

Civil Rights Report

**ADL in the Courts
Litigation Docket 2002**

1913-2003



OUR 90TH YEAR

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2002 Litigation Docket

INTRODUCTION

Civil rights battles long thought settled were reignited in the post-September 11 world. Questions concerning fundamental democratic values were raised: where do civil rights balance with safety? What is the role of the federal government in protecting civil rights? What does religious freedom mean and what are its parameters? Finally, we were forced to ask other fundamental questions as well: what can we do at a time when Israel's very existence is at stake?

In response to these difficult questions, the Legal Affairs Department responded with a renewed flexibility and creativity. For instance, while we continued our traditional role filing *amicus curiae* -- "friend of the court" -- appellate briefs, we expanded our activity elsewhere. We testified at the United Nations Committee on Human Rights, we weighed in (for the first time) on non-Supreme Court nominations, we became involved in more trial level advocacy, we expanded how we monitor and track federal regulatory activity and how we monitor state-based legislation and state courts, we became involved in legal advocacy for Israel. In a word, the world has changed and so have we.

Since these activities are complementary to our work in the Courts, and because they will provide the reader with insight into how the Legal Affairs Department advances ADL's important agenda, discussions of these activities will also be included in this year's Docket.

As always, this year's Docket features a full slate of cases involving critical civil rights issues, from cross burnings to Bible clubs, vouchers to religious worship, and beyond. From a dramatic loss in the Supreme Court vouchers case to a solid victory in the Ninth Circuit's "Nuremberg Files" case, 2003 was an important year for ADL and for civil rights in America.

I. SEPARATION OF CHURCH AND STATE

ADL's commitment to religious freedom leads the League to take a leading role in the defense of a high wall of separation between church and state. The Legal Affairs Department's work in this area reaches back to 1948, where we filed a brief in *Illinois ex. Rel. McCollum v. Board of Education*, questioning whether released time for religious instruction in public school classrooms was constitutional.

While ADL's involvement with church-state litigation historically recorded successes in building a high wall of separation between church and state, deepening divides on the Supreme Court have reversed that trend, with losses in cases such as *Good News v. Milford*. This year proved to be no less disappointing given the Supreme Court's ruling in *Zelman v. Harris-Simmons*. That decision, discussed in detail below, held that a Cleveland, Ohio voucher program passed First Amendment muster. While this ruling was a setback to our notion of First Amendment values, we believe that there are reasons for hope. The ruling in *Zelman* was narrow and fact specific, vouchers remain unpopular (and tend to be defeated when subject to popular vote), and we believe that vouchers run afoul of specific religious freedom provisions contained in a majority of state constitutions.

Notably, charitable choice and vouchers represent the largest direct funding of religion in American history. Because of the nature of some of this funding – grants to individual grantees and block grants to states – never before has so much money flowed to religion and never before has that flow been as decentralized as it is today.

The year 2002 also saw the first rulings in response to so-called "charitable choice." Charitable choice allows government funding to be provided to pervasively sectarian institutions (churches, synagogues, mosques) so that they can provide social services. Again, these decisions are discussed in detail, below.

FROM THE STATEMENT OF INTEREST IN THE ADL'S BRIEF IN THE SCHOOL VOUCHERS CASE

. . . Among ADL's core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy.

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ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

A. SCHOOL VOUCHER PROGRAMS

***Zelman v. Simmons-Harris*, 234 F.3d 945 (6th Cir. 2000), cert. granted, 122 S. Ct. 23 (2001), reversed, 122 S. Ct. 2460 (2002)**

Immediately before the end of last term, the Supreme Court handed down an unfortunate decision that severely undermines religious freedom in America. In a 5-4 decision, the Court held constitutional a Cleveland, Ohio school voucher program. As it had done in the courts below, ADL filed an *amicus* brief in the Supreme Court, arguing that school vouchers are an unconstitutional and ineffective way to fix failing public schools. ADL was deeply disappointed that the Supreme Court did not look beyond the surface of the voucher program— which purported to give parents real educational choice – and realize that the program was structured such that it directly fed funds into the coffers of pervasively sectarian school programs.

It is beyond dispute that in 1995, Cleveland's public schools were in serious trouble. A federal district Court had placed the entire Cleveland School District under the control of the State of Ohio. The district had not met any of the minimum standards for performance set by Ohio, and students in Cleveland schools performed at significantly lower levels than students in other Ohio schools. Further, Cleveland high schools were only graduating a fraction of their classes.

The same year, Ohio enacted the "Ohio Pilot Scholarship Program," which permitted the State of Ohio to grant vouchers to students located within the public school district of Cleveland. With vouchers, the children could attend certain private schools within the Cleveland city limits. While public schools in adjacent districts were allowed to accept vouchers to admit more students from Cleveland, not a single eligible school had participated in the voucher program at the time the Supreme Court heard this case.

Of the non-public schools participating in the program at the time of the litigation, 82% were religious schools. Most of these religious schools provide religious training, and thread religious messages through all aspects of their educational programs and curricula. Consequently, since the date of its enactment, between 88-99% of the students using the voucher program had enrolled in and attended religious schools. These schools, which have clear and unabashedly sectarian missions, are the schools to which taxpayer dollars were flowing.

The voucher program gave students allowances slightly less than \$2,500 annually, which was approximately the cost of a private religious school education. For each student attending a religious school through the voucher program, the State of Ohio directly delivered a check to the school. While the checks were made payable to the childrens' parents, the parents physically had to go to the school and endorse the check over to the school.

When this case was heard in the Ohio Supreme Court, as *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the Court ruled that the program violated a technical provision of the Ohio Constitution. However, in *dicta*, the Court noted that the program was constitutional under the Establishment Clause. Following this decision, the Ohio Legislature re-enacted the same voucher plan, modifying it so as to cure the technical violation. The plaintiffs then challenged the program in Federal District Court on Establishment Clause grounds.

Both the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit affirmed ADL's view that school vouchers are unconstitutional because they violate the Establishment Clause's prohibition on government dollars supporting pervasively sectarian institutions. In 2001, the United States Supreme Court granted *certiorari*.

As *amicus curiae* before the Supreme Court, ADL argued that the Ohio program conflicted with the Establishment Clause because the voucher program allowed government aid, in the form of monetary payments, to go directly to the general accounts of pervasively sectarian religious schools, without any limitation. ADL also argued that because the voucher program only provided tuition in the amount of the cost of private religious schools in the Cleveland area (about \$3000), the program provided a significant financial incentive for parents to send their children to private religious schools and provided them with little or no capability to send their children to more expensive non-sectarian private schools. This structural flaw created inherently biased "choices" for the parents, and caused an overwhelming number of students – some 99% of them on the day this case was argued at the Court – to attend private religious schools.

Unfortunately, the Court did not agree with ADL's analysis, and found that the program was consistent with the Constitution. In an opinion authored by Chief Justice Rehnquist, the Court distinguished between government

programs that directly granted aid to religious schools and those that filtered such aid through the independent choice of private individuals. The Court labeled the Ohio voucher program an example of the latter. The Court explained that “the Ohio program is neutral in all respects toward religion” and represented an effort by the State of Ohio to bring increased opportunities to students who may be suffering due to problems of their school district. The Court added that the vouchers were available to a wide range of students, without regard to religious preferences, and that a number of schools had the opportunity to admit voucher students. While the Court added that students could use their vouchers in a “range” of schools, it also admitted that 46 of the 56 private schools participating in the Ohio voucher program were religious institutions.

DISTINGUISHING *ZELMAN* – WHY IT IS UNIQUE

While the Supreme Court upheld school vouchers in *Zelman v. Simmons-Harris*, vouchers have not been given a green light by the Court beyond the narrow facts of that case. Indeed, Cleveland's voucher program was upheld in a close (5-4) ruling that requires a voucher program to (among other things):

- be a part of a much wider program of multiple educational options, such as magnet schools and after-school tutorial assistance,
- offer parents a real choice between religious and non-religious education (perhaps even providing incentives for non-religious education),
- not only address private schools, but to ensure that benefits go to schools regardless of whether they are public or private, religious or not.

This decision also does not disturb the bedrock constitutional principle that no government program may be designed to advance religious institutions over non-religious institutions.

Finally, and of critical importance, as many state constitutions provide for a higher wall of separation between church and state, voucher programs will likely have a hard time surviving litigation in state courts.

Dissenting, Justice Stevens’ noted that less than five percent of Cleveland students used vouchers during the 1999-2000 school year, demonstrating that vouchers are not very instrumental in increasing educational opportunities for most students. Further, Stevens wrote:

The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at

state expense does, however, support the claim that the law is one respecting an establishment of religion.

Further, Stevens argued that even if parents voluntarily choose to send their children to parochial school, the state should not pay for this religious education.

In an extremely vigorous separate dissent, Justice Souter noted that in Cleveland, almost 97% of all of the students using vouchers were going to religious schools. Souter reasoned that in Cleveland, the students could not employ true choice in choosing which school to attend. First, because the number of seats at nonreligious private schools in Cleveland was small, Souter explained that even if every school accepted vouchers, few students would be able to avail themselves of the educational opportunity. Second, Souter noted that the voucher amount precludes non-religious private schools, with higher tuition rates, from opening their doors to voucher students.

Ohio has spent more than \$33 million of taxpayers' money into the voucher program since its implementation in 1996 (this figure is in addition to the approximately \$600 per student that Ohio sends to private schools, in the form of textbooks, reading and math tutors, laboratory equipment, and other school-related items). Most of this money is funding religious education. It is deeply troubling that a majority of the Supreme Court chose to ignore this critical fact in finding the voucher program acceptable under the Establishment Clause.

THE BLAINE GAME

ADL will continue to oppose vouchers beyond our arguments in the federal court system. Specifically, state constitutional provisions proscribing government support for sectarian schools remain available as a strong means of keeping religion out of our nation's public schools.

The provisions' namesake, Senator James G. Blaine, proposed an amendment to the U.S. Constitution in the late 1800s that would preclude public funds from reaching schools with sectarian influences. While the House voted strongly in favor of the "Blaine Amendment," it failed (albeit by a small margin) to receive enough votes in the Senate. However, many states adopted similar "Blaine Amendments" into their own constitutions. These provisions remain viable means of preventing public funding of religious schools.

