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THE RELIGION CASE REPORTER

Reporter: MARTIN J. FISCH, Esq.

A monthly reporting federal and state cases addressing the free exercise of religion, state establishment of religion, the clergy and religious institutions. Analysis of federal and state legislation. Complete coverage of religion as it impacts on family law; bankruptcy; employment; medical care; rights of association; public accommodations and fair housing; fora analysis; criminal law and prisoner rights; evidence and privileges; commercial law; immigration and the right of asylum; immunity from suit; education and schools; subject matter jurisdiction; real property law; taxation; libel and defamation; church membership; sports; statutes of limitation; insurance; negligent counseling, hiring, training, retention and supervision; organizational operation of religious institutions; display of religious symbols and prayer; damages; sexual abuse; standing; state financial aid; unemployment and workers' compensation benefits; unions; zoning and land control; over one thousand indexed topics.

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or the church and regional and national bodies of the United Methodist Church failed to reflect a constitutionally adequate relation to interstate commerce; the U.S. Supreme Court vacated the judgment of the Fifth Circuit panel and remanded the case for further consideration in light of *Jones v. U.S.*; on remand, the Fifth Circuit concluded that nothing in *Jones* was inconsistent with or suggested error in the Fifth Circuit's prior decision to vacate defendant's plea or in the finding that the factual basis for defendant's plea did not suffice to reflect the substantial effect on interstate alleged by the government; however, the Fifth Circuit now clearly held (1) at the relevant time, the church building was not itself being actively employed for commercial purposes so as to be within the terms of section 844(i) as construed by *Jones* and (2) for purposes of meeting the "substantially affect" requirement in a § 844(i) prosecution aggregation is always inappropriate **Case # 1024** (5th Cir.)

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School board had created a limited public forum by permitting numerous organizations, including churches, private membership organizations, athletic clubs and other outside groups, to utilize its school facilities for after-hour use; for further discussion, see **Case # 1016** (S.D. Fla.) under **BOY SCOUTS**

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MOTTO AND SEAL OF U.S., STATE OR MUNICIPALITY

Defendant county treasurer posted the national motto "In God We Trust" in the county treasurer's office; when plaintiffs complained, defendant allegedly made religious comments supporting her action and/or criticisms of plaintiffs; one plaintiff lacked standing for failing to allege a direct, personal injury resulting from the challenged conduct; the other plaintiff, although sufficiently (but barely) alleging direct injury, also lacked

standing to seek injunctive relief because of, inter alia, the absence of a current case and controversy; plaintiffs' claims were also moot because the poster of which they complained, in which the word "God" was printed in large red letters, was substituted with one which printed the word "God" in the same color and size as all other words in the national motto and which made a larger reference than did the previous posters to the fact that this was the U.S. national motto; even if plaintiffs had standing and the case was not moot, plaintiffs failed to state a claim upon which relief could be granted, either under the free speech or establishment clauses of the First Amendment; defendant was awarded attorneys' fees as plaintiffs' claims were patently frivolous, without any basis in law **Case # 1012** (D. Kan.)

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Plaintiffs failed to establish taxpayer standing to challenge holiday display exhibited by township; plaintiffs failed to carry their burden of proving an expenditure of revenues to which they contributed that would make their suit a good-faith pocketbook action; nor did plaintiffs successfully establish standing based on non-economic injuries allegedly resulting from the display, such as unwelcome contact **Case # 1011** (3d Cir.)

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Plaintiff, intending to attend church services, tripped on a raised metal grate while walking along a public sidewalk abutting the church; under New Jersey's Charitable Immunity Act, the church was immune from suit as plaintiff, even though she had not yet entered the church or church property was, in the language of the statute, "a beneficiary, to whatever degree, of the works" of the church as she was intending to attend the church and receive its benefactions **Case # 1009** (N.J. Super. Ct. App. Div.)

SOLICITATION AND DISTRIBUTION AND SALE OF RELIGIOUS MATERIAL

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STANDING

Plaintiffs failed to establish taxpayer standing to challenge holiday display exhibited by township; plaintiffs failed to carry their burden of proving an expenditure of revenues to which they contributed that would make their suit a good-faith pocketbook action; nor did plaintiffs successfully establish standing based on non-economic injuries allegedly resulting from the display, such as unwelcome contact **Case # 1011** (3d Cir.)

Standing to challenge National Motto posted in county treasurer's office, see **Case # 1012** (D. Kan.) under **MOTTO AND SEAL OF U.S., STATE OR MUNICIPALITY**

City and County ordinances prohibited discrimination on the basis of gender identity or sexual orientation in connection with employment; plaintiff employer had standing to bring a declaratory action even though the government had not yet sought to enforce the ordinances; the action was also ripe for adjudication; the only aspect of plaintiff's case over which the court lacked jurisdiction was plaintiff's objection to those portions of the ordinances which prohibited any person from acting to "incite" another to violate any portion of the ordinances, as there was no existing case and controversy as to said issue because plaintiff had not proposed to engage in any conduct which would run afoul of even a broad interpretation of the incitement provisions of the ordinances, something that was not true in the case of the other provisions of the ordinances; for further details, see **Case # 1008** (W.D. Ky.) under **EMPLOYMENT**, "Anti-Discrimination Laws in Employment; Effect on Employer's First Amendment Rights"

STATE AID TO RELIGIOUS EDUCATION AND OTHER PROGRAMS

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Seventh Day Adventist college was entitled to receive, under Maryland's Sellinger Program, direct funding of nonreligious programs such as mathematics, computer science and nursing; while agreeing with the district court that the college was not a pervasively sectarian institution, although certain aspects of the college clearly were of a sectarian nature, the Fourth Circuit Court of Appeals held that the pervasively sectarian test was no longer the relevant inquiry; even if an institution is pervasively sectarian, under current U.S. Supreme Court jurisprudence the government may fund pervasively sectarian institutions so long as the program satisfies the "neutrality plus." test formulated by Justice O'Connor in her concurring opinion in Mitchell v. Helms **Case # 1015** (4th Cir. 2001)

STREET PREACHERS

Portions of a College Green had been opened up as a non-traditional public forum, but a portion of the Green, on which stood a Civil War Monument, was reserved by the University as a nonpublic forum at which only private speech was allowed; defendant preacher who became involved at the Monument in heated discussion with students was asked by campus police to leave the University grounds and when he refused he was arrested; conviction for criminal trespass upheld; the Monument area was a nonpublic forum, not a traditional public forum, or an area opened up as a non-traditional public forum; college police did not discriminate against defendant in enforcement of the college's policies, nor was the college's policy void for vagueness **Case # 1017** (Ohio Ct. App.)

Village ordinance aimed at regulating door to door solicitation and canvassing by requiring, inter alia, submission of a registration form preliminary to the securing of a permit; the registration form had to furnish information about the solicitor's or canvasser's cause, why he was canvassing, which residences he intended to canvass, how long he intended to canvass, and any "other information concerning the Registrants and [their] business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired"; upon obtaining a permit, a canvasser could canvass any private residence in the Village between the hours of 9 am and 5 pm, provided the owner of the residence had not filed a No Solicitation Form with the Mayor's Office and had not posted a "No Solicitation Sign" on his property; the official "No Solicitation Form" contained a list of various organizations next to which the resident could place a checkmark to indicate the organizations the resident wished to be excluded from the general prohibition; while the No Solicitation Form listed several organizations by name, the only religious organization listed was the Church of Jehovah's Witnesses; individuals covered by the ordinance failing to comply with the ordinance could be charged with a misdemeanor; the district court upheld the ordinance, except that it found that (1) the 5 pm time restraint was an unreasonable restriction on time and that the Village had to allow for canvassing during all daylight hours; (2) the section of the "No Solicitation Form" which singled out Jehovah's Witnesses was unconstitutional and had to be deleted; (3) in order for the ordinance's "additional information" requirement to be constitutional, Jehovah's Witnesses need only note on the application that they sought to "canvass as part of the Jehovah's Witness" ; (4) requiring plaintiffs to list on the Registration Form each residence they intended to visit was an onerous regulation that could potentially violate the exercise of constitutional rights, but that this problem could be cured by the Village allowing a registrant to attach to the Registration Form a list of willing Village residents provided by the Mayor's office; plaintiffs did not appeal those portions of the ordinance the district court found unconstitutional and which it revised, consequently, those questions were not before the Court of Appeals, although the Court of Appeals did question the district court's attempt to rewrite the 9 am to 5 pm time restriction provision; on appeal, plaintiffs continued to attack the entire registration requirement; the Sixth Circuit Court of Appeals upheld the registration requirement holding that the ordinance (a) did not violate plaintiffs' right to free speech; (b) the ordinance was not unconstitutionally overbroad or vague; (c) the ordinance was constitutional as applied to Jehovah Witnesses and furthered the Village's significant interest in protecting its residents from annoyance in their homes and in preventing fraud, and that the ordinance left open ample alternative channels of communication; (d) plaintiffs' free exercise of religion rights were not violated; and (e) although plaintiffs did not secure all the relief they desired, they secured sufficient relief in the district court as to entitle them, as the prevailing party, to an award of attorneys' fees **Case # 1013** (6th Cir.)

TAXES AND FEES

Realty Taxes

When the subject property was acquired by a church in 1996, crops were growing on the land; crops were not planted in 1997 as the church intended to use the property as a extension of an existing, adjacent, yard area; nothing was done to the subject property in 1997 except mowing and tilling in preparation for planting grass; the subject property was entitled to an exemption in 1997 as being used exclusively for religious purposes; evidence that land was acquired for an exempt purpose does not eliminate the need for proof of actual use for that purpose and the mere fact that the subject property adjoins land that is tax exempt is of no significance; but in the instant case, the subject property was converted from agricultural use to actual religious use when the church elected not to plant crops on the property as had been done in 1996 and prior years; that decision, along with mowing the property and tilling it was sufficient as the property was undergoing a "process of change" and development for use as an additional church yard or recreation area; court discusses proper standard of review **Case # 1019** (Ill. App. Ct.)

Church, which had purchased property zoned for agricultural use, obtained special exception permit allowing construction of a church; construction was restricted to a 7.5 acre development envelope, although the construction of driveways, road improvement, storm water management, utilities or other such improvements could take place outside of the envelope; the Supervisor of Assessments determined that all property within the development envelope, plus 3 acres outside the envelope used for storm water management and a septic system, were tax exempt; however, the Supervisor erroneously denied a tax exemption for the remaining 16.5 acres of the property; the entire property had to be viewed as a package and the 16.5 acres, which were restricted to open space use, provided a natural setting for the church for religious worship use; as the disputed acres were being actively used by the church for religious worship use they qualified for the tax exemption **Case # 1018** (Md.)

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CASE # 1003

Bankruptcy; under the Religious Liberty and Charitable Donation Protection Act of 1998, 11 U.S.C. § 1325(b)(2)(A), a Chapter 13 debtor is entitled to allocate up to 15% of his gross annual income to a qualified religious or charitable entity without having to show that it was reasonably necessary for the maintenance and support of the debtor or the debtor's dependents; however, pursuant to 11 U.S.C. § 1325(a)(3), the plan must have been proposed in good faith; in the instant case, the size of debtors' proposed charitable contributions alone did not sufficiently evidence a lack of good faith in order to justify denial of confirmation on § 1325(a)(3) grounds; it was, however, appropriate to mandate that debtors provide documentation of their charitable giving to the trustee in order to ensure that debtors were not fraudulently using the income allocated for charitable contributions as discretionary funds.— *In re Kirschner,* 259 B.R. 416 (Bankr. M.D. Fla. 2001), No. 00-1814-3F3. Dated March 14, 2001. Opinion by J. Jerry A. Funk.

11 U.S.C. § 1325(b)(1) provides that if the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, the court may not approve the plan unless, as of the effective date of the plan, (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected "disposable income" to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan. "Disposable income" is defined by 11 U.S.C. § 1325(b)(2)(A) as income which is received by the debtor and which is not "reasonably necessary to be expended" for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions to a qualified religious or charitable entity or organization in an amount not to exceed 15% of the gross income of the debtor for the year in which the contributions are made. Congress added the provision for charitable contributions to the definition of "disposable income" in the Religious Liberty and Charitable Donation Act of 1998 (the RLCDA"), Pub. L. No. 105-183. See **Case # 157, June 1998 Reporter**. The RLCDA attempted to overrule those bankruptcy courts that found that charitable contributions were per se not reasonably necessary for the support or maintenance of a debtor and thus constituted § 1325(b)(1) "disposable income" that must be applied to Chapter 13 plan payments. Unfortunately Congress did not place the charitable contribution exemption in a stand-alone subsection. The exemption was placed in subsection (b)(2)(A) of 11 U.S.C. § 1325, which remained qualified by the phrase "reasonably necessary to be expended." Some courts write this off as a drafting oversight and find that a qualified contribution of 15% or less of a debtor's gross income need not undergo "reasonably necessary" scrutiny, but is per se reasonably necessary and exempt from the "disposable income" objections of creditors and trustees. *In re Cavanagh*, 250 B.R. 107 (B.A.P. 9th Cir. 2000), **Case # 821, November 2000 Reporter**. Other courts, however, find that in

addition to the 15% limit, a charitable contribution must also be itself "reasonably necessary" in order to be exempted from treatment as disposable income. See *In re Buxton*, 228 B.R. 606 (Bankr. W.D. La. 1999), **Case # 380, March 1999 Reporter**. The *Buxton* court reasoned that Congress did not intend to establish an automatic 15% "exemption," but rather intended to prevent courts from finding charitable contributions per se unreasonable. The present court found the reasoning of the *Cavanagh* decision more persuasive, and therefore concluded that a "charitable contribution" as defined by 11 U.S.C. § 548(d)(3), made to a "qualified religious or charitable entity or organization" as defined by § 548(d)(4), whether "reasonably necessary" for the support and maintenance of the debtors and their family or not, may not be treated as unapplied disposable income if the contribution amounts to 15% or less of a debtor's gross income. The difficulty with the reasonability requirement adopted in *Buxton* is that it completely obviates the intended goal of the RLDCA, namely to protect certain charitable contributions from the consideration-based, cost/benefit- oriented disposable income test. Congress, in enacting the RLDCA, recognized that, compared to the sort of expenses generally considered reasonably necessary, such as electricity, food and transportation, charitable contributions would always look unreasonable, because a debtor receives no legal consideration for them. The Court in *Buxton* feared that a charitable contribution "exemption" freed from the reasonableness requirement would create an opportunity for limitless abuse by debtors seeking to hide discretionary income from creditors. But there is no need to preserve the "reasonably necessary" requirement on such grounds, because more rational limitations do exist. First, Congress explicitly limited the religious giving exemption to 15% of a debtor's gross income. Second, the court may limit potential abuse by providing for monitoring of contributions in order to insure that the stated charitable donations are actually made to a qualified religious entity rather than used as discretionary spending by a debtor. Finally, any attempt by a debtor to claim an amount as "exempt" from treatment as disposable income under the RLDCA must pass the good faith test found in 11 U.S.C. § 1325(a)(3).

Although the plain language of 11 U.S.C. § 1325(b)(2)(A) does not restrict the timing of a debtor's charitable giving or prevent a debtor from increasing the amount of a charitable contribution on the eve of bankruptcy or after a bankruptcy petition is filed, these are factors that ought to be taken into consideration when looking at the totality of the circumstances to determine whether a debtor has proposed a chapter 13 plan in good faith and in compliance with § 1325(a)(3). Relying on *In re Cavanagh*, supra, the present court found the sincerity of a debtor's intent in making the proposed charitable contributions relevant to the good faith inquiry. The court also found it necessary to analyze the proposed charitable contribution expense in the context of the "totality of the circumstances" good faith standard adopted in *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983). The *Kitchens* court set down eleven factors to be considered in determining whether, under the totality of the circumstances, a debtor proposed a Chapter 13 plan in good faith: (1) the amount of the debtor's income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorneys' fees; (4) the probable or expected duration of the debtor's chapter 13 plan; (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of chapter 13; (6) the debtor's degree of effort; (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought relief under the Bankruptcy Act; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; and (11) the burden which the plan's administration would place on the trustee.

In the instant case, the court found that the debtors sincerely intended to make the proposed charitable contributions. The debtors had given to their church prepetition and merely intended to continue giving to their church postpetition. There was no evidence tending to show that the debtors invented the charitable contribution expense solely to keep extra discretionary income outside their creditors' grasp. The Plan provided for a relatively large 21% distribution to unsecured creditors and the debtors' adjusted expenses appeared reasonable. The debtors did not appear to be keeping any extravagant assets and they did not propose to discharge any debts nondischargeable under Chapter 7. The relative size of the qualified charitable contribution expense alone cannot justify a finding of lack of good faith, much as the reservation of a valuable piece of exempt property or lucrative exempt income stream alone cannot justify such a finding. The trustee presented no evidence of a lack of good faith besides the debtors' intent to make charitable contributions, the amount of unsecured debt to be discharged, and the length of the Plan. Their was no evidence tending to show that the debtors did not sincerely desire to pay off as much as reasonably possible to their unsecured creditors during the span of a standard three-year Chapter 13 plan. The

trustee simply made bare assertions that the debtors could afford to pay more and suggested that an additional amount should come out of the "exempt" charitable contribution expense.

The court found that although the debtors' charitable contributions did not constitute unapplied disposable income and did not indicate a lack of good faith so as to prevent confirmation, the debtors should be obliged to provide documentation to the trustee that the amount allocated to charitable expenses was actually given to the designated § 548(d) qualified charitable entity. Debtors could request that their church provide them with a receipt for their contributions.

CASE # 1004

Plaintiff, a former U.S. Navy chaplain belonging to a theologically conservative, evangelical denomination, who had been brought up on charges, sued to be reinstated and restored to active duty, alleging that his separation from the Navy, although granted upon his own application to resign his commission, was involuntary, having been induced by unconstitutional demands that he preach "pluralism among religions" and "inclusiveness"; plaintiff's motion for a preliminary injunction ordering his immediate reinstatement pendente lite was denied; dispute appeared more to be centered upon plaintiff's military deportment than upon his religious convictions; also plaintiff would not suffer irreparable harm if preliminary injunction was denied.— *Veitch v. Danzig,* 135 F. Supp. 2d 32 (D. D.C. 2001), Civil Action No. 00-2982 (TPJ). Dated February 27, 2001. Opinion by J. Thomas Penfield Jackson.

Plaintiff, a U.S. Navy chaplain, was an ordained minister of the Reformed Episcopal Church, a theologically conservative, evangelical denomination. In 1997, when he was stationed at the Norfolk Naval Base, plaintiff filed an EEOC religious discrimination complaint against his command chaplain alleging that he had been improperly excluded from preaching in the General Protestant service aboard the U.S.S. Enterprise, homeported in Norfolk. Plaintiff's complaint was resolved against him, and he was transferred to U.S. Naval Support Activity (NSA) in Naples, Italy. In Naples, plaintiff's command chaplain was Captain Buchmiller, a Roman Catholic. According to plaintiff, Buchmiller and an Episcopal chaplain conspired to create an atmosphere of religious intolerance directed toward conservative and evangelical Protestants, including plaintiff, suggesting that he should preach "religious pluralism" and refrain in his sermons from disparaging other religions. Plaintiff filed a second EEOC complaint in November 1998, which was again dismissed. The acrimony between plaintiff and Capt. Buchmiller escalated, culminating in the spring of 1999 in a disciplinary charge against plaintiff for disrespect of his superior officer. At first, plaintiff elected to stand trial by court-martial in lieu of non-judicial proceedings at a "captain's mast," but in March 1999, acting upon advice of his JAG counsel, plaintiff tendered resignation of his commission in advance of trial. Two weeks later, plaintiff requested an investigation of the circumstances of his resignation, arguing that it was coerced and that Capt. Buchmiller had created a culture of religious oppression against plaintiff and other evangelical groups. The Navy Inspector General concluded that plaintiff's disciplinary problems resulted from his own misconduct and that the allegations of reprisal were unsubstantiated.

Plaintiff filed a complaint in federal district court seeking reinstatement. Plaintiff's motion for a preliminary judgment reinstituting him was denied. To prevail on a motion for a preliminary injunction plaintiff had to show: (1) a substantial likelihood of success on the merits; (2) irreparable harm or injury absent an injunction; (3) less harm or injury to the other parties involved; and (4) the service of the public interest. Because plaintiff was asking the court to require defendant to take affirmative steps to reverse his separation and restore him to active duty five months after his separation was finalized – a ruling that would alter, not preserve, the status quo – plaintiff had to meet a higher standard than were the injunction seeking merely prohibitory relief; he had to "clearly" show that he was entitled to relief or that "extreme or very serious damage" would result from a denial of the injunction.

Plaintiff argued that the Navy, in effect, drove him from his pulpit for failure to preach "pluralism among religions" and / or "inclusiveness. The Establishment Clause clearly forbids that there should be any official judgments about the correctness of religious beliefs. And the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(a), (b), provides that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" except if it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental interest;

and (2) is the least restrictive means of furthering that compelling governmental interest. *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997), found that the military violated RFRA when it forbade chaplains from encouraging their parishioners to write Congress about pending abortion legislation. The compelling interests advanced by the military in *Rigdon* were found to be outweighed by the chaplains' right to autonomy in determining the religious content of their sermons, especially given defendants failure to show how the speech restrictions advanced their interests. Plaintiff in the present case also invoked his right to free speech under the First Amendment.

The problem for plaintiff, insofar as establishing the likelihood of his success on the merits, was that the dispute appeared more to be centered upon his military deportment than upon his religious convictions. The charge brought against him was disrespect for a superior officer, not heresy. Had the disrespect consisted of nothing more than a contest of divine doctrine with Capt. Buchmiller, plaintiff's constitutional rights may well have sufficed as defenses to the charge, whether at a captain's mast or court-martial. He elected, however, to resign rather than face trial. The presumption that his resignation was voluntary was not rebutted by the fact that plaintiff had to choose between two unattractive alternatives. See *McIntyre v. United States*, 30 Fed. Cl. 207, 211 (Fed. Cl. 1993). Plaintiff's argument that his attempt to withdraw his resignation after a change in command in Naples indicated it was not voluntary was unconvincing, because only after the Navy decided not to pursue the court-martial did plaintiff seek to withdraw his resignation. Further, the Naval Inspector Genera concluded that plaintiff's complaints of religious persecution, censorship, and reprisal were unfounded, and that the disciplinary proceedings against him at the time of his resignation were the product of his own military – not theological – misconduct. Considered in light of the federal courts' historic reluctance to intrude upon the authority of the Executive in military and national security affairs, the plaintiff failed to demonstrate that he had a substantial likelihood of success on the merits.

Plaintiff also would not suffer irreparable harm if his motion for a preliminary injunction was denied. His claims of irreparable harm, predominantly those of loss of salary and benefits and damage to his professional reputation – types of injuries typical in instances of the termination of any government employee – were insufficient to show irreparable injury for purposes of pendente lite relief. An insufficiency of savings or difficulties in immediately obtaining other employment do not support a finding of irreparable injury, however severely they may affect a particular individual. True, the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. But, injunctive relief is not appropriate unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought. The loss of First Amendment freedoms in this case took place, if at all, approximately two years ago. A preliminary injunction would not remedy any impending harm to plaintiff's First Amendment interests. Now out of uniform, plaintiff could preach as he chose, unconstrained by military discipline or protocol.

CASE # 1005

Plaintiff, having a degree in marriage and family counseling, had no objection to counseling clients who were gay or who were having an extra-marital affair, but she sought to be excused from having to actively help such people improve their homosexual or extra-marital relationship; indeed, plaintiff was unwilling to counsel anyone on any subject that went against her religion; the employer did not have to accommodate plaintiff's desire to be excused from counseling clients concerning matters she objected to since such accommodation would have been an undue hardship; additionally, the employer offered reasonable alternative accommodations which plaintiff, in her inflexibility, refused to accept.— ***Bruff v. North Mississippi Health Services, Inc.,*** 244 F.3d 495 (5th Cir. 2001), No. 99-60175. Dated March 28, 2001. Opinion by J. Politz.

Plaintiff, who had a master's degree in marriage and family counseling, was hired as a counselor by North Mississippi Medical Center in its Employee Assistance Program (EAP) which provided counseling to the employees of various businesses in the region. Plaintiff was one of only three EAP counselors. Plaintiff counseled a Jane Doe. Several months later, Doe returned for further counseling. At that time she informed plaintiff that she was a homosexual and she asked for help in improving her relationship with her female partner. Plaintiff declined to counsel Doe, advising that homosexual behavior conflicted with her religious beliefs, but offered to continue counseling Doe on other matters. Doe complained to her

employer about plaintiff's actions and her employer in turn complained to the Medical Center. Plaintiff asked the Medical Center that she be excused from actively helping people involved in the homosexual lifestyle to have a better relationship with their homosexual partners, including helping persons who have a sexual relationship outside of marriage have a better sexual relationship. She added that her problem was not with counseling the person per se, but only with providing assistance in improving the homosexual or extra-marital relationship. The Medical Center management denied plaintiff's request. Plaintiff appealed to a vice president of the Medical Center who asked whether there would be any other situations when plaintiff would not want to counsel a person. Plaintiff responded that she would not be willing to counsel anyone on any subject that went against her religion. When the possibility of transferring from the EAP to a section specifically performing pastoral or Christian counseling was discussed, plaintiff demurred, opining that the head of that section held religious views that were more liberal than hers, and that he likely would not tolerate her conservative perspective. The Medical Center's vice president affirmed the decision denying plaintiff's request to counsel only on topics that did not conflict with her religion. The vice president took note of the small size of the EAP staff; the travel and extended hours the counselors must work; the inability to determine beforehand when a trait or topic might arise that would require referring the employee to another counselor, thus requiring either multiple counselors to travel, or scheduling additional counseling sessions at another time; and the additional sessions that introducing a new counselor might require to build the trust relationship necessary to be effective. The vice president did offer plaintiff three options: (1) reconsider her request for accommodation; (2) request a transfer to another position or department in which conflict of care issues were less likely to occur; or (3) resign her position. If she decided to request a transfer, she would be given 30 days to secure another position before she would be terminated. The Medical Center contacted its in-house employment counselor and asked her to assist plaintiff in locating another position within the hospital system. The counselor showed plaintiff a list of available openings, and offered her the opportunity to take two tests designed to manifest her aptitudes and interests. Plaintiff declined to take the tests or to apply for any non-counselor position. The list the employment counselor showed plaintiff included several positions outside of the counseling field that would have allowed plaintiff to remain in the hospital system, thus retaining her benefits and the ability to apply, on a preferential basis, for a transfer to another counselor position when it became available. Those non-counselor positions, however, generally paid between $7 and $8 an hour, whereas plaintiff had been making over $16 an hour as an EAP counselor. Plaintiff did apply for the position of Psychiatric Assessment Counselor in the Behavioral Health Department, the only counselor opening available at that time. Plaintiff's application was considered, but another applicant with superior credentials was selected. A second counselor position became available; however, plaintiff chose not to apply. After the 30 day continued employment period lapsed, plaintiff's employment was terminated. Plaintiff filed a complaint with the Equal Employment Opportunity Commission and the instant action followed. The jury found that the Medical Center had discriminated against plaintiff because of her religious beliefs, that it had not made a reasonable accommodation for those beliefs, and that it had acted with malice or reckless indifference. On appeal, the Fifth Circuit panel held that the evidence, considered in the light most favorable to plaintiff, clearly established that requiring the Medical Center to accommodate plaintiff while retaining her in the position of EAP counselor would have involved more than de minimis cost and therefore was, as a matter of law, an undue hardship. Further, the Medical Center's offer to give plaintiff 30 days to transfer to another position where conflict of care issues were less likely to arise was a reasonable accommodation. Thus, judgment on plaintiff's Title VII claims was reversed.

