religion, finding that it did so both by resulting in government indoctrination of religious beliefs and by creating an incentive to attend religious schools.

In reaching this conclusion, the court compared the program to the tuition reimbursement program struck down by the U.S. Supreme Court in *Committee for Public Education and Religious Liberty v. Nyquist* (1979), and found the two to be factually indistinguishable. As in *Nyquist*, the vast majority of eligible/participating schools under the Ohio program were religiously affiliated. Thus, by the very nature of the program, the court stated, "parents do not have a genuine choice between sending their children to sectarian or

nonsectarian schools because the sectarian schools overwhelmingly predominate." Also as in *Nyquist*, grants made to sectarian schools were unrestricted, in no way guaranteeing the separation between the schools' secular and educational functions or ensuring that state financial aid only supported the former. The aid provided, the court reasoned, thus "directly benefits the religious functions of participating sectarian institutions," and therefore "has the effect of advancing religion through government-supported religious indoctrination."

The court distinguished the program from those held constitutional in post-*Nyquist* cases in which students could redeem their vouchers at any school of their choice. Under the Ohio program, the court stated, because voucher students "may only redeem their vouchers at schools which have registered and are authorized to participate in the Program … the vast majority of [which] are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution." Thus, the court concluded, the program impermissibly created incentives for students to attend religious schools.

On December 11, 2000, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision, concluding that the voucher program constituted an unconstitutional endorsement of religion and sectarian education in violation of the Establishment Clause. The Sixth Circuit, agreeing with the district court's reasoning that of all the cases interpreting *Lemon*, *Nyquist* was most on point, determined that the Cleveland program clearly had the impermissible effect of promoting sectarian schools because it (1) provided no restrictions on religious schools' use of the tuition funds, (2) discouraged the participation by schools not funded by religious institutions, (3) limited the schools to which a parent could apply the voucher funds to those within the program, (4) only provided aid to students who attended private schools, and (5) provided an incentive to choose a religious institution over a secular institution.

Distinguishing the Ohio voucher program from the generally available tax deduction upheld by the U.S. Supreme Court in *Mueller v. Allen* (1983) (involving a tax deduction for low income parents with children in any school, including sectarian ones) and other cases, the Sixth Circuit emphasized that "the idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program." In the words of the court, "the absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring."

The Sixth Circuit subsequently denied defendants' motion for a rehearing en banc, and defendants filed a petition for writ of certiorari to the U.S. Supreme Court. On September 25, 2001, the U.S. Supreme Court agreed to review the case.

AJC Involvement

AJC joined in the National Coalition for Public Education and Religious Liberty's (PEARL's) brief submitted to the Ohio Supreme Court in which we argued that "[t]he Ohio Pilot Scholarship Program violates the bedrock Establishment Clause prohibition against government financing of religious activities." Citing Supreme Court precedent, our brief pointed out that unrestricted state aid to religious institutions was unconstitutional and that the mere fact that a statute benefited secular as well as sectarian schools did not establish that it was "neutral" toward religion. Moreover, the state's attempt here to avoid a constitutional violation by funneling aid through parents elevated form over substance. The pilot program's provision of checks to parents rather than to religious schools was a "transparent fiction," since the state mailed grant checks to parents for use at approved schools and the parents were then required to endorse the checks over to the schools. Because it made state funds available to religious schools for an unrestricted range of sectarian activities, the brief argued, Cleveland's pilot program was constitutionally invalid.

AJC also filed an amicus brief in the Sixth Circuit Court of Appeals, urging the appellate court to affirm the federal district court's ruling that the voucher program is unconstitutional. Our brief argued that *Nyquist* is indeed the controlling precedent, and prohibits exactly the kind of unrestricted state funding of pervasively sectarian schools found in the Ohio program. Our brief distinguished Supreme Court decisions subsequent to *Nyquist* in which the Court approved certain forms of limited state aid to religious schools, such as *Mueller* and Committee for Public Education and Religious Liberty v. Regan (1980)(involving reimbursements with built-in safeguards to ensure that only secular services were covered) and concluded that unlike the programs at issue in those cases, the Ohio program essentially has the effect of a "direct, unrestricted subsidy of religious education."

AJC will once again take the lead in filing an amicus brief with the U.S. Supreme Court urging it to affirm the circuit court's decision.

Religious Liberty

A. Religious Accommodation

ALI v. ALAMORENT-A-CAR

Background

In December 1996, Zeinab Ali was directed by her supervisor at Alamo Rent-a-Car to remove the large head scarf she wore in accordance with her Muslim faith while at work. She objected, but her supervisor insisted and told her that if she persisted in wearing the scarf, he would move her to a position where she did not come into contact with customers. Ms. Ali acquiesced to her supervisor's request, but replaced her traditional scarf with a smaller scarf. Nevertheless, she was transferred to a part of the facility where she was less visible to customers. A year later, she was laid off due to a reduction in workforce. On July 14, 1999, Ms. Ali brought an action against her former employer in

the U.S. District Court for the Eastern District of Virginia alleging a violation of Title VII, which provides that it is a form of unlawful religious discrimination when an employer fails to reasonably accommodate an employee's religious practice unless such accommodation would pose an undue hardship on the employer.