***Holmes v. Bush*, 790 So.2d 1104 (Fl. 2001)**

On April 24, 2001, the Supreme Court of Florida refused to hear *Holmes v. Bush*, 767 So.2d 668 (Fla. Dist. Ct. App. 1st Dist. 2000), which reversed a lower court decision holding that nothing in the State Constitution clearly

prohibited the legislature from allowing the well-delineated use of public funds for private school education.

Serving as attorney of record, along with two law firms and seven other organizations, ADL commenced a lawsuit on behalf of a curriculum coordinator for public schools, parents of students who would be enrolled in public schools, a member of the public school board, the National Association for the Advancement of Colored People, and the Citizens' Coalition for Public Schools. The complaint challenged the constitutionality of the "Opportunity Scholarship Program," Fla. Stat. § 229.0537 ("OSP"). Under this tuition voucher program, public funds are used to pay the tuition and fees for students to attend private schools, most of which are sectarian.

Under the challenged program, the state designates some public schools as "failing" institutions. Parents of children who during the previous year attended a school designated as "failing" twice in four years "may request and receive from the state an opportunity to enroll in and attend a private school." The complaint alleged that the OSP violated three provisions of the Florida Constitution, as well as the Establishment Clause of the First Amendment.

The complaint raised several other concerns regarding the program. First, the OSP included no requirement that the private school offer a higher quality education than the public school. Second, a student was permitted to attend a private school at public expense regardless of any change in the "grade" assigned in the interim to the student's former public school. Third, as a condition of participation in the OSP, private schools are required to accept the voucher as full payment of tuition. However, the OSP does not prohibit a participating private school from raising its tuition to capture the total amount. In fact, the calculated amount is withdrawn from the public school even if it exceeded the amount of tuition actually paid under the OSP. Fourth, a comptroller mailed the money directly to the school. Fifth, participating private schools could compel religious training and instruction. Sixth, although the OSP required that participating private schools admit OSP students on a religion-neutral basis, it did not prohibit such schools from discriminating on the basis of religion in admitting other students or selecting faculty. Finally, the private schools faced no limits in determining how to use the funds. The money could be used, for example, to pay the salaries of clergy or purchase Bibles.

The initial complaints sought a declaration that the OSP was unconstitutional, and an injunction against its implementation. The Florida trial court determined that the program was unconstitutional on its face under a *non-religious* State constitutional provision, and enjoined the OSP's implementation. However, the court failed to address whether the statute also violated the religious provisions of the Florida Constitution or the Establishment Clause of the First Amendment to the U.S. Constitution. The

state defendants and parents of the students receiving scholarships under the OSP appealed the state court's ruling.

A Florida appellate court reversed the trial court on the narrow question of the facial constitutionality of the statute under the education provisions of Florida's Constitution. The court reasoned that nothing in the Florida Constitution expressly forbids the use of public funds for private education. It then remanded the case for trial on the issues of whether the statute violates the religious provision of the Florida Constitution or the Establishment Clause. That judgment was appealed. In April 2001, the Florida Supreme Court declined to review the case, thus, this case has been sent back to the trial court. ADL continues its involvement as counsel, and has filed another brief.

B. RELIGION IN THE PUBLIC SCHOOLS

***Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215 (E.D. Tex. 1997), rev'd, 173 F.3d 274 (5th Cir. 1999), reh'g granted en banc, rev'd and remanded, 240 F.3d 462 (5th Cir. 2001), request granted, *Oxford v. Beaumont Independent School District*, 224 F. Supp. 2d 1099 (E.D. Tex. 2002), motion granted by, in part, motion denied by, in part, 2002 U.S. Dist. LEXIS 24210 (E.D. Tex. 2002)**

Following a remand from the U.S. Court of Appeals for the Fifth Circuit, the U.S. District Court for the Eastern District of Texas (Beaumont Division) held that a school district's "Clergy in the Schools" ("CIS") program – which allowed public school officials to recruit local clergy to counsel selected students during school hours on issues of civic virtue and morality – violated the Establishment Clause.

The CIS program was an extremely troubling introduction of religion in the public schools: the program specifically recruited religious leaders to come into the school during school hours and counsel students. While the clergy volunteers were warned not to speak of religion, sex, abortion, or prayer – or to wear clothing that showed affiliation with a certain church or religion – the reality of the program was quite different: in certain cases, members of the clergy wore clerical garb while participating in the CIS program, quoted from the Bible, promoted prayer, and encouraged the participating students to develop a strong relationship with God. Moreover, while the school district recruited clergy members from many local faiths, nearly all of the participants represented Protestant Christian churches.

Accordingly, the district court found that the CIS program violated the Establishment Clause. Specifically, the district court found that the CIS program failed the second prong of the *Lemon* test, noting that the school district "impermissibly preferred religion over non-religion because the CIS program was not neutral with respect to and, in fact, endorsed religion," as

well as Justice O'Connor's "endorsement test." Furthermore, the court found that the school district offered no comparable programs to CIS that could counter "CIS's non-neutrality toward and endorsement of religion," because other counseling programs were more limited than CIS. In 2002, the district court granted the plaintiffs' request for declaratory judgment against the school district. Later in the year, the court refused to stay entry of judgment, but did delay the finality of the judgment until resolution of a dispute involving legal fees.

ADL's brief, filed at an earlier stage in the proceedings, also argued that because the CIS program lacked clear rules to guide its selection of students, the program divided students and created self-doubt. Furthermore, ADL maintained that by primarily exposing students to majoritarian religions and not giving them the opportunity to interact with minority and non-religious communities, the CIS program failed to promote religious respect and tolerance. Thus, the program was harmful to the whole community.

***Mellen v. Bunting*, 181 F. Supp. 2d 619 (W.D. Va. 2002),
amended by 202 F. Supp. 2d 511 (W.D. Va. 2002)**

Appropriately, life in a military academy is demanding and rigorous. The Virginia Military Institute (VMI) well exemplifies this standard, with its nationally renowned cadet training program that stresses discipline, unity and solidarity among its Cadet Corps. However, VMI is a public military college, funded in part by and subject to the control of the Virginia General Assembly. VMI employs an 'adversative' method of instructing and developing its cadets: students endure rigorous physical activity, an initiation period led by older students, peer pressure, self-sacrifice and a lack of privacy.

VMI – a state funded institution – required its cadets to pray (or listen to prayer) if they wished to remain in the on-campus dining hall. The prayer was a "prayer of thanks" and was to represent monotheistic ideals, as embraced by Judaism, Christianity and Islam. Each day, one cadet would read the prayer that the VMI Chaplain wrote. While the specific prayers varied, they always began with an address to "Almighty God," "O God," "Father God," "Heavenly Father," "Father God," or "Sovereign God." After a message offering thanks or requesting God's blessing, the prayer would always conclude: "Now O God, we receive this food and share this meal together with thanksgiving. Amen." Notably, the practice of mealtime prayer had ceased for a while, but the Defendant Superintendent reinstated the ritual in 1995.

VMI cadets brought suit claiming that their constitutional rights as guaranteed by the Establishment Clause had been violated. The Western District of Virginia agreed. The Court looked to the state-funded school's practice of strict discipline in concluding that the school compelled students to participate in the daily prayer. In fact, the Court noted, it was the school's

administration that exerted the “immense pressure” on the cadets to march with the Corps of Cadets into the mess hall, and then listen to the supper prayer recitation. The Court noted that because of the emphasis VMI places on unity among cadets, the cadets simply could not skip the march to the mess hall,. Thus, the Court concluded that the cadets must have felt pressure to take this march – and once they took it, they had to stay for the prayer. Furthermore, even if a cadet did not feel pressure to march with his classmates, he might have taken the communal trek to the dining hall simply so he would not have to miss evening announcements. Finally, because VMI’s Chaplain wrote the prayers and the Superintendent directed each night’s recitation, the Court concluded that government and religion had become “impermissibly entangled.” Moreover, the Court found that the Superintendent was impermissibly attempting to harness the cadets’ thoughts onto the subjects represented by the VMI prayer.

Ultimately, the Court issued a declaratory judgment stating that VMI’s daily dinnertime prayer recitation violated the Establishment Clause. The Court also issued a permanent injunction preventing VMI from continuing the prayers at dinner.

ADL has now joined an *amicus* brief in the United States Court of Appeals for the Third Circuit where the case is on appeal.

C. FAITH-BASED COUNSELING SERVICES PROVIDED BY THE STATE

***Freedom from Religion Foundation, Inc., et al. v. McCallum, et al.*, 179 F. Supp. 2d 950 (W.D. Wis. 2002), complaint dismissed at, 214 F. Supp. 2d 905 (W.D. Wis. 2002)**

In a case that was in part a victory and is in part an ongoing challenge, the U.S. District Court for the Western District of Wisconsin stopped government funding from reaching Faith Works, an addiction recovery program that greatly emphasizes and involves the Christian faith, but allowed other expenditures to pass from the state Department of Corrections to Faith Works. This case is currently on appeal in the U.S. Court of Appeals for the Seventh Circuit, and ADL joined Americans United for Separation of Church and State and the American Jewish Committee in filing a brief that argued that the Department of Corrections’ grants to Faith Works also violate the Establishment Clause.

Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor and Dan Barker are Wisconsin residents who did not want their tax dollars to pay for the state of Wisconsin to advance and promote religion. Coupled with Freedom from Religion Foundation, Inc., an advocacy organization, they brought suit to prevent their state government from opening its purse to a program that was pervasively sectarian.

Each program in question was uniquely troubling:

- **Faith-Based Addiction Treatment.** In December 1999, Faith Works began its long-term residential treatment program for males with drug and alcohol addictions. The program, which is deeply rooted in faith-based methodology, receives tax-funded money from the State of Wisconsin. Indeed, Christian spirituality is a large part of the program: the Faith Works Milwaukee Annual Report identifies recovery, employment, family services and spiritual enrichment as its important aspects. Additionally, the program seeks to link each participant with either a 'spiritual mentor' or an Alcoholics Anonymous (AA) sponsor – who is also a person grounded in spirituality but is also equipped with the AA 12-step program perspective (which includes acceptance of God as a tenet).