Defendants did not contest that plaintiff established a prima facie case of religious discrimination under Title VII; therefore, the burden shifted to them to show why accommodating her religious beliefs as requested, i.e., allowing her to remain an EAP counselor while only counseling on subjects that did not conflict with her religion, would cause them an undue hardship, or that they offered an alternative reasonable accommodation.

Retention as an EAP counselor. Undue hardship exists, as a matter of law, when an employer incurs anything more than a de minimis cost in reasonably accommodating an employee's religious beliefs. The evidence established that the Medical Center employed three counselors in its EAP program, one of whom handled supervisory duties in addition to her counseling responsibilities. Thus, any request by plaintiff to refer all clients desiring to be counseled on something that she felt conflicted with her religious beliefs meant, necessarily, that one of the remaining two counselors had to assume that responsibility. This could be accomplished by the other counselors either voluntarily assuming a disproportionate workload, or trading counseling assignments with plaintiff on a

quid pro quo basis. Voluntarily accommodating the preferences of other counselors was accepted practice at the EAP, and the record reflected that one of the other EAP counselors disliked counseling young children. She requested that she not be given such assignments, and plaintiff and the other counselor agreed to assume that responsibility whenever possible; however, when neither of them could accommodate her preference the original counselor would counsel the child. Plaintiff did not suggest that her request for accommodation was similarly flexible; instead, she contended that the Medical Center had to excuse her from counseling on all subjects of concern at all times. Furthermore, unlike traditional requests for religious accommodation which merely seek to rearrange an employee's schedule, plaintiff determined that she would not perform some aspects of the position itself. Plaintiff testified that when she initially applied to be an EAP counselor she assumed she would have to counsel homosexuals, but she also assumed she could refer such individuals when they sought counseling on their relationships. Nothing in the record reflected that she raised this issue with her interviewer, or explored how any such conflicts with her religious beliefs could, in fact, be accommodated. Instead, she apparently assumed she would only have to perform those aspects of the position she found acceptable. Title VII does not require an employer to accommodate such an inflexible position.

Given the size of the EAP staff, the area covered by the program and the travel involved, and the nature of psychological counseling incorporating trust relationships developed over time, any accommodation of plaintiff in the EAP counselor position would have involved more than de minimis cost to the Medical Center. Requiring one or both counselors to assume a disproportionate workload, or to travel involuntarily with plaintiff to sessions to be available in case a problematic subject area came up, was an undue hardship as a matter of law. The mere possibility of an adverse impact on co-workers is sufficient to constitute an undue hardship. *Weber v. Roadway Express*, 199 F.3d 270, 274 (5th Cir. 2000), **Case # 684, April 2000 Reporter**. Requiring the Center to schedule multiple counselors for sessions, or additional counseling sessions to cover areas plaintiff declined to address, would also clearly involve more than de minimis cost. There was also testimony that substituting counselors would have a potential negative impact upon those being counseled. But while adding weight to the court's decision, the logistical and economic impact on the Medical Center and the other counselors alone established, as a matter of law, that accommodating plaintiff would result in more than de minimis cost.

Transfer to another counselor position. Once the Medical Center established that it offered plaintiff a reasonable accommodation, even if that alternative was not her preference, defendants, as a matter of law, satisfied their obligation under Title VII. When the Medical Center gave plaintiff 30 days to find another position, it also alerted its in-house employment counselor to the situation and directed that plaintiff be given assistance in that effort. The record reflected that plaintiff was advised of, and applied for, another counselor position. Although she was not successful, the Medical Center was not obligated to give plaintiff preference over others with superior credentials when filling the Psychiatric Assessment Counselor position. Plaintiff was also advised of other available positions, which she declined to apply for, as well as the availability of tests that might illuminate whether positions she might not otherwise consider might be of interest. Although these non-counselor positions would have required plaintiff to take a significant reduction in salary, this alone did not make the accommodation unreasonable. Plaintiff declined to even consider a transfer to the pastoral counseling department because she speculated there might be a personal conflict with its director. Plaintiff's testimony that she declined to apply for a second counselor position when she learned of that opening, because she didn't think the Medical Center would seriously consider her, was based upon pure speculation. An employee has a duty to cooperate in achieving accommodation of her religious beliefs, and must be flexible in achieving that end.

Plaintiff's state law claims. Plaintiff contended that by asking her to counsel clients on improving homosexual or extramarital relationships, defendants were asking her to violate Mississippi state sodomy laws which make certain sexual acts unlawful. Nothing in the record suggested that plaintiff, or any other counselor, was ever asked to counsel anyone on the performance of sexual acts, nor that she ever raised any such concern with anyone. The Court of Appeals found the argument specious, and agreed that this was strictly a Title VII religious discrimination case.

Note: The Court of Appeals took no position on what professional standards or ethics codes might require in the field of counseling. The Court's inquiry was strictly to what extent Title VII required the Medical Center to accommodate plaintiff's religious beliefs.

CASE # 1006

Plaintiff, a Seventh Day Adventist, was fired after leaving work early one Friday evening before the completion of his work shift so as not to violate his Sabbath; although defendant had a policy whereby employees who were late for work twice during their probationary period were subject to termination and plaintiff had violated defendant's tardiness policy, the facts justified a finding that plaintiff was not discharged because of violation of the tardiness rule but because he failed to complete his scheduled work shift on Friday evening; defendant could have accommodated plaintiff by moving him to an earlier shift by switching with another probationary worker; because probationary workers were not members of the union there would have been no interference with the seniority system of the collective bargaining agreement; safety concerns expressed by the employer as the reason plaintiff could not be switched were, under the facts, unjustified; hearing examiner erroneously proceeded on assumption that that what transpired in the initial job interview was irrelevant to establishing religious discrimination in this case, but totality of facts justified finding plaintiff established a prima facie case.— ***Franks v. National Lime & Stone Co.,*** 138 Ohio App. 3d 124, 740 N.E.2d 694 (Ohio Ct. App. 2000), *appeal not allowed*, 90 Ohio St. 3d 1452, 737 N.E.2d 55 (Ohio 2000), No. 5-99-58. Dated June 14, 2000. Opinion by J. Shaw.

Plaintiff – a Seventh-Day Adventist who believed that work should not be performed on the Sabbath, which he observed from sunset Friday until sunset Saturday – filed a charge with the Ohio Civil Rights Commission (OCRC) alleging that the defendant employer unlawfully discriminated against him due to his religion. Defendant terminated the plaintiff's employment when he walked off the job prior to the end of his shift on Friday, April 23, 1993. The OCRC conducted a preliminary investigation and determined that probable cause existed to believe that the defendant had engaged in unlawful discriminatory practices. The Hearing Examiner recommended, inter alia, that the defendant make an offer of employment to the plaintiff as an equipment operator on first shift. The OCRC issued a cease and desist order, which adopted the Hearing Examiner's report. The County Court of Common Pleas affirmed the OCRC's order and the Court of Appeals now affirmed the judgment of the trial court.

The Court of Appeals began by taking issue with the conclusion of the OCRC Hearing Examiner that what transpired in the initial job interview was irrelevant to establishing religious discrimination in this case. The employer testified that during the initial job interview, plaintiff was specifically informed of the possibility of Friday evening and weekend work, was specifically asked about potential conflicts, and that plaintiff affirmatively indicated that he had no schedule problems with such work. The employer further testified that the matter of plaintiff's religion was never mentioned during the interview until after the offer of employment and then only in the context of a request to take a particular Tuesday afternoon off during the first week of employment. In sharp contrast, the plaintiff unequivocally testified that he specifically and fully informed the employer during the initial interview of his religious beliefs and of the potential conflict between those beliefs and a Friday evening shift. The plaintiff also testified that his religious beliefs did not preclude emergency or overtime work during the weekend Sabbath. In his findings of fact and conclusions of law, the OCRC Hearing Examiner chose, albeit without explanation, to accept the testimony of the employer in its entirety and thus accepted as true that the complainant failed to disclose and/or lied about any conflict between his alleged religious beliefs and the potential Friday work responsibilities during the initial job interview. However, based solely on a cursory review of the tenets of the Seventh Day Adventist religion itself, the Hearing Examiner essentially found as a matter of law that the religious belief of the plaintiff was sincerely held and summarily found that any failure to disclose the work conflict in the interview was "irrelevant" because this was not a "failure to hire" case. This analysis was inadequate because it improperly purported to evaluate only the "sincerity" of plaintiff's religious belief. Presumably, the OCRC Hearing Examiner as the trier of fact had the prerogative to find the religious belief of the complainant sincerely held based on the totality of the evidence, notwithstanding a deceptive initial job interview. However, in no event is the deliberate failure to disclose and/or lying about a religious work conflict in the initial job interview irrelevant to the pertinent issues of: (1) whether a complainant holds a sincere religious belief that conflicts with an employment requirement or (2) whether that complainant has adequately informed the employer of that conflict. The deliberate failure to disclose a known religious conflict in response to direct employer questioning

during an initial job interview does not constitute properly "informing the employer of the conflict." Moreover, the failure to fully and honestly disclose such a conflict in the initial interview clearly calls into question the extent to which a religious belief is sincerely held by the party claiming to hold it and thus whether the employee's belief in a particular religion really conflicts with an employment requirement. As a result, the matter of what was said during the initial job interview in this case should have been the subject of further inquiry. Nevertheless, under the operable standard of review and the totality of the evidence in the record, including the plaintiff's testimony, the Court of Appeals was persuaded that there was ample evidence to support the outcome reached by the Hearing Officer notwithstanding the error. According to Ohio R.C. 4112.06(E) and case law interpreting it, a trial court, in reviewing an appeal from an OCRC decision, must affirm the OCRC's finding of discrimination if the finding is supported by reliable, probative, and substantial evidence on the entire record. The role of a reviewing court, in considering the OCRC's order is more limited than that of the trial court. An appellate court is to determine whether the trial court abused its discretion in finding that there was reliable, probative, and substantial evidence to support the OCRC's finding of discrimination.

In this case the Hearing Examiner, and the trial court by its affirmation, found that the plaintiff had established a prima facie case of religious discrimination. [Federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is generally applicable to cases involving alleged violations of Ohio R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.*, 66 Ohio St. 2d 192, 421 N.E.2d 128 (1981).] The plaintiff was a practicing Seventh-Day Adventist. The plaintiff was assigned to work second shift and scheduled to work from 2:45 PM until 10:45 PM, Monday thru Friday. During the first week he was assigned to second shift, the plaintiff informed his supervisor that due to his religious beliefs, he would not be able to complete his shift on Fridays. On Friday, April 23, 1993, the plaintiff walked off the job early. The plaintiff's employment was terminated on Monday, April 26, 1993. The reason stated on the plaintiff's separation notice was failure to complete shift hours assigned to his position. The defendant contended that the Hearing Examiner erred in finding that the plaintiff established a prima facie case when there was undisputed evidence that he had violated company policy, whereby employees who are late for work twice during their probationary period are subject to termination. The evidence showed that the plaintiff was made aware of this policy at the time of his initial interview and it was undisputed that the plaintiff was late for work on both April 7 and April 14, 1993. The defendant contended that this violation of company policy was a justifiable reason for the plaintiff's termination. The Hearing Examiner concluded that the plaintiff had indeed violated the defendant's tardiness policy, but the timing and reason stated for plaintiff's discharge supported the conclusion that he was discharged because he failed to complete his scheduled work shift on Friday, April 23, 1993. The defendant made no effort to enforce the tardiness policy until the religious accommodation issue surfaced. Indeed, Gary Smyth, a superintendent at defendant, spoke to Brian Barger, Vice President of Administration at defendant, on April 23, 1993, about the plaintiff's intention to leave work early on Fridays because of his religion. Smyth also informed Barger that the plaintiff had been late for work twice during his probationary period. Yet, Smyth did not recommend that plaintiff be discharged, nor did Barger instruct Smyth to discharge him for violating the tardiness policy. Instead, Barger informed Smyth that he would contact him if the plaintiff actually left early that night. The Court of Appeals agreed with the trial court that there was reliable, probative, and substantial evidence to establish that plaintiff met his burden of showing a prima facie case of religious discrimination.

The Court of Appeals rejected defendant's contention that the plaintiff could not have been reasonably accommodated without the company suffering an undue hardship. The most obvious accommodation would have been to move the plaintiff to first shift, where the required work hours would not interfere with his Sabbath. The defendant refused to transfer the plaintiff to first shift claiming that doing such would cause them undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977), held that to require an employer to bear more than a de minimis cost in order to accommodate an employee's religious practices is an undue hardship. However, *TWA* was clearly distinguishable from the present case. In that case, the employee was subject to a seniority system in a collective bargaining agreement between the employer and the union. Under this seniority system, the most senior employees had first choice for job and shift assignments as they become available. In order to accommodate the plaintiff, the employer would have had to breach the seniority system. The Court held that the duty to accommodate does not require the employer to violate an otherwise valid collective bargaining agreement. In the present case, a similar seniority agreement was in place. Pursuant to the collective bargaining agreement

between the defendant and the union, employees were entitled to shift preference by virtue of seniority. However, the plaintiff was not yet a union member and therefore was not subject to the seniority system. Employees did not become members of the union until they completed a ninety-day probationary period. Therefore, the defendant would not have been required to breach the collective bargaining agreement in order to accommodate the plaintiff.

A total of eight new employees were hired at the same time that the plaintiff was hired. After two weeks of orientation, the new employees were informed of their shift assignments. Two new employees were assigned to work first shift, four were assigned to second shift, and two were assigned to third shift. None of these eight employees were subject to the seniority system. The Hearing Examiner found that the defendant could have reasonably accommodated the plaintiff by moving him to first shift. He could have been switched with one of the new employees assigned to first shift, thereby avoiding any interference with the collective bargaining agreement. The defendant cited safety concerns as the reason the plaintiff could not be switched. The plaintiff was the most experienced of the new hires and his experience was allegedly needed on second shift. Defendant claimed that it could not afford to put less experienced employees on second shift where there was less supervision. But defendant's contention was purely speculative, as it provided no evidence to support this contention. Moreover, the plaintiff may have had more experience than the other new hires, but he had no duty to supervise or train them. The plaintiff had the same title and salary as all the new employees. Furthermore, there was in fact supervision on the second shift for the new employees, as a supervisor was brought in from another plant to oversee the new employees on the second shift. In addition, after the plaintiff was terminated, the machine he operated ran unmanned for over a week. And while not mentioned by the Hearing Examiner as a reasonable accommodation, it appeared to the Court of Appeals that if the machinery could operate unmanned for over a week, the defendant could have allowed the plaintiff to leave a few hours early on Fridays without experiencing any significant loss or undue hardship.

CASE # 1007

Plaintiff's employer, Baptist Healthcare System, had previously disassociated itself from the South Carolina Baptist Convention; the disability plan maintained by the employer was subject to the federal Employee Retirement Income Security Act (ERISA) and did not, under the facts, qualify as a "church plan" exempt from the provisions of ERISA; because ERISA applied, and there was a federal question, the federal district court had subject matter jurisdiction to determine that the plaintiff employee did not suffer a total disability and hence the insurer, under, the terms of the disability plan, was correct in denying benefits to plaintiff.— *Lown v. Continental Casualty Co.*, 238 F.3d 543 (4th Cir. 2001), No. 00-1547. Dated February 2, 2001. Opinion by J. Wilkinson.

Plaintiff worked as a mental health counselor at Baptist Healthcare System, which, until 1993, had been affiliated with the South Carolina Baptist Convention, a group of state Baptist churches. In 1993, Baptist Healthcare's board voted to remove itself as an agency of the South Carolina Baptist Convention, a move the Convention subsequently ratified. After 1993 no Baptist Healthcare board member was a member of or held any office with the South Carolina Baptist Convention and Baptist Healthcare did not receive any funding from either the Southern Baptist Convention or the South Carolina Baptist Convention. Baptist Healthcare System served individuals of all faiths and creeds and Baptist Healthcare had no denominational requirement for either it chaplains or the counselors. Its approximately 3,000 employees were affiliated with a number of different faiths.

Baptist Healthcare maintained a long term disability plan for its employees issued by Continental Casualty Co. Participants in the disability plan were specifically advised that the plan was subject to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA). Certain Baptist Healthcare employees were also eligible for a retirement plan which was established and maintained by the Annuity Board of the Southern Baptist Convention. The retirement plan was constructed as a "church plan" in order to qualify for exemption from ERISA. Plaintiff apparently was eligible for participation in both the retirement plan and the disability plan.

Plaintiff applied for disability benefits. Continental, taking the position that plaintiff's disability was not total, denied plaintiff's claim for disability benefits, noting that the plan only provided benefits in case of total disability. Plaintiff filed suit in state court and the case was removed to federal district court on federal question grounds. The district court upheld the denial of plaintiff's benefits, stating that plaintiff failed to present reasonably supported and consistent evidence of total disability. The Fourth Circuit Court of Appeals affirmed. On appeal, plaintiff unsuccessfully contended that the disability plan was a church plan, not governed by ERISA. Because federal question jurisdiction was the only alleged basis for suit in the federal court, if the disability plan were a church plan , and hence not governed by ERISA, the district court would have lacked subject matter jurisdiction and the Court of Appeals would have been required to remand the case to the state court. However, the Court of Appeals held that the disability plan was governed by ERISA and was not a "church plan."

ERISA applies to employee benefit plans established or maintained by any employer engaged in commerce. 29 U.S.C. § 1003(a). Federal courts have jurisdiction to hear an action brought to recover benefits due under an ERISA plan. 29 U.S.C. § 1132(a), (e). However, "church plans" are not ERISA plans. 29 U.S.C. § 1003(b)(2). A church plan means a plan established and maintained "for its employees (or their beneficiaries) by a church or by a convention or association of churches." 29 U.S.C. § 1002(33)(A). A church plan does not include all plans maintained by a church. The statute specifically excludes plans established and maintained primarily for the benefit of those "who are employed in connection with one or more unrelated trades or businesses." Id. § 1002(33)(B)(i). Despite this exception to the definition of a church plan, a plan established by a corporation associated with a church can still qualify as a church plan. The statute defines church plans to include plans "maintained by an organization, whether a civil law corporation or otherwise, . . . if such organization is controlled by or associated with a church or a convention or association of churches." 29 U.S.C. § 1002(33)(C)(i). An organization is controlled by a church when, for example, a religious institution appoints a majority of the organization's officers or directors. 26 C.F.R. § 1.414(e)-1(d)(2). To be "associated with a church," the corporation must share "common religious bonds and convictions with that church or convention or association of churches." 29 U.S.C. § 1002(33)(C)(iv).

The federal court's jurisdiction in this case turned on whether, at the expiration of plaintiff's coverage under the plan in 1997, the disability plan was an ERISA plan or a church plan. By 1997, the South Carolina Baptist Convention did not control Baptist Healthcare. The Convention did not appoint or approve a majority of Baptist Healthcare's Board or officers, and plaintiff pointed to no other factors indicating that the Convention controlled the hospital. See 26 C.F.R. § 1.414(e)-1(d)(2). Plaintiff could still demonstrate, however, that Baptist Healthcare was associated with the South Carolina Baptist Convention by showing that the two shared sufficient "common religious bonds and convictions." In deciding whether an organization shares such common bonds and convictions with a church, three factors bear primary consideration: (1) whether the religious institution plays any official role in the governance of the organization; (2) whether the organization receives assistance from the religious institution; and (3) whether a denominational requirement exists for any employee or patient/customer of the organization. Baptist Healthcare did not meet any of these criteria. Plaintiff pointed to only one fact potentially tying Baptist Healthcare to the South Carolina Baptist Convention – Baptist Healthcare's participation in a pension plan that the hospital treated as a church plan. This fact, however did not establish a common bond between the two entities. Indeed, the evidence was that Baptist Healthcare's participation in the pension plan was a purely business relationship. It is true that the South Carolina Baptist Convention and Baptist Healthcare both shared the name "Baptist." Yet the name was not the thing. Rather, the evidence showed that plaintiff failed to satisfy any of the criteria for determining common religious bonds and convictions between the two entities.

CASE # 1008

City and County ordinances prohibited discrimination on the basis of gender identity or sexual orientation in connection with employment; the ordinances also prohibited employers from publishing any advertisement relating to employment which indicated a preference based upon gender identity or sexual orientation and prohibited any person from inciting another to violate the substantive provisions of the ordinances; both ordinances also contained exemptions from its provisions for religious institutions; plaintiff employer had standing to bring a declaratory action even though the government had not yet sought to enforce the ordinances; the action was also ripe for adjudication; the only aspect of plaintiff's case over which the court lacked jurisdiction was plaintiff's objection to those portions of the ordinances which prohibited any person from acting to "incite" another to violate any portion of the ordinances, as there was no existing case and controversy as to said issue, because plaintiff had not proposed to engage in any conduct which would run afoul of even a broad interpretation of the incitement provisions of the ordinances, something that was not true in the case of the other provisions of the ordinances; the ordinances did not violate plaintiff's free exercise of religion or equal protection rights by exempting religious institutions, but not individuals, from their provisions; there was no violation of the right of conscience under Ky. Const. § 5; plaintiff's desire to express his opposition to the ordinances while advertising for employees constituted a form of commercial speech that was not afforded protection; the ordinances were not unconstitutional owing to overbreadth or vagueness and did not violate plaintiff's right to intimate or expressive association; finally the local city and county governments were not barred by various provisions of the state constitution and state statutory law from enacting the ordinances.— ***Hyman v. City of Louisville,*** 132 F. Supp. 2d 528 (W.D. Ky. 2001), 3:99CV-597-S. Dated March 21, 2001. No. Opinion by J. Charles R. Simpson.

In February 1999, the City of Louisville, Kentucky prohibited discrimination in employment because of "sexual orientation or gender identity." See generally Louisville Code of Ordinances §§ 98.00, and 98.15 – 98.21. In October 1999, Jefferson County, Kentucky, comprising the City of Louisville as well as other cities and unincorporated areas, amended its Code of Ordinances somewhat more broadly, prohibiting discrimination on the basis of gender identity or sexual orientation not only in connection with employment, but also with access to housing and public accommodations. See Jefferson County Code of Ordinances §§ 92.01 – 92.25. In addition to said general prohibitions, both ordinances contained provisions prohibiting employers from, inter alia, (1) publishing any advertisement relating to employment which indicated a preference based upon gender identity or sexual orientation, Lou. Code Ord. § 98.17(D) & Jeff. Co. Code Ord. § 92.06(E), and (2) prohibiting any person from inciting another to violate the substantive provisions of the ordinances, Lou. Code Ord. § 98.17(F)(2) &; Jeff. Co. Code Ord. § 92.16(B). Both ordinances also contained exemptions stating the ordinances "in regard to sexual orientation or gender identity shall not apply to a religious institution, or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association or society." Lou. Code Ord. § 98.00; Jeff. Co. Code Ord. § 92.07(B).

Plaintiff was a physician whose medical practice was located in the City of Louisville. Thus, both the City and County Ordinances possibly applied to him in the conduct of the employment function of his business as a medical practitioner. Alleging that his religious beliefs so conflicted with the ordinances' proscriptions that he would not comply with them and that he thus risked prosecution on account of his religion, plaintiff sought to have the ordinances declared invalid insofar as they pertained to employment discrimination on the basis of sexual orientation and gender identity. Plaintiff also alleged that he had attempted to place in the Courier-Journal, a Louisville newspaper, an advertisement which purportedly violated both ordinances and that the newspaper would not allow his ad to be placed because of its "discriminatory" content. Finally, plaintiff indicated that he was in the process of hiring a new employee and that as part of the hiring process, he inquired into two applicants' sexual orientation intending to take this fact into account in reaching an employment decision. Although holding that plaintiff had standing to challenge the ordinances and that his claim was not unripe, the federal district court granted defendants'

motion for summary judgment and dismissed plaintiff's complaint.