Case Status

On December 7, 1999, the district court dismissed Ms. Ali's complaint for failure to state a cognizable claim under Title VII. The court did so on the grounds that Ms. Ali had not alleged that she had suffered any significant adverse employment action, such as demotion or loss of pay or benefits, as a result of her religious practice. To state a cognizable claim under Title VII, the court held, it is not sufficient for an employee to allege failure to accommodate reasonable religious needs. In addition to such so-called "religious detriment," according to the court, an employee must claim that she has suffered work-related detriment.

Ms. Ali appealed to the U.S. Court of Appeals for the Fourth Circuit. On appeal, Ms. Ali argued that an employer's refusal to accommodate an employee's request to wear a religiously mandated head scarf at work, when so doing would not interfere with her work in the least, gives rise to a Title VII claim even in the absence of demonstrable work-related detriment to the employee. In support of this argument, Ms. Ali cited decisions of several other circuit courts which have held that an employer's needless abridgment of an employee's religious practice was sufficient to give rise to a Title VII claim. In addition, Ms. Ali pointed out that regulations promulgated by the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, make it clear that an employer's obligation to make reasonable accommodations for an employee's religion exists wholly apart from the obligation not to discriminate on religious grounds through adverse personnel action.

On March 6, 2001, the Fourth Circuit ruled against Ms. Ali and affirmed the district court's dismissal, ruling that Title VII religious discrimination claims require a showing of adverse employment action. The court determined that because Ms. Ali did not lose her job, she had not experienced an adverse employment action. In light of the Fourth Circuit's ruling, Ms. Ali filed a petition for certiorari to the U.S. Supreme Court. However, on October 1, 2001, the Court denied Ms. Ali's petition.

AJC Involvement

AJC, together with the Metropolitan Washington Employment Lawyers Association and the American Civil Liberties Union of Virginia, filed an amicus brief with the Fourth Circuit in which we argued that an employer's requiring an employee to abandon or compromise her religious principles while at work, while refusing to make any effort at accommodation, is sufficient to invoke the protections of Title VII. Our brief cited to the EEOC regulations as well as two U.S. Supreme Court cases, *Trans World Airlines, Inc. v. Hardison* (1977) and *Ansonia Board of Education v. Philbrook* (1986), that establish the

existence of an independent duty to accommodate under Title VII, making an employer's refusal to accommodate religious beliefs a violation of that statute.

In July 2001, AJC joined in an amicus brief in support of Ms. Ali's petition for certiorari to the U.S. Supreme Court with the American Jewish Congress, Agudath Israel of America, and the Anti-Defamation League. In our brief, we asserted that the holding of the court below boils down to the proposition that employees whose religious beliefs require the wearing of distinctive garb may be banished to the workplace equivalent of the back of the bus so long as the employee suffers no measurable economic loss, or what judicial precedent has termed an "adverse employment action." We further argued that while the Fourth Circuit's narrow economic-based reading of Title VII requirements was not unique, it was not self-evidently correct, as many other courts have interpreted such factors as physical environment, type of work, ability to exploit one's talents, success on the job and contact with people as important considerations in the adverse employment action analysis.

In addition, we stressed that even if the court fails to find an "adverse employment action," segregating employees is illegal without regard to economic impact because Title VII flatly forbids an employer to "segregate ... his employees ... *in any way* which would deprive or *tend to deprive* any *individual* of employment opportunities or otherwise adversely affect his status as an employee ... because of such individual's religion" (emphasis added). That prohibition, we argued, accurately describes Alamo's action in confining Ms. Ali to its back office operation, and should apply even where there is no "adverse employment action."

TENAFLY ERUVASSOCIATION v.BOROUGH OF TENAFLY

Background

Orthodox Jewish law prohibits individuals from carrying any items on the Sabbath other than within a "private domain," typically defined as a dwelling or other enclosed area. An eruv is an unbroken perimeter that renders the area it encloses a private domain for purposes of Jewish law, thus enabling the observant to carry within its bounds. Creating an eruv has significant real-life implications for the observant in that it grants freedom of movement on the Sabbath to those who would otherwise be homebound. This would include handicapped or incapacitated people who depend on crutches or canes, or parents of toddlers who must be wheeled in baby carriages or strollers, since such activities, absent the eruv, are considered "carrying" and are impermissible.

According to Jewish law, an eruv must be at least forty inches high and continuous. Since it will generally encompass an area containing many private homes and public thoroughfares, in most instances the eruv will take advantage of existing telephone and utility poles and wires; with vertical strips, often plastic or rubber, serving as the sides of a symbolic "doorway." Because the physical structure of the eruv is usually at approximately the same height as power lines attached to utility poles, it is rarely noticeable, and thus does not constitute an actual physical barrier. A large number of

communities around the United States, including ones in the New York, Washington, D.C., and Los Angeles areas, presently have eruvim.

Tenafly, a New Jersey suburb with approximately 14,000 residents, has a racially and religiously diverse population, to which a fledgling Orthodox community has recently been added. This community erected its eruv approximately two years ago, after obtaining a license from the local telephone and cable companies to attach a cord to their utility poles, and then approached the mayor with a request that she issue a "ceremonial proclamation." According to newspaper reports, the mayor brought the issue before the town council, which demanded that the group officially apply for a permit for the eruv. It did so, and the town council voted 5-0 against granting the application. The mayor then ordered the eruv's removal.