The Faith Works employees are also deeply involved with the promoting the faith of their employer to benefits recipients. Each counselor commits approximately eight hours per week to discussing questions of faith or spirituality, and remains available for such conversation at any time he or she is working. When making hiring decisions, Faith Works looks at potential counselors' "[c]ommitment to Christian beliefs and values." In fact, Faith Works employees are expected to attend church and staff meetings that commence with a prayer. Additionally, counselors encourage program participants to forge a personal relationship with God.

Faith Works participants go through a four-phase session, which can last as long as one year (the program is ultimately directed at getting addicts back on their feet and into the routine of a less destructive lifestyle). In a clear demonstration of the pervasively sectarian nature of the program, Faith Works specifically defines an addict's recovery as the time when he addresses spirituality. Faith Works' former executive director stated that while most program participants are not actively practicing any faith when they begin their treatment, they share some form of a relationship with God before their own programs end.

**FAITH-BASED INITIATIVES:
FINDING A CURE OR FINDING CONVERTS?**

Rev. John Castellani, Executive Director of an evangelical Christian organization named "Teen Challenge," remarked that his drug-treatment program aimed to "complete" Jews through conversion. Speaking to the House Government Reform subcommittee on May 23, 2001, Rev. Castellani used the offensive term "completed Jew" in referring to Jews who had converted to Christianity while undergoing treatment for drug addiction through his program.

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In a letter to President Bush, Glen A. Tobias, ADL National Chairman, and Abraham Foxman, ADL National Director, noted the League's worries:

The offensiveness and insensitivity of [Rev. Castellani's] remark before the House subcommittee, and the fact that he admits that the drug-treatment program actively 'encourages embracing Christian teaching,' underscore our concern that faith-based organizations would be either unable or unwilling to separate their power to transform lives from their theologically grounded mission to proselytize and convert.

Government must never fund proselytizing activity. Not only would such activity violate the First Amendment to the United States Constitution, it runs counter to our vision of an America that is open and welcoming to persons of all points of view and all religions.

- **Faith-Based Halfway House.** The Wisconsin Department of Corrections also gives money to Faith Works when supervised offenders enroll in Faith Works' halfway house. In November 1999, the Department of Corrections contracted with Faith Works to offer five beds in the halfway house, for nine months. When the Department of Corrections requested that the governor waive the bidding requirement to enter into the agreement with Faith Works without considering other proposals, they did so because they considered Faith Works unique. They renewed the contract with Faith Works in 2000, and planned to renew again in 2001. The Department of Corrections understood Faith Works' spiritual emphasis, and no rules or regulations guide the Department's buying faith-based services, so long as the offenders participating in the programs are not compelled to participate in faith-based programs.
- **Workforce Development Program.** The Department of Workforce Development grants also presented Establishment Clause problems. The grant agreement Faith Works received specifically stated that "grant funds [could] not be used to attempt to support either religious or anti-religious activities." In May 1999 the president of the Faith Works board of directors requested funding from the governor's discretionary funds for a Welfare-to-Work project. Faith Works' proposal included specific references to worship, Bible study, and spirituality. Faith Works received money from the Department of Workplace Development in 1998 and 1999.

The U.S. District Court for the Western District of Wisconsin, hearing the case for the first time, found that the religious and secular components of the Faith Works program were inseparable, and that the Department of Workforce Development's provision of funds to Faith Works violated the

Establishment Clause. The defendants were directed to stop using the governor's discretionary grant to pay Faith Works.

The question of whether the Department of Corrections' funding of Faith Works was also unconstitutional presented a trickier question because it was unclear whether the offenders participating in Faith Works had any choice in the matter, or whether they were compelled to work with the program. On May 28, 2002, this case was calendared for further hearings in the U.S. District Court for the Western District of Wisconsin, for trial on this question.

In a decision dated July 26, 2002, the Western District found that offenders under the Department of Corrections' custody who enrolled in Faith Works did so of their own volition, exercising an independent and private choice in the matter. Thus, the Court found, the offenders did not face coercion to participate in the faith-based program, and the government did not endorse any religion because of the offenders' voluntary participation. The Court granted judgment as a matter of law for the defendants and dismissed the claim that the Department of Corrections' funding of Faith Works violated the Establishment Clause.

ADL was pleased that the Western District of Wisconsin halted the Department of Workforce Development's spending on Faith Works. In order to help defend the judgment on appeal, ADL filed a brief in the Seventh Circuit Court of Appeals, challenging the court's ruling on the Corrections program. That the offenders choose to enter the program of their own volition is of no import; the government should not be permitted to fund any program that uses religion as its foundation.

D. RELIGIOUS DISPLAYS

***Glassroth v. Moore*, 229 F. Supp. 2d 1283 (M.D. Ala. 2002), judgment entered by 229 F. Supp. 2d 1290 (M.D. Ala. 2002), injunction granted at 2002 U.S. Dist. LEXIS 25091 (M.D. Ala. Dec. 19, 2002), motion granted by 2002 U.S. Dist. LEXIS 25312 (M.D. Ala. Dec. 23, 2002)**

In the rotunda of the Alabama State Judicial Building, Alabama Supreme Court Chief Justice Roy Moore placed a two-and-a-half ton monument engraved with the Ten Commandments and other references to God. Finding that Justice Moore acted with the specific purpose and effect of pointing the Judeo-Christian image of God as the "moral foundation of our laws," the United States District Court for the Middle District of Alabama held that Justice Moore's actions violated the Establishment Clause. ADL filed an *amicus* brief in this matter, and is pleased to have helped pave the way for the removal of this inappropriate monument.

This ruling is especially important given Justice Moore's history of Establishment Clause violations. When he was an Alabama state court

judge, then-Judge Moore's courtroom featured a plaque with the Ten Commandments carved onto it. Moreover, he invited members of the clergy into that courtroom, to lead prayers before trials began. Following two highly publicized lawsuits, *Alabama Freethought Association v. Moore*, 893 F. Supp. 1522 (N.D. Ala. 1995), and *Alabama ex rel. James v. ACLU of Alabama*, 711 So.2d 952 (Ala. 1998), both of which were dismissed, Judge Moore campaigned for and won his current position as Chief Justice of the Alabama Supreme Court. His campaign heavily referenced the Ten Commandments, going so far as to label Moore as the "Ten Commandments Judge" – a position that ultimately proved popular with the citizens of Alabama. Shortly after his election to the position of Chief Justice, Moore began designing the huge granite monument for the Alabama Supreme Court. The final design was 5,280 pounds, and measured three feet by three feet by four feet. Its image calls to mind a Bible opened on a lectern. Further, the monument is centrally placed in the Judicial Building's rotunda, and is immediately visible to anyone entering the building from its main entrance. Curiously, Chief Justice Moore installed it in the courthouse without the knowledge or approval of any of the other Alabama Supreme Court Justices.

During the unveiling of the monument, Chief Justice Moore stated that it showed the "moral foundation of the law." Almost two months after the Ten Commandments monument was introduced into the courthouse, in what was perhaps an effort to negate the overly religious nature of the monument, Moore added a marble plaque with quotations from Rev. Dr. Martin Luther King, Jr. and Frederick Douglass, as well as a brass plaque with the Bill of Rights. Visually, it was not clear that these plaques were related to the Ten Commandments monument. Also, the Chief Justice denied requests to add to the display Dr. King's "I Have a Dream Speech" and a sculpture of the atheist symbol of an atom.

Alabama attorneys, who often confronted the monument in practice, initiated the suit against Chief Justice Moore. Two of these attorneys have modified their "use and enjoyment" of the rotunda housing the monument, in order to avoid the structure.

In deciding that the monument did indeed violate the Establishment Clause, the District Judge wrote:

The court found the monument to be, indeed, much more than the sum of its notable quotations, large measurements, and prominent location. The court was captivated by not just the solemn ambience of the rotunda [where the sculpture was located]... but by something much more sublime; there was the sense of being in the 'presence of something not just valued and revered (such as an historical document) but also holy and sacred.... The court is impressed that the monument and its immediate surroundings are, in essence, a consecrated place, a religious sanctuary, within the walls of a courthouse.

The court also found that Justice Moore intended the monument to invoke the Judeo-Christian God. Indeed, the district court found that Justice Moore's actions violated the Establishment Clause under both the *Lemon* test and the more rigorous coercion test announced by Justice Kennedy in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*. Specifically, the court rejected Chief Justice Moore's interpretation of the link between the Judeo-Christian God and American law, as well as Moore's definition of "religion," and then gave Moore thirty days to remove the Ten Commandments monument from his court. When Moore failed to do so within the specified time, the court granted a permanent injunction, requiring the Chief Justice to remove the structure immediately. However, on December 19, 2002, Moore filed a motion requesting that the court stay the injunction while his appeal was pending. The court has granted that injunction. In doing so, though, the court noted that it looked forward to the monument's removal, emphasizing, "it should be repeated that the court does not discount the harm to the plaintiffs in allowing the monument to remain pending appeal of this case, nor does the court discount the public interest in having the unconstitutional actions by the Chief Justice remedied forthwith."

While ADL is pleased that the court required removal of the large and inappropriate Ten Commandments structure that overshadowed the Alabama Judicial Building, it is disappointed by the court's language indicating that some displays of the Ten Commandments, for example, those which are small and allegedly not religious-based, might be acceptable.

An appeal on this matter is pending in the United States Supreme Court for the Eleventh Circuit, and ADL intends to file a brief.

Freethought Society, et al. v. Chester County, et al., 191 F. Supp. 2d 589 (E.D. Pa. 2002), stay granted in part by 194 F. Supp. 2d 437 (E.D. Pa. 2002)

In West Chester, Pennsylvania, on a wall of the Chester County Courthouse, next to the sign admonishing visitors not to smoke, there is a bronze plaque: a 50 inch by 30 inch sign with the Ten Commandments, along with other religious language. People passing by on the sidewalk or entering the courthouse can easily read "The Commandments" and, if they so desire, walk up the steps to read the full text.

The courthouse is a center of official community life in West Chester. The courthouse houses many public offices, including the three Chester County Commissioners, County Treasurer, Controller, District Attorney, Public Defender, Sheriff, Clerk of Court, Register of Wills, Court of Common Pleas, Adult Probation and Solicitor. Plaintiff Sally Flynn, who is a member of plaintiff organization Freethought Society of Greater Philadelphia, has herself many times entered the courthouse – to get a dog license, serve her jury duty three times, and testify as a victim-witness.