Plaintiff had standing to bring his declaratory action. Disputes between parties must constitute actual "cases" or "controversies" to be cognizable by a federal court. U.S. Const. art. III, § 2. In order to have standing to assert a claim, a plaintiff is required to demonstrate that he suffered an injury-in-fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. An injury-in-fact is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Plaintiff was seeking pre-enforcement relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. A declaratory judgment action brought prior to the completion of an injury-in-fact is proper if the plaintiff can demonstrate actual present harm or a significant possibility of future harm. An individual need not await the consummation of threatened injury to obtain preventive relief. The injury must only be "certainly impending." Based on plaintiff's allegations, plaintiff had standing to bring his action against defendants. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiff's conduct of his affairs with serious penalties attached to their noncompliance, access to the courts under the Declaratory Judgment Act must be permitted. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Here, the ordinances appeared to require an immediate and significant change in the plaintiff's conduct of his affairs if he was to avoid liability for noncompliance. And the record suggested that the ordinances would be enforced against all secular employers who discriminated on the basis of sexual orientation or gender identity. Plaintiff's claim was also more than a generalized grievance shared in substantially equal measure by a large class of citizens. Therefore, plaintiff had standing to raise his claims.

The action was ripe for adjudication. While the focus of a standing inquiry is whether the plaintiff is the proper party to litigate a particular issue, a court faced with a question of ripeness must determine whether a particular challenge has been brought at the proper time. The two primary factors to be balanced are the hardship to the parties of withholding court consideration and the fitness of the issues for judicial decision. In the context of a First Amendment pre-enforcement challenge to a statute or ordinance brought pursuant to the Declaratory Judgment Act, the ripeness inquiry usually focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute in order to ensure that the fear of prosecution is genuine and the alleged chill on First Amendment rights is concrete and credible, and not merely imaginative or speculative. Plaintiff sufficiently demonstrated that his claim was ripe for adjudication. Plaintiff indicated that he had inquired into the sexual orientation of two job applicants with the intention of excluding those persons who engaged in sexual relationships which were not heterosexual and monogamous. Also, plaintiff attempted to place an advertisement in a local newspaper which may have been discriminatory in violation of the ordinances. Finally, neither the City nor the County indicated that were plaintiff to violate the ordinances they would refrain from enforcing the ordinances against him; in fact, they stated that they intended to enforce the ordinances as a matter of course. Courts have often found that a plaintiff's pre-enforcement challenge is ripe if he has stated an intent not to comply with the mandate of the statute, and the appropriate authority has expressed an intent to enforce the statute. The City defendants unsuccessfully argued that plaintiff would not be prejudiced by a delay in having his claim adjudicated. The "hardship" factor turns upon whether the challenged action creates "a direct and immediate" dilemma for the parties. The record indicated that plaintiff was faced with such a dilemma. The only difference between hearing plaintiff's claim now and entertaining it at a later date was that once plaintiff actually violated the ordinances, he could be subject to fines by the government and to civil actions by those against whom he discriminated. The court believed such possibility in itself constituted a "hardship."

Ordinances did not violate the Free Exercise Clause. Plaintiff unsuccessfully argued that the ordinances preferred religious institutions over individuals in violation of both the First Amendment of the U.S. Constitution and § 5 of the Kentucky Constitution. Plaintiff argued that the ordinances impermissibly distinguished between individuals who, based on their religious beliefs, seek to make employment decisions on the basis of sexual orientation or gender identity and religious institutions with the same intentions. (Remember, both the City and the County Ordinances contained identical exemptions stating that the ordinances "in regard to sexual orientation or gender identity shall not apply to a religious institution, or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association or society.") While the ordinances made no denominational distinctions,

plaintiff contended that provisions which exempt religious institutions and fail to exempt individuals with comparable religious convictions are at odds with the Free Exercise Clause of the First Amendment.

Under *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), if a challenged regulation is religion-neutral and generally applicable, it does not violate the Free Exercise Clause even if its enforcement results in an incidental burden on a particular religious practice. However, regulations found to be either nonneutral or not generally applicable must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Plaintiff unsuccessfully contended that the distinction between religious institutions and individuals destroyed the neutrality and general applicability of the ordinances just as surely as would an exemption with a denominational preference, rendering the ordinances facially discriminatory. A law is not neutral if its purpose is to infringe upon or restrict practices because of their religious motivation. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Evidence of a law's neutrality may come from several sources. At a minimum, the text of a statute must not be discriminatory. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the law's language or context. Contrary to plaintiff's claim, the purpose of the ordinances' exemptions for religious institutions was not to "restrict practices because of their religious motivation." Neither the ordinances nor their accompanying exemptions referred to "religious practice." While discrimination against individuals on account of their sexual orientation or gender identity may have been a religious practice for plaintiff, the ordinances' prohibitions were textually and contextually secular. The ordinances in question did not regulate plaintiff's beliefs. Rather, they merely sought to regulate the conduct of all individuals engaged in the employment of others. Such a religion-neutral, generally applicable regulation was consistent with the mandate of the Free Exercise Clause.

Having determined that the ordinances at issue were neutral laws of general applicability, the court did not need to address whether they were justified by a compelling government interest and whether they were narrowly tailored to advance that interest. A law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). There was ample authority for the proposition that the elimination of discrimination on the basis of sexual orientation or gender identity was within the purview of legitimate legislative interests. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), holding that laws which prohibit discrimination on the basis of sexual orientation in the provision of public accommodations are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . . ." Louisville and Jefferson County also legitimately chose to balance the goal of nondiscrimination against a similarly valid goal of noninterference with religious institutions. The essential "link" between the classification adopted and the object to be attained was sufficient to justify the conclusion that the ordinances were rationally related to a legitimate government interest.

Ky. Const. § 5 and the right of conscience. The ordinances also did not violate Ky. Const. § 5, providing that "no human authority shall, in any case whatever, control or interfere with the rights of conscience." Plaintiff unsuccessfully contended that this language had to be interpreted to prohibit the City and County from expanding the scope of their anti-discrimination ordinances to include discrimination because of sexual orientation and gender identity. Kentucky courts have repeatedly interpreted the Kentucky Constitution to be consistent with the U.S. Constitution with regard to issues of religious freedom. And Kentucky courts have looked to the U.S. Supreme Court for guidance in interpreting provisions of the Kentucky Constitution that deal with religious freedom. (Citations omitted.) Thus, the district court found that the ordinances in question withstood plaintiff's challenge premised upon § 5 of the Kentucky Constitution for the same reasons they withstood his First Amendment Free Exercise Clause challenge. [Although *Triplett v. Livingston County Bd. of Educ.*, 967 S.W.2d 25 (Ky. Ct. App. 1997), applied strict scrutiny analysis because plaintiffs claimed that their parental rights were violated in addition to their free exercise rights, in the present case, the district court said it need not engage in a similar analysis of the ordinances for two reasons. First, the Sixth Circuit did not recognize a "hybrid-rights" exception to the general rule of *Smith.* See *Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine*, 5 F.3d 177, 180 (6th Cir. 1993). Second, as further discussed below, the ordinances in question did not burden "other constitutionally protected rights."]

Free speech claim; the advertising restrictions; plaintiff's speech was commercial speech. Plaintiff contended that the ordinances' prohibition against publishing any advertisement relating to employment that indicated a preference based upon gender identity or sexual orientation infringed upon his free speech rights. Although *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973), upheld a similar ordinance prohibiting gender-biased employment advertising in the face of a First Amendment challenge, plaintiff argued the court should hold otherwise because (1) the advertisements at issue in *Pittsburgh Press* were distinguishable from plaintiff's proposed advertisements and (2) the instant ordinances were unconstitutionally overbroad. The court found plaintiff's arguments unpersuasive and that *Pittsburgh Press* required judgment for defendants.

The ordinance at issue in *Pittsburgh Press* forbade an employer from publishing any notice or advertisement relating to employment which indicated any discrimination because of sex. The Pittsburgh Commission on Human Relations found that the Pittsburgh Press had aided employers in violating the ordinance by publishing help wanted ads in separate columns titled "Male Help Wanted" and "Female Help Wanted." The paper appealed the case, claiming that the ordinance infringed upon its First Amendment rights. The case turned, principally, on whether the speech involved constituted commercial speech. The Supreme Court noted that the critical test for commercial speech was whether it "did no more than propose a commercial transaction." The Court found that the advertisements in the Pittsburgh Press were merely proposals of possible employment, and therefore, were "classic examples of commercial speech." In the instant case, plaintiff unsuccessfully argued that his advertisements were different in that he proposed to make known his stand on the ordinances, although it was clear that he intended to do so in the context of soliciting applications from prospective employees.

Commercial speech is entitled to "substantial protection," *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983), but only if it concerns lawful activity. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Plaintiff's proposed speech concerned an activity – discriminating against prospective employees because of their sexual orientation and gender identity – which was made illegal by the ordinances. Therefore, if plaintiff's advertisements constituted commercial speech, they were not entitled to First Amendment protection because the ordinances were valid legislative enactments.

Commercial speech is not worthy of broader First Amendment protection simply because it coexists with speech addressing important public issues. Advertisements can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues." *Bolger,* supra, 463 U.S. at 67-68. This conclusion is apt when the commercial speech and political statement are not "inextricably intertwined." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). Nothing required plaintiff to express his opinions in his advertisements for employment. Including plaintiff's political and moral views in his "Help Wanted" advertisements did no more to turn them into political speech than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. Because at their essence, plaintiff's advertisements were proposals of possible employment, they constituted commercial speech. The language plaintiff proposed to use was, accordingly, not shielded by the First Amendment.

Because the Kentucky Constitution protected speech to the same extent as did the U.S. Constitution, *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740 (Ky. 1999), the court's decision with respect to plaintiff's claims under federal law foreclosed his free speech claims based upon state law.

Free speech claim; overbreadth. Plaintiff unsuccessfully argued that the ordinances were overbroad in that they effectively forbade all employers from printing or publishing any writings expressing criticisms of the ordinances or of the hiring of homosexuals, bisexuals or transgendered individuals in general. While such a prohibition would raise serious constitutional concerns, the ordinances were readily susceptible to a construction which avoided any overbreadth concern. Both ordinances limited liability to any "employer, labor organization, or employment agency" and stated that a covered advertisement must be "for employment." Lou. Code Ord. § 98.17(D); Jeff. Co. Code Ord. § 92.06(E). The court read the ordinances as only applying to advertisements soliciting job applications or proposing employment opportunities. As such, the ordinances were classic examples of commercial speech. Because the ordinances only addressed commercial speech, the doctrine of overbreadth did not apply, as the

overbreadth doctrine does not apply to commercial speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

The incitement prohibition; no case and controversy. Plaintiff also unsuccessfully objected to portions of the ordinances which prohibited any person from acting to "incite" another to violate any portion of the ordinances' bans on discrimination. Lou. Code Ord. § 98.17 (F) (2); Jeff. Co. Code Ord. § 92.16 (B). Plaintiff correctly asserted that the First Amendment prohibits government from forbidding advocacy of law violation except when such advocacy is directed to inciting imminent lawless conduct and is likely to produce such conduct. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). He argued that the ordinances were not written to apply only and specifically to advocacy directed to inciting imminent lawless conduct and they therefore were unconstitutional. But under the "case" or "controversy" requirement of Article III of the Constitution, federal courts lack jurisdiction to hear a complaint unless there is a real, substantial controversy between parties having adverse legal interests: a dispute definite and concrete, not hypothetical or abstract. But plaintiff had not proposed to engage in any conduct which would run afoul of even a broad interpretation of the incitement provisions of the ordinances. Thus, there was no real, concrete dispute between the parties over this issue, and the court was being asked, essentially, to render an advisory opinion. The court had no jurisdiction to consider such a nonjusticiable question.

Freedom of association. Plaintiff unsuccessfully claimed that his freedom of association was violated by the ordinances. *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), held that two types of relationships are entitled to protection under the Freedom of Association Clause of the First Amendment. First, "certain intimate human relationships" such as those that "attend the creation and sustenance of a family" are to be afforded constitutional protection. Second, one's right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion – is protected. The ordinances in question did not violate plaintiff's "freedom of intimate association." Plaintiff's ability to enter into the sort of "highly personal relationships" contemplated by *Roberts* was in no way impaired by either ordinance. Plaintiff's medical practice was simply a commercial enterprise and the Supreme Court has interpreted the First Amendment to provide little protection under the Freedom of Association Clause to commercial enterprises. Plaintiff did not allege that the ordinances abridged any relationship other than that which existed between himself, as employer, and his employees. Free association protections are not extended to such relationships.

The record also would not support a finding that plaintiff's "freedom of expressive association" was implicated by the ordinances. Such a finding depends largely upon that group's purpose or mission. See, e.g., *Roberts*, 468 U.S. at 626-28; *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 2451-52, 147 L. Ed. 2d 554 (2000), **Case # 751, July 2000 Reporter**; *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). Plaintiff made no allegation that would suggest that his medical practice had as a purpose the exercise of his religion.

Equal protection. The Equal Protection Clause of the Fourteenth Amendment essentially states that all persons similarly situated should be treated alike. A statute which draws a distinction between those to whom it applies will normally be upheld if that distinction is rationally related to a legitimate government interest. However, if a statute impinges on personal rights protected by the Constitution, then strict scrutiny review is applied, and the statute will be upheld only if it is narrowly tailored to serve a compelling government interest. As noted above, neither ordinance impinged on plaintiff's First Amendment rights. Therefore, the proper inquiry was whether or not the exemptions in the ordinances were rationally related to a legitimate state interest. The district court found *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987), to be instructive on this point. In *Amos*, the Court was faced with a challenge to Title VII's religious exemption permitting religious employers to discriminate on the basis of religion. While the challenge in *Amos* was based on the Establishment Clause, the Court addressed the issue of equal protection, as well. The Court held that Title VII's religious exemption was rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. The facts which confronted the Supreme Court in *Amos* were found to be analogous to those with which the district court was now faced and the district court found that the exemptions contained in both ordinances were rationally related to the same purpose of alleviating governmental interference with the activities of religious institutions. Therefore, plaintiff's challenge, to the extent it was based on the

Equal Protection Clause of the Fourteenth Amendment, failed. The standards for equal protection analysis under the Kentucky Constitution being the same as those under the Fourteenth Amendment of the U.S. Constitution, *Commonwealth v. Meyers*, 8 S.W.3d 58, 61 n.4 (Ky. Ct. App. 1999), plaintiff's challenge based on the Kentucky Constitution's equivalent of the Equal Protection Clause also failed.

Due process; ordinances not unconstitutional for vagueness. Plaintiff unsuccessfully claimed that the terms "sexual orientation" and "gender identity," as used in the ordinances, were unconstitutionally vague in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. See the court's opinion for this aspect of the case, where the court found plaintiff's reasoning "hypertechnical." The definitions of "sexual orientation" and "gender identity" were found to be consistent with the meanings attributed to those terms by common usage.

Ky. Rev. Stat. § 82.082. In addition to his constitutional arguments, plaintiff unsuccessfully claimed that the ordinances violated Ky. Rev. Stat. (KRS) § 82.082 which stated in relevant part: "(1) A city may exercise any power and perform any function within its boundaries . . . that is in furtherance of a public purpose of the city *and not in conflict* with a constitutional provision or statute. (2) A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is *a comprehensive scheme of legislation on the same general subject* embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of KRS Chapters 95 and 96." Plaintiff alleged that Kentucky, through its enactment of the Kentucky Civil Rights Act (KCRA), KRS §§ 344.010 – 344.990, had in place "a comprehensive scheme of legislation" on the subject of discrimination. By expanding the coverage of the Kentucky statute, plaintiff contended that both the City and County ordinances violated KRS § 82.082(2). The federal district court rejected plaintiff's argument, holding that the provisions of the KCRA were nonexclusive and the Kentucky General Assembly left room for local governments to prohibit discrimination in various contexts based on characteristics not listed in any provision of the KCRA. See the court's detailed discussion of KRS § 344.020(3), KRS § 344.300, KRS § 82.082 and KRS § 67.083.

Kentucky Constitution § 59. Enactment of the City and County ordinances did not violate Section 59 of the Kentucky Constitution prohibiting the General Assembly from passing "local or special acts." See court's decision for details.

Ultra vires. Plaintiff unsuccessfully contended that the City Ordinance violated §§ 27 and 28 of the Kentucky Constitution providing for the division of powers of the government among a legislative, an executive, and a judicial department, as well as KRS § 83.430, providing that in each city of the first class there shall be a legislative, an executive, and a judicial department and that none of these departments shall exercise any power properly belonging to either of the others, except as permitted by law. See court's decision for details of plaintiff's arguments and why they were rejected by the court.

CASE # 1009

Plaintiff, intending to attend church services, tripped on a raised metal grate while walking along a public sidewalk abutting the church; under New Jersey's Charitable Immunity Act, the church was immune from suit as plaintiff, even though she had not yet entered the church or church property, was, in the language of the statute, "a beneficiary, to whatever degree, of the works" of the church as she was intending to attend the church and receive its benefactions.— *Thomas v. Second Baptist Church of Long Branch,* 337 N.J. Super. 173, 766 A.2d 816 (N.J. Super. Ct. App. Div. 2001), No. A-1336-99T3. Dated February 15, 2001. Opinion by J. Skillman.

Plaintiff was a member of the congregation of defendant New Jersey Church. A friend drove plaintiff to the Church to attend Sunday morning services. Plaintiff got out of the car carrying a Bible and began walking along a sidewalk abutting the church. As she neared the front of the church, plaintiff tripped on a raised metal grate and fell, suffering a knee injury. Plaintiff brought a personal injury action against the Church and City. The trial court granted, inter alia, the Church's motion for summary judgment on the ground that plaintiffs' claim was barred by the Charitable Immunity Act, N.J.S.A. 2A:53A-7 to 2A:53A -11. The Appellate Division affirmed.

N.J.S.A. 2A:53A-7(a) provides in relevant part: "No nonprofit corporation, society or association organized exclusively for religious . . . purposes . . . shall . . . be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a *beneficiary, to whatever degree, of the works* of such nonprofit corporation,

society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association . . . ." Plaintiff unsuccessfully argued before the trial court that although the church was a nonprofit organization organized exclusively for religious purposes, when the accident occurred she was not a "beneficiary" of the Church's works because she had not yet entered the Church.

The Charitable Immunity Act is to be deemed remedial and is to be liberally construed. N.J.S.A. 2A:53A-10 The statutory provisions have been construed to immunize a church from a personal injury claim by a church member who trips and falls while exiting the church after attending services. *Monaghan v. Holy Trinity Church*, 275 N.J. Super. 594, 646 A.2d 1130 (N.J. Super. Ct. App. Div. 1994); *Bixenman v. Christ Episcopal Church Parish House*, 166 N.J. Super. 148, 399 A.2d 312 (N.J. Super. Ct. App. Div. 1979); *Vitolo v. St. Peter's Church*, 118 N.J. Super. 35, 285 A.2d 570 (N.J. Super. Ct. App. Div.), *certif. denied*, 60 N.J. 285, 288 A.2d 27 (1972). The rationale of these decisions is that a church member is "a beneficiary, to whatever degree" of the church's religious mission not only during the period when church services are actually being conducted, but also while the member is entering or leaving the church to obtain the benefit of those services. Plaintiff sought to distinguish this line of decisions on the ground that they all involved persons who suffered personal injuries on church property, while she tripped and fell on a "public sidewalk" abutting the church. However, a church's entitlement to immunity from a personal injury action brought by one of its members does not turn on the nature of the church's interest in the property where an accident occurs. Instead, it turns on the reason for the member's presence on the property, which in this case was attendance at a church service. Thus, plaintiff was a beneficiary of the church's religious works when she tripped and fell as she walked down the sidewalk toward the church to the same degree as if the accident had occurred on the walkway between the sidewalk and the entrance to the church. This conclusion was supported by the statement in *Brown v. St. Venantius Sch.*, 111 N.J. 325, 337, 544 A.2d 842 (1988) – the case extending sidewalk liability to churches and other charitable organizations – "that a charitable organization may be liable in tort to a nonbeneficiary for its failure to maintain an abutting sidewalk." The Court's limitation of a charity's liability for a dangerous condition of a sidewalk "to a nonbeneficiary" constituted an implicit recognition that a sidewalk liability claim is subject to the same immunity from claims of "beneficiaries" as any other type of tort claim against a church or other entity entitled to the protections of the Charitable Immunity Act. The Appellate Division recognized that plaintiff could have suffered personal injuries from a trip and fall on the sidewalk abutting the church if she had used the sidewalk to walk to a store or some other destination unrelated to attendance at church, and that the church would not be immunized from liability under such circumstances. However, plaintiff would not in that event have been "a beneficiary, to whatever degree" of the church's religious mission at the time of the accident. Her presence on the sidewalk would have been the same as that of any member of the general public who uses a sidewalk abutting a church for a purpose "unrelated to . . . the [church's] benefactions." Although it may appear somewhat anomalous for a church's entitlement to charitable immunity to turn on the reason for a person's presence on a sidewalk abutting the church, this is simply a reflection of the fact that a church member may be within a church's benefactions at certain times but at other times have the same relationship to the church as any other member of the general public.

CASE # 1010N

Libel. On May 6, 1991, Time magazine published a 10-page, cover article entitled "Scientology: The Cult of Greed." The Article, written by Richard Behar, was highly critical of Scientology, which it described as "posing as a religion" but being "really a ruthless global scam"; Behar narrated various instances of wrongdoing by a number of individual Scientologists. The Church of Scientology International filed a complaint alleging libel against Behar and Time. Magazine and its parent company Time Warner. The Second Circuit found the challenged statements in the Article were not published with actual malice or were subsidiary in meaning to statements made without actual malice and it affirmed the judgments of the district court dismissing the complaint.— ***Church of Scientology International v. Behar,*** 238 F.3d 168 (2d Cir. 2001), Nos. 98-9522(L) & 99-7332(CON). Dated January 12, 2001. Opinion by J. John M. Walker, Jr.

CASE # 1011

Plaintiffs failed to establish taxpayer standing to challenge holiday display exhibited by township; plaintiffs failed to carry their burden of proving an expenditure of revenues to which they contributed that would make their suit a good-faith pocketbook action; nor did plaintiffs successfully establish standing based on non-economic injuries allegedly resulting from the display, such as unwelcome contact.— *ACLU-NJ v. Township of Wall,* 246 F.3d 258 (3d Cir. 2001), No. 00-2075. Dated April 3, 2001. Opinion by J. Alito.

Since at least 1997, Wall Township, New Jersey had exhibited a holiday display near the entrance to the municipal building housing much of the Township's government. The individual plaintiffs, Eleanor and Randy Miller, were taxpayers and residents of the Township and members of the organizational plaintiff, the American Civil Liberties Union of New Jersey (ACLU). The Millers frequently visited the complex in which the municipal building sat for a variety of personal and professional reasons. In 1998, while visiting the complex, the Millers observed the Township's holiday display and found it objectionable. The display consisted principally of a creche with traditional figures, a lighted evergreen tree, two decorated urns that were part of the complex, and four snowman banners attached to light posts at the complex. Plaintiffs brought suit alleging that the display violated the U.S. and New Jersey Constitutions. Plaintiffs sought declaratory and injunctive relief. In October 1999, the federal district court denied defendant's motion to dismiss plaintiffs' complaint for lack of standing, finding that plaintiffs possessed standing as a result of their direct personal contact with the government-sponsored religious display that made them feel less welcome, less accepted, tainted and rejected. In December 1999, the Township again exhibited a holiday display. But the 1999 display was different than the 1998 display. In addition to a creche, the 1999 display included a donated menorah, candy cane banners rather than the less prominent snowman banners, a larger evergreen tree, and two signs reading: (1) "Through this and other displays and events through the year, Wall Township is pleased to celebrate our American cultural traditions, as well as our legacy of diversity and freedom" and (2) "Merry Christmas Happy Hanukkah." Mr. Miller observed the modified display on December 2, 1999. On December 20, 1999, plaintiffs moved for a temporary restraining order and preliminary injunction. At a December 23, 1999 hearing, the district court denied plaintiffs' motion for a restraining order due to plaintiffs' delay in seeking relief and consolidated plaintiffs' motion for preliminary injunction with a future trial on the merits. In early 2000, the Township moved for summary judgment. The district court invited and received additional evidence from the parties, including a January 26, 2000 Township resolution directing the purchase of "twig-style reindeer and a sleigh" to add to the display and formalizing the future components of the display. The district court ruled on the merits of plaintiffs' suit, finding that the Township's holiday display, as modified and memorialized in the 2000 resolution, did not violate the federal or New Jersey Constitutions and entered judgment for the Township. On appeal, the Third Circuit Court of Appeals reversed, holding that plaintiffs, who were seeking relief only as to the 1999 display, lacked standing and the district court therefore lacked subject matter jurisdiction to render a rule regarding the constitutionality of the Township's past (1999) display. But while the lack of standing prevented plaintiffs from obtaining a ruling from a federal court regarding the constitutionality of the Township's past display – which apparently would not be exhibited again – it did not prevent plaintiffs from attempting to challenge any future display that plaintiffs believed violated constitutional principles.

The ACLU rested its standing on the interests of its members, the Millers, rather than on an independent injury to the organization. As a result, the ACLU's ability to sue was dependent on that of the Millers. The Millers unsuccessfully claimed standing based on their status as municipal taxpayers and, alternatively, on non-economic injuries allegedly resulting from the display. As explained below, the Millers failed to establish standing in either capacity.

Taxpayer status. *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952), recognized that a municipal taxpayer may possess standing to litigate "a good-faith pocketbook action." To establish federal municipal taxpayer standing a plaintiff must show only that (1) he pays taxes to the relevant entity, and (2) tax revenues are expended on the disputed practice. The plaintiffs in *Doremus* were state and municipal taxpayers who challenged a state law mandating Bible reading in public schools. The Court found that the plaintiffs failed to establish a direct monetary injury that would confer standing to raise such a challenge, as they did not allege that the Bible reading was supported by any separate tax or paid for from any particular appropriation or that it added any sum whatever to the cost of conducting the school. Likewise, the *Doremus*

plaintiffs failed to provide any information as to what kind of taxes they paid or to aver that the Bible reading increased any tax they did pay or that as taxpayers they were, would, or possibly could be out of pocket because of the activity. In short, the plaintiffs failed to establish more than a potential de minimis drain on tax revenues due to the challenged reading.