Case Status

In mid-December 2000, a group representing fifteen Orthodox families residing in Tenafly, N.J., filed a federal discrimination suit against the borough of Tenafly and its mayor (collectively the "Town") for their refusal to grant them a permit for an eruv. The group, known as the Tenafly Eruv Association, sought a restraining order to prevent the borough from removing the eruv it had already erected. On December 15, a New Jersey federal district court granted a temporary restraining order, and ordered a hearing to decide whether to grant a permanent injunction.

On August 10, 2001, Judge William G. Bassler rendered his decision in the case, denying the Tenafy Eruv Association's motion for a preliminary injunction that would prohibit the Town from dismantling the eruv. In his decision, the judge found that the eruv constituted symbolic speech for the purpose of First Amendment analysis, but that the utility poles upon which the eruv is strung are a nonpublic forum. Therefore, the court determined, the Town may restrict access to the poles based upon subject matter and speaker identity, so long as its restrictions are reasonable in light of the purpose served by the forum and viewpoint neutral.

The judge also disposed of plaintiff's free exercise claim, stating that while "the First Amendment restrains certain governmental interference with religious exercise, it does not require governmental action to facilitate that religious exercise." He then cited the Supreme Court's 1990 decision in *Employment Division v. Smith* for the proposition that government need not allow exceptions to a neutral, generally applicable law to avoid a free exercise violation. Furthermore, the judge stated that accommodating plaintiffs' request for an eruv "would amount to granting a sectarian group preferential access to governmental property, and would violate the Establishment Clause" because the controlling local ordinance is a "neutral regulation of general applicability."

Finally, with respect to plaintiff's Fair Housing Act (FHA) claim, the court found the town had not violated the relevant portion of the FHA, which makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person

because of ... religion ...." Rather than impacting the *ability* of Orthodox Jews to live in Tenafly, the judge said that the Town's refusal to permit the eruv impacted their *desire* to do so, and as such was not actionable.

Shortly after the district court issued its decision, plaintiffs filed a notice of appeal with the Third Circuit, but Judge Bassler denied their request for a stay pending appeal so that the eruv could be maintained until the dispute is finally resolved. Plaintiffs appealed the judge's denial of a stay, which the Third Circuit reversed, allowing the eruv to remain in place while it considers the merits of the case.

AJC Involvement

In November 2001, AJC, together with the Anti-Defamation League, Ethics & Religious Liberty Commission of the Southern Baptist Convention, and Hadassah, joined an amicus brief authored by the Union of Orthodox Jewish Congregations of America on behalf of plaintiffs in their appeal to the Third Circuit. In our brief we argued that the Town's denial of permission to utilize its utility poles for the erection of an eruv constituted a denial of appellants' free exercise rights guaranteed by the First Amendment and should be subject to strict scrutiny. Furthermore, the Town's denial of permission to affix plastic strips to utility poles for the purpose of the eruv while permitting such strips, and other items, to be placed upon utility poles for other purposes failed to withstand review under a strict scrutiny standard. In addition, citing numerous instances in which the court has upheld governmental accommodation of religious observances, we asserted that the Town's accommodation of the eruv was not barred by the Establishment Clause.

B. Zoning

CITY OF CHICAGO HEIGHTS v. LIVING WORD OUTREACH FULL GOSPEL CHURCH AND MINISTRIES, INC.

Background

In order to counter the city's economic decline, the city of Chicago Heights in December 1995 adopted a comprehensive zoning plan that included commercial zones intended to foster economic development. According to the zoning plan, churches could be located anywhere in a residential zone, or in a "B-2 commercial" zone if granted a special use permit. In January 1996, the Living Word Outreach Full Gospel Church purchased a property located within a B-2 commercial zone, but did not apply for a special use permit until after it took possession of the property.

Pursuant to a city ordinance, special use permits were granted where the special use would not "(1) be unreasonably detrimental to or endanger the public health, safety, morals, comfort or general welfare; (2) be injurious to the use and enjoyment of other property in the immediate vicinity or substantially diminish and impair property values in the neighborhood; or (3) impede the normal and orderly development and improvement of surrounding property for permitted uses." The church applied to the city council for a

special use permit, but the application was denied because the church was situated in an area zoned for economic development purposes. Despite the denial, the church continued to operate in its new location. When the church failed to heed the city's citations, the city brought suit in Illinois state court to enjoin the church's operations.

Case Status

The trial court rejected the city's request for an injunction, finding that the city's denial of the special use permit was "arbitrary and capricious and not substantially related to the public health, safety or welfare," and that the church had met all the requirements for a permit. In a subsequent order, the court permanently enjoined the city from enforcing the ordinance against the church, and also held that the city's actions violated the First Amendment's Free Exercise Clause. The city appealed those rulings.

In December 1998, the Appellate Court of Illinois, First District, Third Division, held that under the state Religious Freedom Restoration Act (the state RFRA) the usual presumptive validity of zoning ordinances and special uses gives way to a more stringent burden for the city. Because free exercise rights were burdened by the zoning ordinance, the city had to show that its interest in the adoption of the ordinance was compelling and that the ordinance was the least restrictive means of furthering that interest. Despite this more stringent test, the appellate court held that the ordinance was valid because the city had a compelling interest in enforcing its zoning laws and the ordinance served the public health, safety and morals. Since the ordinance only affected the 40 percent of the city zoned for commercial use, and therefore the church had access to the "majority of the city," the court went on to hold that the ordinance was the least restrictive means of achieving the city's interest.