Since approximately 1996, Flynn has been an atheist. In addition to the times she has gone *into* the courthouse, she also often is *outside*, to support rallies. Flynn objects to the Ten Commandments plaque's presence on Establishment Clause grounds. Finding that Flynn had suffered injury because of the hanging plaque, the Eastern District of Pennsylvania ruled that she had standing to contest the tablet's existence on the courthouse. The court also found that the Freethought Society had standing because some of its members, most of whom are also atheists or "free-thinkers," were forced to pass by the plaque against their will.

Applying the *Lemon* test, the Court found that the plaque had a primarily religious purpose that was only "incidentally secular" because the plain words on the tablet conveyed a religious message. The Court also noted that the County had not attempted to minimize the plaque's prominence. Moreover, the Court looked to the 1920 gift to determine the purpose of the government action, which was to perform a "marriage of Church and County." By looking at the plaque's actual representation, and also to the history of its placement on the court's exterior, the Court concluded that the government's actions did not have a secular purpose, and therefore failed to meet the first prong of the *Lemon* test. Similarly, the Court held that the second prong of the *Lemon* test was satisfied because the effect of the plaque was to show a state endorsement of religion. Specifically, the Court highlighted the fact that the plaque stood on its own, with no artifacts of legal significance nearby. Having found that the Ten Commandments plaque failed the first two inquiries of the *Lemon* test, the Court did not consider the third prong, that is, whether the state's actions caused "excessive entanglement with religion."

Recognizing that the morality offered by the Ten Commandments flows through American society like images and phrases of the Bible, the Court identified the strong disestablishment of religion embraced by American history. The Court noted: "The tablet displayed alone outside the Chester County Courthouse, however much an icon it may be to mainline Protestantism and others, thus runs against the strong current of disestablishment in this nation, to which the First Amendment only in recent decades has added its power." Thus, in March 2002 the Court permanently enjoined Chester County from continuing to maintain the Ten Commandments tablet on the courthouse wall.

This case is on appeal at the U.S. Court of Appeals for the Third Circuit, where the appellate court will decide whether the tablet's continued presence violates the Establishment Clause. Along with Americans United for Separation of Church and State ("AU"), ADL has filed a brief in this appeal, and hopes that the Third Circuit similarly recognizes the affront to the First Amendment that the Ten Commandments plaque presents. The brief argues that the Ten Commandments plaque cannot constitutionally be displayed on the courthouse as an "historical artifact," as argued by the defendant-

appellant Chester County and *amicus* counsel Chester County Historic Preservation Network. In fact, the plaque is one of many similar fixtures erected during the 1910s and 1920s as part of a religious campaign that was spearheaded by a reactionary religious group. Thus, the League and AU assert that the plaque has *no* historical significance beyond its religious roots.

Furthermore, the brief argues that the plaque's hanging on the courthouse would be permissible under the Establishment Clause *only* if it were part of a greater, comprehensive display of influences on American law. As the brief notes, American law draws from many sources, most of which are secular. However, the fact that Chester County displayed the Ten Commandments plaque by *itself* sends a strong religious message to reasonable observers. This kind of display is clearly unconstitutional, and the plaque's blatant religious message is not mitigated by the presence of other plaques on the courthouse grounds.

Finally, in response to an effort by the Appellants to argue that because the plaque had not been challenged for decades, ADL and AU argued that there is no laches or other time bar on a continuing constitutional violation. Moreover, ADL and AU argued that such a delay often flows from the hostility that has plagued religious minorities when they undertake to assert their constitutional rights. Our country has a shameful history of retaliating against people who show the courage to challenge government conduct that violates the Establishment Clause.

***Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001), *reh'g en banc granted*, 281 F.3d 812 (9th Cir. 2002), *rev'd*, 294 F.3d 1124 (9th Cir. 2002), *petition for certiorari filed*, Jan. 21, 2003**

The Ninth Circuit Court of Appeals, sitting *en banc*, reversed its earlier decision and held that the City of San Diego violated Article XXI, § 5 of the California Constitution and favored sectarian interests in its sale of a piece of property in the Mt. Soledad National Park. The property at issue consists of approximately one-half an acre of land at the top of Mount Soledad, a publicly maintained site, upon which sits a 43-foot-high Latin cross. ADL's *amicus* argument at the District Court level contended that the City structured its sale of the land to insure that the cross would remain atop Mount Soledad.

This case began in 1989, when Philip K. Paulson sued the City of San Diego in an attempt to remove the cross from public land. Two years later, the District Court for the Southern District of California dismissed the City's argument that the cross merely existed as a war memorial. Instead, the Court found that the cross carried an "inherently religious message" and appeared to pay tribute only to Christian servicemen in violation of the No Preference Clause of the California Constitution, Art. I, § 4. The Court

permanently enjoined the City from featuring the cross on publicly maintained land.

In an attempt to comply with the injunction but still maintain the cross on the mountaintop, the City presented a "save the cross" proposition to sell the land where the cross stood to a private corporation. Voters approved the plan, and the City relinquished control of a small patch of land under the cross to the Mt. Soledad Memorial Association – the group that had first erected the cross in 1954 – without even considering any other groups' bids. This measure proved a surefire way for the City to insure the continued presence of the cross, as the Association had already communicated its intent to maintain the cross after the purchase. This transaction brought Paulson to court again in 1997, this time asking for enforcement of the initial injunction. The District Court invalidated the sale because in failing to consider other buyers, the City seemed to give preference to the Christian religion, and because the patch of land the City transferred was too small to comply with the constitutional requirement to keep this public land free of a structure that evidences religious preference.

Once again, the City attempted to sell the land, and this transaction became the subject of the Ninth Circuit's most recent ruling. Offering a larger portion of land beneath the cross for sale, the City also invited bids to purchase the land under the cross. Corporations interested in the land had to pledge to maintain an historic war memorial on the property if they were to acquire it. Also, whichever corporation purchased the Mount Soledad property would inherit its adorning cross. The City provided that the new property owner was free to maintain or remove the cross, but did not provide any resources to do so.

Five organizations submitted proposals for the purchase of the Mount Soledad land. Of those bidders, three organizations declared that they would retain the cross as a memorial. The other two bidding organizations, the National League for the Separation of Church and State and the Freedom From Religion Foundation, proposed memorials that did not include the cross. Though the process of this sale was different, the results were the same as before: The City again selected the Mt. Soledad Memorial Association to purchase the land under the cross. Specifically, the City maintained that the Mt. Soledad Memorial Association proffered both the best proposal and bidding price. Once again, Paulson brought the City to court. However, the District Court saw this sale as legitimate and "neutral," and in 2001, the Ninth Circuit agreed.

The tides changed when the Court, sitting *en banc*, reviewed Paulson's claim this year. First, the Court labeled the cross a "sectarian symbol that conveys a religious message." Then, the Court held that the City of San Diego's actions were unconstitutional because the bidding procedure and selection of the Association to purchase the land on Mount Soledad "substantially aided the sectarian purpose of preserving the cross." Specifically, the Court noted

that bidding organizations like the Mt. Soledad Memorial Association that intended to keep the cross earned a discount that they could use to enhance their bid. That is, they could construct the requisite memorial free of charge. Yet organizations bidding for the property that wanted a different form of memorial would have to finance the removal of the cross, as well as the creation of another form of commemoration. These factors, the Court found, more favorably positioned organizations that would maintain the cross.

ADL applauds the Ninth Circuit for delving below the surface on this issue and appropriately recognizing that governments cannot mask sectarian preference by proffering facially neutral objectives.

***Kong v. City and County of San Francisco*, 18 Fed. Appx. 616 (9th Cir. 2001), cert. denied, 2003 WL 1339302 (Apr 28, 2003)**

In another case involving the sale of land with a cross adorning it, the Ninth Circuit Court of Appeals placed its stamp of approval on a public auction to sell the land where a cross was situated in order to remove the fixture from “public land.”

The court found evidence of an “open and public auction” to remove the land on Mount Davidson from public control, and into private custody, based on the manner of the sale. That is, the newspaper used for official City advertising ran five invitations to bid on the land. Interested bidders, like plaintiff, were also able to attend a public tour and inspection of the land for sale.

In finding the transaction permissible, the Court determined that the sale was permissible under the No Preference Clause because it used an appropriate method to transfer the cross from publicly-held property to privately-owned property. Further, the Court found that the sale did not raise any questions regarding possible Establishment Clause violations. The sale did not have the effect of endorsing religion because the land on Mount Davidson was physically and aesthetically separate from the park’s remaining public land.

Kong is a disappointing verdict, as it failed to account for the reality of the cross in practice. Judge Canby, concurring, noted that were he deciding the case before the Ninth Circuit’s earlier decision in *Paulson*, he would have found that the sale of the land with a cross violated both the No Preference Clause and the Establishment Clause. He wrote: “[fr]om the public’s viewpoint, nothing has really changed; the land that was public as part of the park remains public despite the change of title, and the religious display remains on it.” Canby continued, “In essence, the land has become a public forum in which only one group can maintain a particular religious symbol.” ADL agrees with Judge Canby and maintains that in light of the Ninth Circuit’s recent *en banc* decision in *Paulson*, *Kong* should also be reversed.

E. EQUAL ACCESS

***Prince v. Jacoby, et al.*, 303 F.3d 1074 (9th Cir. 2002)**

Eleventh grader Tausha Prince did more than start a Christian Bible club at Washington's Spanaway Lake High School. When she demanded that the "World Changers" receive the same access to school facilities and benefits that other school clubs enjoyed, she began litigation that ultimately raised to the Ninth Circuit the question of whether a school district must provide a religious-based club in a public school with the same benefits that secular clubs receive, based on the First Amendment and the Equal Access Act, 20 U.S.C. § 4071(a). Unfortunately, more than a year after hearing arguments, the Ninth Circuit held that the district should have given Prince's club the same perks that other student organizations enjoyed.

Student organizations in Washington schools are either "Associated Student Body (ASB) Organizations," which receive financing from the School District and access to school facilities, or "Student Sponsored and Initiated Groups (Policy 5525 clubs)." The latter category was designated to comply with the Equal Access Act – a law that protects the rights of students attending public secondary schools to participate in extracurricular organizations involving religious, political or philosophical activity otherwise protected under the First Amendment, when other students also have this right. Under the Bethel District Policy 5525, religious organizations may meet at school if the principal approves, but cannot take advantage of the same benefits enjoyed by non-religious ASB clubs. After the School District twice denied her request to form the "World Changers" as an ASB organization, Prince filled out the paperwork for the Bible club to become a so-called Policy 5525 club.