In the instant case, plaintiffs paid property taxes to the Township. However, they failed to establish that the Township had spent any money, much less money obtained through property taxes, on the religious elements of the 1999 display. Plaintiffs did allege, "on information and belief," that the 1998 Nativity display was erected and maintained with public funds, including tax revenues collected by the Township. However, the Township denied this allegation and plaintiffs presented no evidence on the issue. Moreover, the record established that both the Nativity display and the menorah were donated to the Township. While the Township thus owned the Nativity display, and presumably the menorah, and the overall display was set up with defendant's support, direction and/or approval, the Township denied that it "maintained" the display. Plaintiffs thus failed to establish an expenditure on the challenged elements of the display.

Even if the holiday display was erected by paid Township employees, there was no indication that the portion of such expenditure attributable to the challenged elements of the display would have been more than the de minimis expenditure that was involved in the Bible reading in *Doremus*. Nor could the court could assume that the Township expended more than a de minimis amount in lighting the religious elements of the display. Cf. *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (lighting for challenged cross was put up by the city's volunteer firemen, on their own time, and the minuscule cost of the electricity required to keep the lights lit was defrayed by voluntary contributions from city residents.). As a result, the Third Circuit found that plaintiffs failed to carry their burden of proving an expenditure of revenues to which they contributed that would make their suit a good-faith pocketbook action.

Non-economic injuries. Plaintiffs also failed to establish standing based on non-economic injuries suffered as a result of the challenged 1999 display. The Millers provided substantial evidence regarding their contact with and reaction to the 1998 display; that they frequently visited the municipal complex to fulfill personal, professional, and political responsibilities and that they both saw the 1998 holiday display and found it objectionable. Before the Millers' suit was expanded to include the 1999 display, the district court found that the evidence sufficiently established the Millers' standing to raise their constitutional claims. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752 70 L. Ed. 2d 700 (1982), held that plaintiffs living in Virginia and Maryland who learned through a news release of the conveyance of federally-owned land in Pennsylvania to a Christian College lacked standing. Plaintiffs in *Valley Forge* failed to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagreed. In the instant case it could be argued that the Millers' alleged injuries from observance of the 1998 display – Mr. Miller's resentment and Mrs. Miller's feelings of being "less welcome in the community, less accepted and tainted in some way" – were tantamount to what the Supreme Court in *Valley Forge* termed "psychological consequences produced by observation of conduct with which one disagrees," and that these psychological consequences were insufficient to establish standing. Decisions of other circuits, however, suggested that the Millers' evidence might be sufficient to establish standing with respect to the 1998 display because, unlike the plaintiffs in *Valley Forge*, the Millers had personal contact with the display. See, e.g., *Foremaster v. City of St. George*, 882 F.2d 1485, (10th Cir. 1989), and *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987). However, in the instant case, the Third Circuit panel said it need not decide whether the Millers' evidence would be sufficient to confer standing to challenge the 1998 display, because plaintiffs did not press their challenge to that display on appeal. Plaintiffs sought relief only as to the modified display exhibited in 1999. The Third Circuit did not believe that the Millers' proffered evidence would establish standing to challenge the 1999 display under the law of any circuit. The record contained no evidence that Mrs. Miller even saw the 1999 display. While Mr. Miller testified that he went to the municipal complex and observed the 1999 display, it was unclear whether he did so in order to describe the display for the present litigation or whether, for example, he observed the display in the course of satisfying a civic obligation at the municipal building. Cf. *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997), **Case # 18, January 1998 Reporter**, recognizing standing of plaintiff who, "as a participant in local government," had direct contact with a Ten Commandments display in a county courtroom. Moreover, neither Mr. or Mrs.

Miller provided testimony regarding their reaction to the 1999 display, which was significantly different from the display in 1998. While the Court of Appeals assumed that the Millers disagreed with the 1999 display for some reason, it could not assume that the Millers suffered the type of injury that would confer standing. The party invoking federal jurisdiction bears the burden of establishing standing. Mere assumption could not satisfy their burden to prove standing. Accordingly, the Court of Appeals found that plaintiffs failed to establish standing to challenge the Township's 1999 display. The order of the district court was vacated and the case remanded for the district court to dismiss for lack of jurisdiction.

CASE # 1012

Defendant county treasurer posted the national motto "In God We Trust" in the county treasurer's office; when plaintiffs complained, defendant allegedly made religious comments supporting her action and/or criticisms of plaintiffs; one plaintiff lacked standing for failing to allege a direct, personal injury resulting from the challenged conduct; the other plaintiff, although sufficiently (but barely) alleging direct injury, also lacked standing to seek injunctive relief because of, inter alia, the absence of a current case and controversy; plaintiffs' claims were also moot because the poster of which they complained, in which the word "God" was printed in large red letters, was substituted with one which printed the word "God" in the same color and size as all other words in the national motto and which made a larger reference than did the previous posters to the fact that this was the U.S. national motto; even if plaintiffs had standing and the case was not moot, plaintiffs failed to state a claim upon which relief could be granted, either under the free speech or establishment clauses of the First Amendment; defendant was awarded attorneys' fees as plaintiffs' claims were patently frivolous, without any basis in law.— ***Schmidt v. Cline,*** 127 F. Supp. 2d 1169 (D. Kan. 2000), No. 00-4138-SAC.Dated December 6, 2000. Opinion by J. Sam A. Crow.

Defendant, a County Treasurer, displayed, in the offices of the County Treasurer, posters bearing the words "In God We Trust." The posters were alleged to have measured 11 by 14 inches, to have had the word "God" printed in red letters larger than the black printing used for the other words thereon, and to have made a "barely visible" reference to that phrase as being the national motto. Plaintiffs brought suit seeking preliminary and permanent injunctive relief. After plaintiffs filed this case, the posters complained of were removed from defendant's office, and replaced by other posters which included the motto, "In God We Trust," but which printed the word "God" in the same color and size as all other words in the national motto, and made a larger reference than did the previous posters to the fact that this was the "U.S. National Motto Passed by Congress July 30, 1956."

Plaintiffs lacked standing. To satisfy the requirements for standing for injunctive relief, a plaintiff must demonstrate (1) that he will suffer an injury in fact which is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the conduct complained of will cause the injury alleged; and, (3) that it is likely, not speculative, that the injury will be prevented by a favorable decision. When non-economic injury is alleged, plaintiffs must be directly affected by the laws and practices against which their complaints are directed. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n. 22, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). No standing exists where a plaintiff claims that the Constitution has been violated, but claims nothing else. Although plaintiffs were taxpayers, and taxpayers may establish standing when it is a good-faith pocketbook action, here the grievance which plaintiffs sought to litigate was not a direct dollars-and-cents injury but a religious difference. See *Doremus v. Board of Education*, 342 U.S. 429, 434, 72 S. Ct. 394, 96 L. Ed. 475 (1952). Standing in cases such as this requires a plaintiff to allege a direct, personal injury resulting from the challenged conduct. See *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), where the plaintiff worked in a city that displayed a logo containing a Mormon temple and was directly confronted by the logo on a daily basis because it appeared on city vehicles.

Here, the complaint named Mary Lou Schmidt and Darlene Stearns as plaintiffs. The complaint reflected no contact between Stearns and any of the events alleged in the complaint. Instead, it merely alleged that Stearns lived in Topeka, Kansas, was a member of the Board of Directors of the ACLU of Kansas and Western Missouri, and objected to defendant's acts. The complaint failed to allege that Stearns had ever seen the posters in the county treasurer's office, had

ever spoken to the defendant about them or about any other matter, had ever received any communication from the defendant with or without religious content, or that the defendant had ever made any comments about her. Further, the complaint failed to include any allegations that either plaintiff continued to suffer any emotional, psychological, spiritual, or other non-economic harm from defendant's alleged acts. Plaintiff Stearns thus failed to demonstrate injury in fact, and lacked standing to pursue this case.

Plaintiff Schmidt alleged that she was a pagan, that she personally told defendant that she was offended by the "religious message" of the posters, that she objected to defendant's offensive acts. It was further alleged that (1) three days after plaintiff Schmidt complained about the posters, defendant wrote Schmidt a letter on her official letterhead in which defendant questioned Schmidt's integrity and patriotism, criticized Schmidt's religious beliefs, and revealed defendant's "religious motivation" for hanging the posters in question; (2) on some unspecified date(s) defendant mailed Schmidt a tract about the Bible and made disparaging remarks about Schmidt's religious faith and practices in televised news interviews; and (3) defendant sent Schmidt a letter in which she likened herself and her official mission to those of Jesus Christ. Unlike plaintiff Stearns, plaintiff Schmidt had some contact with the allegedly objectionable acts of the defendant, largely, if not exclusively through telephone calls and letters. However, Schmidt's contact with the alleged offensive acts was less direct, more limited, more infrequent, and more avoidable than the contact of the plaintiff in *Foremaster.* Plaintiff Schmidt did not allege that she had contact with the offensive acts on a daily or regular basis, or that she was likely to have such contact in the future by virtue of her employment or her status as a taxpayer, or otherwise. Further, no allegations were made that defendant's acts continued to offend, intimidate, or otherwise affect her, as the plaintiff in *Foremaster* alleged. Nonetheless, given *Foremaster*'s broad holding that an allegation of direct personal contact with the offensive action alone sufficiently alleges direct injury, the district court in the present case said it would not find that plaintiff Schmidt had insufficiently alleged direct injury for purposes of standing to bring constitutional claims.

But even if plaintiff Schmidt may have been personally subjected to past illegal conduct, this did not in itself show a present case or controversy regarding injunctive relief where the past illegal conduct was unaccompanied by any continuing, present adverse effects. An injunction is appropriate only where future conduct is at issue. The moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation. Plaintiffs could not obtain standing to sue for injunctive relief merely by alleging that the defendant had made negative statements about pagans in the past. Plaintiffs had to demonstrate that they themselves faced a real and immediate threat, not a conjectural or hypothetical threat, of harm in the future. Plaintiffs responded that defendant's offensive acts were likely to recur. Plaintiffs stated that the defendant had a past pattern of so acting, as evidenced by her alleged sending of similar letters and/or tracts to four other constituents in 1998. Plaintiffs further alleged that defendant remained undeterred by the present lawsuit, because after the present suit was filed defendant sent a letter and document "primarily religious in content" to yet another non-party, and conducted a lengthy interview with a news agency relating to the posters. Accordingly, plaintiffs believe that absent court intervention, defendant would engage in similar acts in the future. These assertions failed to meet plaintiffs' burden to demonstrate that they personally faced a likelihood of future harm as a result of defendant's conduct. Allegations of defendant's acts directed toward the general public or persons other than plaintiffs, whether years before the lawsuit was filed, or during the pendency of the suit, did not relate to the standing of plaintiffs to maintain the suit. Plaintiffs were not bringing this case as a class action, they were asking for relief solely as individuals. Even where a given action may cause harm to third persons, a litigant may invoke only its own constitutional rights and may not assert rights of others not before the court. Nothing in the pleadings gave the court any reason to find that in the absence of plaintiffs' volitional contact with the defendant in the future, they were likely to have any direct contact with the defendant or the posters, let alone suffer any injury in fact from defendants acts. Under these circumstances, the sole threat of future harm to plaintiffs was hypothetical, not real and immediate. Here, without changing their behavior as a consequence of defendant's action, the plaintiffs could fully participate as citizens in the county without ever seeing the posters in the county treasurer's office, or having any contact with the defendant whatsoever. This situation was therefore distinguishable from that in *Foremaster*. Further, plaintiffs failed to show that it was likely that any such future harm would be prevented by a favorable decision. It was difficult to imagine what form the plaintiff's envisioned the requested injunction would take. An order prohibiting defendant from referring to her personal religious beliefs could raise its own novel issues of constitutionality to the extent it would constitute a

prior restraint on defendant's free speech. Plaintiffs thus lacked standing to pursue this case as pled.

Claims were moot. Even if plaintiffs had standing to maintain this action, plaintiffs' claims were based upon the posters removed from the defendant's office and consequently such claims were moot. The posters displayed currently in the County Treasurer's office did not show the word "God" in any different color or size than the other words in the national motto, and made a large and clear reference to the fact that this was the "U.S. National Motto Passed by Congress July 30, 1956." An exception to the mootness doctrine arises in cases which are capable of repetition, yet evading review. But this case did not fall within this narrow exception.

Merits of plaintiffs' claims. Even if the plaintiffs had established standing, and no issues were moot, plaintiffs' complaint failed to state a claim upon which relief could be granted.

Free speech claim. Plaintiffs alleged that defendant violated the First Amendment free speech clause by "subjecting them to criticism and humiliation . . . in her capacity as a government official, in response to their personal expression of their religious beliefs." Such a claim is traditionally brought not as free speech claims, but as a defamation claim. Plaintiffs' conclusory allegation of a free speech violation fell far short of stating any claim under the First Amendment. No allegations were made that defendant ever attempted to control, compel, chill, deny, or otherwise restrict or inhibit in any manner whatsoever the content, form, time, place or manner of any speech by either plaintiff. Nor were there any allegations that defendant somehow illegally retaliated against the plaintiffs for any protected speech engaged in by them. There was no alleged employment, contractual, or other relationship between the plaintiffs and the defendant except that of resident taxpayers and elected public official. Plaintiffs appear to have believed, without supporting authority, that they were free to contact a public official to voice their own religious or anti-religious views, but that the public official's response to them could not include religious content without violating the plaintiffs' free speech rights.

Establishment clause claim. Nothing supported plaintiffs' assertion that a public official violates the establishment clause by communicating personal, religious beliefs to a constituent in response to a communication from that constituent. In addition, *Gaylor v. United States*, 74 F.3d 214 (1996), squarely and unambiguously held that the national motto "In God We Trust" does not constitute an establishment of religion. *Gaylor* held that the national motto has a secular purpose, symbolizes the historical role of religion in our society, fosters patriotism, and expresses confidence in the future; that its primary effect is not to advance religion; and that it does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state. Further, *Gaylor* held that a reasonable observer, aware of the purpose, context, and history of the phrase "In God we trust" would not consider its use to be an endorsement of religion. The fact that plaintiffs were personally offended by defendant's acts failed to bring their case within any known first amendment analysis.

Defendant's acts, including but not limited to displaying the posters, were not rendered unconstitutional because defendant allegedly harbored or expressed a "religious motive" for such acts. Plaintiffs may have alleged that defendant acted with a religious purpose, but they failed to allege that defendant's acts lacked any secular purpose. This case was nothing like the few in which the U.S. Supreme Court found acts to violate the establishment clause due to motive of the actor alone. (Citations omitted.)

Plaintiffs further complained that the content of the statements defendant made about her religion, and/or critical of their religion, violated the establishment clause. (Such statements allegedly consisted of one letter to Schmidt, one Bible tract, and a news conference in which defendant may or may not have named or alluded to Schmidt.) But plaintiffs failed to show how such conduct, either by itself or in conjunction with the posters, was actionable. Plaintiffs cited no support for their position that defendant's posting the national motto in the county treasurer's office and making the alleged religious comments and/or criticisms either coerced adult constituents into supporting or participating in religion, or otherwise established religion in violation of the constitution.

Attorneys' fees. The district court awarded defendant attorneys' fees pursuant to 42 U.S.C. § 1988(b), holding that plaintiffs' claims were patently frivolous without any basis in law. See court's opinion for details.

CASE # 1013

Village ordinance aimed at regulating door to door solicitation and canvassing by requiring, inter alia, submission of a registration form preliminary to the securing of a permit; the registration form had to furnish information about the solicitor's or canvasser's cause, why he was canvassing, which residences he intended to canvass, how long he intended to canvass, and any "other information concerning the Registrants and [their] business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired"; upon obtaining a permit, a canvasser could canvass any private residence in the Village between the hours of 9 am and 5 pm, provided the owner of the residence had not filed a No Solicitation Form with the Mayor's Office and had not posted a "No Solicitation Sign" on his property; the official "No Solicitation Form" contained a list of various organizations next to which the resident could place a checkmark to indicate the organizations the resident wished to be excluded from the general prohibition; while the No Solicitation Form listed several organizations by name, the only religious organization listed was the Church of Jehovah's Witnesses; individuals covered by the ordinance failing to comply with the ordinance could be charged with a misdemeanor; the district court, in Case # 647, February 2000 Reporter, upheld the ordinance, except that it found that (1) the 5 pm time restraint was an unreasonable restriction on time and that the Village had to allow for canvassing during all daylight hours; (2) the section of the "No Solicitation Form" which singled out Jehovah's Witnesses was unconstitutional and had to be deleted; (3) in order for the ordinance's "additional information" requirement to be constitutional, Jehovah's Witnesses need only note on the application that they sought to "canvass as part of the Jehovah's Witness" ; (4) requiring plaintiffs to list on the Registration Form each residence they intended to visit was an onerous regulation that could potentially violate the exercise of constitutional rights, but that this problem could be cured by the Village allowing a registrant to attach to the Registration Form a list of willing Village residents provided by the Mayor's office; plaintiffs did not appeal those portions of the ordinance the district court found unconstitutional and which it revised; consequently, those questions were not before the Court of Appeals, although the Court of Appeals did question the district court's attempt to rewrite the 9 am to 5 pm time restriction provision; on appeal, plaintiffs continued to attack the entire registration requirement; the Sixth Circuit Court of Appeals upheld the registration requirement holding that the ordinance (a) did not violate plaintiffs' right to free speech; (b) the ordinance was not unconstitutionally overbroad or vague; (c) the ordinance was constitutional as applied to Jehovah's Witnesses and furthered the Village's significant interest in protecting its residents from annoyance in their homes and in preventing fraud, and that the ordinance left open ample alternative channels of communication; (d) plaintiffs' free exercise of religion rights were not violated; and (e) although plaintiffs did not secure all the relief they desired, they secured sufficient relief in the district court as to entitle them, as the prevailing party, to an award of attorneys' fees. — ***Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,*** Ohio, 240 F.3d 553 (6th Cir. 2001), Nos. 99-4087 and 00-3325. Dated February 20, 2001. Opinion by J. Kennedy. Concurring in part and dissenting in part, J. Gilman.

Pursuant to a Village ordinance, "canvassers, solicitors, peddlers, [or] hawkers" going to a private residence for "purposes of advertising, promoting, selling and/or explaining any product, service, organization or cause" were required to first register with the Office of the Mayor by filling out a Registration Form, requiring such persons to furnish information about their cause, why they were canvassing, which residences they intended to canvass, how long they intended to canvass, and any "other information concerning the Registrants and [their] business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired." Once the individuals registered, they were to be furnished a "Solicitation Permit" unless the Mayor determined that they (1) failed to complete the Registration Form, (2) provided

fraudulent information on the form, (3) made false or fraudulent statements or misrepresentations while canvassing, (4) violated any other local, state, or federal laws, (5) trespassed while canvassing, or (6) ceased to possess the qualifications required to obtain a Solicitation Permit. No fee was required to obtain a permit. Upon obtaining a permit, a canvasser could canvass any private residence in the Village between the hours of 9 am and 5 pm, provided the owner of the residence had not filed a No Solicitation Form with the Mayor's Office and had not posted a No Solicitation Sign on his property. Prior to the present litigation, the "No Solicitation Form" contained a list of various organizations next to which the resident could place a checkmark to indicate the organizations the resident wished to be excluded from the general prohibition. While the No Solicitation Form listed several organizations by name, the only religious organization listed by name was the Church of Jehovah's Witnesses. Individuals covered by the ordinance failing to comply with the Ordinance could be charged with a fourth degree misdemeanor.

Plaintiff Jehovah's Witnesses – as "canvassers" seeking to explain their "cause" – sought a declaratory judgment that the ordinance was unconstitutional on its face and as applied to them. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, Ohio*, 61 F. Supp. 2d 734 (S.D. Ohio 1999), **Case # 647, February 2000 Reporter**, the district court found three provisions of the ordinance and one provision of the No Solicitation Form potentially constitutionally troubling. First, the district court found that the 5 pm time restraint contained in the ordinance was an unreasonable restriction on time and ordered the Village to change the time restraint to allow for canvassing during all daylight hours. Second, it found that the section of the "No Solicitation Form" which singled out Jehovah's Witnesses was unconstitutional and ordered the Village to delete any reference to Jehovah's Witnesses from the Form. Third, it found that in order for the ordinance's "additional information" requirement to be constitutional, Jehovah's Witnesses need only note on the application that they sought to "canvass as part of the Jehovah's Witness." Finally, the district court found that requiring plaintiffs to list on the Registration Form each residence they intended to visit was an onerous regulation that could potentially violate the exercise of constitutional rights; however, the district court held that this problem could be cured by the Village allowing a Registrant to attach to the Registration Form a list of willing Village residents provided by the Mayor's office. Unsatisfied with the scope of relief, plaintiffs appealed those parts of the district court's order which upheld the constitutionality – facially and as applied to plaintiffs – of parts of the ordinance. Plaintiffs did not appeal those portions of the ordinance the district court found unconstitutional and revised. Consequently, those questions were not before the Court of Appeals. However, the Court of Appeals observed that while it would likely have no problems with the district court's decision to strike the time restriction provision from the ordinance as it believed it was severable under Ohio law, the Court of Appeals said it would have a more difficult time with the district court's attempt to rewrite that provision. See *Wilson v. National Labor Relations Bd.*, 920 F.2d 1282, 1289 (6th Cir. 1990), recognizing that "courts cannot judicially redraft statutory language". [However, as previously observed, the issue was not appealed, and hence not before the Court of Appeals.] The Court of Appeals was not concerned with the court's revision of the administrative Forms as they were not part of the ordinance. Likewise, it was not concerned by the construction of the "additional information" provision of the ordinance, as courts routinely construe legislation so as to avoid constitutional problems.

Free speech challenge to registration requirement; intermediate scrutiny proper level of judicial scrutiny. Plaintiffs contended that the ordinance's requirement that canvassers register prior to canvassing violated the First Amendment's free speech clause both facially and as applied to them. The district court subjected the ordinance to an analytic framework that asked whether the ordinance's restrictions on speech were reasonable in the context of time, place, and manner. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed.2d 101 (1992). Under such a framework, a law that is content based is subject to strict scrutiny, while a law that is content neutral and of general applicability is subject to some form of intermediate scrutiny. Concluding that the Village ordinance was content neutral and of general applicability, the district court held that the Village ordinance was subject to intermediate scrutiny. Plaintiffs unsuccessfully argued that strict scrutiny applied because the ordinance potentially infringed upon two constitutionally protected rights – freedom of speech and freedom of religion – thereby making their claim a "hybrid rights" claim. And, they continued, *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), established that hybrid rights claims subject the law in question to strict scrutiny. Hybrid rights claims aside, plaintiffs argued, strict scrutiny applied because the ordinance discriminated based on the content of the speech. That discrimination was allegedly evidenced by the reference to Jehovah's Witnesses in the No Solicitation Form and the

Mayor's testimony that he would not furnish Jehovah's Witnesses with an exemption from the time restraints. Rejecting plaintiffs' arguments, the Court of Appeals concluded that the ordinance was content neutral and of general applicability, and hence, not subject to strict scrutiny. A law is content neutral and of general applicability if on its face and in its purpose it does not make a distinction between favored and disfavored speech. On its face, there was no indication that the ordinance distinguished between favored and disfavored speech; it required all individuals seeking to canvass to register irrespective of the content of their message. Nor was their any evidence that the Village's purpose in promulgating the ordinance was to regulate speech based on the message it conveyed. Instead, the Village's principal objective in promulgating the ordinance was to prevent fraud and protect the privacy interests of the residents of the Village. That the "No Solicitation Form" listed Jehovah's Witnesses was not evidence that the Village's purpose in promulgating the ordinance was to restrict their speech; rather, it was evidence of the Village's "administration" of the ordinance. And that evidence did not indicate that the Village applied the ordinance unequally. It may simply be that Jehovah's Witnesses, along with the other organizations listed on the form, canvassed or solicited more frequently than other groups, thereby making it efficient to place their name on the form. Likewise, the testimony of the Mayor that he would not grant Jehovah's Witnesses an exemption from the ordinance's time restriction was not evidence of the purpose of the Village in promulgating the ordinance. Nor was it evidence of the Village's application of the ordinance, as plaintiffs had not applied for an exemption. The ordinance was neutral on its face and the Village's purpose in promulgating it was content neutral. The Court of Appeals rejected plaintiffs' assertion that *Employment Division v. Smith* established that laws challenged by hybrid rights claims are subject to strict scrutiny. While much debate revolved around the Court's language in *Smith*, the Sixth Circuit panel did not believe the Supreme Court held there, nor ever held, that a different level of scrutiny applies to laws that potentially affect hybrid rights. See also *Kissinger v. Board of Trustees of the Ohio State University*, 5 F.3d 177, 180 (6th Cir. 1993).

Ordinance not unconstitutionally overbroad. Plaintiffs unsuccessfully argued that the ordinance was unconstitutionally overbroad because it would have the effect of prohibiting individuals from going door-to-door to engage in political speech without first obtaining a permit. The Sixth Circuit found plaintiffs' reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), which invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature to be misplaced. The Sixth Circuit concluded that there was little reason to read *McIntyre*'s holding as protecting political canvassers from being required to reveal a portion of their identities – their names on a registration form – when their very activity, their physical appearance before the person they sought to canvass, revealed other portions of their identity – their physical identity – and subjected them to scrutiny. [The Sixth Circuit also noted that even if *McIntyre* were implicated, it would find the present ordinance constitutional on its face. In reviewing Ohio's statute, the *McIntyre* Court applied strict scrutiny. However, as already noted, the present ordinance was being reviewed under intermediate scrutiny and the Sixth Circuit believed the difference in the level of scrutiny would be outcome determinative.]

Ordinance not unconstitutionally vague. A law is unconstitutionally vague when it does not afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or when it authorizes or encouragers arbitrary and discriminatory enforcement. The plaintiffs unsuccessfully argued that the ordinance was unconstitutionally vague because the meanings of the terms "solicitor," "canvasser," and "cause" were not clear. The court observed that because the word "cause" was not modified by any other word, but included all causes, it was not vague. (See court's opinion for further discussion.)

