



2009 YEAR END REVIEW

2009 proved to be an interesting year in the courts for ADL’s agenda. The Supreme Court wrestled with two cases concerning religious displays on public grounds, one at the end of its last term and one at the beginning of the newest term. Also, at the end of last term, the Court decided controversial cases involving race-based decisions in the employment context as well as in the voting booth. In the U.S. Supreme Court term which began in October 2009, ADL has already filed in four cases, and we are preparing for at least two more filings in 2010.

In addition, the United States Courts of Appeals and the state courts provided opportunities for ADL advocacy in 2009. The League continues to be involved in cases addressing such issues as extremist groups and the First Amendment; the interpretation of state hate crimes statutes; the line between the free exercise clause and the establishment clause; and strengthening the understanding of workplace discrimination laws. ADL has been a consistent opponent of the California same-sex marriage ban that was analyzed in a number of court cases in the state. Further, the League participated in two separate cases involving anti-Semitism in a jury room.

The following is a summary of the cases in which ADL was involved in 2009.

DECISION KEY	
	Favorable to ADL
	Contrary to ADL
	Decision on other grounds

2009 DECISIONS FROM U.S. SUPREME COURT

Discrimination
Race-conscious decision-making



Ricci v. DeStefano (U.S. Supreme Court)

This case was brought by firefighters in New Haven after the City threw out the results of an exam to determine who would be promoted to lieutenant in the Fire Department because the results meant that no African-Americans would be promoted. The City claimed that if it made promotions based on the test, it would be subject to a lawsuit by African-American firefighters. The white firefighters sued, claiming racial discrimination. In a brief supporting neither side, ADL asserted that the lower courts’ scrutiny of New Haven’s race-based action was inadequate, and suggested that the court require the City to demonstrate a “compelling interest” before scrapping the exam. The Court agreed that the City’s decision to ignore the results because it feared being sued had to be supported by a "strong basis in evidence."

Civil Liberties
Voting rights



Northwest Austin Municipal Utility District v. Holder (U.S. Supreme Court)

This case challenges the constitutionality of Congress’ 2006 decision to extend Section 5 of the Voting Rights Act for an additional 25 years. The decision to extend the law was based on Congressional findings that vestiges of discrimination still exist and thus the law should remain in effect. ADL joined with the nearly 200 organizations that comprise the Leadership Conference on Civil Rights and urged the Court to uphold the VRA extension, arguing that Congress’ determination was reasonable and that history shows that gains in

minority political participation can be reversed if the political branches and the courts fail vigilantly to protect them.

Church-State
Separation
Religious
displays on
public property



Pleasant Grove v. Summum (U.S. Supreme Court)

Pleasant Grove City, Utah, refused a request by Summum, a religious organization, to place their Seven Aphorisms monument next to an existing Ten Commandments monument in a public park. The 10th Circuit ruled in favor of Summum, on free speech grounds, holding that the park was an open forum that “the city cannot close...by fiat.” No Establishment Clause claim was raised. ADL joined in filing an *amicus* brief in the U.S. Supreme Court which argued (a) the free-speech analysis is improper because permanent monuments are government speech and (b) the Establishment Clause provides the proper framework for this case. In a 9-0 decision, the Court held that the display of monuments in public parks constitutes government speech, but did not engage in an Establishment Clause analysis. Importantly, the Court noted as part of its analysis that when the government chooses monuments to display, it “must comport with the Establishment Clause” and cannot promote or endorse religion.

2009 DECISIONS FROM APPELLATE AND STATE COURTS

Church-State
Separation
Religious music
in schools



Stratechuk v. South Orange – Maplewood School District (U.S.C.A. Third Circuit)

This case involves a school board policy to reduce the religious holiday content of school music concerts by requiring that “religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.” A suit was brought by a parent arguing that the policy amounts to hostility toward religion and that it deprives students of the right to receive information and ideas. The lower court upheld the policy. ADL joined with other Jewish organizations in filing an *amicus* brief arguing that the policy does not violate the First Amendment. The court agreed with the coalition and found the school’s policy was valid.