The School District argued that allowing Prince's club ASB status would upset the "careful balance between the Free Speech and Establishment clauses of the First Amendment" included in the Equal Access Act, because ASB clubs were subject to the School District's watchful eye. The U.S. District Court for the Western District of Washington agreed, granting summary judgment for the School District. Further, the Court noted that the School District did not violate the First Amendment's Free Speech, Free Exercise or Establishment Clauses, or the Equal Protection Clause of the Fourteenth Amendment. Further, the Court held that the Equal Access Act does not require that student groups benefit from "absolute equality."

Prince appealed this decision, and ADL and the ACLU filed an *amicus* brief in support of the School District, arguing that the Establishment Clause prohibited the school from titling the "World Changers" an ASB organization. The brief argued "[w]hile honoring students' rights to freedom of speech and religion, a school district must also ensure that its own actions do not contribute, intentionally or unintentionally, to a message of endorsement or preference for any one set of religious beliefs." While Prince had a right to form the "World Changers," she did not have the right to "enlist the

sponsorship and financial resources of the State in doing so.” Furthermore, “ASB status for a religious club violates the Establishment Clause for the simple reason that under Washington law, ASB status is a form of endorsement. By definition, ASB status means official approval of a student group’s activities.... Such endorsement of and control over a religious group would violate all three prongs of the *Lemon* test.”

The brief also documented other reasons why Prince’s group should not constitutionally be classified as an ASB Organization. For example, state regulations require that any property purchased by student groups becomes school property. Then, as the brief argued, “Bible club members would certainly agree that this level of state oversight would be intolerable if it were applied to the churches they attend outside of school. It is equally offensive to the Establishment Clause when applied to a student-initiated religious club.” Moreover, if Prince’s club gained ASB Organization status, it would be eligible to receive school funding. As the brief explained, this would violate the Establishment Clause, which “forbids transfer of public funds to religious organizations for religious purposes.”

Finally, ADL and the ACLU argued that “[t]he Establishment Clause violations that would result from Prince’s requested relief are not justified by either the EAA or the Free Speech Clause.” The EAA does not guarantee religious groups the exact same rights as other groups. The brief explained, “The evil that the Act’s sponsors sought to remedy was school officials denying student religious groups the right to gather together on school premises at all.” Nevertheless, “[t]he Free Speech Clause does not permit a school to violate the Establishment Clause.” The brief also attacked Prince’s specious arguments: Her “claim of viewpoint discrimination fails... because her speech has not been limited, restricted, or punished.... Even if viewpoint neutrality were properly invoked here, it would not compel the school district to grant ASB status and its accompanying financial benefits. No cases interpret the Free Speech Clause to require a school to provide non-speech benefits to an exclusively sectarian organization.”

In conclusion, the ADL and the ACLU’s brief argued that “[w]ithholding sponsorship and financial involvement from sectarian clubs is an acceptable method for schools to avoid statutory and constitutional problems.”

Reviewing the issues *de novo*, the Ninth Circuit reversed the district court. In an attempt to determine whether the School District’s unequal apportionment of benefits to school clubs stripped the opportunity for “equal access or a fair opportunity to, or discriminates against,” Prince and her Bible club, the Ninth Circuit relied on the 1990 decision in *Board of Education v. Mergens*. There, the Supreme Court held that denying a Christian club “official recognition” and the benefits afforded that statute, represented a denial of “equal access” and “fair opportunity” under the Equal Access Act. Thus, the Ninth Circuit wrote that in the case of Prince’s club, it “must reject the School District’s contention that providing ‘fair opportunity’ is sufficient to

provide 'equal access.'" The Court also held that the School District need not "sponsor" Prince's club in order to allow it to become an ASB organization, though the district involves itself in the functions of ASB clubs.

While under the Equal Access Act, the School District should have provided "World Changers" with some benefits that had been withheld, the Ninth Circuit concluded that the Equal Access Act did not entitle Prince's Bible club to all of the benefits it requested. However, the Court did grant "World Changers" many of the advantages it requested, including equal access to ASB funding, yearbook space, use of the public address system and bulletin boards, audio/visual equipment, supplies, and school vehicles used by ASB organizations.

Notably, in a dissent, Judge Berzon wrote that the Court should not have required Prince's high school to allow religious activity like "World Changers" meetings to occur during periods when students were required to attend school. She argued that such a situation violated the Establishment Clause, and was distinguishable from allowing religious activity during periods when students were not required to be in school. Further, Judge Berzon noted that, contrary to the majority's position, the Establishment Clause would not allow the School District to funnel publicly funded school vehicles, supplies, and audio/visual equipment towards religious purposes like the Bible club.

The League was disappointed by the Court's interpretation of the Equal Access Act and First Amendment to allow equal funding and access to benefits to a religious-based club in a public high school. This decision unwisely allows public money to go to religious ventures, and also allows for religious activity during the school day.

II. FREE EXERCISE OF RELIGION

In 1997, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down the Religious Freedom Restoration Act (RFRA), which required government to have a “compelling interest” before impeding religious observances. Since then, ADL has focused on lobbying state legislatures to pass their own versions of RFRA on the state level. To the benefit of their citizens, several states have already enacted such laws.

ADL continues to support Congressional efforts to enact legislation to protect freedom of religion, including the Workplace Religious Protection Act and the Religious Land Use and Institutionalized Persons Act (RLUIPA). These laws guarantee that the compelling interest standard is used in two important arenas: first, where religious entities face zoning regulations which have been used to severely burden their religious activities, and second, where prisoners wish to exercise their religion.

***Mayweathers v. Newland, et al.*, 258 F.3d 930 (9th Cir. 2001); related proceedings at *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152 (E.D. Cal. 2001); 2001 WL 804140 (E.D. Cal. 2001), affirmed, 314 F.3d 1062 (9th Cir. Dec. 27, 2002)**

In this case, the U.S. Court of Appeals for the Ninth Circuit upheld the constitutionality of the Religious Land and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (2000), which states that “no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution unless the government justifies a compelling government interest and that it is the least restrictive means of furthering this compelling interest.” RLUIPA applies to any “program or activity that receives Federal financial assistance” and also when the substantial burden affects interstate commerce. 42 U.S.C. § 2000cc-1(b)(1), (2). ADL participated in filing an *amicus* brief in the Ninth Circuit arguing for RLUIPA’s constitutionality under the Establishment Clause, and as a valid exercise of Congress’ Commerce Clause power.

Muslim inmates at Solano began this series of lawsuits in 1996 against various officials of the California State prison system. Held in a medium security state prison about 35 miles southwest of Sacramento, California, the prisoners wished to attend hour-long Friday Sabbath services, known as *Jumu’ah*. Doing so, however, would cause them to miss time in their work program, which could lead to discipline. The prisoners alleged that the prison rules penalized them for attending religious services, violating their rights under the First Amendment. The inmates later added a claim under RLUIPA after the statute was enacted in 2000.

Most of the prisoners at Solano are involved with the prison’s work incentive program. For every day that a prisoner works, his sentence may be reduced

by one day, except where an inmate has received a life sentence. Prison administrators assign the inmates to specific work projects, and may do so without the inmates' consent. Inmates, of course, are not free to act without consent: an inmate's unexcused absence from work could subject him to discipline, including suspension of privileges, confinement to quarters, forfeiture of up to 30 days of work credits, change in work incentive program eligibility, and transfer to a higher security prison.

The Muslim inmates who brought suit argued that the work incentive program interfered with their right to freely exercise their religion: if they missed work to attend *Jumu'ah* services, they would face discipline. Specifically, plaintiffs maintained that this service is a necessary part of practicing Islam, according to the *Qur'an*, and that the Friday prayers must be led by an Imam and recited with others.

ADL's *amicus* brief argued that RLUIPA does not offend the Establishment Clause because it protects prisoners' constitutional right to Free Exercise of Religion, has a secular purpose, and does not impermissibly advance religion or entangle the government and religion. Further, the brief posited that RLUIPA is not an endorsement of religion, but of constitutional rights.

The brief also asserted that RLUIPA falls within Congress' Commerce Clause authority. Specifically, RLUIPA targets administration of government institutions, including prisons and hospitals. Recent Supreme Court jurisprudence, though hostile to federal civil rights legislation, nevertheless clearly establishes that the administration of such government institutions substantially affects interstate commerce. First, the activity being regulated is commercial in nature. Second, because it is located on commercial property, the activity being regulated has a direct and per se substantial effect on commerce and also has a substantial effect in the aggregate. Third, Congress expressly found that the regulated activity has a substantial effect on commerce. Finally, RLUIPA features an express jurisdictional element that ensures its constitutionality.

Fortunately, the Ninth Circuit agreed with ADL and found that RLUIPA was a valid exercise of Congress' authority under the Spending Clause, which conditions the receipt of federal funds – including those received by Solano – on compliance with certain federal mandates, provided that the statute is in pursuit of the general welfare. Specifically, the court determined that the Act meets all of the requirements for passing valid Spending Clause legislation: RLUIPA promotes the general welfare, it clearly and unambiguously states its intention to impose a condition on the receipt of federal money, the condition is sufficiently related to the federal interest (in particular national projects or programs), and finally, RLUIPA violates no other constitutional provision. This last element is of particular note.

In looking at whether RLUIPA violated other provisions of the Constitution, the court looked to the Establishment Clause. Applying the *Lemon* test, the

court found RLUIPA acceptable under the Establishment Clause. Specifically, the court found that the Act has a secular legislative purpose, its primary effect was neither to advance nor inhibit religion, and it did not foster excessive government entanglement with religion. Furthermore, the court found RLUIPA permissible under the Tenth Amendment, as the Act does not assume regulation of a “core state function.” Instead, the court noted, states may forego federal funding if they disagree with the Act’s requirements.

The court also determined that the Eleventh Amendment did not bar this suit from going forward. While California citizens would not be free to sue the State of California, the inmates’ action under RLUIPA involved a suit against California state prison *officials*, which is permissible under the Eleventh Amendment.