As applied challenge to registration requirement. Although the Village had not brought an enforcement action against plaintiffs, plaintiffs had standing to proceed on their as applied challenge. Because plaintiffs alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there existed a credible threat of prosecution, plaintiffs were not required to await and undergo criminal prosecution as the sole means of seeking relief.

In the context of an as applied challenge, a law requiring registration prior to engaging in speech passes intermediate scrutiny if (1) it is narrowly tailored to serve a significant government interest and (2) leaves open ample alternatives for communication. See *Forsyth County v. Nationalist Movement*, supra. If the government interest is in redressing past harm or preventing anticipated harms, the government must demonstrate that the harms are real. See *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). An anticipated harm would be considered real if it were determined that there was a

reasonable ground to fear that serious evil would result if free speech were practiced without the regulation. *United States v. National Treasury Employees Union*, 513 U.S. 454, 475, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995). In making this determination, the Court pays deference to the predictive judgments of the government. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 93 S. Ct. 2080, 103, 36 L. Ed. 2d 772 (1973). A law would be considered narrowly tailored to promote the governmental interests if the interest would be achieved less effectively absent the regulation and the regulation does not burden substantially more speech than is necessary in furthering the interest. And finally, while it is unclear exactly what constitutes ample alternatives for communication, the standard does not mean the least restrictive means of promoting the interest in question. *Ward v. Rock Against Racism*, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

In the instant case, the ordinance's registration scheme promoted significant government interests and was narrowly tailored to promote said interests. The governmental interests the Village sought to promote – protecting its residents from fraud and undue annoyance in their homes – were sufficiently significant. And, the harm the Village sought to prevent – criminals posing as canvassers in order to defraud its residents – was a real threat. An Ohio Assistant Attorney General stated that Ohio had had difficulty with several groups that perpetrated frauds by going door-to-door posing as solicitors or canvassers. And the testimony of the Village's Mayor and its Solicitor indicated that the Village was aware of problems in other Ohio cities with door-to-door fraud when it passed the ordinance. Plaintiffs argued that the fact that the State of Ohio had had problems with such fraud was insufficient to establish a real anticipated harm; they would instead require that the Village itself have problems with fraud before it could promulgate an ordinance to prevent fraud. That argument ignored the fact that the interest the ordinance promoted was preventing an anticipated harm. If the Court required the Village to wait until it had trouble with door-to-door fraud, it would be depriving it of a police power the Supreme Court has made clear municipalities possess. Plaintiffs' argument also ignored the principle reaffirmed by the Supreme Court's holding in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000), that a city may use evidence from the experiences of other cities that are similarly situated to establish a reasonable ground to believe that an anticipated harm is real. As municipalities may take the experiences of other municipalities into account, the Court of Appeals paid deference to the Village's predictive judgment. Accordingly, the Village was entitled to promulgate an ordinance that was narrowly tailored to promote its interests in preventing fraud and in protecting its residents from unwanted annoyance. Contrary to plaintiffs' assertions, *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943), did not hold that a government's interest in protecting its residents from undue annoyance in their homes is insufficient to uphold an ordinance such as the Village's. At best, the Supreme Court said that such an interest is insufficient to uphold an ordinance flatly prohibiting door-to-door canvassing. Further, plaintiffs' argument demonstrated a misunderstanding of how the ordinance served the Village's interest in protecting its residents from undue annoyances. The interest primarily supported the portion of the ordinance prohibiting canvassers from going to the doors of residents who indicated they wished to be left alone. It did so by (1) attaching a criminal penalty to canvassers who ignored those wishes and (2) requiring identification from the canvasser prior to canvassing so that if he did ignore the wishes of the residents, the Village had information that would assist it in prosecuting the canvasser, thereby adding to the likelihood that a canvasser would be deterred from canvassing such residents. Nothing the Supreme Court has said suggests that this is not a sufficient interest to support a municipality promulgating a content-neutral ordinance such as the Village's. In fact, the Supreme Court's opinions seem to suggest the opposite. See *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).

The Village's interest in preventing fraud would also be achieved less effectively absent the ordinance. Absent a registration requirement, the Village had no way of assessing whether canvassers were in fact affiliated with an organization such as Jehovah's Witnesses or were instead perpetrators of fraud using a Jehovah's Witnesses claim as cover. Requiring the individuals to identify themselves as having a relationship with the organization provided the Village with information helpful in making this assessment. Consequently, the ordinance better equipped the Village in its attempt to turn away perpetrators posing as Jehovah's Witnesses. Moreover, the requirements went further than anti-fraud laws in deterring such individuals from committing fraud because they knew the Village had information that would make it easier to apprehend them.

The dissent's argument that the registration requirement burdened substantially more speech than necessary because it required registration not only for

those wishing to engage in sales transactions – a possible avenue for fraud – but also for those wishing to engage in political, religious, or social advocacy assumed too much. First, it assumed that the only avenue for engaging in fraud is posing as a sales person. Second, it assumed that one who intends to engage in fraud by posing as a sales person would be honest enough to inform the Village that he was intending to pose as a sales person and thus would register as such. It was possible that the criminal would inform the Village that he was going to engage in political, religious, or social advocacy in order to avoid the registration requirement. It would be nice if the Village had the ability to discern in advance who, or what type of groups, would commit fraud. However, it did not. And absent such ability, the Village did not burden substantially more speech than necessary by requiring all individuals seeking to go door-to-door to register.

The ordinance also left open ample alternatives of communication. Indeed, the ordinance did not foreclose the option of going door-to-door; one only needed to register first. Plaintiffs' argument that the ordinance effectively foreclosed that option to them because of their religious convictions was, as discussed below, foreclosed by the Supreme Court's decision in *Employment Division v. Smith*. Further, there were several alternatives to door-to-door canvassing. Jehovah's Witnesses could spread their message at stores, on street corners, in restaurants, in parks, and other public forums. Although plaintiffs and the dissent argued that the Village could have included in the ordinance an exception from its requirements for Jehovah's Witnesses, if the Village had included such an exception, the ordinance would not be content neutral. Therefore, that was not a viable alternative here. As the ordinance satisfied the ample alternatives as well as the other requirements of intermediate scrutiny, the ordinance did not violate plaintiffs' free speech rights.

Free exercise claims. Other than arguments that the ordinance failed strict scrutiny, plaintiffs offered no arguments for why the ordinance violated their free exercise rights. The cases cited by plaintiffs involved ordinances flatly prohibiting the dissemination of ideas either in a public forum or door-to-door, which was not the case in the instant legislation. And the ordinances that did require a permit, unlike the Village's ordinance, left the decision whether to grant the permit to the *discretion* of a municipal officer. A law that is content neutral and of general applicability does not violate an individual's free exercise rights. See *Employment Division v. Smith*, supra; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). One that is not content neutral or not of general applicability, on the other hand, must pass strict judicial scrutiny. The Village ordinance under consideration was both content neutral and of general applicability. In the context of free exercise challenges, a law is not content neutral if the object of the law is to infringe upon or restrict religious practices because of their religious motivation. To determine whether the law has such an object, the court looks to the language and operation of the law, and how officials apply the law. A law is facially content based if it refers to a religious practice without a discernable secular meaning. The Village ordinance did not. While the No Solicitation Form did refer specifically to Jehovah's Witnesses, it was not part of the text of the ordinance. Further, the district court ordered the Village to remove that language. The ordinance was also neutral in its operation, as it imposed the same burdens on all individuals or organizations seeking to canvass door-to-door. Finally, Village officials applied the ordinance neutrally. There was no indication that the Mayor discriminated against religious organizations in determining whether to grant permits. Indeed, there was little room for him to make any decision once the applicant completed the Registration Form. And contrary to plaintiffs' assertion, the Mayor's statements that he would not grant Jehovah's Witnesses an exemption from the ordinance's time restrictions on canvassing did not compel a finding that he unequally applied the ordinance. He never applied the ordinance's time restrictions to them because they never requested an exemption from the restrictions. To be generally applicable, the law must not be the product of a government action that, in pursuit of legitimate interests, imposes burdens only on conduct motivated by religious belief essential to the protection of the rights guaranteed by the Free Exercise Clause. The ordinance was not the product of such action. The Village made clear that its interest was in preventing fraud and protecting its residents from undue annoyance. In pursuing these ends, the ordinance burdened any individual seeking to canvass door-to-door.

The Court of Appeals rejected plaintiffs' argument that they should be granted an exemption from the ordinance because seeking permission to spread their religious beliefs violated their religious convictions. It has never been held that an individual's religious beliefs excuse compliance with an otherwise valid law prohibiting conduct the State is free to regulate.

Attorney's fees. The district court had awarded attorneys' fees to plaintiffs by concluding (1) that

plaintiffs were the prevailing party and (2) that they had obtained substantial relief and were thus entitled to compensation for the time their attorneys expended on the entire course of the litigation. The Village argued that plaintiffs' relief was so small (and not of the type sought), that they could not be considered the prevailing party and that even if they were the prevailing party, plaintiffs had not obtained the relief for which they hoped – being exempted from complying with the ordinance – and therefore could not be considered to have achieved substantial success. The Court of Appeals rejected the Village's arguments and had no trouble agreeing with the district court's conclusion that plaintiffs were in fact the prevailing party. As a result of the litigation, their legal relationship with the Village was altered in a manner which they sought. The question of whether this success was sufficient to be considered substantial was much tougher. The Village was correct that plaintiffs still had to register prior to canvassing, and eliminating that requirement was a focal point of plaintiffs' lawsuit. As it was a close call, the Court of Appeals deferred to the factual findings of the district court and concluded that it did not abuse its discretion in awarding attorneys' fees.

CASE # 1014

Wyoming statute mandated the issuance of an exemption from immunization for schoolchildren upon a written religious objection and did not permit an inquiry into the sincerity of the religious beliefs of the applicant.— *In re LePage,* 2001 Wyo. 26, 18 P.3d 1177 (Wyo. 2001), No. 00-10. Dated March 8, 2001. Opinion by J. Kite.

Wyo. Stat. Ann. § 21-4-309(a), providing for mandatory immunization of Wyoming schoolchildren, provided in pertinent part, that "[w]aivers *shall* be authorized by the state or county health officer upon submission of written evidence of religious objection or medical contraindication to the administration of any vaccine." The Wyoming Supreme Court held that by virtue of the word "shall" the statutory language was mandatory and the exemption self-executing upon submission of a written objection. A broad investigation into an individual's belief system in an effort to discern the merit of a request for exemption was not authorized, as the statutory language lacked any mention of an inquiry by the state into the sincerity of religious beliefs.

In the instant case, a parent, Mrs. LePage, petitioned by letter for a religious exemption from the hepatitis B vaccination on behalf of her daughter. The letter stated in part:: "Because of the strong religious beliefs of our family, we do not believe our daughter will engage in behavior that involve[s] exposure to blood or body fluids. We believe that the instituting of mandatory Hepatitis B vaccines is the direct result of our children growing up in a declining moral culture." To assure that faith served as the basis for the request, the State Health Officer asked Mrs. LePage to define her beliefs as being religious-based and to explain how she acted upon her faith in a consistent manner. Mrs. LePage responded with a second letter, which restated her concerns. The request for an exemption was denied, and Mrs. LePage was informed that if her daughter was not immunized she would be unable to attend school. Mrs. LePage requested a hearing, and the matter was referred to the Office of Administrative Hearings (OAH). At the hearing Mrs. LePage stated she had recently concluded that all vaccines were not God's will. The OAH determined that Mrs. LePage had failed to provide evidence to justify the religious exemption, finding that her objection was based on personal, moral, or philosophical beliefs rather than on a principle of religion or a truly held religious conviction. The OAH observed that LePage had had her children vaccinated against other diseases in the

past and that when she initially requested the religious exemption it was based on her personal belief that the mandatory vaccination condoned immoral behavior which was contrary to how she raised her children, not on an express religious belief. The Wyoming Supreme Court reversed, holding that the Department of Health exceeded its legislative authority when it conducted an inquiry into the sincerity of Mrs. LePage's religious beliefs. There was no justification found within the statute for the Department of Health to institute a religious inquiry. Furthermore, construing the statute as allowing such an inquiry raised questions concerning the extent to which the government should be involved in the religious lives of its citizens. Should an individual be forced to present evidence of his/her religious beliefs to be scrutinized by a governmental employee? If parents have not consistently expressed those religious beliefs over time, should they be denied an exemption? Can parents have beliefs that are both philosophical and religious without disqualifying their exemption request? Should the government require a certain level of sincerity as a benchmark before an exemption can be granted? If the legislature had chosen to address these types of questions with further legislation, such legislation would call into question the constitutional prohibition against governmental interference with the free exercise of religion under Article 1, Section 18 of the Wyoming Constitution. However, those issues did not need to be addressed in this case because the statute did not provide the authority for such inquiry. In her initial request for exemption, Mrs. LePage fully complied with both the statutory and the regulatory requirements. The Court also noted that, in attempting to enforce the immunization for hepatitis B, the Department of Health failed to abide by its own regulations, which did not include the hepatitis B vaccination. Department of Health Rules, Immunization Regulations, ch. 1, § 3(e) (048 141 001-2). An administrative agency must follow its own rules and regulations. This could be an independent reason for reversing the State Health Officer's conclusion that a religious waiver was necessary for exemption from the hepatitis B vaccination.

The Court recognized the genuine concern that there could be increased requests for exemption and a potential for improper evasion of immunization. But if problems regarding the health of Wyoming's schoolchildren developed because the self-executing statutory exemption was being abused, it was the legislature's responsibility to act within the constraints of the Wyoming and U.S. Constitutions.

CASE # 1015

Seventh Day Adventist college was entitled to receive, under Maryland's Sellinger Program, direct funding of nonreligious programs such as mathematics, computer science and nursing; while agreeing with the district court that the college was not a pervasively sectarian institution, although certain aspects of the college clearly were of a sectarian nature, the Fourth Circuit Court of Appeals held that the pervasively sectarian test was no longer the relevant inquiry; even if an institution is pervasively sectarian, under current U.S. Supreme Court jurisprudence the government may fund pervasively sectarian institutions so long as the program satisfies the "neutrality plus" test formulated by Justice O'Connor in her concurring opinion in Mitchell v. Helms.— ***Columbia Union College v. Oliver,*** 2001 U.S. App. LEXIS 14253 (4th Cir. 2001), No. 00-2193. Dated June 26, 2001. Opinion by J. Wilkinson. Concurring opinion by J. Motz.

Columbia Union was a private four-year college affiliated with and controlled by the Seventh-day Adventist Church. Approximately 80% of the college's traditional students were Seventh-day Adventists. Columbia Union, which offered majors in subjects typical of any college, applied for a grant from Maryland's Sellinger Program, Md. Code. Ann., Educ. § 17-101 et seq., under which the state made annual payments directly to eligible institutions. To qualify, an institution had to (1) be a non-profit private college or university established in Maryland before July 1, 1970; (2) be approved by the Maryland Higher Education Commission, the agency statutorily assigned to administer the program (3); be accredited (4) have awarded the associate of arts or baccalaureate degrees to at least one graduating class; (5) maintain one or more programs leading to such degrees, other than seminarian or theological programs; and (6) submit each new program or major modification of an existing program to the Commission for approval. In addition, the statute also mandated that no funds could be used for sectarian purposes. To comply with this non-sectarian command, the chief executive officer of the qualifying institution had to provide the Commission with annual pre- and post-expenditure affidavits detailing the intended and actual use of the funds. See Md. Regs. Code. tit. 13B, § .01.02.05 (2001). The amount of the grant was determined in part by the "number of full-time equivalent students enrolled at the institution." Students enrolled in

seminarian or theological programs were specifically excluded from this computation. Md. Code Ann. Educ. § 17-104(a)(1) and (b).

As of fiscal year 1997, fifteen institutions received Sellinger funds. Twelve had no religious affiliation and three were affiliated with the Roman Catholic Church. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96, S. Ct. 2337, 49 L. Ed.2d 179 (1976), held that the Maryland colleges affiliated with the Roman Catholic Church were entitled to Sellinger funds because despite the religious association of the institutions, the colleges were not so pervasively sectarian that secular activities could not be separated from sectarian ones. Columbia Union applied for funds under the Sellinger Program, asking the Commission for the same treatment as the Catholic-affiliated institutions. Columbia Union requested $806,079 for programs in mathematics, computer science, clinical laboratory science, respiratory care, and nursing. The college satisfied each of the statutory requirements for participation in the program. However, the Commission denied the application on the ground that Columbia Union was pervasively sectarian. The federal district court initially upheld the ruling of the Commission. See *Columbia Union College v. Clarke*, 988 F. Supp. 897 (D. Md. 1997), **Case # 110, April 1998 Reporter**. On appeal, the Fourth Circuit reversed and remanded the case for trial on the issue of whether Columbia Union was a pervasively sectarian. See *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013, 119 S. Ct. 2357, 144 L. Ed. 2d 252 (1999) (*Columbia Union I*), **Case # 314, November 1998 Reporter**. Preliminarily, the Court of Appeals ruled that the Commission's denial of funds to the college infringed on Columbia Union's free speech rights because the Commission rejected the application solely because of the college's alleged pervasively partisan religious viewpoint. Such an infringement on the college's free speech rights would be justified only as a means of complying with the dictates of the Establishment Clause. In deciding whether the funding of Columbia Union's secular programs would violate the Establishment Clause, the Court of Appeals relied on the analysis set forth in *Roemer*, supra, that the Constitution "permits direct state money grants to the general secular educational programs of religious colleges only if those colleges are not pervasively sectarian." It rejected Columbia Union's argument that subsequent Supreme Court cases had overruled *Roemer*'s holding by permitting the government to fund pervasively sectarian institutions so long as the state used neutral criteria to allocate aid. Nevertheless, the Fourth Circuit remanded the case to the district court because the record was not fully developed on the issue of Columbia Union's pervasively sectarian status. The Court of Appeals noted, however, that a careful reading of *Roemer* led to the inescapable conclusion that even colleges obviously and firmly devoted to the ideals and teachings of a given religion are not necessarily so permeated by religion that the secular side cannot be separated from the sectarian. On remand, the district court ruled that Columbia Union was not a pervasively sectarian institution. See *Columbia Union College v. Oliver*, 2000 U.S. Dist. LEXIS 13644 (D. Md. 2000), **Case # 863, January 2001**. The Court of Appeals for the Fourth Circuit now affirmed the district court's judgment. But this time, while agreeing with the district court that Columbia Union was not a pervasively sectarian institution, the Fourth Circuit Court of Appeals held that the pervasively sectarian test was no longer the relevant inquiry. Even if the institution is pervasively sectarian, under current U.S. Supreme Court jurisprudence the government may fund pervasively sectarian institutions so long as the program satisfies the "neutrality plus" test formulated by Justice O'Connor in her concurring opinion in *Mitchell v. Helms.*

In *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed.2d 660 (2000), **Case # 759, July 2000 Reporter**, the Supreme Court upheld the constitutionality of an aid program to parochial primary and secondary schools. *Mitchell* was a case in which the federal government distributed money to state and local governmental agencies, which in turn bought educational material and equipment on behalf of certain public and private schools. The local agencies then lent what they had purchased to the schools. Through the program, private schools were able to acquire such items as library books, computers, television sets, and laboratory equipment. In the challenged school district, approximately 30% of the funds went to private schools. Of the 46 private schools participating in the program, 41 were religiously affiliated. The Court, applying the test outlined in *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed.2d 391 (1997), held that the federal aid program was constitutional under the Establishment Clause because the federal program had a secular purpose and because the program did not have the primary effect of advancing or inhibiting religion. While six Justices agreed with this result, the case did not produce a majority opinion. Rather, four justices signed on to the lead, plurality, opinion by Justice Thomas. Justice O'Connor, joined by Justice Breyer, wrote an opinion concurring in the judgment on narrower grounds. Because the secular purpose of the program was uncontested, the Court focused on

whether the aid had the effect of advancing religion. The plurality opinion in *Mitchell* emphasized that the neutrality of aid criteria was the most important factor in considering the effect of a government aid program. The plurality would sustain the constitutionality of an aid program so long as the religious, irreligious, and areligious are all alike eligible for the governmental aid. The *Mitchell* plurality also made clear that governmental aid can even be diverted to religious use if the criteria used to dispense the aid are neutral and the purpose of the aid is secular. Thus, for the plurality, the relevant constitutional inquiry was how the aid is assigned, not where the aid goes. Indeed, the plurality opinion explicitly noted the irrelevance of a pervasively sectarian inquiry. While acknowledging that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school, the plurality believed "that period is one that the Court should regret, and it is thankfully long past." Although Justice O'Connor agreed with the plurality opinion on many issues, two specific aspects of the opinion compelled her to write separately. First, although she recognized that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges, she would not make neutrality, and neutrality alone, the one factor of singular importance in adjudication of Establishment Clause challenges to government school-aid programs. Justice O'Connor noted that the Court had never held that a government aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid. Instead, Justices O'Connor and Breyer held that neutrality is important, but by no means the only axiom in the history and precedent of the Establishment Clause. Second, Justice O'Connor criticized the plurality for approving the "actual diversion of government aid to religious indoctrination." Actual diversion concerned Justice O'Connor because if "religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion." Justices O'Connor and Breyer agreed with the plurality opinion, however, that the federal aid program in *Mitchell* passed constitutional muster. Applying the *Agostini* test, Justice O'Connor found that the government did not act with the purpose of advancing religion and that the aid did not have the effect of advancing religion. Justice O'Connor's opinion did not take issue with the plurality's holding that the pervasively sectarian doctrine should be "buried now." Instead, she specifically criticized prior Supreme Court decisions for "apply[ing] an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination." Instead of focusing on this irrebuttable presumption that even the secular courses in a religious school are "inescapably" religious, Justice O'Connor would require plaintiffs to "prove that the aid in question actually is, or has been, used for religious purposes." By focusing on actual diversion of aid instead of the presumption that any secular class at a religious school would "inevitably inculcate religion," Justice O'Connor acknowledged her agreement with the plurality that the pervasively sectarian doctrine was becoming ever more problematic for Establishment Clause purposes. Thus, although Justice O'Connor and Justice Breyer would not go as far as the plurality, their separate opinion established three fundamental guideposts for Establishment Clause cases. First, the neutrality of aid criteria is an important factor, even if it is not the only factor, in assessing a public assistance program. Second, the actual diversion of government aid to religious purposes is prohibited. Third, and relatedly, "presumptions of religious indoctrination" inherent in the pervasively sectarian analysis "are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause." The O'Connor concurring opinion, which was the controlling opinion from *Mitchell*, replaced the pervasively sectarian test with a principle of "neutrality plus." Neutrality is a necessary and important consideration in judging Establishment Clause cases, but it may not be sufficient in and of itself. Instead, courts must examine whether actual diversion of aid occurs and whether the "particular facts of each case" reveal that the Establishment Clause has been violated.

The Fourth Circuit proceeded to hold that Columbia Union was entitled to Sellinger Program funds under the neutrality plus test without resort to examining the college's pervasively sectarian status. First, neither party disputed that the Sellinger Program had the secular purpose of supporting private higher education generally, as an economic alternative to a wholly public system. Of the fifteen schools currently receiving Sellinger Program funds, only three were affiliated with a religious institution. Second, the aid did not have the effect of advancing religion. The Sellinger Program was indisputably premised upon neutral criteria. Several additional factors served to reinforce the program's constitutionality, namely the prohibition against using any Sellinger money for religious purposes, the safeguards in place to prevent such aid from being used for sectarian purposes, and the fact that the assistance was being afforded to higher education. Under the plurality opinion in *Mitchell v. Helms*, the, the Sellinger Program's secular purpose and its neutral criteria would practically

dispose of this case. And under the analysis of Justice O'Connor, the neutrality of the Sellinger Program remained a critical factor (if not determinative) factor in considering its constitutionality. Additional considerations, however, underscored the constitutionality of Sellinger assistance to the college.

A second consideration was one precisely identified by Justice O'Connor – the lack of any evidence of actual diversion of government aid to religious purposes. The fact that a sectarian school is offering secular courses like computer science no longer results in the presumption of religious indoctrination. Instead, it must be shown that the government aid in question has actually resulted in religious indoctrination. Here, the State could not make a showing of actual diversion. The only evidence it produced related to the pervasively sectarian status of the school, not to the use of aid in an improper fashion. And it was impossible for Maryland to make the requisite showing of actual diversion in this case for the simple reason that Columbia Union had yet to receive any money under the Sellinger Program.

In addition to the absence of evidence of actual diversion, there were safeguards against future diversion of Sellinger Program funds for sectarian purposes. The statute required that a qualifying institution "may not use" Sellinger Program funds "for sectarian purposes." Md. Code Ann. Educ. § 17-104. Columbia Union satisfied this prerequisite as well. The President of Columbia Union signed a sworn affidavit stating that the funds would not be used for sectarian purposes. Moreover, the program assigned the amount of aid based on the "number of full-time equivalent students enrolled at the institution," excluding "students enrolled in seminarian or theological programs." Indeed, the requirements that funds not be used for sectarian purposes and that students enrolled in sectarian programs be excluded from the total number of students signified that, if anything, sectarian colleges were actually at a disadvantage in receiving Sellinger funds.

Government need not have a failsafe mechanism capable of detecting any instance of diversion. *Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring in the judgment). Because the presumption that the use of instructional materials and equipment by religious-school teachers in secular classes is in reality aid to religion itself should be abandoned there was likewise no constitutional need for pervasive monitoring. In this case, the safeguards against sectarian diversion, while not obtrusive or excessively entangling, were more than constitutionally sufficient. In addition to the bedrock prohibition on the use of Sellinger funds for sectarian purposes, Md. Code Ann. Educ. § 17-107, colleges that had only a seminarian or theological program were precluded from receiving Sellinger funds. Id.§ 17-103. Sellinger funds were subject to audit by the Commission. Id.§ 17-303; Md. Regs. Code tit. 13B, § .01.02.05. The college had to provide annual pre- and post- expenditure sworn affidavits documenting the institution's intended and actual use of the funds. See Md. Regs. Code tit. 13B, § .01.02.05. Given these restrictions, the program contained adequate safeguards against the diversion of the money to sectarian use. And the court could not assume that school officials would act in bad faith or otherwise misstate the proposed uses of Sellinger funds. See, e.g., *Mitchell*, 530 U.S. at 863-864 (O'Connor, J., concurring in the judgment) ("I . . . believe that it is entirely proper to presume that these school officials will act in good faith. That presumption is especially appropriate in this case, since there is no proof that religious school officials have breached their schools' assurances or failed to tell government officials the truth.").

