

# McDermott Will & Emery

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April 9, 2007

Ms. Kathleen C. Montgomery  
Executive Vice President  
Unitarian Universalist Association  
25 Beacon Street  
Boston, MA 02108

Re: Summary of UUA Amicus Participation

Dear Kay:

The following is a summary of the cases in which the UUA joined in filing an *amicus curiae* brief. This report is for the period beginning March 13, 2006 (the date of my last report) to the present.

## United States Supreme Court

1. *Parents Involved in Community Schools v. Seattle School District; Meredith v. Jefferson County Board of Education*

*Parents Involved in Community Schools* and *Meredith* involve the constitutionality of two public school districts' consideration of racial diversity and racial balance among other factors in voluntary public school integration programs. The school districts in both cases primarily used student preferences to assign students to schools, but could deny admission based on race if the student's enrollment would upset racial balance. In *Parents Involved in Community Schools*, the Ninth Circuit held that a Seattle school district had a compelling interest in securing the educational benefits of racial diversity and upheld the use of a race-based tiebreaker in the open choice, noncompetitive public high school assignment plan. In *McFarland v. Jefferson County Public Schools*, the Sixth Circuit upheld the district court's decision that the county's school assignment plan was constitutional. The county's plan, which included specific goals for racial representation at each school, first considered factors such as the student's residence, school capacity, program popularity and the nature of the student's choice; the plan then allowed for consideration of the student's race to determine whether the student received his first, second third or fourth choice of school.

The United State Supreme Court agreed to hear the *Parents Involved in Community Schools* and *Meredith* appeals at the same time. The UUA joined an *amicus curiae* brief filed by religious organizations in support of the school districts. The brief argued that assimilation of minorities through integrated schools helps avoid the alienation of religious minorities that has

resulted in unrest in other nations. Thus, there are compelling governmental interests justifying the race conscious decisions in the plans. Those compelling interests include installing democratic values and preparing schoolchildren for a diverse workforce and society.

The Supreme Court heard oral arguments on both cases on December 4, 2006.

### **Third Circuit Court of Appeals**

#### 2. *Borden v. East Brunswick School District*

Over a period of twenty-three years, the plaintiff in *Borden*, a high school football coach, led his team in prayer before each pre-game dinner and each game. After the school district issued several directives ordering the plaintiff to cease this conduct, he filed suit against the school district alleging that the directives violated his federal constitutional right of free speech as well as his rights of free speech and liberty under the New Jersey Constitution. He stated that in the future, he would only silently bow his head and kneel during player-led, voluntary, non-denominational pre-game prayers.

A federal trial judge found that the coach's plan did not violate the Establishment Clause. The judge also held that the school district directives violated the coach's First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, and New Jersey's constitutional rights of liberty and free speech.

An appeal is pending before the United States Court of Appeals for the Third Circuit. The UUA joined the American Civil Liberties Union and a number of religious organizations in an *amicus* brief in support of the school district's argument that the coach's conduct violated the Establishment Clause. The organizations argue that the team prayers are not voluntary and student-initiated, but rather bear the imprimatur of the school, creating a coercive effect on students of minority faiths. The Third Circuit has not yet scheduled oral arguments.

### **Seventh Circuit Court of Appeals**

#### 3. *Winkler v. Gates*

In March of 2005, a federal trial judge in Illinois declared that a 1972 statute passed by Congress that enabled the Department of Defense to provide support for the National Boy Scout Jamboree (held every four years in Virginia) is unconstitutional. The court held that the government's support of the Boy Scouts' jamboree violated the Establishment Clause because it had a primary effect of advancing religion. On appeal, the UUA filed an *amicus* brief arguing that the trial judge's holding should be affirmed.

On April 4, 2007, the Seventh Circuit Court of Appeals ruled that the plaintiff did not have standing to challenge the Jamboree statute and therefore did not reach the question of the statute's constitutionality. The court held that the plaintiff did not have standing, as the statute in question is not "taxing and spending legislation" as defined in Supreme Court cases, and thus the case was not suitable for taxpayer standing.