Finally, the court analyzed RLUIPA under the principle of separation of powers. The court noted that the Act likely exists as a response to *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court held that laws of general applicability that incidentally burden religious conduct are allowable under the First Amendment. The Ninth Circuit indicated that by requiring States to show that prison regulations that substantially burden inmates’ free exercise of religion are actually the least restrictive means of securing a compelling government interest, RLUIPA raises the standards established in *Smith*. This additional protection does not go so far as to erroneously review or revise a Supreme Court ruling, since RLUIPA does not overturn the Supreme Court’s constitutional interpretation.

Notably, RLUIPA takes seriously the legitimate security issues in a prison. Pointing to an injunction as evidence of alternatives to the prison regulations, the Ninth Circuit found that “the unexcused absence policy under attack in the present case is not rationally related to a legitimate penological purpose.”

ADL was pleased with the ruling and continues to defend RLUIPA against constitutional attacks nationwide.

III. DISCRIMINATION

Following the terrorist attacks of last September 11, discrimination and intolerance have increasingly permeated our society. Against this background, and mindful of a history that has already been blemished by ignorance and hatred, ADL continues its fight to protect the right of all Americans to remain free from unlawful discrimination.

Our commitment to fighting discrimination is as old as ADL itself, and has guided our work since the League was founded:

The Anti-Defamation League was organized in 1913 . . . in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.

- From ADL's Statement of Interest in its amicus curiae brief in *Brown v. Board of Education*

ADL hopes that its involvement with these important cases will help to protect every individual's right to live free of discrimination.

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), on remand, Garrett v. University of Alabama at Birmingham Board of Trustees, 261 F.3d 1242 (11th Cir. 2001), vacated in part by 276 F.3d 1227 (11th Cir. 2001), summary judgment granted by 223 F. Supp. 2d 1244 (N.D. Ala. 2002)

Patricia Garrett and Milton Ash, Respondents in the Supreme Court, worked for the state of Alabama. Both sued Alabama for damages under the Americans with Disabilities Act (ADA). Specifically, Garrett was employed as a Director of Nursing at the University of Alabama in Birmingham Hospital. In 1994, she received a diagnosis that she had breast cancer. Her treatment required her to take time off of work. Upon her return to the hospital in 1995, Garrett heard from her supervisor that she would have to give up her position as Director of Nursing. After re-applying, she received a lower paying position as a manager of nurses.

Ash had a medical condition that interfered with his job as a security officer for the Alabama Department of Youth Services. A chronic asthmatic, he asked early in his employment for an accommodation in his duties, so that he could avoid contact with carbon monoxide and cigarette smoke. Later, he

received a diagnosis that he had sleep apnea, and asked to work day shifts. The Department of Youth Services refused to grant either of Ash's health-related requests, and Ash filed a discrimination claim with the Equal Employment Opportunity Commission. Shortly thereafter, Ash's performance evaluations dropped.

Garrett and Ash filed separate claims in the Northern District of Alabama seeking money damages under the ADA. The State of Alabama moved for summary judgment by claiming that the ADA exceeds Congress's authority to abrogate the State's Eleventh Amendment sovereign immunity rights. In a consolidated ruling, the district court found for the State on both claims. On appeal, the Eleventh Circuit reversed the district court's ruling and held that the ADA validly curtails the State's Eleventh Amendment immunity. This ruling set the backdrop for an important fight in the Supreme Court: whether states can be sued for violating the civil rights of its employees. Part of an on-going series of cases dealing with the relationship of the state and federal governments, the Court has been attacking some of the great civil rights advances of the modern era.

The Supreme Court granted certiorari and then dealt a tremendous blow to the civil rights laws that protect individuals: the Court held that states could not be sued for damages under the Americans with Disabilities Act (ADA). The 5-4 decision held that Congress was not equipped with the power to hold states liable to employees for damages. This decision severely limited the scope of the ADA, and furthered the Court's assault on Congress's power to protect civil rights.

An especially troubling aspect of the decision was that the Supreme Court held Congress to an exceedingly high standard of proof to show that the law was justified in abrogating state sovereign immunity. To show that sufficient justification *did* allow ADA to abrogate states' immunity, Justice Breyer's dissent offered more than 300 examples of states discriminating on the basis of disability.

Following the Supreme Court's decision, the United States Court of Appeals for the Eleventh Circuit complied and reversed its earlier decision. During the petition for rehearing, however, plaintiffs argued that the state defendants voluntarily waived their Eleventh Amendment immunity to claims under § 504 of the Rehabilitation Act because they received federal funds conditioned on such a waiver. In response, the defendants asked the Eleventh Circuit to grant a rehearing on the issue of whether states could face liability under § 504 of the Rehabilitation Act, and remand this claim to the district court. Denying a suggestion to rehear this petition *en banc*, the Eleventh Circuit remanded the Rehabilitation Act issue to the United States District Court for the Northern District of Alabama.

The trip back to the Northern District of Alabama resulted in the unfortunate grant of summary judgment for Alabama. The Northern District of Alabama

cited *Barnes v. Gorman*, 122 S. Ct. 2097 (2002), which held that a plaintiff could not rely on the Rehabilitation Act's reference to the Spending Clause (which conditions receipt of federal funding on satisfaction of a condition) as a justification for a punitive damages claim. Justice Scalia's opinion in *Barnes* noted that Congress cannot impose conditions upon recipients of federal funds unless those conditions are unambiguous.

Extending the rationale of *Barnes* to this case, the Northern District of Alabama decided that waiver terms in § 504 of the Rehabilitation Act did not "comport with community standards of fairness," as the standard set by *Barnes*. Further, the Court held that ambiguity in the language of § 504 of the Rehabilitation Act prevented the state from waiving its Eleventh Amendment immunity rights when it accepted money from the government. The Court concluded issuing a separate order that granted summary judgment to the university on this claim.

While the Rehabilitation Act issue was largely ignored throughout the pendency of the *Garrett* litigation, the Northern District of Alabama noted that the State of Hawaii recently petitioned the Supreme Court for *certiorari* to review *Vinson v. Thomas*, 288 F.3d 1145 (9th Cir. 2002), a case presenting the same question about Rehabilitation Act claims. The Northern District of Alabama concluded noting that if the Supreme Court does not grant *certiorari* in *Vinson*, *Garrett* case may reach the high court for a second time.

***Alexander v. Sandoval*, 532 U.S. 275, on remand, sub nom, Sandoval v. Hagan, 268 F.3d 1065 (11th Cir. 2001)**

In April 2001, the Supreme Court issued another troubling ruling which limited the rights of Spanish-speaking citizens to challenge Alabama's requirement that the state driver's license examination be administered only in English. The Supreme Court's decision demonstrates another instance of the chipping away of Congress' power to legislate on key civil rights issues.

"Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI."

Justice John Paul Stevens dissenting in *Alexander v. Sandoval*

In 1990, Alabama amended its Constitution to provide that English is the official language of the state. In turn, the Alabama Department of Public Safety determined that the "English-only" Amendment required adoption of an English-only policy. Martha Sandoval, on behalf of herself and others similarly situated to her, filed a suit in the United States District Court for the Middle District of Alabama, seeking a judgment that Alabama's practice was unconstitutional. The suit also sought to enjoin the administration of the driver's license examination only in English. The District Court found that the

Department of Public Safety's policy violated Title VI's well-settled prohibition on using federal money to fund programs that have a disparate impact on minorities, but reserved ruling on the Equal Protection claim. The Department appealed this decision to the United States Court of Appeals for the Eleventh Circuit.

On appeal, the Department of Public Safety argued that the suit was barred by the Eleventh Amendment, that Title VI does not contain an implied private cause of action for disparate impact claims, and that the English-only policy, as a matter of law, cannot discriminate on the basis of national origin. The Eleventh Circuit disagreed on all grounds, and affirmed the district court's decision. However, the Supreme Court granted *certiorari* and reversed the lower courts' decisions.

At the Supreme Court, ADL, along with 10 other civil rights organizations, joined an *amicus* brief authored by the National Women's Law Center in support of Martha Sandoval. The brief focused on the importance of a settled enforcement scheme for federally guaranteed civil rights. It argued that both the existence of a private right of action to enforce civil rights laws against public recipients of federal funds and the disparate impact regulations adopted to effectuate such rights "have become well established elements of the federal civil rights enforcement scheme." Congress has consistently acted upon the premise that plaintiffs may avail themselves of a private right of action to enforce federal civil rights in federal courts. Moreover, Congress' authorization of lawyers' fees for prevailing parties in civil rights actions is evidence that Congress assumed the availability of such a right of action.

The brief also argued that disparate impact regulations were properly adopted as part of Congress' express delegation of the authority of federal agencies to effectuate Title VI. A disparate impact analysis looks at a policy or statute and determines if it causes harm to people of a particular race, color, or national origin, and whether the harm was intentional. While the express language of Title VI speaks only of instances of intentional discrimination, it has been held that federal financial assistance may be conditioned upon modest additional obligations that are necessary to effectuate the statute – especially in light of the difficulties of proving intentional discrimination. Thus, it is reasonable to require recipients of federal aid to avoid policies that, intentionally or not, have a harmful impact based on race, color, or national origin. Importantly, states can avoid the additional burdens by refusing to accept federal aid. Finally, the brief maintained that the disparate impact regulations could be enforced in a private right of action for equitable relief.

In a decision characterized by four dissenting Justices as "unfounded in our precedent and hostile to decades of settled expectations," the Supreme Court held that there is no private right of action under Title VI to enforce a disparate impact claim. The Court held that Title VI prohibits only intentional discrimination and that the remedies available under Title VI are limited. The

case was then remanded to the Eleventh Circuit. On July 16, 2001, the Eleventh Circuit, in an unpublished decision, partially reversed and partially vacated the Supreme Court's disappointing ruling.

***Catholic Charities of Sacramento, Inc. v. Superior Court*, 90 Cal. App. 4th 425, review granted, 31 P.3d 1271 (California 2001) (Briefs filed Spring, 2002).**

This case arose when Catholic Charities of Sacramento challenged a California statute requiring all employers to provide their employees with health insurance that covers prescription contraceptives. Catholic Charities, a public benefit corporation that receives government funding, provides social services to the poor, disabled, elderly, and otherwise vulnerable members of society, regardless of their religious beliefs. Catholic Charities argued that the statute violates the religious freedom guarantees of both the U.S. and California Constitutions because under the religious tenets of Catholicism, the use of contraception is "extrinsically evil and a grave sin." The organization sought declaratory and injunctive relief.