A final reason for sustaining the constitutionality of Columbia Union's use of Sellinger Program funds was the fact that Columbia Union was an institution of higher learning. If the aid program to primary and secondary schools was upheld in *Mitchell*, the assistance to a college should be sustained as well. The Supreme Court has consistently stated that it would scrutinize aid to religiously-affiliated colleges and universities more leniently than aid to primary and secondary schools. Students attending college are more likely to do so by free will and more likely to encounter a variety of influences and opinions while on campus. College students are simply less susceptible to religious indoctrination. (Citations omitted.) Indeed, the *Roemer* Court approved the precise program at issue in this case. Although earlier cases turned largely on the pervasively sectarian character of the institutions, the fact remained that the Supreme Court had never struck down a government aid program to a religiously-affiliated college or university. Thus, even if direct funding of classes raises special constitutional concerns at the primary and secondary level, direct funding of secular classes at the collegiate level might still survive scrutiny. For at the college level, there is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity like the study of biology or the learning of a foreign language will actually be infused with religious content or significance.

In sum, the Sellinger Program was compatible with the constitutional guideposts set forth by the Court in *Mitchell*. The program's purpose was secular. And

because of the program's neutrality, the lack of actual diversion, the safeguards against future diversion, and the fact that Columbia Union was an institution of higher learning, the aid did not have the effect of advancing religion. Examining the Sellinger Program as a whole, Columbia Union's receipt of Sellinger funds was not only consistent with the "neutrality plus" formula of Justice O'Connor's concurrence, it was a stronger case than *Mitchell* due to the fact that Columbia Union was a college. The Fourth Circuit recognized that the Sellinger Program was a direct aid program whereas *Mitchell* involved the lending of materials and equipment to supplement that used by sectarian schools. Nevertheless, the Sellinger Program more than satisfied the "neutrality plus" criteria of *Mitchell*. Thus, the Fourth Circuit believed that the U.S. Supreme Court would approve of Columbia Union's use of Sellinger Program funds for secular courses of instruction without resort to a pervasively sectarian analysis.

In addition, even under a pervasively sectarian analysis, there was no reason why Columbia Union should be denied Sellinger Program assistance. Even assuming that the pervasively sectarian analysis remains relevant for determining violations of the Establishment Clause, Columbia Union was entitled to Sellinger Program funds because the district court was not clearly erroneous in its findings. The district court looked to four factors identified by *Columbia Union I* to determine if a college is pervasively sectarian: (1) mandatory student worship services; (2) academic courses implemented with the primary goal of religious indoctrination; (3) an express preference in hiring and admissions for members of the affiliated church; and (4) church dominance over college affairs. A college is not pervasively sectarian unless it possesses a "great many" of these characteristics. Working through the four factors in this case, the district court found that although Columbia Union had a mandatory worship policy, it applied only to a minority of students. With regard to the second factor, the district court held that the evidence was insufficient to show that the traditional liberal arts classes were "taught with the primary objective of religious indoctrination." The court pointed to affirmative evidence indicating that secular education was the primary goal of Columbia Union. The district court examined the college's mission statement and the descriptions of secular curricula in the college's catalog, among other things, in making this finding. The court looked at the college's syllabi for secular courses and determined that the religious references were too isolated and scattered to justify a finding that religion permeated the secular courses. And although the district court found that the Seventh-day Adventist Church exerted a dominance over college affairs and that the college gave an express preference in hiring and admissions to members of the Church, these factors by themselves were not enough to make the college a pervasively sectarian one. Looking at all the factors, the district court concluded that "a great many" were not present. The district court's finding that Columbia Union was not "pervasively sectarian" was not clearly erroneous. And one other factor supported the district court's revised finding on remand that Columbia Union was not pervasively sectarian. As noted, neither the Supreme Court, nor any circuit court had ever found a college to be pervasively sectarian. There was no disqualifying difference between Columbia Union and the colleges in *Roemer*, supra; *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed.2d 923 (1973); and *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed.2d 790 (1971).

CASE # 1016

School board had created a limited public forum by permitting numerous organizations, including churches, private membership organizations, athletic clubs and other outside groups, to utilize its school facilities for after-hour use; the board sought to bar the Boy Scouts from renting and leasing school facilities because the Scouts' membership and leadership policies banning homosexuals discriminated on the basis of sexual orientation in violation of the school board's anti-discrimination policy; the Scouts were granted a preliminary injunction preventing the school board from denying the Scouts the right to lease public school facilities and buses during the off school hours; the board was not, however obligated to actively endorse, participate, or solicit others to participate in Boy Scouts activities, as the board had previously done under a partnership agreement, and the board could promote its own message of combating anti gay bias.— ***Boy Scouts of America v. Till***, 136 F. Supp. 2d 1295 (S.D. Fla. 2001), No. 00-7776-Civ-Middlebrooks-Bandstra. Dated March 21, 2001.

In Florida, the Broward County School Board permitted numerous organizations, including churches, private membership organizations, athletic clubs and other outside groups, to utilize its school

facilities for after-hour use. This longstanding practice amounted to the creation of a "limited public forum" for purposes of First Amendment analysis. However, the School Board also employed an "anti-discrimination" policy prohibiting the "rental use or enjoyment of school facilities by any group or organization which discriminates on the basis of age, race, color, disability, gender, marital status, national origin, religion, or sexual orientation." For many years, the local arm of the Boy Scouts of America enjoyed the after-hours use of many Broward school facilities. Moreover, in 1998, the two sides entered into a five-year partnership agreement that authorized a "School Night for Scouting" throughout the School District at school facilities and allowed school administrators to assist the Scouts in promoting the event during school hours through activities such as school announcements and the distribution of promotional materials. The Boy Scouts emphasized traditional family values since the inception of the movement and believed avowed homosexuals did not provide a role model for Scouts that was consistent with the values of the Scout oath and Law. Accordingly, the Boy Scouts did not accept avowed homosexuals as members or leaders. Prompted by the Scouts' policy of excluding homosexual children and adults from group membership, the School Board decided to terminate the partnership agreement with the Scouts. Further, the School Board concluded that the Scouts were ineligible to rent and lease school facilities like any other private group because the Scouts' membership policies discriminated on the basis of sexual orientation, and therefore violated the School Board's anti-discrimination policy. The Scouts asserted that this decision was impermissible viewpoint discrimination under the First Amendment and violative of the Equal Protection Clause of the Fourteenth Amendment. Pending a hearing on the merits, the district court granted the Scouts a preliminary injunction preventing the School Board from denying county public school facilities and buses during the off school hours by reason of the Boy Scouts' membership policy. The preliminary injunction was not to apply to activities of the Boy Scouts constituting "involvement" of the group in the schools as provided in the terminated Partnership Agreement. Nor were defendants required to endorse, participate, or solicit others to participate in Boy Scouts activities.

To obtain a preliminary injunction, a plaintiff is required to demonstrate that: (1) there is substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. The School Board argued that it had a compelling interest in protecting students (and teachers wishing to be Scout leaders) from the emotional harm that would occur from their exclusion from Boy Scout activities on school property solely because of their sexual orientation. The Board also argued that it had a compelling interest in eradicating discrimination so that, by example, their students were taught respect and tolerance. The district court acknowledged that when government is the speaker, it may make content-based choices. See *Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 2518, 132 L. Ed. 2d 700 (1995). For instance, when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. See *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 1773, 114 L. Ed. 2d 233 (1991). And a school board may determine the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. See *Board of Regents of Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 234, 120 S. Ct. 1346, 1357, 146 L. Ed. 2d 193 (2000), **Case # 671, March 2000 Reporter**. Consequently, in this case, the Board, in its disapproval of intolerance towards homosexuality, was free to fashion its own message. It was not required to assist the Boy Scouts in the solicitation of members through "scouting days" or in any other affirmative acts to enhance the involvement of the Scouts in the schools as set forth in the Partnership Agreement. The Board was not required to embrace or endorse the Boy Scouts' expression and indeed could fashion its own contrary message. However, in expressing its own message and setting its example for students to follow, the School Board could not punish another group for its own message. The government was required to abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker was the rationale for the restrictions. See *Perry Ed. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983).

Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), **Case # 751, July 2000 Reporter**, held that the application of New Jersey's nondiscrimination law, requiring Boy Scouts to appoint an avowed homosexual as an Assistant Scoutmaster, ran afoul of the Scouts' freedom of expressive association. In addressing the question of whether forcing the inclusion of Dale would significantly affect the Boy Scouts' ability to advocate public or private viewpoints, the U.S. Supreme Court found that Dale's presence would significantly burden

the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior. Indeed, the School Board in the instant case conceded that the Boy Scouts had a First Amendment right to freedom of expressive association, which included the right to exclude homosexuals as members or leaders in the organization.

There was no question that a School Board, like the private owner of property, can legally preserve the property under its control for the use to which it is dedicated. However, once the state has opened a limited public forum, it may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint. Here, the School Board conceded that in allowing a multitude of groups to use its facilities on a regular basis, it had created a limited public forum. The facts of this case brought it very close to the decision in *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), ordering a preliminary injunction against a school board's policy denying the Ku Klux Klan the use of a high school gymnasium for what the Klan termed a patriotic meeting on a Saturday morning. The school board had argued that the rally would impede desegregation of the parish schools and involve the state in forwarding the KKK's invidious views. The court found these arguments unavailing in the face of the constitutional guarantees of freedom of speech and association. [See also Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000), *cert denied sub nom* Yarnell v. Cuffley ___ U.S. ___, 121 S. Ct. 1225, 149 L. Ed. 2d 135 (2001), finding that a state may not deny access to its Adopt-A-Highway program based upon the KKK's beliefs and advocacy.] In seeking to distinguish the facts here from those considered by the *Knights of the Ku Klux Klan* case, the Broward School Board made two primary arguments. First, it argued that the pervasiveness of the use of the school facilities made this case different, pointing to the language of the KKK case that "the occasional and temporary use" of school facilities does not constitute state action. In fact, counsel for the School Board suggested that if only one Boy Scout troop wanted to use the facilities the Board would be powerless to act. This argument was not persuasive. The district court found no support for the proposition that the number of participants or the frequency of use changes public forum analysis. Unless the private use were to be in actuality a subterfuge whereby a public body utilized private groups to perpetuate discrimination, the frequency of use lacked significance. See *Gilmore v. City of Montgomery*, 417 U.S. 556, 94 S. Ct. 2416, 41 L. Ed. 2d 304 (1974).

The Board argued that the fact that the Boy Scouts, unlike the Klan, primarily drew members and scout leaders from the student body and the teachers of the schools gave it a compelling interest in stopping discrimination against those with whom it had a special relationship and duty. Boys might be excluded in the evenings from schools they attended that morning and teachers might be excluded from the school at which they taught. This concern was understandable. The emotional hurt that such an event could cause could be a reason for parents and young men to disassociate themselves from participation in scouting. But the hurt of exclusion is part of the price paid for the freedom to associate. The court did not see how this hurt differed from that of the African-American student whose school gymnasium was used for a Klan rally, the Holocaust survivor forced to contemplate the Nationalist Socialist Party parading through the streets of Skokie, Illinois wearing swastikas, the gays or lesbians who were refused a place in a St. Patrick's Day parade, or James Dale's pain after being excluded from scouting after 12 years of active and honored participation. Freedom of speech and association has its costs, and tolerance of the intolerant is one of them. See *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, supra; *Nationalist Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977); *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); *Boys Scouts of America v. Dale*, supra.

The Supreme Court has recognized that First Amendment rules in the public schools must be applied in light of the special characteristics of the school environment and that school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. However, unlike cases where the Supreme Court has given schools more control over their own message and teachings, the present case was dealing with a limited public forum created by the School Board itself. Further, the speech the School Board wished to regulate was not student speech taking place during school hours, but rather the speech of a private organization wishing to exercise its expressive association rights during non-school hours. The action taken by the School Board barring the Boy Scouts from use of school facilities did nothing to stop the possible exclusion of students or teachers from scouting. If its purpose was to stop discrimination, the method chosen by the Board was ineffective. When government seeks to regulate speech based upon its content, the regulation must achieve the stated governmental purpose, it must be narrowly tailored,

and it must be the least restrictive alternative available. Excluding the Boy Scouts from Broward school facilities based on their anti-gay viewpoint could not pass constitutional muster under this standard and a First Amendment violation would constitute irreparable harm. Moreover, since the Boy Scouts' had used the facilities for many years and other groups continued to enjoy access, the threatened injury to the plaintiffs outweighed any threatened harm the proposed preliminary injunction could cause the School Board. Finally, enjoining a selective denial of a dedicated public forum to a group because of its membership policies would forward and not contravene the public interest.

CASE # 1017

Portions of a College Green had been opened up as a non-traditional public forum, but a portion of the Green, on which stood a Civil War Monument, was reserved by the University as a nonpublic forum at which only private speech was allowed; defendant preacher who became involved at the Monument in heated discussion with students was asked by campus police to leave the University grounds and when he refused he was arrested; conviction for criminal trespass upheld; the Monument area was a nonpublic forum, not a traditional public forum, or an area opened up as a non-traditional public forum; college police did not discriminate against defendant in enforcement of the college's policies, nor was the college's policy void for vagueness.— *State of Ohio v. Spingola,* 136 Ohio App. 3d 136, 736 N.E.2d 48 (Ohio Ct. App. 1999), *appeal dismissed*, 88 Ohio St. 3d 1496, 727 N.E.2d 921 (Ohio 2000), No. 99CA19. Dated December 22, 1999. Opinion by J. Roger L. Kline.

Ohio University (OU) is a public university located in Athens, Ohio. The College Green was an open square-shaped area surrounded on three sides by academic buildings. The fourth side abutted East Union Street, a public street. A Civil War Monument was located on the Green near the East Union Street sidewalk. Students congregated at the Monument to study, read, sit, talk, and eat. At the intersection of East Union and Court Streets, there was a gate to OU where students and non-students could, after receiving a permit, pass out literature and other objects, set up a table, and engage in fundraising and other activities that did not impede the free flow of pedestrians. The gate was one of six sites that individuals could reserve for such activities by applying for and receiving a permit from OU. The University did not permit individuals to use any other site for assemblies or speeches. OU's policy prohibited assemblies or public speaking at the Monument. Defendant, who was not a student, began preaching on East Union Street but later moved to the Monument area where he engaged in heated dialogue with several students. When the Ohio University Police Department (OUPD) learned that defendant did not have a permit, they asked him to leave OU property. He refused to do so, and the OUPD arrested him. The OUPD did not ask for permits or arrest any of the people who had gathered in response to defendant's preaching. The Court of Appeals affirmed defendant's conviction for criminal trespass, because he had no First Amendment right to engage in public communication at the Monument. The record contained no evidence that OU selectively enforced its policy requiring permits based upon a speaker's viewpoint. Nor was OU's policy on speech unconstitutionally vague. The policy provided sufficient notice of its proscriptions and contained reasonably clear guidelines to prevent arbitrariness or discrimination in its enforcement.

Ohio Revised Code (R.C.) 2911.21 prohibited any person, without privilege to do so, from recklessly entering or remaining on the land or premises of another when the person has been notified that his or her presence is unauthorized. The only element of R.C. 2911.21 at issue on appeal was whether defendant had a privilege to be on OU's property. A privilege includes a right conferred by law. R.C. 2901.01(L). Defendant unsuccessfully argued that he had a First Amendment right to speak at the Monument because it was a public forum and OU did not have a policy forbidding or regulating speech at the Monument. While the campus of a public university, at least for its students, possesses many of the characteristics of a public forum, a university differs in significant respects from public forums such as streets or parks because of the special characteristics of the school environment and a university's educational mission. Because of this mission, the university may impose reasonable regulations compatible with that mission upon the use of its campus and facilities. A public university need not make all its facilities equally available to students and non-students or grant free access to all of its buildings. A traditional public forum is a place that, by long tradition or by government fiat, has been devoted to assembly and debate. The government may not prohibit all communicative activity in a public forum. However, the government may enforce

content-neutral time, place and manner restrictions that are narrowly tailored to serve a significant governmental interest if alternative channels of communication are left open. In this case, portions of the College Green were a non-traditional public forum, while that portion of the Green on which the Monument stood was reserved as a nonpublic forum. As part of a public university, the Green did not possess the characteristics inherent in public forums. Further, there was no evidence that the public traditionally used the Green for public assembly and debate. A non-traditional public forum is public property opened by the government for use by the public as a place for expressive activity. Even though the government is not required to indefinitely keep a non-traditional forum open, when the government does open up the forum, it is bound by the same standards that apply in a traditional public forum. The government may open up portions of a non-public forum and not open the remaining portions. Therefore, OU could designate portions of the green as a non-traditional public forum, but keep other areas of the green as non-public forums. Accordingly, OU could designate the six green sites found in the college handbook as nontraditional public forums while keeping the Monument as a non-public forum.

Areas of the Green that were non-public forums, such as the Monument, were governed by different standards than public forums. OU could reserve the forum for its intended purpose, communicative or otherwise, as long as the regulation on speech was reasonable and was not an effort to suppress expression merely because public officials opposed the speaker's view. OU's policy, as articulated in its handbook, reserved the Monument space for private communication. The Monument was reserved for communication targeted at specific individuals rather than all individuals present in the Monument area. When conversations on the green got too loud, the OUPD regularly asked people to move to the city sidewalk. This was reasonable given OU's mission of education and the special characteristics of the school environment. Maintaining a quiet atmosphere in the academic setting served OU's mission of education. Thus, defendant had no First Amendment right to engage in public communication at the Monument.

Defendant also unsuccessfully contended that while OU's policy apparently was content-neutral on its face, OU discriminated based upon content in enforcing its policy. Defendant argued that (1) the failure to remove students who gathered at the Monument on a daily basis to eat, have conversations, read and study, (2) the heavy regulation of preachers, and (3) the failure of OUPD to remove and arrest, if necessary, the students who vocalized their disagreements with defendant's viewpoint, proved that OU was enforcing its own policy based upon the content of speech. But the failure to remove students who gathered at the Monument to eat, have conversations, read, and study was consistent with OU's policy to allow private speech to occur at the Monument. Thus, it had no bearing on the determination whether OU enforced its policy based upon viewpoint or content. Nor did the record support defendant's contention that preachers were "heavily regulated." Defendant's testimony was limited to the five or six times that he visited OU. He testified that much of the preaching on those days was done from city property, the public sidewalk. OUPD officials regularly asked people engaged in any public speech for a permit and if they did not have one, they asked the people to leave OU property. The fact that defendant was arrested, but not the students who were "mocking and heckling" him, did not indicate viewpoint discrimination. Defendant testified that the "champion of the hecklers" left before the police arrived. Thus, she was not available for arrest at the time the OUPD arrested defendant. And many non-viewpoint discriminatory reasons existed for the police officers not to ask the students to leave. The OUPD may have thought that by having defendant leave, the students would naturally disperse, or follow him off of the property. Or, they may have asked defendant to move first with the intention of also asking the other students to leave, but became occupied with defendant because he refused to leave. Furthermore, the evidence did not establish whether the students were engaged in public or private communication. If the students were speaking directly to defendant in a conversational tone, the police may have viewed their communication as private communication, and thus a permitted use of the Monument area. The Court refused to attribute the most sinister reason to the OUPD for not arresting any of the people gathered in response to defendant's preaching, especially when no direct evidence of OUPD's reasons was presented at the hearing.

Finally, OU's policy was not unconstitutionally vague. When a statute is challenged under the due process doctrine of vagueness, a court must determine whether the enactment (1) provides sufficient notice of its proscriptions and (2) contains reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement. Reading OU's policy as a whole, it was clear that a person could only use the six sites listed on a designated form for public communication and the remainder of the Green for private communication. The policy provided sufficient notice of its proscriptions, and contained reasonably

clear guidelines to prevent official arbitrariness or discrimination in its enforcement. See court's opinion for further details.

CASE # 1018

Church, which had purchased property zoned for agricultural use, obtained special exception permit allowing construction of a church; construction was restricted to a 7.5 acre development envelope, although the construction of driveways, road improvement, storm water management, utilities or other such improvements could take place outside of the envelope; the Supervisor of Assessments determined that all property within the development envelope, plus 3 acres outside the envelope used for storm water management and a septic system, were tax exempt; however, the Supervisor erroneously denied a tax exemption for the remaining 16.5 acres of the property; the entire property had to be viewed as a package and the 16.5 acres, which were restricted to open space use, provided a natural setting for the church for religious worship use; as the disputed acres were being actively used by the church for religious worship use they qualified for the tax exemption; Maryland law.— ***Supervisor of Assessments of Baltimore County v. Keeler,*** 362 Md. 198, 764 A.2d 821 (Md. 2001), No. 85. Dated January 4, 2001. Opinion by J. Bell. Dissenting opinion by J. Wilner.

Maryland Code § 7-204 of the Tax-Property Article provided that property owned by a religious group or organization is not subject to property tax if the property is actually used exclusively for: (1) public religious worship; (2) a parsonage or convent; or (3) educational purposes. Section 7-204 contained no restriction on the amount of property that could qualify for the exemption. The Roman Catholic Church intended to construct a church on property zoned R.C. 2, agricultural, which permitted a church only as a special exception. The County Board of Appeals (CBA) granted a special exception permitting the construction of a church. The CBA concluded that the property should be viewed "as a package," and found that the proposed church size and scale were appropriate for the subject tract of land and not out of character in relation to the surrounding community. However, the CBA limited construction on the property to a 7.5 acre development envelope, although the construction of driveways, road improvement, storm water management, utilities or other such improvements could take place outside of the 7.5 acre development envelope. Other conditions were placed by the CBA on the grant of the special exception. For example, the Church had to enter into a legally enforceable document prior to issuance of building permits restricting the areas north and south of the developed envelope to open space or agricultural use in perpetuity, unless (i) the property or any portion of the property was rezoned, or (ii) the Master Zoning Plan designated the property or any portion of the property for use other than agricultural preservation, or (iii) the Director of the Department of Environmental Protection and Resource Management found, in writing, that the property or any portion of the property was no longer viable for agricultural use. This restriction was not to preclude the construction of driveways, road improvements, storm water management, utilities or other such similar improvements within the restricted area. The Church was also to enter into a legally enforceable agreement prohibiting, for a period of 60 years from the date of the CBA order, the construction of any buildings outside the 7.5 acre building envelope so long as the subject site retained its R.C. zoning.

The Supervisor of Assessments determined that all property within the development envelope, plus 3 acres outside the envelope which were to be used for storm water management and a septic system, were tax exempt. An exemption was denied to the remainder of the property. The Church appealed the decision of the Supervisor of Assessments to the Property Tax Assessment Appeals Board (PTAAB), which, agreeing with the church, extended the exemption to the 16.5 acres in dispute. The Maryland Tax Court and Circuit Court affirmed. The Maryland Court of Appeals affirmed the judgment of the Circuit Court.

Supervisor of Assessments of Baltimore County v. Trustees of Bosley Methodist Church Graveyard, 293 Md. 208, 443 A.2d 91 (1982), set out the requirements for the religious exemption: (1) the property must be "owned" by a religious group or organization; (2) the property must be "used" for public religious worship; (3) the exempt use must be "actual"; and (4) the exempt use must be "exclusive." What was disputed in the instant case was whether the contested 16.5 acres were used, actually and exclusively, for religious worship, whether their being a part of the church site – the lot on which the church was built – constituted a sufficient use to justify the application of the exemption to them. The Supervisor of Assessments

unsuccessfully argued that allowing the exemption for property required to be kept as open space, in effect a non-use, was a violation of § 7-204 because a non-use is, by definition, neither "actual" nor "exclusive" use and is not in furtherance of a church or religious worship purpose. The Supervisor of Assessments failed to show that the 16.5 acres, whose use had been restricted to open space, was merely an appurtenance to the remainder of the tract, or that any non-church use of the 16.5 acres had occurred, or that being restricted to open space use had a subordinate position or was a use different from the rest of the property. Nor did it appear that the 16.5 acres at issue were somehow divisible from the remaining acreage.

The Supervisor of Assessments unsuccessfully relied on, inter alia, *Bosley*, supra, where the property in question was the church caretaker's home. The use of that residence was, to be sure, directly related to the church, but the residence itself was not available for public worship or integral to the primary purpose of the church. In that instance, the caretaker's residence was ancillary or appurtenant to the church purpose in that upkeep and security of the church were not in and of themselves necessary to public worship. The *Bosley* Court held that property owned by a religious group was not exempt if used for a non-worship or religious purpose. Here, unlike *Bosley*, the property in question was neither ancillary nor appurtenant to the remainder of the property any more than would be the front or back yard of a residential parcel. Indeed, the 16.5 acres were part of the land on which the church sat and that parcel was not subject to another, non-church use. The applicable covenants and zoning restrictions prohibited that property from being put to other than open space use; there simply could be no commercial, residential, or other non-worship related development on the property. The land, then, could be used only for church purposes, either in tangible, such as the construction of a prayer garden, or in non-tangible, i.e. reflective or spiritual, ways. The Court rejected the Supervisor of Assessments' argument that non-tangible uses cannot satisfy the "actual" and "exclusive" use requirements of § 7-204. On the contrary, where the use to which the exemption applies is itself intangible, and the zoning of the property in question restricts its development, requiring that it be kept in open space status, the lack of construction, development, or landscaping alone cannot determine whether the property is in "actual use." Indeed, the term,"use" was defined to include "benefit," "occupy," and "enjoy," terms which do not necessarily contemplate and certainly do not require physical construction or an explicit function.