On March 22, 2001, the Illinois Supreme Court reversed the appellate court's decision ordering the trial court to grant the injunctive relief sought by the city, and directed the trial court to enter judgment ordering the city to issue an order requiring the city to grant the church's application for a special use permit.

Like the trial court, the Illinois Supreme Court concluded that the city council's denial of the church's application was arbitrary and capricious, and bore "no substantial relation to the public health, safety, morals, comfort and general welfare" (citations omitted). The Supreme Court emphasized that the city council offered no reason for denying the application, other than its belief that all noncommercial uses would thwart the city's recently devised "comprehensive" development plan. However, the court reasoned, the city council was required to follow the requirements set forth in the zoning laws, which allowed for noncommercial uses in the area at issue, not the comprehensive development plan. To elevate the plan over the zoning laws, said the court, would be inappropriately permitting the council to suspend the expressed intent of the ordinance.

The court did not address the church's contentions that the city violated the Illinois RFRA and the church's constitutional rights when the city denied the church's application for a special use permit.

AJC Involvement

AJC joined in an amicus brief filed in the Illinois Supreme Court supporting the church's right to operate in its present location. Other organizations signing onto the brief include the Anti-Defamation League, American Jewish Congress Midwest Region, Catholic Conference of Illinois, Christian Legal Society, and Greek Orthodox Diocese of Chicago. Our brief emphasized that the Illinois RFRA was a valid exercise of the Illinois General Assembly's broad authority to enact legislation for the general welfare of Illinois citizens, including the protection of their basic civil liberties. We urged the Illinois Supreme Court to affirm the appellate court's ruling that the city's actions constituted a substantial burden on religious exercise, but to reject the appellate court's perfunctory application of RFRA. For example, the city's permitting meeting halls to locate in similar business districts without special use permits demonstrates the absence of a compelling governmental interest in enforcing the zoning ordinance against the church. Because RFRA mandates the application of a stringent standard where the government interferes with religious exercise rights, the city's interest in enforcing the ordinance against the church "must be *genuinely* compelling, and there must be no other means of protecting it."

Civil Liberties/Discrimination

A. Capital Punishment

McCARVER v.NORTH CAROLINA

Background

In 1992, Ernest P. McCarver was convicted of first-degree murder and robbery with a dangerous weapon and sentenced to death. The jury that convicted and sentenced him never heard an expert diagnose him as mentally retarded, although they did hear evidence of his childlike functioning. However, a leading scholar on mental retardation interviewed and tested Mr. McCarver and concluded that he is mentally retarded based upon a number of factors, including the fact that his IQ "falls in the bottom one percent of the general population and is consistent with the reading level of about third grade."

Following a series of protracted legal proceedings, the North Carolina secretary of corrections set Mr. McCarver's execution date for March 2, 2001. After the execution was set, Mr. McCarver filed a petition for a writ of habeas corpus, arguing that executing mentally retarded individuals violates the Eighth Amendment's proscription against "cruel and unusual punishment." Pursuant to that petition, a state trial judge issued a stay of his execution on February 27, 2001, the state of North Carolina sought to dissolve the stay, and on February 27, 2001, the North Carolina Supreme Court vacated the stay and denied Mr. McCarver's petition for a writ of habeas corpus in its entirety.

Case Status

The U.S. Supreme Court, which initially denied certiorari in January 2001, granted cert in March 2001 on the question of whether executing mentally retarded individuals violates the Eighth Amendment's prohibition against "cruel and unusual punishment."

In its 1989 decision in *Penry v. Lynaugh*, which also involved the constitutionality of imposing capital punishment on the mentally retarded, the Supreme Court noted that the Eighth Amendment's proscriptions are not static. Rather, "the prohibition against cruel and unusual punishment ... recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" In order to ascertain the current "standard of decency," courts look to evidence of a national consensus with regard to a particular form of punishment. At the time of the *Penry* decision, only one state (Georgia) had in place a ban against the execution of retarded persons. Finding Penry's evidence—public opinion surveys showing public opposition to the execution of the mentally retarded—insufficient proof of a national consensus on the issue, the Court declined at that time to find the practice in violation of the Eighth Amendment.

In his petition for certiorari filed with the Supreme Court, Mr. McCarver argued that a national consensus against the execution of the mentally retarded has emerged since the *Penry* decision such that it now violates the Eighth Amendment's prohibition against cruel and unusual punishment. As evidence of a national consensus, Mr. McCarver pointed to the fact that since *Penry*, twelve additional states have banned the execution of the mentally retarded. He also noted that "when combined with the twelve states and the District of Columbia that have prohibited the death penalty altogether, ... the majority of jurisdictions in this country prohibit the execution of the mentally retarded."In addition to state legislation, Mr. McCarver pointed to municipalities that have passed resolutions calling for a moratorium on the death penalty in states, such as North Carolina, where the execution of the mentally retarded has not been statutorily prohibited.