### **Ninth Circuit Court of Appeals**

#### 4. *Barnes-Wallace v BSA*

*Barnes-Wallace v. BSA* involves the constitutionality of the City of San Diego's lease of 18 acres of Balboa Park, to the Boy Scouts of America ("BSA") for 1\$/year. A federal trial judge ruled that the lease was unconstitutional under both the federal and state constitutions, finding that a reasonable observer would perceive an advancement of religion in the City's failure to use a neutral process to select lessees for the parkland.

An appeal from the District Court's decision is currently pending before the Ninth Circuit Court of Appeals. The UUA joined an amicus curiae brief filed by the Social Justice Committee arguing that the city's preferential grant of 18 acres to the Boy Scouts for \$1/year was unconstitutional. Oral arguments were heard by the Ninth Circuit on February 14, 2006.

On December 18, 2006, the Ninth Circuit certified three questions for decision to the California Supreme Court, stating that the resolution of any of the questions could determine the outcome of the appeal. The Ninth Circuit asked the California Supreme Court to decide whether the leases were violations of the California constitution's "No Preference" and "No Aid" clauses. On December 26, 2006, the Ninth Circuit requested that the California Supreme Court delay its consideration of the certified questions, as a judge of the Ninth Circuit filed a notice that could lead to en banc review by the Ninth Circuit. Thus, there has been no final appellate consideration of this case as of this date.

### **California**

#### 5. *In re Marriage Cases*

On March 14, 2005, San Francisco Superior Court Judge Richard A. Kramer addressed same-sex marriage in six coordinated cases in California. Judge Kramer ruled that California's ban on same sex marriage was unconstitutional, as "no rational purpose exists for limiting marriage in this state to opposite-sex partners."

The UUA joined a number of other organizations in an *amicus* brief in the California Court of Appeals (the intermediate appellate court) arguing that California's ban on same-sex marriages is unconstitutional. The California Court of Appeal in San Francisco reversed the decision on October 5, 2006, finding that the state's historical definition of marriage did not

deprive individuals of a vested fundamental right or discriminate against a suspect class. The California Supreme Court accepted the cases for review on December 20, 2006. The Supreme Court has not yet scheduled oral arguments.

### **Maryland**

6. *Conaway v. Deane*

In *Conaway*, the plaintiffs argued that Maryland's statutory prohibition of same-sex marriage is unconstitutional under the Maryland constitution's equal rights and due process amendments. The Circuit Court for Baltimore granted summary judgment for the plaintiffs, finding that the law discriminated against a suspect class and was not narrowly tailored to serve any compelling government interests.

The Court of Appeals of Maryland, the highest court in Maryland, granted *certiorari* on July 26, 2006. The UUA joined an amicus brief filed by religious organizations and religious leaders in support of the lower court's finding that the Maryland statutory prohibition on same-sex marriage is unconstitutional.

The Court of Appeals heard oral arguments on the appeal on December 4, 2006. No decision has been rendered.

### **New York**

7. *Hernandez v. Robles*

This case involves a lawsuit challenging the denial of marriage licenses to same-sex couples as a violation of the New York constitution. In February of 2005, the trial court ruled that the denial of marriage licenses to same-sex couples violates the state constitution's guarantees of due process and equal protection. The court ordered that the state domestic relations law be construed to include same-sex couples, but stayed implementation of its judgment. In December 2005, an appellate court reversed the trial court's favorable decision. The UUA joined a number of religious organizations in an amicus brief in the New York Court of Appeals (New York's highest court) supporting marriage rights for same-sex couples.

On July 6, 2006, the New York Court of Appeals affirmed the decision of the appeals court, holding that New York's constitution did not compel recognition of same-sex marriage.

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As always, it is a pleasure to assist the UUA with respect to *amicus* briefing.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Leibensperger', written in a cursive style.

Edward P. Leibensperger

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