Church-State
Separation
Bible reading in
schools



Busch v. Marple Newton School District (U.S.C.A. Third Circuit)

A school district had a program designed to involve parents in their children’s kindergarten classes, and one parent sought to read Bible verses to the class. The school prohibited this activity, and the parent sued the school. ADL’s *amicus* brief argued that there is a constitutionally required difference between activities that had been permitted in the classroom – e.g., explaining the significance of a dreidel in a neutral manner – and reading directly from Holy Scripture. ADL argued that a line can be drawn that protects open discussion of cultural and religious differences but does not permit proselytizing in the public schools. The court agreed with the League’s position, and upheld the prohibition of reading Scripture to kindergarten students.

Church-State
Separation
University clubs



Christian Legal Society v. Hastings Law School (U.S.C.A. Ninth Circuit)

The Christian Legal Society, a student religious group seeking formal recognition at University of California Hastings College of the Law, wished to deny gays and lesbians membership or officer positions in their club. However, this student group would be receiving support from a publicly-funded university. ADL wrote a brief arguing that such publicly-funded discrimination should not be permitted. The 9th Circuit agreed and issued a decision upholding the right of the law school to enforce its policy against discrimination on the basis of religion and sexual orientation on the student group.

Church-State
Separation

Proselytizing on
public property



Cooper v. United States Postal Service (U.S.C.A. Second Circuit)

The U.S. Postal Service contracted with a church for the operation of a “contract postal unit.” The church used the space to deliver its religious messages. In its brief, ADL argued that the church functioned as a state actor when operating the contract postal unit and that the religious activities of the Church (while delivering postal services) impermissibly intertwined government and religion. ADL also argued that even if the church wasn’t a state actor, the requirement that the government’s customers – postal patrons – endure proselytizing was a violation of the Establishment Clause. The court agreed with both contentions. Regrettably, the court provided an inadequate remedy: it held that the postal unit merely had to have a postal counter free of religious material and that it had to use “visual cues” to distinguish the space operating as a postal facility from the space functioning as purely private property.

Free Exercise

Zoning



Pastor Rick Barr v. City of Sinton (Texas Supreme Court)

A pastor challenged a zoning ordinance that precluded free housing and religious instruction for men recently released from prison within “1000 feet of a residential area ... church, synagogue, or other place of worship.” The trial and appellate courts upheld the ordinance, arguing that zoning restrictions do not substantially burden auxiliary religious operations. ADL filed a brief arguing that courts should not determine what is auxiliary and what is central to a religious organization. Such a standard violates the Texas Religious Freedom Restoration Act, which states “religious exercise does not need to be motivated by a central part or central requirement of the person’s sincere religious belief.” The Court adopted ADL’s position, agreeing that TRFRA protection extends to all sincere religious beliefs, and the judiciary is not suited to determine what is auxiliary to a religious group or belief.

Extremism

Extremists in
law
enforcement



Nebraska v. Henderson (Nebraska Supreme Court)

A Nebraska state police officer, who was fired after it was discovered he was a member of the White Knights (a Ku Klux Klan group) and had posted messages to their website, challenged his termination as unconstitutional. ADL, which has a long history of working closely with law enforcement in the fight against extremism, filed a brief in support of the State arguing that public confidence in law enforcement would be severely undermined by the presence of a Klan member on the force. The brief also argued that opposing discrimination is well-established public policy. The Court agreed that a reinstatement would violate Nebraska’s explicit public policy of enforcing the law without discrimination on the basis of the race of its citizens.

Combating
Hate

Hate crimes



Wisconsin v. Welda (Wisconsin Supreme Court)

This case involves a challenge to a hate crime enhancement penalty to a disorderly conduct criminal charge. Petitioners argue that because the underlying crime was speech-only, and speech forms the basis of the penalty enhancement, the charge is unconstitutional. ADL submitted a brief arguing that the U.S. Supreme Court had held this very statute constitutional in *Wisconsin v. Mitchell* and that unprotected speech that constitutes a crime may be subject to enhancement penalties. The court dismissed the petition holding it is premature to decide the issue at this point because the underlying facts have not been developed.