Subsequent to the Court's granting cert in *McCarver*, the North Carolina legislature enacted a law prohibiting the execution of the mentally retarded in that state, thereby rendering the case moot. However, the Court has since agreed to review the case of *Atkins v. Virginia*, which raises the same constitutional question.

AJC Involvement

AJC joined in an amicus brief in the *McCarver* case filed by the United States Conference of Catholic Bishops that 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. The brief was signed by an interfaith coalition of organizations, all of whom agree that executing the mentally retarded violates the Eighth Amendment. In stating its views concerning the execution of persons with mental retardation, AJC emphasized that it opposes capital punishment in general, which it believes is cruel, unjust, and incompatible with the dignity and self-respect of man, and in particular with respect to the execution of mentally retarded individuals. We will be joining in a similar brief in the *Atkins* case.

B. Freedom of Speech

AMERICAN COALITIONOF LIFE ACTIVISTS (ACLA) v.
PLANNEDPARENTHOOD

Background

In 1997, five doctors and two clinics that provided reproductive health services, including abortions, brought an action in federal district court in Oregon seeking injunctive relief and damages from fourteen individual defendants and two organizations. Plaintiffs' complaint stated that the lawsuit "seeks to protect plaintiffs … against a campaign of terror and intimidation by defendants that violates the Freedom of Access to Clinic Entrances Act," which prohibits the use of threats to intimidate any person from receiving or providing reproductive health services. The plaintiffs sought to enjoin the defendants from continuing their "campaign" and, more specifically, from publishing certain documents that plaintiffs contended were actionable as "true threats."

The individual defendants in this action were leaders and active participants in the movement to outlaw abortion, which they believed was equivalent to murder, who advocated the use of violence against abortion providers and contended that the murder of abortion providers was "justifiable homicide." As part of their campaign to stop abortions, defendants issued four "documents" that formed the basis for the lawsuit:

1. A "Deadly Dozen" poster, listing the names, addresses, and telephone numbers of twelve abortion doctors under the heading "GUILTY of Crimes Against Humanity." Stating that abortion was prosecuted as a "war crime" at the Nuremberg trials, the poster offered a $5000 reward for "information leading to the arrest, conviction and revocation of license to practice medicine" (sic).
2. A poster with a photograph of plaintiff Dr. Robert Crist underneath the words "GUILTY of Crimes Against Humanity" and the statement that abortion was prosecuted as a war crime at Nuremberg. The poster listed Dr. Crist's home and work addresses, referred to him as a "notorious Kansas City abortionist," and offered in bold letters a "$500 REWARD," under which it stated in smaller letters "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines."
3. A bumper sticker distributed by defendants, stating in large black letters "EXECUTE," and then in red letters "Murderers" and "Abortionists."
4. The "Nuremberg Files," which originally consisted of a box containing identifying information, including photographs, of doctors who provided abortions. The Nuremberg Files were subsequently placed on an Internet website, which stated at the top, against a backdrop of images of dripping blood: "VISUALIZE Abortionists on Trial." It also indicated that the ACLA was "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity …. [E]verybody faces a payday someday, a day when what is sown is reaped." The names of 294 individuals then appeared under the headings "ABORTIONISTS: the shooters," "CLINIC

> WORKERS: their weapons bearers," "JUDGES: their shysters," "POLITICIANS: their mouthpieces," "LAW ENFORCEMENT: their bloodhounds," and "MISCELLANEOUS BLOOD FLUNKIES." The document suggested that the reader "might want to share your point of view with this 'doctor' …."

The context for the lawsuit was the escalation of violence against abortion providers over the last decade, as the debate between those in favor of a woman's constitutional right to end a pregnancy and those opposed to reproductive choice has become more inflamed. In March 1993, the "debate" turned deadly when Dr. David Gunn was shot and killed by Michael Griffin while entering his Pensacola, Fla., clinic. Prior to his murder, Dr. Gunn had been the subject of an old Western-style "wanted poster," distributed in the Florida and Alabama areas where Dr. Gunn worked, featuring personal information about the doctor, including his name, photograph, and address. Dr. George Patterson was subsequently murdered in Mobile, Ala., in August 1993, following the publication of a wanted-style poster containing personal information about him. The violence continued in 1994 when Dr. John Bayard Britton, Dr. Gunn's replacement, and his volunteer security escort, James Barrett, were gunned down outside the Pensacola clinic following the release of an "unWANTED" poster containing Dr. Britton's name, photograph, and physical description. Later that year, John Salvi opened fire at two Massachusetts clinics, killing two clinic workers and wounding five others. Most recently, Dr. Barnett Slepian, a Buffalo, N.Y., physician, was shot and killed by a sniper while standing in the kitchen of his home.

In response to the increasingly aggressive tactics of extremist elements within the antichoice movement, Congress in 1994 enacted the Freedom of Access to Clinic Entrances Act (FACE).

Case Status

The issue before the district court on defendants' summary judgment motion was whether any of the four challenged documents constituted "true threats" actionable under FACE, or whether they were "protected speech" under the First Amendment. According to the Ninth Circuit's interpretation of Supreme Court precedent, a "true threat" has been made when "a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person." To impose liability upon the speaker of a true threat, it is not necessary that the speaker intends or even has the ability to carry out the threat. Moreover, a statement need not be expressly threatening to be actionable. Rather, the "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners."