The Sacramento County Superior Court denied the motion for a preliminary injunction. The case proceeded to the Court of Appeals, which also held that the statute was valid because it contained a religious exception for which Catholic Charities did not qualify as Catholic Charities employs people of all faiths and beliefs (it does so in order to receive government money). The court further held that the statute was generally neutral and thus not subject to a strict scrutiny analysis under the Free Exercise Clause. The purpose in enacting the statute was an elimination of gender discrimination in women's health insurance coverage. Since the United States Supreme Court has held that the right to use contraception is a fundamental constitutionally protected interest, the Court of Appeals found the State's interest in this case a compelling one. According to the court, the statute also survives the three-prong *Lemon* analysis. The legislature did not have "an impermissible intent when it enacted the religious employer exemption in the prescription contraceptive coverage statute." The court stated that because the statute does not give preference to a particular religion, it does not violate the Establishment Clause. Furthermore, the incidental effects on the corporation's religious beliefs do not violate the Free Exercise Clause.

In late 2001, the California Supreme Court agreed to review this case. ADL filed an *amicus* brief asking California's highest court to recognize the importance of a health care system that does not discriminate based on religious beliefs and adequately covers all employees, regardless of the prescriptions or treatments they seek.

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie, Fraternal Order of Eagles and Washington State Aerie, Fraternal Order of Eagles, et al., 108 Wn. App. 208 (2001), review granted by 145 Wn.2d 1033 (2002), rev'd, 148 Wn.2d 224 (2002)

The Grand Aerie of the Fraternal Order of Eagles (FOE) and the Washington State FOE wanted to turn their organization into a men-only club. The Supreme Court of Washington, sitting *en banc*, determined that Washington's law against discrimination, RCW § 49.60, prevented FOE from excluding new female members. Along with other organizations, ADL submitted a brief urging the court to overturn the Washington Court of Appeals' determination that the law exempts fraternal organizations like the FOE from its anti-discrimination mandates.

FOE, which has 1.6 million members worldwide, restricted membership to males over the age of 21, who retained other characteristics such as good moral character and belief in the existence of a Supreme Being. Additionally, FOE would not admit members of the Communist party or individuals who advocate the violent overthrowing of the government. Established in 1898, for almost 100 years FOE excluded women from joining its ranks.

However, in 1995, the organization's governing body issued "Opinion 750," which allowed females to join FOE. The Tenino branch of FOE took advantage of this decision, and began adding females to its roster. In total, the local FOE admitted 56 women while Opinion 750 was in effect. Three years after its inception, FOE withdrew Opinion 750, thereby again closing its doors to interested women but allowing the women who joined FOE while Opinion 750 was in effect to remain full members.

The Washington statute at issue prohibits discrimination in "public accommodation" – a term that includes "any place, licensed or unlicensed... where the public gathers, congregates, or assembles for amusement, recreation, or public purposes." Like the Court of Appeals had previously done, the Supreme Court of Washington looked to the Legislature's intent in enacting the anti-discrimination law. While the law only exempts "fraternal organizations" that are "distinctly private," the court lacked a clear definition of a "distinctly private" club. However, relying on factors such as size, purpose, policies, selectivity, public services offered, practices, and other pertinent characteristics, the Supreme Court of Washington held that FOE is an organization not entitled to exemption from the anti-discrimination law. As such, the court held, FOE cannot discriminate on the basis of gender, and is required to admit women.

ADL is pleased that the Supreme Court of Washington took a broad view of its State anti-discrimination law, by refusing to allow an almost all-male organization with more than one million members to discriminate against

women. This ruling speaks not only to gender equality, but also to a refusal to tolerate discrimination in public groups.

III. HATE CRIMES

In the fight against hate crimes, ADL is one of the world's preeminent leaders; indeed, the hate crimes statutes adopted by most states is, in large part, based upon the model statute crafted by the League more than 20 years ago. In June 1993, the United States Supreme Court upheld a Wisconsin hate crime statute that was based on ADL's model. ADL remains actively involved in the passage of hate crimes laws, and in submitting *amicus* briefs in support of victims of hate crimes.

JoAnn Brandon, as Personal Representative of the Estate of Teena Brandon v. The County of Richardson, Nebraska, 261 Neb. 636 (2001), subsequent appeal at 264 Neb. 1020 (2002)

Made famous by the movie *Boys Don't Cry*, Brandon Teena's story is tragic. He was born Teena Brandon and raised as a girl. However, he lived as a man and was brutally raped because of his gender identity. Though he was threatened with death if he reported the rape, he went to the Sheriff's Department. Even though the police identified Brandon's attackers, they failed to make arrests or to protect Brandon – who was murdered five days after the rape.

JoAnn Brandon, Brandon's mother, brought a suit against the Sheriff's Department for wrongful death and intentional infliction of emotional distress, for failing to take reasonable measures to prevent Brandon's murder.

In 1997, the Nebraska Supreme Court recognized, for the first time, a duty on the part of law enforcement officials to protect victims of violent crime, like Brandon, from foreseeable future harm at the hands of their attackers. Despite this, on remand, the trial court found that the perpetrators were primarily responsible for the harm to Brandon, and transferred 85% of the liability to them. Effectively, the trial court defeated the purpose of the Nebraska Supreme Court's rule, which was to impose liability on law enforcement for failure to protect, in order to create an incentive for officials to respond appropriately to a crime victim who comes forward to the authorities. This incentive was severely undercut by placing primary liability with Brandon's attackers, rather than with the Sheriff's Department.

When the case came before the Nebraska Supreme Court for the second time, the court reversed the trial court's reduction of damages and affirmed the finding that the county had a duty to protect Brandon. Further, the court found that the duty to protect extended beyond merely investigating the complaint.

The Nebraska Supreme Court held that damages should not be apportioned for intentional tortfeasors, as they were in this case under Nebraska's

comparative negligence law. The court went so far as to hold that as a matter of law, the County Sheriff's conduct towards Brandon was outrageous enough to support JoAnn Brandon's claim for intentional infliction of emotional distress. The court also found that the award of zero damages on JoAnn Brandon's loss of society claim was inadequate as a matter of law, and that the trial court's finding that the victim was one percent contributory negligent was clearly erroneous.

ADL joined a number of civil rights groups in filing an *amicus* brief with the Nebraska Supreme Court. The brief emphasized that victims of bias crimes must be free to report their crimes without fear of retaliation. Further, the brief argued that the apportionment of liability between intentional and negligent tortfeasors is inappropriate, particularly for claims of failure to protect. ADL's brief also argued that in the context of hate crimes, holding law enforcement officials liable for breaching their duty to protect encourages victims to come forward to report crimes. Victims of bias crimes remain especially vulnerable to brutal repeat attacks, and failure to report these crimes hampers the law enforcement response to hate crimes. In addition, the brief argued that society would benefit from an improved ability to prosecute hate crimes.

In 2002, JoAnn Brandon returned to the Supreme Court of Nebraska yet again, arguing that the district court's award of damages was insufficient. The Court affirmed the previous ruling. It found that the district court's determination of damages was supported by evidence, and was not clearly erroneous. Ultimately, JoAnn Brandon received over \$98,000 for her claims of negligence, wrongful death, and intentional infliction of emotional distress. While, of course, no dollar amount could ever compensate the plaintiffs for their suffering, Brandon Teena's case forcefully illustrates why efforts to prosecute hate crimes must be stepped up, and why law enforcement authorities must take responsibility in protecting victims and fully investigating complaints.

Black v. Virginia, 553 S.E.2d 738 (2001), cert. granted, Virginia v. Black, 122 S. Ct. 2288 (2002).

A cross burning statute does not run afoul of the First Amendment if it punishes only criminal behavior such as intimidation. Our brief argues that the government has the clear power to outlaw serious threats of violence, and makes the strong point that criminal conduct is not immune from punishment merely because it is disguised as expressive activity. While we would oppose government attempts to stifle expression, there is no real expression involved here, only threats.

- National Director Abraham H. Foxman on ADL's brief in *Virginia v. Black*

A few months after Richard Elliott and Jonathan O'Mara tried to light a cross in an African American family's backyard, Barry Elton Black organized a Ku Klux Klan rally that included speeches rife with bigotry and ended with the burning of a 25 to 30 foot tall cross. All three men faced punishment for their actions under Virginia Code § 18.2-423, which prohibits cross-burning with the intent to intimidate any person or group of people. The Supreme Court granted *certiorari* to determine the constitutionality of this Virginia statute.

Following a spate of Klan activity – including cross burning – the Virginia General Assembly adopted the predecessor statute to the law in question in 1952. Relying on the 1992 case of *R.A.V. v. City of St. Paul* (505 U.S. 377), where the United States Supreme Court held that the government may regulate certain categories of speech, but may not use its regulation to discriminate against certain types of speech based on content, the Supreme Court of Virginia vacated the cross burners' convictions and found the statute too broad because it addressed protected and unprotected speech. The court also labeled cross burning a form of symbolic speech and found that the Virginia law impermissibly attempted to stifle a form of free expression.

Specifically, the court found that the Virginia law was "analytically indistinguishable" from the St. Paul, Minnesota Bias-Motivated Crime Ordinance that the Supreme Court held unconstitutional in *R.A.V.* According to the Virginia Supreme Court, both the St. Paul and Virginia statutes were discriminatory as applied, because they proscribed threats or intimidation based on "racial, religious, or some other selective content-focused category of otherwise protected speech" and therefore violated the First Amendment. The court explained that while the Virginia statute did not *literally* center on "race, color, creed, religion or gender," that was nevertheless the reason for the ban on cross burning.

ADL was the primary author of a multi-organization *amicus* brief filed in the Supreme Court, arguing that the cross burning statute passes constitutional muster because government may prohibit speech or conduct which flows from an intent to frighten or terrorize specific individuals.