Discrimination

Same-sex
marriage



Strauss v. Horton (California Supreme Court)

After the California Supreme Court held that the State’s ban on same-sex marriage was unconstitutional, a ballot measure was prepared that would amend the CA Constitution to hold that marriage is between a man and a woman. Opponents petitioned the Court for a *writ of mandate* to remove this measure from the ballot, arguing the measure would be a constitutional revision, rather than a constitutional amendment, and that a constitutional

revision requires 2/3 vote of the legislature. The Court denied the petition and voters approved Proposition 8. Another challenge was brought to the CA Supreme Court on the same grounds. ADL submitted *amicus* briefs in support of both the petition for a *writ of mandate* and in support of petitioners in the follow-up case challenging the validity of Prop 8. In its *amicus* brief, ADL relied on California’s Equal Protection Clause and the history of discrimination in the state’s laws. The Court disagreed, and upheld Proposition 8.

Combating
Hate
Hate Crimes



New York v. Mazin Assi (New York Appellate, First Department)

This case involves the first hate crime prosecution under the New York Hate Crime Act. The defendant and his friends placed Molotov cocktails outside a Bronx synagogue to send an anti-Israel message to the Jewish community. The defendants argued, in part, that their act was not a hate crime because it targeted a building, rather than a person. ADL submitted an *amicus* brief arguing that the statute’s plain language, the legislative purpose at the time of its passage, and public policy confirm that the New York Hate Crime Act covers crimes against property. The Court agreed that property crimes are indeed covered in the New York law. The Defendant appealed the case to the New York Court of Appeals, and ADL again filed an *amicus* brief in New York’s high court (described in “Briefs Filed” section below.)

Discrimination
Accommodation in
schools



NYS Division of Human Rights v. East Meadow Union Free School District (New York Appellate, Second Department)

The New York Human Rights Division determined that the East Meadow Union Free School District violated the state’s Human Rights Law ("Law") when it refused to accommodate a student with a disability. The school district argued that, as a public school district, it did not fall under the jurisdiction of this Law. ADL joined a coalition of national and local civil rights organizations in a brief arguing that the Law covers all educational settings, and makes no distinction between public and private schools. The Second Department agreed with the district and found that school districts are not liable under New York Human Rights Law.

Discrimination
Accommodation
in schools



Newfield Central School District v. NYS Division of Human Rights (New York Appellate, Third Department)

Newfield Central School District argued that, as a public school district, it does not fall under the jurisdiction of the New York Human Rights Division or the New York State Human Rights Law. ADL joined a coalition of national and local civil rights organizations in an *amicus* brief arguing that the Law covers all educational settings, and makes no distinction between public and private schools. The court issued an opinion related to administrative proceedings, without resolving the merits. The Court allowed the Division to proceed with its investigation, but made no decision about whether it had jurisdiction to do so.

BRIEFS ADL FILED AWAITING DECISION

Church-State
Separation
Religious
displays on
public property

Salazar v. Buono (U.S. Supreme Court)

In this case, the Supreme Court will resolve a long battle between Congress and the courts surrounding a 74-year-old 8-foot-tall cross (which has been replaced several times) standing on Sunrise Rock in California’s Mojave National Preserve. The Ninth Circuit ruled that the government could not maintain the statue nor could it evade the strictures of the First Amendment by transferring title to the small parcel of land on which the cross sits to a private party. In support of the ruling below, ADL argues, as part of a coalition, that the government cannot transfer a small piece of land in the middle of a public park to private control merely to protect the religious monument that stands on it, and should not

restrict the right of Americans to sue when confronted with violations of the Establishment Clause.