Because of its concern that the First Amendment's free speech guarantee might be abridged in this case, the Oregon affiliate of the American Civil Liberties Union (ACLU) filed an amicus brief with the district court in which it advanced an alternative analysis for the determination of what constitutes a true threat. Viewing the Ninth Circuit's test as incorporating only an *objective* component, the ACLU urged the district court to also inquire into the subjective intent of the speaker. The ACLU proposed that:

A challenged statement should be considered a true threat only where:

(1) considering all relevant factual circumstances, a reasonable recipient of the communication would interpret the statement as communicating a serious expression of an intent to inflict or cause serious harm to the recipient (the "objective test"); and

(2) the speaker intended that the communication be taken as a serious expression of an intent to inflict or cause serious harm to the recipient, thereby intending to place the recipient in fear for his or her safety (the "subjective test").

This proposed analysis, the ACLU argued, would sufficiently protect free speech rights, while allowing for the imposition of liability in order to punish and deter true threats.

The district court rejected the ACLU's analysis and concluded that the existing Ninth Circuit test for true threats sufficiently safeguarded First Amendment rights. Moreover, it found that the only distinction between this case and existing Ninth Circuit case law was the absence of expressly threatening language in the challenged communications here. Given the Ninth Circuit's determination that the "true threats" analysis includes an examination of the factual context in which the alleged threats were uttered, the court held that the lack of expressly threatening language does not require the application of a different legal test.

Applying Ninth Circuit law to the facts before it, the district court ruled that three of the challenged documents were actionable as true threats: the Deadly Dozen poster, the Crist poster, and the Nuremberg Files. In contrast, it determined that the challenged bumper sticker was not actionable because the evidence did not show that it could be reasonably interpreted "as a serious expression of an intention to inflict bodily harm" on any of the plaintiffs.

After a three-week trial, in February 1999, the jury returned a verdict in favor of plaintiffs in the amount of $107 million in damages. In conformity with that verdict, the court then issued an order permanently enjoining defendants from intentionally threatening plaintiffs, and from publishing or distributing the documents at issue.

Upon appeal by defendants to the Ninth Circuit, a three-judge panel issued a unanimous opinion on March 28, 2001, vacating the jury's verdict and the district court's injunction and entered judgment for the defendants. Ruling that the defendants' statements are political speech protected by the First Amendment, the appellate court said it was following the U.S. Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.*, in which the Court held that civil liability could not be imposed on individuals who had threatened violence against African Americans who did not observe an economic boycott of white businesses. The panel also pointed out that the defendants' statements "not only fail to threaten violence by the defendants, but fail to mention future violence at all." Thus, the court held, allowing the jury to infer that defendants' statements are true threats on account of the context of violence surrounding the abortion debate "could have

a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause."

In light of the panel's opinion, plaintiffs requested a rehearing en banc and on October 3, 2001, the Ninth Circuit granted the request. We are now awaiting a decision.

AJC Involvement

In October 1999, AJC, the Anti-Defamation League, and Hadassah filed a joint amicus brief in the Ninth Circuit authored by Professor Erwin Chemerinsky of the University of Southern California Law School, arguing that the standard of the "true threats" applied by the district court was correct and should be upheld. "Political hyperbole is protected speech," the brief argues, "making people fear for their lives is not."

In support of plaintiffs' petition for rehearing en banc, AJC joined again in an amicus brief authored by Professor Chemerinsky urging the full court of the Ninth Circuit to rehear the case. Our brief argued that the panel's decision conflicts with both existing Ninth Circuit precedent and Supreme Court precedent on the law of "true threats." First, we pointed out that the panel ignored the firmly established principle that it is for the jury to decide, based upon the totality of the circumstances, whether speech constitutes a true threat. Second, we argued that the panel's ruling that true threats require the speakers personally to have the means and intent to carry out the threats themselves contradicts established Ninth Circuit law. Finally, our brief distinguished *Claiborne Hardware*, which involved statements made to a crowd and was an action brought by individuals who were not the targets of the threats, i.e., the owners of the boycotted businesses. In contrast, this case involves targeted threats at particular individuals and the plaintiffs seeking a remedy are the individuals who were threatened.

Our brief was resubmitted to the court upon its decision to rehear the case en banc.

C. Immigration

ST. CYR v. IMMIGRATION AND NATURALIZATION SERVICE (INS)

Background

This suit involved Enrico St. Cyr, a Haitian native who was admitted to the United States as a lawful permanent resident in June 1986. In March 1996, St. Cyr pleaded guilty to the sale of narcotics. This was before the enactment of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a law making it far easier for the INS to deport immigrants convicted of criminal offenses. On April 10, 1997, after the new law had gone into effect, the INS instituted "removal" (the new term used to describe deportation) proceedings against him. St. Cyr then asked to apply for a special waiver of deportation known as "212(c) relief," which application entailed asking the attorney general to consider the impact of immigration on an alien's family and, if the attorney general should so deem appropriate, to waive deportation. The right to apply for 212(c)

relief had been available to legal permanent residents prior to the effective date of the 1996 legislation (which repealed it), and therefore had been available at the time St. Cyr made the decision to plead guilty to a deportable offense. The immigration judge and the Board of Immigration Appeals held, however, that he could no longer apply for 212(c) relief, regardless of what law was in place at the time of his conviction, because such relief was no longer available at the time of the removal proceedings themselves.