Arguments were heard in December, and the Court's decision is expected in the spring term. Interestingly, Justice Thomas, arguably the most conservative justice on the Court, made a rare impassioned statement from the bench during oral arguments, during which he pointed to the true danger associated with burning crosses. The burning cross, he said, symbolizes "no communication, no particular message," but rather, "a reign of terror" signifying 100 years of lynching" Following Thomas' personal accounting of what a burning cross means to a black man, other members of the Court characterized burning crosses as uniquely threatening symbolic speech. For example, Justice Scalia likened the threat attached to burning crosses to the threat of a gun. Thomas' statement served to change the tone of debate,

suggesting that the Supreme Court had previously been too dismissive concerning the power a symbol such as a cross could carry.

ADL argued that the Government may constitutionally proscribe intimidation and threats, even if accomplished by speech or expressive conduct, that the burning of a cross with the intent to intimidate may be banned under the "fighting words" doctrine, that even though the Virginia statute singles out the burning of crosses for particular proscription, this does not invalidate the statute because legislatures can make judgements about which threats it will ban and finally, that this case falls out of the ambit of *R.A.V.*

IV. HATE ON THE INTERNET

To many, the Internet is an indispensable part of modern life. Email, up-to-date information, and one-stop pharmacies, supermarkets and clothing stores are all convenient and appreciated Internet functions many Americans use on a daily basis. Yet while the Internet enables us to access information and reach out to a wide audience, it provides hate groups, racists and anti-Semites the same wide audience.

Web sites marked by hateful and racist vitriol are easily found through search engines and other users' recommendations. Hatemongers use the Internet to draw in curious browsers, as well as equally hateful people ready for a rally. A simple search can produce scores of hateful lyrics, "information," groups and materials to purchase.

At the same time, Internet law remains in its infancy and is only beginning to answer questions about legal Web content. As hate on the Web will undoubtedly increase and Internet law continues to develop, ADL will likely find itself involved with difficult cases and controversies that require careful balancing of First Amendment rights and safety concerns.

Planned Parenthood of the Columbia/Williamette, Inc., et al. v. American Coalition of Life Activists, et al., 244 F.3d 1007 (9th Cir. 2001), rehearing en banc granted, 268 F.3d 908 (9th Cir. 2001), affirmed by, in part, vacated by, in part, remanded, 290 F.3d 1058 (9th Cir. 2002), rehearing, en banc, denied by, corrected by, 2002 U.S. App. LEXIS 13829 (9th Cir. 2002), petition for cert. filed, 71 USLW 3292 (2002)

The case, which was the subject of intense media scrutiny and passionate public debate, was brought by physicians and health clinics that provide medical services, including abortions, to women. The Defendants, anti-abortion extremists, posted "wanted"-style posters on the Internet. These posters contained personal identifying information about the physicians, including their names and addresses. The plaintiffs argued, and the courts agreed, that the defendants had stripped the physicians of their anonymity and paved the way for anti-abortion activists to locate them.

After trial, a jury awarded the physicians more than \$100 million in damages, and the District Court of Oregon enjoined the defendants' Web site. The defendants' appeal to the U.S. Court of Appeals for the Ninth Circuit focused on their alleged rights under the Free Speech Clause of the First Amendment.

ADL filed a brief supporting the plaintiff-appellees. ADL argued, first, that "true" threats do not enjoy First Amendment protection. Second, an objective standard governs whether a particular statement is a true threat. The standard to be applied in such cases is whether a reasonable person

would foresee that those at whom the statement is directed would interpret it as a serious expression of intent to harm or assault. ADL argued that the First Amendment clearly does not protect such speech. Finally, ADL's brief noted that whether speech may be classified as a "true threat" is a question for the jury.

A panel of the Ninth Circuit disagreed with ADL and ruled that the First Amendment applied to protect the defendants' speech. Judge Alex Kozinski's decision reasoned that the posters and publication of the physicians' names could not be construed as a direct threat that they would physically harm the abortion providers.

Following the Ninth Circuit's decision, ADL filed another *amicus* brief, written by noted University of Southern California Law Professor Erwin Chemerinsky, petitioning the Ninth Circuit for a rehearing *en banc*. This petition argued that the Ninth Circuit should rehear the matter, in order to resolve conflict among the panel's decision, the Ninth Circuit's prior decisions and the United States Supreme Court precedent.

ADL's brief first restated its earlier position that a jury should decide whether speech constitutes a true threat, based on the totality of the circumstances. The brief argued that the panel erred in holding that a true threat "requires that the speakers personally have the means and intent to carry out the threat themselves." Furthermore, the brief argued that the Ninth Circuit's three-judge panel ruling conflicted with other Ninth Circuit holdings. Specifically, the Ninth Circuit has consistently held that there is "no First Amendment protection when a reasonable person could foresee that the listener will believe that he will be subjected to physical violence."

The brief also contended that the panel decision was inconsistent with Supreme Court precedents. Specifically, the brief argued, the Ninth Circuit panel misinterpreted an earlier true threats case, *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982), which held that a true threat did not exist where the speaker had not "authorized, ratified, or directly threatened acts of violence." However, *Clairborne Hardware* differed from *Planned Parenthood* because the former case presented facts where there was only minimal reason to fear that violence would actually occur. Finally, the *amicus* brief pointed out, the Supreme Court has made clear that while political hyperbole is protected by the First Amendment, true threats are not.

In late 2001, the Ninth Circuit granted rehearing *en banc* for this case. Arguments were heard in December, and the Court issued its ruling in May 2002. ADL is pleased with the results of the *en banc* decision, which recognizes that true threats – as reasonable people would define them – are separate and apart from otherwise protected political speech.

First, the court found that it was appropriate for the lower court to adopt the law on "true threats" and to define a "threat" for the purpose of the Freedom

of Access to Clinics Entrances Act (FACE). As ADL argued was appropriate, the Court employed the “reasonable speaker” test, a test formulated in *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969) that has come to set the standard: “Whether a particular statement may properly be considered a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.” *Planned Parenthood*, 290 F.3d 1058, 1074 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). Under this test, the Court noted, the defendant need not actually intend to, or even be able to, carry out the threat. Rather, a true threat requires that the defendant “intentionally or knowingly communicate the threat.” Then, the court noted, a threatening statement in violation of FACE would not receive First Amendment protection.

Relying on this standard, the court concluded that the “wanted” posters were not simply political statements. Three doctors were in fact killed after the release of “wanted” posters identifying them. Aware of this pattern, defendant American Coalition for Life Activists still issued a “wanted” poster for another doctor and identified two doctors on another “guilty” poster. As the Court noted, “[t]his goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.” Another poster, the “Nuremberg Files,” also listed “Abortionists” and identified abortion providers who have faced death or injury. Distinguishing the posters from true political speech, the Ninth Circuit recognized that the question of whether these materials constituted true threats was a question for the jury to consider.

The court found that the “wanted” and “guilty” posters constituted a true threat. While the advocacy of violence is protected speech under the First Amendment, the court noted, threatening a person with violence is not in the same category. The court found: “The posters are a true threat because, like... burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant ‘You’re Wanted or You’re Guilty; You’ll be shot or killed.’” Furthermore, after the posters were circulated, the physicians began wearing bulletproof vests and taking other steps to safeguard themselves and their families. The court concluded that the anti-abortionists could have easily foreseen that their actions would cause such results and that the group intended to intimidate the physicians. This, the court concluded, stripped the activists’ speech of First Amendment protection.

Finally, the court ruled that keeping the activists from continuing to threaten the physicians did not burden the activists’ speech more than was necessary. Specifically, the activists wanted to hold onto their posters identifying the physicians. However, the court found that the activists had a *de minimis* interest in holding onto the posters, while the group’s continued possession

was actually part of the threat to the doctors. Noting that the injunction was especially narrow, the court concluded that the order to turn over the threatening materials was no broader than necessary to insure that the group could not threaten the physicians with the posters again.

In July 2002, the Ninth Circuit issued another ruling in this case. In addition to amending Judge Kozinski's dissent from the most recent ruling, the decision denied the defendant-appellants' petition for rehearing en banc. ADL again applauded the Ninth Circuit for ensuring that such conscious and blatant threats do not receive First Amendment protection.

V. FEDERALISM

***United States of America v. Lemrick Nelson, Jr. and Charles Price*, 277 F.3d 164 (2d Cir. 2002), cert. denied, 123 S. Ct. 145 (2002)**

The Crown Heights riots recall images of chaos, violence, and ultimately, murder. They also strike a sharp chord concerning issues of racial relations in the mostly Jewish and African American Brooklyn neighborhood. In 1992, during the tumultuous riots, the defendants killed Yankel Rosenbaum, committing a crime that followed closely behind a Hasidic driver's striking and killing an African-American child.

After a controversial trial that attracted much attention, the defendants were acquitted of Rosenbaum's murder. However, they were later convicted in federal court for violation of Rosenbaum's civil rights in their commission of this hate crime. While their appeal was pending before the U.S. Court of Appeals for the Second Circuit, the Supreme Court, in *United States v. Morrison*, 529 U.S. 598 (2000), found the civil remedies provision of the Violence Against Women Act unconstitutional. In light of the *Morrison* decision, the Second Circuit requested that lawyers brief the issue of constitutionality of the statute under which Nelson and Price faced conviction. ADL, along with a consortium of Jewish organizations, filed an *amicus* brief in the appeal.

The new year brought with it a sharp turn in this case, when the Second Circuit overturned Nelson and Price's convictions on January 7, 2002. The decision ordered a new trial, based on the court's finding of reversible error in the District Court's considerations of race when empanelling the jury. Most importantly for the broader civil rights interests implicated in this case, however, the Second Circuit affirmed the District Court's finding that the civil rights statute in question, 18 U.S.C. § 245 (b)(2)(B), was constitutional as applied to Jews. The panel reached its decision based on Congress' authority under the Thirteenth Amendment, which reaches both private and public conduct and has historically been interpreted to give Congress "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

Judge Guido Calabresi's opinion took note of the defendants' argument that the Thirteenth Amendment can only be used to support civil rights legislation dealing with race-based discrimination. Even if defendants were correct, the opinion observes, "race" was a loose term of art at the time of the Thirteenth Amendment's enactment, and was then understood to include religion in its definition. Therefore, regardless of whether defendants' Thirteenth Amendment argument held weight, the Court could find the civil rights statute constitutional as applied in the case of anti-Jewish violence.