When property is purchased solely as a site on which to build a church, and zoning orders and the covenants required to be attached to the land restrict the use of the property, some use other than that which the zoning and covenants dictate must be shown before a differentiation of use may be found and the exemption applicable to the remainder of the property denied. The Tax Court explicitly found that the CBA structured the property as a package, and that the church was effectively prohibited from using the open space for any residential or commercial purpose for the next 60 years. On that basis, it upheld the findings of the PTAAB and, on appeal, the Circuit Court upheld the exemptions because it could find no use which negated the religious purpose – for contemplation or enjoyment – of the land as it existed or, as an extension of the activities held within the physical structure of the church. A use other than a church use must be found before a property may be demarcated for tax exemption purposes. See *Ballard v. Supervisor of Assessments*, 269 Md. 397, 306 A.2d 506 (1973); *Bullis School v. Appeal Tax Court*, 207 Md. 272, 114 A.2d 41 (1955). A church is more than four walls built of stone, marble or concrete. The result reached in the present case was supported by a number cases in sister courts. In *Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 137 N.E.2d 225 (1956), the court observed as to property on which a priory (a Dominican house similar to a monastery) was sited: "The real estate owned by the taxpayer comprises seventy-eight and five-tenth acres. During most of the time only a relatively small portion of this area is used. But the area, which is wooded and pleasant, is used at times by its members of the priory for walks during recreational periods." See also *Green Acre Baha'i Institute v. Eliot*, 150 Me. 350, 110 A.2d 581 (1954); See also, *Columbus v. Outreach for Christ, Inc.*, 241 Ga. 2, 243 S.E.2d 42 (Ga. 1978); *Pickens County Bd. of Tax Assessors v. Atlanta Baptist Assoc., Inc.*, 191 Ga. App. 260, 381 S.E.2d 419 (Ga. Ct. App. 1989); *National Music Camp v. Green Lake Township*, 76 Mich. App. 608, 257 N.W.2d 188 (Mich. Ct. App. 1977); *People ex. rel. Pearsall v. Catholic Bishop*, 311 Ill. 11, 142 N.E. 520 (1924).

The determination of whether a parcel of land is tax exempt does not turn on the property's level of development. Rather, under § 7-204 the exemption depends on the actual use of the property and whether that religious worship use is exclusive. In the present case, it did not follow that, merely because the Church had been required, or decided, to leave a large portion of the church property undeveloped, the property was not being used or that the congregation would not use the property in its natural state to enrich its worship

experience. The Court of Appeals rejected the position that a parcel of land consisting of more physical space than is minimally necessary to construct the main structure is, by default, subject to demarcation for taxing purposes.

Noting that the Tax Court indicated that its decision in favor of the Church may have been different if the disputed 16.5 acres could have been used for other purposes, the Supervisor of Assessments pointed out that agricultural use was allowed and the Church could actually, not theoretically, farm the property for the next 60 years. Therefore, according to the Supervisor of Assessments, even using the Tax Court's logic, its own opinion did not support the conclusion that the property should be packaged with the public worship use so as to meet the exemption criteria. The Court of Appeals was not convinced by the Supervisor of Assessments' argument. Nothing in the case negated the conclusion that the property was to be viewed as a package or a unitary parcel supporting the public worship of the church, this notwithstanding that the property could have been used for agricultural purposes.

CASE # 1019

When the subject property was acquired by a church in 1996, crops were growing on the land; crops were not planted in 1997 as the church intended to use the property as a extension of an existing, adjacent, yard area; nothing was done to the subject property in 1997 except mowing and tilling in preparation for planting grass; the subject property was entitled to an exemption in 1997 as being used exclusively for religious purposes; evidence that land was acquired for an exempt purpose does not eliminate the need for proof of actual use for that purpose and the mere fact that the subject property adjoins land that is tax exempt is of no significance; but in the instant case, the subject property was converted from agricultural use to actual religious use when the church elected not to plant crops on the property as had been done in 1996 and prior years; that decision, along with mowing the property and tilling it was sufficient as the property was undergoing a "process of change" and development for use as an additional church yard or recreation area; court discusses proper standard of review; Illinois law.— *Lutheran Church of the Good Shepherd of Bourbonnais v. Department of Revenue of the State of Illinois,* 316 Ill. App. 3d 828, 250 Ill. Dec. 98, 737 N.E.2d 1075 (Ill. App. Ct. 2000), No. 3-00-0044. Dated October 13, 2000. Opinion by J. Slater.

Plaintiff Church filed an application for a property tax exemption for the year 1997 for two parcels of land adjacent to other Church land containing a worship facility, a parking lot and a 20 foot strip of grass. When the subject property was acquired by the Church in 1996, crops were growing on the land. The Church did not plant crops on the land in 1997 because it intended to use the property as a extension of the existing, adjacent, yard area. The yard was to be used as a playground or picnic area or for other recreational activities. After the crops were harvested in late 1996, nothing was done to the subject property until August of 1997 when weeds that had overgrown the property were mowed. In November 1997, the property was tilled in preparation for planting grass seed, but no seeding took place due to unfavorable weather conditions. The Department of Revenue of the State of Illinois denied the application for a tax exemption on the basis that the property was "not in exempt use." The Circuit Court affirmed denial of the tax exemption. The Appellate Court reversed.

The threshold issue in this case concerned the proper standard of review to be applied by the Appellate Court to the Department of Revenue's decision. Where the facts on appeal are undisputed, the issue of whether property is tax exempt is a question of law subject to de novo review. However, when the issue on appeal is fact specific a "clearly erroneous" standard is appropriate. In the present case, the clearly erroneous standard of review was appropriate for three reasons. First, to qualify for a tax exemption the Church had to show that the subject property was "used exclusively for religious purposes." 35 Ill. Comp. Stat (ILCS) 200/15-40. Property satisfies the exclusive-use requirement if it is primarily used for the exempted purpose. Thus, whether a particular property is entitled to exemption turns on the evidence showing how the property is being used. Given the necessarily fact-based nature of this inquiry, de novo review would not be proper. Second, *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205, 229 Ill. Dec. 522, 692 N.E.2d 295 (1998), held that the clearly erroneous standard should be applied to mixed questions of fact and law, which it referred to as "involving an examination of the legal effect of a given set of facts." Such mixed questions have also been described as "questions in which the

historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982). This case appeared to fall squarely within that definition, since it required determining whether the uncontested facts satisfied the statutory exclusive-use requirement. Third, the clearly erroneous standard grants a degree of deference to the Department of Revenue that is not present in de novo review. This deference acknowledges the Department's expertise and credits its experience in such matters. For these reasons, the Appellate Court said it would not disturb the Department's ruling unless it was clearly erroneous, which it was.

Statutes exempting property from taxation are to be strictly construed in favor of taxation and all facts are to be construed and all debatable questions resolved in favor of taxation. The burden of proving the right to a tax exemption rests upon the party seeking it. The statutory provision at issue here provided in part: "All property *used* exclusively for religious purposes, or used exclusively for school and religious purposes, or for orphanages and not leased or otherwise used with a view to profit, is exempt . . . ." 35 ILCS 200/15—40. The issue in this case was not whether the Church's plan to use the subject property as an extension of the existing yard area would qualify as a "religious purpose." The Appellate Court took it for granted that it would. Here the issue was whether the property was actually being used for exempt purposes. Property must be in actual use for the exempting purpose to qualify for exemption. Evidence that land was acquired for an exempt purpose does not eliminate the need for proof of actual use for that purpose. Intention to use is not the equivalent of use. *Illinois Institute of Technology v. Skinner*, 49 Ill. 2d 59, 64, 273 N.E.2d 371, 374 (1971). Furthermore, the mere fact that the subject property adjoins land that is tax exempt is of no significance. In the instant case, the subject property was converted from agricultural use to religious purposes when the Church elected not to plant crops on the property as had been done in 1996 and prior years. That decision, along with mowing the property in August 1997 and tilling it in November 1997, was sufficient under *Pearsall v. Catholic Bishop of Chicago*, 311 Ill. 11, 142 N.E. 520 (1924), and *In re Application of County Collector*, 48 Ill. App. 3d 572, 6 Ill. Dec. 415, 362 N.E.2d 1335 (1977). In *Pearsall* the property at issue was a 400 acre tract of land used as the grounds of a seminary. Although there were some buildings, including a dormitory and a chapel, most of the property was devoted to recreational use, including a 40 acre nursery for growing trees and shrubs to use in beautifying the grounds, a baseball diamond and tennis courts, a 140 acre lake, 80 acres intended as a golf course and wooded lands containing paths and trails. The Court found that all but the 80 acres intended as a golf course was tax exempt. The entire acreage, from plans previously made, was undergoing a "process of change" from the raw or natural state and being converted into school grounds or campus, with drives, walks, flower beds and other improvements. The proposed golf course, on the other hand, was not exempt because it was in its natural state and had never been used as a golf course or for purposes of recreation. Similarly in this case, the subject property was undergoing a process of change from the raw or natural state and was being converted to use as additional church yard or recreation area. Mowing and tilling in 1997 were part of this process, as was the decision not to plant crops. This activity was more than mere planning and constituted actual physical use of the property.

In addition, exemptions have been allowed where property is in the actual process of development and adaptation for exempt use. In *Weslin Properties, Inc. v. Department of Revenue*, 157 Ill. App. 3d 580, 109 Ill. Dec. 696, 510 N.E.2d 564 (1987), the court found that the development of a master site plan, meeting with architects, approval of the design plan and the construction of berms were sufficient development and adaptation to qualify a proposed urgent care center as tax exempt. The Department of Revenue unsuccessfully argued that *Weslin* represented a narrow exception to the actual use requirement that applies only where extensive planning, preparation or construction is required to put property into actual use for tax exempt purposes. But although no such planning or construction was required to convert the subject property to recreational use, each individual claim for exemption must be determined from the facts presented. The Church's efforts at development and adaptation of the subject property had to be judged in light of the ultimate intended use. Viewed in that manner, the Church's activities – refraining from planting crops and mowing and tilling the land in preparation for planting grass seed – were more extensive than those in *Weslin* in that the Church more nearly approached completion. Accordingly, the Church presented sufficient evidence that the subject property was in the process of development and adaptation for exempt use to qualify as tax exempt and the Department's decision denying the Church's application was clearly erroneous.

CASE # 1020

Pastor of religious charitable organization, who was not an attorney, could not represent the organization in court on appeal from denial of application for tax exempt status; court was without jurisdiction to hear the appeal.— *Spirit of the Avenger Ministries v. Commonwealth of Pennsylvania,* 767 A.2d 1130 (Pa. Commw. Ct. 2001), No. 237 F.R. 1999. Dated January 25, 2001. Opinion by J. James R. Kelley. Dissenting opinion by Doris A. Smith.

The Spirit of the Avenger Ministries appealed pro se from a decision and order of the Board of Finance and Revenue of the Pennsylvania Department of Revenue denying its application for tax exempt status as a charitable organization. It is well settled that, with a few exceptions not applicable here, non-attorneys may not represent parties before the Pennsylvania courts and most administrative agencies. Thus, the Commonwealth Court was without jurisdiction to consider the claims raised by appellant's pastor as he was not licensed to practice law in Pennsylvania. Although neither party raised the issue, the Court had the obligation to raise the issue of its jurisdiction to hear an appeal sua sponte. Cf. the dissenting opinion wherein it was argued: "The majority quashes this appeal on an issue raised sua sponte by the Court, which has never been addressed by either party. I therefore respectfully dissent. Pastor Orth was permitted to apply for tax-exempt status for the Spirit of the Avenger Ministries before the Board of Finance and Revenue of the Department of Revenue as a pro se litigant. He was permitted to appeal pro se the Board's decision to the Department's Board of Appeals, to file pro se a petition for review in this Court and to file pro se a brief in this Court. On May 24, 2000 the Court entered an order requiring that this case be submitted on briefs. The record contained no indication that the need for the Ministries to be represented by an attorney was ever raised. Fundamental fairness requires the Court at this stage to decide the merits of the appeal or in the alternative to afford Pastor Orth an opportunity to respond to the issue raised by the majority or to obtain counsel within a reasonable time period. As for the merits of the Ministries' petition for review, I would affirm the order of the Board. . . . ."

CASE # 1021

Church successfully challenges planning commission's denial of its application for a special use permit to construct a parking lot across the street from the church.— *High Street United Methodist Church v. City of Binghamton Planning Commission,* 186 Misc. 2d 159, 715 N.Y.S.2d 279 (N.Y. Sup. Ct. 2000), Index No. 2000-0320, RJI No. 2000-0197. Dated August 15, 2000. Opinion by J. Phillip R. Rumsey.

Petitioner church was served by approximately 40 parking spaces behind the church building. Due to increases in the size of the congregation, and the fact that the existing parking area, by virtue of its fairly steep slope, was somewhat difficult for elderly and disabled persons to utilize, petitioner entered into a contract to purchase a nearby property on which stood a "rapidly deteriorating" two-family residence to use for additional parking, contingent upon its obtaining the necessary approvals and permits from the controlling municipal authorities. Petitioner applied to respondent Planning Commission for a special use permit, which was denied. The court held that the petition for a special permit should have been granted.

The minutes of the Planning Commission's meeting showed that its members did not consider petitioner's application in accordance with the proper standards for review of a proposal to establish or expand a religious use. Such uses enjoy a constitutionally protected status which severely curtail the permissible extent of governmental regulation in the name of the police powers. A proposal for the establishment or expansion of a religious use – which encompasses not only buildings designed for worship, but also ancillary and accessory uses such as schools, playgrounds, related housing, and parking lots – may be rejected, on zoning grounds, only if it is found that the proposed change will have a direct and immediate adverse effect upon the health, safety or welfare of the community. Moreover, where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former. Thus, while there is no conclusive presumption that any religious or educational use automatically outweighs its ill effects, and an application may be denied where the proposed use will actually detract from the public's health, safety, welfare or morals, the municipality must make a diligent effort to accommodate the applicant, while mitigating the adverse effects on the surrounding community to the greatest extent possible through the

imposition of conditions or otherwise. Lastly, where a municipality imposes more stringent restrictions upon a religious use than it would on a residential use, such requirements are viewed with suspicion. (Citations omitted.) The remarks of respondent's counsel at the hearing, to the effect that the general principles applicable to religious uses had no bearing on the subject application, because petitioner sought to construct a parking lot rather than an actual church building, essentially directed the Commission to refrain from according the application the special status to which it was entitled. And the contention that the local Zoning Ordinance categorically precluded the approval of any off-street parking lot that was to be used for other than residential purposes had the manifest erroneous effect of excluding a religious use where an otherwise identical residential use would be permitted. In sum, respondent provided no justification for its failure to approach the instant application from a position of flexibility and accommodation, in an attempt to fashion a solution that would serve petitioner's goals while having a minimally detrimental impact on the surrounding neighborhood. The resulting determination was therefore arbitrary, capricious, and affected by an error of law. Accordingly, the petition had to be granted.

CASE # 1022N

Petitioner entered U.S. in 1983 under a student visa. In 1996, petitioner, by then an ordained minister, pled guilty to involuntary manslaughter for her involvement in the beating death of a 25-year-old woman during a religious ceremony to exorcize demons. Conviction for involuntary manslaughter under California Penal Code § 192(b) held to constitute an "aggravated felony" for which an alien is deportable under 8 U.S.C. § 1227(a)(2)(A)(iii), formerly 8 U.S.C. § 1251(a)(2)(A)(iii).— ***Park v. Immigration and Naturalization Service,*** 241 F.3d 1186, 2001 U.S. App. LEXIS 11693 (9th Cir. 2001), No. 97-71373. Dated June 5, 2001. Opinion by J. Paez.

CASE # 1023N

Plaintiff Torah Soft Ltd. sued Michael Drosnin, the author of "The Bible Code", along with the book's publishers, distributors and retailers, for copyright infringement caused by the unauthorized reproduction in the book of printouts of output generated by plaintiff's computer program. See 17 U.S.C. §§ 501 et seq. Court grants defendants' motion for summary judgment. The other eleven claims, brought pursuant to 28 U.S.C. § 1367, alleging copyright infringement under the laws of various foreign countries, were dismissed under the doctrine of forum non conveniens. Case not directly relevant to this publication, but those readers interested in the theory of a "Bible Code" according to which the Hebrew Bible is embedded with a code which appears to foretell future events may find the case of interest. The "code" is allegedly revealed by finding words and phrases which appear in the Bible at equidistant letter skips. ("ELS's"). These ELS's are most efficiently found by using a computer program to search the Hebrew letters of the text of the Bible. See court's opinion for further details.— ***Torah Soft Ltd. v. Drosnin***, 136 F. Supp. 2d 276 (S.D.N.Y. 2001), No. 00 Civ. 5650 (SAS). Dated March 30, 2001. Opinion by J. Shira A. Scheindlin.

CASE # 1024

Defendant's plea of guilty to a violation of 18 U.S.C. § 844(i) in burning a church building was vacated; in an earlier opinion, two members of the panel were of the opinion that arsons under 18 U.S.C. § 844(i) were not a meaningful "class of activities" suitable for aggregation with all other arsons of property used in interstate commerce or in activities affecting interstate commerce so as to achieve a substantial impact on interstate commerce; a third member of the panel argued that aggregation was appropriate; all agreed that the activities carried on between the church and its insurer or the church and regional and national bodies of the United Methodist Church failed to reflect a constitutionally adequate relation to interstate commerce; see Case # 657, February 2000 Reporter; the U.S. Supreme Court vacated the judgment of the Fifth Circuit panel and remanded the case for further consideration in light of *Jones v. U.S.*, 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000); on remand from the U.S. Supreme Court, the Fifth Circuit concluded that nothing in *Jones* was inconsistent with or suggested error in the Fifth Circuit's prior decision to vacate defendant's plea or in the finding that the factual basis for defendant's plea did not suffice to reflect the substantial effect on interstate alleged by the government; however, the Fifth Circuit now clearly held (1) at the relevant time, the church building was not itself being actively employed for commercial purposes so as to be within the terms of section 844(i) as construed by *Jones* and (2) for purposes of meeting the "substantially affect" requirement in a § 844(i) prosecution aggregation is always inappropriate.— *United States v. Johnson,* 246 F.3d 749 (5th Cir. 2001), No. 98-50396. Dated April 2, 2001. Per curiam opinion.

Defendant was convicted, on his plea of guilty, of the arson of a church building in violation of 18 U.S.C. § 844(i). Defendant appealed his conviction contending that the factual basis for his plea as put forth by the government in the district court did not support a finding that the church was a "building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" as required by section 844(i). In a November 1, 1999 decision, a panel of the Fifth Circuit Court of Appeals essentially held that the factual basis presented to the district court failed to establish the interstate commerce element of section 844(i). The panel vacated defendant's guilty plea and remanded for further proceedings consistent with its opinion. See *United States v. Johnson*, 194 F.3d 657 (5th Cir. 1999), **Case # 657, February 2000 Reporter**. In its November 1, 1999 decision, the Fifth Circuit addressed the question in terms of whether the factual basis for the plea as reflected in the record sufficed to bring the case within the third of the three categories of activity which *U.S. v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), held Congress could regulate under its commerce power, namely those activities that "substantially affect interstate commerce." The Court had concluded that neither the first nor second of the *Lopez* categories ("use of the channels of interstate commerce" and "to regulate and protect the instrumentalities of, or persons or things in interstate commerce") applied. The government had not contended that the building "was used in interstate or foreign commerce" but rather that it was "used in an activity affecting interstate commerce." The government contended that category was satisfied because arsons of similar properties, when "aggregated" have a substantial effect on commerce." Judge Benavides held that aggregation is proper for such purpose if, but only if, the effect on interstate commerce in the particular case is more than speculative or attenuated, and that this threshold showing had not been met by the factual basis for defendant's plea. On the other hand, Judge Garwood, joined by Judge Barksdale, held that for purposes of meeting the "substantially affect" requirement in a § 844(i) prosecution aggregation is always inappropriate because section 844(i) is not a regulation of any interstate market or economic activity and the individual instances of arson which it addresses are wholly unrelated to each other or to any particular regulatory scheme or purpose other than the prevention of arson. The U.S. Supreme Court vacated the judgment of the Fifth Circuit panel and remanded the case to for further consideration in light of *Jones v. U.S.*, 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000). See *U.S. v. Johnson*, 530 U.S. 1201, 120 S. Ct. 2193, 147 L. Ed. 2d 230 (2000).

In *Jones* the Supreme Court held that an "owner-occupied residence" not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity and that arson of such a dwelling therefore is not subject to federal prosecution under 18 U.S.C. § 844(i). The Supreme Court further held that the Indiana dwelling

involved in *Jones* was not being "used in" in commerce or a commerce-affecting activity for purposes of section 844(i) notwithstanding that the property was (1) used by the owner as collateral for a mortgage from an Oklahoma lender, (2) was insured by a Wisconsin insurer's policy protecting both the owner and the lender, and (3) used natural gas from outside Indiana. The Supreme Court held section 844(i) required more, namely "active employment for commercial purposes." It observed that the Indiana owner did not use the residence in any trade or business.

Reconsidered in the light of *Jones*, the Fifth Circuit Court of Appeals, on remand from the U.S. Supreme Court, concluded that nothing in the Court's *Jones* opinion, or in its holding there, was inconsistent with or suggested error in the Fifth Circuit's prior, November 1, 1999, decision to vacate defendant's plea and remand the case for further proceedings or in the finding that the factual basis for defendant's plea did not suffice to reflect the substantial effect on interstate commerce required to bring the case within the third *Lopez* category of commerce clause power. However, while the Fifth Circuit's prior, November 1, 1999, opinions did not address whether the factual basis of the plea as shown by the record sufficed to reflect that at the relevant time the church building was being actively employed for commercial purposes so as to be within the terms of section 844(i) as construed by *Jones*, the Fifth Circuit now held that the factual basis for the plea as shown by the record did not suffice for that purpose. See *U.S. v. Rea*, 223 F.3d 741 (8th Cir. 2000). Accordingly the Fifth Circuit vacated defendant's guilty plea and remanded for further proceedings consistent with its prior November 1, 1999, opinions, with its current opinion and with the Supreme Court's opinion in *Jones*. To the extent that the November 1, 1999, respective opinions of Judge Benavides and Judge Garwood conflicted, Judge Garwood's opinion, in which a majority of the panel joined, was to control on remand. Thus, for purposes of meeting the "substantially affect" requirement in a § 844(i) prosecution aggregation is always inappropriate.

CASE # 1025

Court grant's preliminary injunction enjoining performance of autopsy on prisoner's body following execution.— *Workman v. Levy,* 136 F. Supp. 2d 899 (M.D. Tenn. 2001), No. 3:01-0296. Dated March 29, 2001. Opinion by J. Todd J. Campbell.

Court granted death-row prisoner's motion for a preliminary injunction enjoining defendants from performing an autopsy on his body following execution. The inmate had a sincerely held religious belief. To the extent defendants asserted authority to perform an autopsy pursuant to Tennessee Code § 38-7-106, the court noted that that statute was discretionary, not mandatory and defendants had not shown a compelling state interest sufficient to outweigh plaintiff's religious rights. It was undisputed that irreparable harm would result if the preliminary injunction was not granted. Nothing prevented the external examination of plaintiff's body by defendants after the scheduled execution, if otherwise authorized by law. Accord *United States v. Hammer*, 121 F. Supp. 2d 794 (M.D. Pa. 2000), **Case # 897, February 2001 Reporter**.

CASE # 1026

Texas state prisoner, without undergoing a formal conversion process, declared that he had changed his religion to Judaism; prisoner was not entitled to religious materials at government expense; there was no claim that plaintiff was prevented from obtaining religious materials at his own expense or from outside sources; prison did not have to provide religious services to each religion present in the facility or system, or allow a prisoner to automatically transfer to a facility that provided religious services in the prisoner's newly adopted faith; prison officials could also inquiry into the sincerity of the conversion where such conversion was the basis of a request to transfer to another facility.— *Mack v. Reynolds,* 2000 U.S. Dist. LEXIS 18575 (N.D. Tex. 2000), No. 7:97-CV-170-R. Dated December 8, 2000. Opinion by J. Jerry Buchmeyer.

Plaintiff prisoner, confined in a unit of the Texas Department of Criminal Justice (TDCJ), expressed his desire to convert to Judaism and asked that he be allowed to attend Jewish religious ceremonies. He also requested that he be issued a free Jewish Bible and other Jewish materials. It was undisputed that plaintiff failed to complete a formal conversion process. However, plaintiff claimed that he was a "Reform Jew" and, therefore, was not required to complete a formal conversion process prior to becoming Jewish. The court held that plaintiff's claim of entitlement to free Jewish religious materials was without merit. There is no legal or constitutional requirement that inmates be provided with religious materials at government expense. *Frank v. Terrell*, 858 F.2d 1090 (5th Cir. 1998). Plaintiff made no claim that he was prevented from obtaining religious materials through friends or at his own expense and it was undisputed that plaintiff was permitted to receive religious materials from outside sources. The expert testimony was that there were inmates of approximately 157 different religions confined in the TDCJ. There were only 5 Rabbis available to provide ceremonies and other religious services for approximately 800 Jewish inmates in the TDCJ. Because of the limited number of Jewish inmates and Rabbis in the TDCJ, formal services for Jewish inmates were not provided in all TDCJ Units. They were not provided in the unit to which plaintiff was confined. While every effort was made to accommodate inmates with truly held religious beliefs, there was undisputed testimony that there had been a marked increase in the number of Texas inmates seeking to convert to Judaism or to American Indian religions in an effort to obtain a transfer to other TDCJ units. Therefore, prison officials had a rational basis for determining if inmates seeking to change religions that would effect a transfer truly held the beliefs underlying their assertions of a change in faith. Asking a potential Jewish convert to proceed through a conformation process or otherwise demonstrate his truly held beliefs was reasonably related to this legitimate penological interest. The TDCJ could not possibly provide religious services for each of the 157 religions at every prison facility within the State of Texas. Nor could the TDCJ be expected to transfer an inmate to a facility where his newly adopted religion's ceremonies were provided for immediately upon a declaration that he has changed religions. Such a practice would open a floodgate of inmates seeking transfer to other prison units simply by declaring a change of religion. There was no evidence that plaintiff was prevented from attending non-denominational services at the unit in which he was confined, or that he was in any way prevented from practicing his religious beliefs during such services or in his cell. The court noted that, since originally filing his lawsuit, plaintiff had been transferred to a prison unit where Jewish religious services were provided. Under the circumstances of this case and in light of TDCJ's legitimate penological interest, the conduct of defendants was not constitutionally infirm and plaintiff's First Amendment rights were not violated.