Case Status

In 1999, St. Cyr filed a petition for habeas corpus relief in the U.S. District Court for the District of Connecticut. The district court ruled that it could consider the petition, rejecting INS arguments that the 1996 law barred habeas corpus jurisdiction. It then ruled that the INS was wrong to deny St. Cyr a chance to apply for 212(c) relief, holding that Congress could not have intended to retroactively change the legal landscape that immigrants such as St. Cyr had relied on. The INS appealed to the Second Circuit, which rendered its decision on September 1, 2000.

Regarding the jurisdictional issue (i.e., whether the court had jurisdiction to review INS deportation orders), the Second Circuit held that while the IIRIRA provisions that curtailed judicial review of deportation orders prevented the court from hearing most types of appeals from immigrants who had been ordered deported for committing criminal offenses, it did not bar the court from hearing appeals based on habeas corpus petitions.

Having found that it still possessed the right to review deportation orders through habeas corpus jurisdiction, the court turned to the issue it was petitioned to review, i.e., whether the repeal of 212(c) applied to cases where an immigrant had been convicted of deportable offenses before the law had gone into effect. The court found that the fact that the 212(c) waiver was in effect at the time that St. Cyr pleaded guilty to a deportable offense could reasonably have been a factor motivating him, and others in his situation, to enter a guilty plea in the first place. By entering a guilty plea, which usually leads to a lighter sentence than is risked by going to trial, he willingly made himself subject to deportation proceedings; but he did so with the understanding that he would be eligible to apply for a waiver that would allow him to stay in the United States. The retroactive application of the repeal of 212(c) relief would thus attach new legal consequences to a decision that was made in reliance upon the laws he had expected to apply to his case. Because Congress had not clearly indicated its intention to produce such a retroactive effect, it was not permissible in a case such as St. Cyr's, and the Second Circuit affirmed the district court's ruling that St. Cyr was allowed to apply for a 212(c) waiver. The INS appealed to the U.S. Supreme Court.

On June 25, 2001, the Supreme Court, by a 5-4 vote, led by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, affirmed the circuit court's judgment. The Court reasoned that pursuant to canons of statutory construction, IIRIRA did not repeal the federal courts' habeas jurisdiction, as Congress failed to make any clear and unambiguous indication of its intention to do so. Moreover, the Court emphasized, to

conclude that the writ of habeas corpus is no longer available in this context would represent a departure from historical practice in immigration law. Thus, the Court concluded federal courts do have jurisdiction to hear habeas petitions brought by lawful permanent residents.

Second, the Court held, for reasons of fairness and pursuant to canons of statutory construction, 212(c) relief remains available for aliens, like St. Cyr, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect. To reach its conclusion, the Court emphasized the Supreme Court's long-standing presumption against retroactive application of ambiguous statutory provisions. Upon its review of Congressional intent regarding the retroactive application of the repeal of 212(c) relief, the Court determined that Congress had failed to clearly indicate that it intended the retroactive application of the repeal of discretionary relief. Further, citing previous Supreme Court decisions on retroactivity, the Court stated that "the judgment of whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance and settled expectations." In light of these factors, the Court concluded that because of the frequency with which 212(c) relief was granted in the years leading up to IIRIRA, the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial. Thus, the Court concluded that because of an alien's reasonable reliance on the continued availability of discretionary relief from deportation, and lack of clear congressional intent to the contrary, the elimination of such relief must not have a retroactive effect.

AJC Involvement

AJC joined as amicus in the U.S. Supreme Court in a brief filed on behalf of St. Cyr urging the Court to uphold the decision of the Second Circuit. Our brief, filed by a coalition that included the Florida Immigrant Advocacy Center, American Immigration Lawyers Association, National Council of La Raza, Mexican American Legal Defense and Educational Fund, Asian American Legal Defense and Education Fund, Lutheran Immigration and Refugee Service, Leadership Conference on Civil Rights, and Hebrew Immigrant Aid Society, argued that the elimination of 212(c) relief for lawful permanent residents with pre-IIRIRA convictions would be nothing short of a radical change in immigration law that would result in the mandatory deportation of many deserving lawful permanent residents, with respect to whom compelling equities against deportation exist and who would therefore be likely to prevail if given the opportunity to apply for 212(c) relief. Moreover, it would be unfair to deprive them of the opportunity to apply for such relief when they relied on its availability when making a decision about how to plead.

D. National Origin Discrimination

ALEXANDER v.SANDOVAL

Background

Alabama, like almost every other state, historically has administered the written part of its driver's license exam in a variety of foreign languages. However, in 1990 the state legislature ratified an amendment to the Alabama constitution stating that "[t]he legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." The Alabama Department of Public Safety (the "Department") subsequently adopted the requirement that the driver's license exam be administered in English only.

Case Status

In 1996, Martha Sandoval initiated a class action suit in federal district court against the Department. The suit alleged that the Department's policy constituted discrimination on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, which prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program, and sought to permanently enjoin the Department from continuing to test only in English. On June 3, 1998, the district court found that the English-only policy exerted an adverse and disproportionate impact on thousands of Alabama residents of foreign descent, and ruled that it violated Title VI.