Civil Liberties
Jurisdiction
over foreign
officials

Samantar v. Bashe Abdi Yousuf, et al. (U.S. Supreme Court)

A group of Somalis are seeking legal redress in a U.S. court for the alleged torture they suffered at the hands of soldiers under the command of a former Somali government official. The former prime minister, is claiming immunity under the Foreign Sovereign Immunities Act. ADL argued that U.S. courts cannot provide immunity to officials of foreign countries who are accused of violations of *Jus Cogens* norms (the most fundamental norms of international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”), including acts of torture, genocide and other crimes against humanity. At the same time, ADL asked the Court to not tamper with a developing set of doctrines and principles in the Courts of Appeals that have served to prevent such suits from becoming political weapons.

Combating Hate
Terrorism

Holder, et al. v. Humanitarian Law Project, et al. (U.S. Supreme Court)

This case analyzed the “material support” provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). In its amicus brief, ADL argued that prohibitions against knowingly providing “training,” “expert advice or assistance” and/ or “service” to foreign terrorist organizations and other designated forms of material support or resources to foreign terrorist organizations are constitutional. The League argued that providing resources to humanitarian components of foreign terrorist organizations is linked to their ability to engage in terrorist acts, and may enhance the organization's legitimacy.

Discrimination
Workplace
discrimination

Lewis v. Chicago (U.S. Supreme Court)

This case concerns a lower court ruling which dramatically limited the time within which victims of workplace discrimination can file a claim. Specifically, the case involved firefighters who wanted to challenge a promotions test they thought was racially discriminatory. A lower court ruled that the employees had to file a lawsuit within 300 days of getting the test results. The firefighters claimed that they should be permitted to file a lawsuit within 300 days of the time each hiring decision based upon those test results was made. ADL joined a coalition of civil rights groups in a brief arguing that each time a discriminatory practice is used, it has an impact on employees and on the community and so litigants must have appropriate access to the courts to ensure that such practices are ended, not enshrined.

Church-State
Separation
Standing

McCollum v. California (U.S.C.A. Ninth Circuit)

This case involves a Wiccan clergy member challenging a policy of the California Department of Corrections which limits paid clergy positions to members of five religions. The plaintiff was denied his right to bring a lawsuit because the Court thought he wasn't the correct party to do so. ADL joined a group of civil rights organizations in arguing that the clergy member deserved his day in court, and that even if being unconstitutionally denied a job wasn't a good enough reason to challenge the policy, as a taxpayer he should have had the right to challenge the use of government funds that favor some religions over others.

Discrimination
Anti-Semitism

Tenenbaum v. Ashcroft (U.S.C.A. Sixth Circuit)

David Tenenbaum, a U.S. Army engineer, was accused of being an Israeli spy and was subjected to numerous invasive investigations, none of which resulted in a criminal prosecution. The Defense Department's Office of the Inspector General concluded that,

“[b]ut for Mr. Tenenbaum’s religion, the investigations would likely have taken a different course.” Tenenbaum’s lawsuit against the government was thrown out (twice) because the court found that state secrets would be at issue. In a brief supporting his appeal, ADL argued that Tenenbaum should be given his day in court. The brief explained that the anti-Semitic canard of “dual loyalty” - that Jews are more loyal to Israel than the U.S. - may have been at play; and that adherence to this stereotype, particularly in government-dominated fields, has resulted in a pattern of discrimination against American Jews.

Discrimination
Hostile Work
Environment

Harris v. Mayor and City Council of Baltimore (U.S.C.A. Fourth Circuit)

This Title VII sexual harassment case concerns the standards for proving a hostile work environment claim. ADL joined a coalition of civil rights organizations in a brief arguing, among other things, that courts may consider many factors when evaluating the severity or pervasiveness of harassing conduct and that conduct does not have to be physical in nature, nor does it have to be directed specifically at the victim, to be actionable. The brief also explained that the new, heightened standard the district court created would enable employers to ignore workplace harassment with impunity, and discussed the reasoning behind the established hostile environment standards.