SUBSEQUENT HISTORY OF PREVIOUSLY REPORTED CASES
(See also the December 2000 Reporter)

Case # 16 Chandler v. James, 985 F. Supp. 1062 (M.D. Ala. 1997), *motion for a stay of sections 6(a)-(e) and 7 of the court's October 29, 1997 permanent injunction denied except for striking twelve word in section 6(a),* 998 F. Supp. 1255 (M.D. Ala. 1997). Supplemental opinion and order setting out findings of fact and conclusions of law, 985 F. Supp. 1068 (M.D. Ala. 1997). See also Chandler v. James, 985 F. Supp. 1094 (M.D. Ala. 1997). For court's opinion holding Ala. Code § 16-1-20.3 unconstitutional, see Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997). The judgment of the district court holding the statute unconstitutional was affirmed, but the permanent injunction vacated, in Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), **Case # 582**. For subsequent history, see Notes under **Case # 582**, infra.

Case # 110 Columbia Union College v. Clarke, 988 F. Supp. 897 (D. Md. 1997), *vacated and remanded*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357, 144 L.Ed.2d 252 (1999), **Case # 314**. On remand, see *Columbia Union College v. Oliver,* 2000 U.S. Dist. LEXIS 13644 (D. Md. 2000), **Case # 863**, *affirmed*, 2001 U.S. App. LEXIS 14253 (4th Cir. 2001), **Case # 1015**

Case # 114 Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C. Cir. 1998), *rehearing denied,* 154 F.3d 487 (D.C. Cir. 1998), *suggestions of rehearing en banc denied,* 154 F.3d 494 (D.C. Cir. 1998), **Case # 272**. In Lutheran Church-Missouri Synod v. FCC, the D.C. Cir. held that an FCC Equal Employment Opportunity (EEO) rule was an unconstitutional race-based classification. On remand, the FCC suspended the EEO rule in its entirety. Concluding that word-of-mouth recruiting was the single greatest barrier to equal employment in the broadcast industry because it tended to replicate the current composition of the workforce, the FCC issued a new EEO rule requiring licensees to achieve a "broad outreach" in their recruiting efforts. The D.C. Circuit held that the new rule put official pressure upon broadcasters to recruit minority candidates, creating a race-based classification that was not narrowly tailored to support a compelling governmental interest and that it too was unconstitutional. Because the court found that the unconstitutional portion of the rule was not severable, the court vacated the rule in its entirety. See MD/DC/DE Broadcasters Association v. Federal Communications Commission, 236 F.3d 13 (D.C. Cir. 2001)

Case # 239 Clay v. Kuhl, 297 Ill. App.3d 15, 231 Ill. Dec. 674, 696 N.E.2d 1245 (Ill. App. Ct. 1998), *appeal denied*, 179 Ill.2d 579, 235 Ill. Dec. 562, 705 N.E.2d 435 (Ill. 1998). See also Ferrer v. Kuhl, 301 Ill. App. 3d 694, 235 Ill. Dec. 302, 704 N.E.2d 875 (Ill. App. Ct. 1998), **Case # 393**, *reversed sub nom.* Clay v. Kuhl, 189 Ill.2d 603, 244 Ill. Dec. 918, 727 N.E.2d 217 (Ill. 2000), **Case # 860**

Case # 272 See comments under **Case # 114**, supra.

Case # 279 Stitt v. Moeller. Correct to read, Stitt v. Holland Abundant Life Fellowship, 229 Mich. App. 504, 582 N.W.2d 849 (Mich. Ct. App. 1998), *reversed*, 462 Mich. 591, 614 N.W.2d 88 (Mich. 2000), **Case # 857**. See also comments under **Case # 857**, infra.

Case # 280 American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board, 20 F. Supp. 2d 1176 (S.D. Ohio 1998), *reversed*, 210 F.3d 703 (6th Cir. 2000), **Case # 738**, *decision and judgment of panel vacated and rehearing of case en banc ordered*, 222 F.3d 268 (6th Cir. 2000) (en banc). On reconsideration, the en banc court concluded that the Ohio motto did not violate the Establishment Clause and the judgment entered by the district court was affirmed, 243 F.3d 289(6th Cir. 2001) (en banc), **Case # 960**

Case # 283 Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *rehearing and suggestions for rehearing en banc denied, but for clarity that part of the last sentence of the panel opinion following the number (2) was amended*, 165 F.3d 311 (5th Cir. 1999), *reversed sub nom.* Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed.2d 660 (2000), *case remanded for further proceedings*, 530 U.S. 1270, 1271, 120 S. Ct. 2738, 147 L. Ed.2d 1001 (2000), *rehearing denied*, 530 U.S. 1296, 121 S. Ct. 15, 147 L. Ed.2d 1039 (2000), **Case # 759**. On remand from the U.S. Supreme Court, the Fifth Circuit in Helms v. Picard, 229 F.3d 467 (5th Cir. 2000), wrote as follows: "The Supreme Court reversed our judgment and held that 20 U.S.C. §§ 7301-7303, as applied in Jefferson Parish, is constitutional. By necessary inference, this also reversed our holding that the Louisiana counterpart of that statute, La. Rev. Stat. Ann. §§ 17: 351-352, was also unconstitutional as applied in Jefferson Parish. Although it vacated our judgment in its entirety, The High Court did not address the other issues decided by us. . . . Accordingly: We reinstate our judgment in favor of Defendants declaring the Louisiana special education program, La. Rev. Stat. Ann. § 17:1941-1956, constitutional as applied in Jefferson Parish. We reinstate our judgment affirming the District Court's decision in favor of defendants that the transportation payments to the Jefferson Non-Public School Transportation Corporation, by virtue of La. Rev. Stat. Ann. § 17:158 are constitutional. We render judgment in favor of Defendants declaring that the Federal instructional materials program, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La. Rev. Stat. Ann. §§ 17:351-52, are constitutional as applied in Jefferson Parish.

Case # 285 Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998), *rehearing denied and suggestion for rehearing en banc denied,* 1998 U.S. App. LEXIS 27867 (8th Cir. 1998). On remand, see Westendorp v. Independent School District No. 273, 35 F. Supp. 1134 (D. Minn. 1998). On whether the parents were entitled to attorney's fees under 42 U.S.C. § 1988 on the theory that they were not the "prevailing party", see Peter v. Jax, 187 F.3d 829 (8th Cir. 1999), *cert. denied sub nom.* Westendorp v. Ventura, 529 U.S. 1098, 120 S. Ct. 1832, 146 L. Ed.2d 776 (2000) and Westendorp v. Independent School District No. 273, 131 F. Supp. 2d 1121 (D. Minn. 2000).

Case # 291 Borer v. Church Mutual Insurance Co., 965 P.2d 1258 (Colo. 1998). On remand, see Borer v. Church Mutual Insurance Co., 12 P.3d 854 (Colo. Ct. App. 2000), where the court held that because an insurer's promise to pay post-judgment interest on punitive damages and damages for intentional torts is against public policy, the trial court properly denied plaintiff's request to enter judgment against the garnishee for the interest on all the compensatory damages and punitive damages awarded against the minister at trial.

Case # 312 Hack v. The President and Fellows of Yale College, 16 F. Supp. 2d 183 (D. Conn. 1998), *affirmed*, 237 F.3d 81 (2d Cir. 2000), **Case # 988**

Case # 314 Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357, 144 L.Ed.2d 252 (1999). On remand, see *Columbia Union College v. Oliver,* 2000 U.S. Dist. LEXIS 13644 (D. Md. 2000), **Case # 863**, *affirmed*, 2001 U.S. App. LEXIS 14253 (4th Cir. 2001), **Case # 1015**

Case # 341 Good News Club v. Milford Central School, 21 F. Supp. 2d 147 (N.D.N.Y. 1998), *affirmed*, 202 F.3d 502 (2d Cir. 2000), **Case # 725**, *reversed*, ___ U.S. ___, 121 S. Ct. 2093, 150 L. Ed.2d 151 (2001), **Case # 985**

Case # 346 Commonwealth of Pennsylvania v. Nixon, 718 A.2d 311 (Pa. Super. Ct. 1998), *affirmed*, 761 A.2d 1151 (Pa. 2000), **Case # 867**

Case # 359 Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185 (W.D. Mo. 1998), *affirmed*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079, 121 S. Ct. 778, 148 L. Ed.2d 675 (2001)

Case # 372 Smith v. Calvary Christian Church, 233 Mich. App. 96, 592 N.W.2d 713 (Mich. Ct. App. 1998), *reversed*, 462 Mich. 679, 614 N.W.2d 590 (Mich. 2000), **Case # 858**

Case # 393 Ferrer v. Kuhl, 301 Ill. App. 3d 694, 235 Ill. Dec. 302, 704 N.E.2d 875 (Ill. App. Ct. 1998), *reversed sub nom.* Clay v. Kuhl, 189 Ill.2d 603, 244 Ill. Dec. 918, 727 N.E.2d 217 (Ill. 2000), **Case # 860**

Case # 407 Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999), *on rehearing, the en banc court, holding that the action was not ripe for judicial review, vacated the district court's decision and remanded case to the district court with instruction to dismiss the action without prejudice*, 220 F.3d 1134 (9th Cir. 2000) (en banc), **Case # 838,** *cert. denied*, ___ U.S. ___, 121 S. Ct. 1078, 148 L. Ed.2d 955 (2001)

Case # 416 Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (S.C. Ct. App. 1999), *affirmed*, 341 S.C. 320, 534 S.E.2d 672 (S.C. 2000), **Case # 862**

Case # 461 Foroglou v. Immigration and Naturalization Service, 170 F.3d 68 (1st Cir. 1999), *cert. denied*, 528 U.S. 819, 120 S. Ct. 60, 145 L. Ed.2d 53 (1999). For subsequent developments, see Foroglou v. Reno, 241 F.3d 111 (1st Cir. 2001).

Case # 463 Thomas v. Runyon, 36 F. Supp. 2d 1284 (D. Kan. 1999), *affirmed*, 225 F.3d 1149 (10th Cir. 2000), **Case # 852**

Case # 464 Thomas v. National Association of Letter Carriers, 40 F. Supp. 2d 1244 (D. Kan. 1999), *affirmed*, 225 F.3d 1149 (10th Cir. 2000), **Case # 852**

Case # 470 Lightman v. Flaum, 179 Misc. 2d 1007, 687 N.Y.S.2d 562 (N.Y. Sup. Ct. 1999), *reversed*, 278 A.D.2d 373, 717 N.Y.S.2d 617 (N.Y. App. Div. 2000), **Case # 850**

Case # 490 Doe v. Beaumont Independent School District, 173 F.3d 274 (5th Cir. 1999), *reversed and remanded*, 240 F.3d 462 (5th Cir. 2001) (en banc). On rehearing, the en banc the Court of Appeals, by a vote of 9-6, held that the student plaintiffs had standing to challenge the Clergy in Schools" Program. Five of the 15 judges believed that the Program was constitutional as a matter of law and should not be remanded. Six of the 15 judges believed that the Program was unconstitutional as a matter of law and should not be remanded. A controlling minority of 3 of the 15 judges believed the case should be remanded because the parties did not squarely engage each other on the merits and produced an uncertain record burdened with genuine issues of material fact, including the place of the clergy program in the school district's larger overall volunteer program.

Case # 494 Parks v. Kinaki, 305 Ill. App.3d 449, 238 Ill. Dec. 547, 711 N.E.2d 1208 (Ill. App. Ct. 1999), *reversed*, 193 Ill.2d 164, 249 Ill. Dec. 897, 737 N.E.2d 287 (Ill. 2000), **Case # 861**

Case # 521 Levin v. Yeshiva University, 180 Misc.2d 829, 691 N.Y.S.2d 280 (N.Y. Sup. Ct. 1999), *affirmed*, 272 A.D.2d 158, 709 N.Y.S.2d 392 (N.Y. App. Div. 2000), *modified and affirmed*, ___ N.Y.2d ___, ___ N.Y.S.2d ___, ___ N.E.2d ___, 2001 NY LEXIS 2016 (2001). In modifying, the New York Court of Appeals held that plaintiffs pleaded allegations sufficient to raise an issue of fact as to whether defendant's housing policy had a disparate impact on the basis of sexual orientation under the New York City Human Rights Law. Case to be covered in detail in the August 2001 Reporter.

Case # 546 Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 711 N.E.2d 203 (Ohio 1999). On June 29, 1999, the Legislature passed Amended Substitute House Bill No. 282 (Education Budget Bill) instructing the State Superintendent of Public Instruction to establish a Pilot Project Scholarship Program. In *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999), **Case # 694**, *affirmed*, 234 F.3d 945 (6th Cir. 2000), **Case # 885**, the 1999 Voucher Program was found to be in violation of the Establishment Clause. See also *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725 (N.D. Ohio 1999), **Case # 580**.

Case # 547 Johnson v. Economic Development Corporation of the County of Oakland, 1999 U.S. Dist. LEXIS 10542 (E.D. Mich. 1999). Now cite to 64 F. Supp.2d 657, *affirmed*, 241 F.3d 501 (6th Cir. 2001).

Case # 551 Altman v. Bedford Central School District, 45 F. Supp. 2d 368 (S.D.N.Y. 1999), *reversed and vacated in part, and affirmed in part*, 245 F3d 49 (2d Cir. 2001), **Case # 964**

Case # 553 Henley v. City of Youngstown, 1999 Ohio App. LEXIS 3171 (Ohio Ct. App. 1999), *reversed*, 90 Ohio St. 3d 142, 735 N.E.2d 433 (Ohio 2000), **Case # 917**

Case # 564 Davidovics v. Shore, 1999 Ohio App. Lexis 3490 (Ohio Ct. App. 1999). Now cite to 135 Ohio App. 3d 374, 734 N.E.2d 395 (Ohio Ct. App. 1999)

Case # 582 Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *judgment vacated and case remanded sub nom*. Chandler v. Siegelman, 530 U.S. 1256, 120 S. Ct. 2714, 147L. Ed.2d 979 (U.S. 2000). The petition for a writ of certiorari was granted and the judgment was vacated and the case remanded to the U.S. Court of Appeals for the Eleventh Circuit for further consideration in light of Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed.2d 295 (2000), **Case # 736**. On remand, the Eleventh Circuit concluded that its decision in 180 F.3d 1254 (Chandler I) was not in conflict with the U.S. Supreme Court's decision in *Santa Fe*. Accordingly, it reinstated its opinion and judgment in Chandler I. However, the Eleventh Circuit took the opportunity to explain how Chandler I fits within the U.S. Supreme Court's analysis in Santa Fe so that the district court may have guidance when it revisits its injunction. For the Eleventh Circuit's decision on remand from the U.S. Supreme Court, see Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000), **Case # 909**, *rehearing en banc denied*, 248 F.3d 1032 (11th Cir. 2001)

Case # 583 Campbell v. St. Tammany Parish School Board, 1999 U.S. Dist. LEXIS 12035 (E.D. La. 1999), *reversed,* 206 F.3d 482 (5th Cir. 2000), **Case # 724**, *petition for rehearing en banc denied and petition for panel rehearing denied*, 231 F3d 937 (5th Cir. 2000) (per curiam decision denying rehearing merits reading; cf. dissent.)

Case # 647 Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, Ohio, 61 F. Supp. 2d 734 (S.D. Ohio 1999), *affirmed*, 240 F.3d 553 (6th Cir. 2001), **Case # 1013**

Case # 657 United States v. Johnson, 194 F.3d 657 (5th Cir. 1999), *cert. granted, judgment vacated, and case remanded for further consideration in light of Jones v. United States*, *529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (U.S. 2000)*, 530 U.S. 1201, 120 S. Ct. 2193, 147 L. Ed. 2d 230 (2000). On remand from the U.S. Supreme Court, see United States v. Johnson, 246 F.3d 749 (5th Cir. 2001)**Case # 1024**. Cf. **Case # 840**

Case # 667 Ganulin v. United States of America, 71 F. Supp. 2d 824 (S.D. Ohio 1999), *affirmed*, 238 F.3d 420 (6th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1605, 149 L. Ed.2d 471 (2001)

Case # 694 Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999), *aff'd*, 234 F.3d 945 (6th Cir. 2000), **Case # 885**

Case # 695 KDM ex rel. WJM v. Reedsport School District, 196 F.3d 1046 (9th Cir. 1999), *petition for rehearing and petition for rehearing en banc denied*, 210 F.3d 1098 (9th Cir. 2000), *cert. denied*, 531 U.S. 1010, 121 S. Ct. 564, 148 L. Ed.2d 483 (2000)

Case # 707 Lytle v. Brewer, 77 F. Supp. 2d 730 (E.D. Va. 1999). The district court granted a preliminary injunction barring enforcement of Virginia Code section 46.2-930, which prohibits loitering on designated bridges. The Governor and his fellow defendant, Charles D. Griffith, Jr., the Commonwealth's Attorney for the City of Norfolk, did not seek to overturn the injunction on its merits. Rather, the Governor asserted that he lacked a sufficient connection to enforcement of the challenged statute and, thus, could not be made a party to this action pursuant to the exception to sovereign immunity found in *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (permitting federal actions against appropriate state officers for prospective relief from continuing violations of federal law). Although the Circuit Court of Appeals held that it possessed jurisdiction to decide the issue, it remanded in order for the district court to consider the issue in the first instance. See Lytle v. Griffith, 240 F.3d 404 (4th Cir. 2001).

Case # 716 Seaworth v. Pearson, 203 F.3d 1056 (8th Cir. 2000), *cert. denied*, 531 U.S. 895, 121 S. Ct. 226, 148 L. Ed. 2d 160 (2000)

Case # 721 Books v. City of Elkhart, Indiana, 79 F. Supp. 2d 979 (N.D. Ind. 1999), *reversed*, 235 F.3d 292 (7th Cir. 2000), **Case # 935**, *cert. denied*, ___ U.S. ___, 121 S Ct. 2209, 149 L. Ed.2d 1036 (2001) (dissenting opinion by C.J. Rehnquist, with whom Justices Scalia and Thomas joined)

Case # 722 Bey v. Moorish Science Temple of America, 130 Md. App. 543, 747 A.2d 241 (Md. Ct. Spec. App. 2000), *reversed and remanded with directions to vacate the injunction*, 362 Md. 339, 765 A.2d 132 (Md. Ct. App. 2001). Injunctive relief normally will not be granted unless the petitioner demonstrates that it will sustain substantial and irreparable injury as a result of the alleged wrongful conduct. At trial in the present case respondent's evidence was that while petitioner was holding himself out as a trustee of the Temple, petitioner was not soliciting any monies under the guise of that alleged trusteeship. Moreover, when asked whether petitioner's conduct had caused any dissension within the Temple, respondent's witness responded "none . . . . our organization is a national organization, with over 360-some temples around the country. This man is not even known by most of the people that's [sic] in our organization." Rather than demonstrating irreparable harm, such evidence supported the conclusion that petitioner's conduct did not predict future irreparable harm. Respondent's greatest concern regarding petitioner was that his conduct violated its religious code, and that the Temple requested injunctive relief because addressing petitioner's conduct was "costing [the Temple] time and money." These assertions invoked ecclesiastical principles which the lower courts chose properly not to entertain. Thus, there was no evidence in the record to substantiate the Circuit Court's implicit (and required) finding of irreparable harm.

Case # 724 Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000), *petition for rehearing en banc denied and petition for panel rehearing denied*, 231 F3d 937 (5th Cir. 2000) (per curiam decision denying rehearing merits reading; cf. dissent.)

Case # 725 Good News Club v. Milford Central School, 202 F.3d 502 (2d Cir. 2000), *reversed*, ___ U.S. ___, 121 S. Ct. 2093, 150 L. Ed.2d 151, 69 U.S.L.W. 4451 (2001), **Case # 985**

Case # 738 See Notes under **Case # 280**, supra.

Case # 769 Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1483, 149 L. Ed.2d 372 (2001)

Case # 772 Saxe v. State College Area School District, 77 F. Supp. 2d 621 (M.D. Pa. 1999), *reversed*, 240 F.3d 200 (3d Cir. 2001), **Case # 963**

Case # 789 Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 206 F.3d 1322 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 881, 148 L. Ed.2d 790 (2001)

Case # 807 Western Mohegan Tribe and Nation of New York v. State of New York, 100 F. Supp. 2d 122 (N.D.N.Y. 2000), *affirming dismissal of the NHPA claim, but vacating and remanding the First Amendment claim to the district court for further consideration*, 246 F.3d 230 (2d Cir. 2001). Turning first to the Tribe's NHPA claim, the Court of Appeals noted that the Tribe conceded on appeal that it sued the wrong party in bringing this claim against the State. Indeed, violations of the NHPA can only be committed by a federal agency. See 16 U.S.C. § 470f (2000); *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989). Because the Tribe did not have a cause of action against the State under the NHPA, the Court of Appeals could affirm the district court's dismissal of the NHPA claim without reaching the question of whether the district court properly construed the NHPA as applicable only to projects that are federally funded. As to the Tribe's First Amendment claim, instead of reaching the merits, the district court found that the Tribe did not have standing to bring it. The district court correctly stated that in order to have standing to pursue a claim, a litigant must suffer a personal injury that can be redressed by a favorable decision. But the court went on to draw the conclusion that unless the members of the Tribe could prove that they were Native American and descendants of the Island's inhabitants, they could not demonstrate a cognizable injury for purposes of standing. This was erroneous. Whatever the race or lineage of its members, the Tribe claimed that it had been conducting religious ceremonies on Schodack Island because that land had religious significance to it. To the extent restrictions on the use of the Island applied to the Tribe, they would consequentially impact the Tribe's ability to perform its religious ceremonies. Such restrictions would therefore constitute an injury in fact to the Tribe's religious freedom. It was unnecessary to engage in an examination of the Tribe's authenticity, as the district court did to find that the Tribe possessed a legally protected interest which was concrete and particularized. The Court of Appeals did not foreclose the possibility that the Tribe may lack standing for other reasons. For example, the Court noted that the Tribe had not alleged that it met in groups of 25 or more for its religious ceremonies on the Island. If the permit requirement did in fact apply only to groups of 25 or more, the Tribe may lack standing to enjoin it. On appeal, the State did not argue that the district court's decision on the Tribe's First Amendment claim should be upheld on the basis of standing. Rather, it asked the Court of Appeals to examine the proposed fee and permitting requirements for Schodack Island under *Employment Div. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), and to find that the Tribe's right to the free exercise of religion would not be unduly burdened. Given that such an examination would entail facts outside the current record, the better course was to vacate the dismissal of the First Amendment claim and to remand to the district court for further proceedings.

Case # 814 Sanderson v. People of the State of Colorado, 2000 Colo. App. LEXIS 1027 (Colo. Ct. App. 2000). Now cite to 12 P.3d 851 (Colo. Ct. App. 2000)

Case # 823 Parker-Bigback v. St. Labreschool, 2000 Mont. 210, 7 P.3d 361 (Mont. 2000), *cert. denied*, 531 U.S. 1076, 121 S. Ct. 772, 148 L. Ed.2d 671 (2001)

Case # 828 Brooks v. City of Oak Ridge, 222 F.3d 259 (6th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1097, 148 L. Ed.2d 970 (2001)

Case # 831 Gentala v. City of Tucson, 213 F.3d 1055 (9th Cir. 2000), *rehearing en banc ordered*, 222 F.3d 614 (9th Cir. 2000), *on the rehearing en banc the decision of the district court was affirmed*, 244 F.3d 9th Cir. 2001), **Case # 987**

Case # 832 Bush v. Holmes, ___ So.2d ___ (Fla. Dist. Ct. App. 2000). Now cite to 767 So.2d 668 (Fla. Dist. Ct. App. 2000), *petition for review denied*, 2001 LEXIS 952 (Fla. 2001)

Case # 836 United States v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112, 121 S. Ct. 857, 148 L. Ed.2d 771 (2001)

Case # 837 Music Square Church v. United States, 218 F.3d 1367 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1013, 121 S. Ct. 569, 148 L. Ed.2d 488 (2000)

Case # 838 Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000) (en banc), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1078, 148 L. Ed.2d 955 (2001)

Case # 839 Ehlers-Renzi v. Connelly School of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1192, 149 L. Ed.2d 107 (2001)

Case # 857 Stitt v. Holland Abundant Life Fellowship, 462 Mich. 591, 614 N.W.2d 88 (Mich. 2000), *amending the final paragraph of the opinion*, 2000 Mich. Lexis 1487 (Mich. 2000). On remand, see Stitt v. Holland Abundant Life Fellowship, 243 Mich. App. 461 (Mich. Ct. App. 2000)

Case # 863 Columbia Union College v. Oliver, 2000 U.S. Dist. LEXIS 13644 (D. Md. 2000), *affirmed*, 2001 U.S. App. LEXIS 14253 (4th Cir. 2001), **Case # 1015**

Case # 935 Books v. City of Elkhart, Indiana, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 2209, 149 L. Ed.2d 1036, 69 U.S.L.W. 3747 (2001). Compare the statement of J. Stevens respecting denial of the petition for writ of certiorari and the dissenting opinion of C.J. Rehnquist, with whom JJ. Scalia and Thomas joined.

Case # 985 Good News Club v. Milford Central School, 69 U.S.L.W. 4451 (2001). Now cite to ___ U.S. ___, 121 S. Ct. 2093, 150 L. Ed.2d 151 (2001)

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