The Department appealed to the U.S. Court of Appeals for the Eleventh Circuit, arguing (among other things) that no private right of action exists under Title VI to enforce discrimination in the absence of a showing of discriminatory intent. The court disagreed, holding on November 30, 1999, that regulations promulgated under Title VI by both the Department of Transportation and the Department of Justice prohibit funding recipients (such as the Alabama Department of Public Safety) from taking any action that results in a disparate impact on the basis of national origin, and that U.S. Supreme Court precedent supports recognition of an individual's right to bring a cause of action to enforce these regulations.

On April 24, 2001, the U.S. Supreme Court handed down its 5-4 decision in the case, which agreed with Alabama that private citizens have no right to challenge such a policy. Written by Justice Scalia, the majority decision held that while Title VI allows individuals to sue for intentional discrimination, it does not allow them to bring so-called "disparate impact suits," i.e., suits based on the discriminatory impact of regulations as opposed to discriminatory intent.

Writing for the dissent, Justice Stevens called the ruling "the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress."

AJC Involvement

AJC joined as amicus in the U.S. Supreme Court in a brief opposing the Department's appeal, which focused on the issue of whether an implied private cause of action exists under Title VI. Our brief, filed by a coalition that included the Anti-Defamation League,

the National Women's Law Center, and Trial Lawyers for Public Justice, argued that the challenge to Alabama's policy is based on well-settled civil rights law, which supports a private litigant's right to bring an action to enforce the disparate impact regulations adopted by federal agencies to effectuate Title VI. The brief first argued that earlier Supreme Court decisions (e.g., *Cannon v. University of Chicago* (1979), which established the availability of a federal private right of action to enforce federal rights created under Title VI of the Civil Rights Act of 1964), subsequent congressional legislation (e.g., the Rehabilitation Act Amendments of 1986, which abrogate the states' Eleventh Amendment immunity under Title VI and other civil rights statutes) and the legislative history of the Civil Rights Restoration Act of 1987, all attest to the availability of a private right of action to enforce Title VI against recipients of federal financial assistance. The brief then argued that the disparate impact regulations adopted to effectuate Title VI were intended as an integral part of the civil rights enforcement scheme, and are therefore equally enforceable through a private right of action.

E. 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.

Case Status

A federal court jury convicted Nelson and Price under 18 U.S.C. §245(b)(2)(B) for violating the civil rights of Rosenbaum. 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.

On May 15, 2000, the U.S. Supreme Court rendered a decision in the case of *U.S. v. Morrison*, which involved a challenge to the civil remedy provided for in the Violence Against Women Act. In its 5-4 ruling in *Morrison*, the Court continued its recent trend of narrowly interpreting congressional authority to enact legislation under the Commerce Clause (Article I, §8) and section 5 of the Fourteenth Amendment ("§5"). In striking down the statute, the Court rejected the argument that under the Commerce Clause "Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Court also held that the statute could not be sustained under §5, because it was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."

In light of the *Morrison* ruling, 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). The court heard oral argument in the case in January 2001, and a decision is awaited.

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 statute's constitutionality. The brief argued that the statute in question is constitutional under the Commerce Clause, as an essential part of a larger regulation of economic activity (and therefore distinguishable from the statute struck down in *Morrison*).

The brief further argued that the statute is constitutional under the Thirteenth Amendment, which provides:

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

The Supreme Court has interpreted this language as giving 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. Furthermore, in *Shaare Tefila Congregation v. Cobb*, the Supreme Court held that Jews constitute a "race" for the purpose of a discrimination claim asserted under 42 U.S.C. §1982, which has its constitutional basis in the Thirteenth Amendment.

The amicus brief thus 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.

F. School Funding Equity

CAMPAIGN FOR FISCAL EQUITY v. STATE OFNEW 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 antidiscrimination 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 school children.

Case Status

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.

After a seven-month trial, seventy-two witnesses, and the admission of 4,300 documents into evidence, Justice DeGrasse concluded that CFE had met the challenge set for it by the Court of Appeals. In his ruling, the judge defined a "sound basic education" as one that gives students "the foundational skills that [they] need to become productive citizens capable of civic engagement and sustaining competitive employment." The judge then held that (1) "the education provided New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York State Constitution" and that "the State's actions are a substantial cause of this constitutional violation," and (2) "the State school funding system has an adverse and disparate impact on minority public school children and that this disparate impact is not adequately justified by any reason related to education."

In ruling 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 October 25, 2001, the Appellate Division, First Department of the New York State Courts heard oral argument in the case. A decision from that court is now awaited.

AJC Involvement

In September 2001, AJC joined in an amicus brief in support of plaintiffs, which began by pointing out that "public education is the bulwark of our democratic system." Because Justice DeGrasse's order did not contain specifics as to a remedy, amici expressed concern that the legislature will be slow in developing remedies and that ultimately such remedies will prove inadequate. Accordingly, we urged the appellate court to mandate that the trial court consult with an independent panel of experts in order to "stipulate specific benchmarks of a sound basic education, ... determine the actual cost of meeting those benchmarks, and ... order defendants to appropriate at least that amount of money for the benefit of the State's schoolchildren." Amici otherwise expressed support for the trial court's ruling.