A.A. v. Needville Independent School District (U.S.C.A. Fifth Circuit)

A district court enjoined an elementary school from enforcing a district-wide hair style policy against a 5-year old who wore his hair in two long braids in the tradition of Native American religions. On the appeal, ADL filed a brief arguing that by refusing to grant an exemption from its policy against long hair for boys, it effectively forces him and his parents to sacrifice their religious beliefs, or else to forgo public education entirely. Punishing a kindergartner or denying him access to the public schools for the simple, non-disruptive act of wearing long hair in accordance with his family’s sincere religious beliefs is irreconcilable with basic principles of religious liberty.

Free Exercise
Religious garb
in schools

American Atheists, Inc. v. Duncan (U.S.C.A. Tenth Circuit)

This case involves the placement of crosses along public highways by the Utah Highway Patrol Association to memorialize officers who died in the line of duty. The lower court reasoned that the cross is not a religious symbol, but rather a secular symbol of death, and thus the erection of crosses are constitutional. ADL submitted an *amicus* brief arguing that indeed the cross is a long-standing religious symbol, cannot be interpreted as a secular symbol, and that the State’s displays in this case show a religious preference by the government in violation of the First Amendment.

Church-State
Separation
Religious
displays on
public property

MGA v. Mattel (U.S.C.A. Ninth Circuit)

In a case in which it was revealed that a juror made bigoted (anti-Iranian) comments about a defendant while serving on a jury, ADL led a coalition in a brief that argued that the right to a fair trial by an impartial jury is paramount. Specifically, ADL argued that (a) the juror’s comments about the ethnicity of the defendant established her actual bias under the law, (b) her bias likely influenced the other jurors, through her overt demeaning of Iranians and her covert expression of that bias throughout jury deliberations, (c) a civil verdict in which a biased juror has participated cannot stand and (d) litigants do not have an obligation to ask questions about all possible prejudices during *voir dire*, as the district court held.

Discrimination
Bigotry

University of the Cumberlands v. Pennybacker (Kentucky Supreme Court)

The Kentucky legislature appropriated \$10 million to a sectarian university to finance the construction of a new pharmacy school. The lower court held that the appropriation violated

Church-State
Separation
State funding

the State Constitution, which restricts state funding of religious education. The University appealed, arguing that the restriction, as applied, is unconstitutional. ADL joined the American Jewish Congress in a brief arguing that the State restriction on funding is a constitutional and appropriate restriction under the First Amendment, and that the restriction does not violate free speech because it is viewpoint neutral.

Combating Hate
Hate Crimes

New York v. Mazin Assi (New York Court of Appeals)

This case, involving the New York Hate Crime Act, is more fully described in the “Appellate and State Courts Decisions” section above. After a good decision in the appellate court, which upheld a strong definition of a hate crime, the case was appealed to New York State’s highest court. Again, ADL submitted an amicus brief arguing that the statute’s plain language, the legislative purpose at the time of its passage, and public policy confirm that the New York Hate Crime Act covers crimes against property.

Discrimination
Anti-Semitism

Pepose Vision v. Fleshner (Missouri Supreme Court)

This case centers on allegations by two jurors that fellow jury members used viciously anti-Semitic slurs, including “penny pinching Jew,” and “cheap Jew,” to describe the defendant in a case, and then returned a verdict against the defendant. ADL filed a brief on the Appellate level, arguing that while American law has always protected the sanctity of jury deliberations, basic notions of justice, fairness and due process require that a verdict resulting from the bias or prejudice of the jury cannot be permitted to stand. The Court of Appeals remanded the case, but did not base its decision on the issue of the effect of anti-Semitism in the jury room. The case was appealed, and the League filed, again arguing that prejudice in the jury room should be impermissible.

Civil Liberties
Immigrants

Lozano v. Hazleton (U.S.C.A. Third Circuit)

This case involves an anti-immigration ordinance which prohibited the hiring of, and leasing of property to, illegal immigrants. The lower court ruled the ordinance was unconstitutional because immigration policy is more properly governed by federal law. ADL joined a coalition of civil rights organizations in filing an *amicus* brief which depicted the history of anti-immigrant sentiment in U.S. history and argued that the Hazleton ordinance was discriminatory in intent and effect.

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