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October 14, 2011

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

Re: Summary of UUA *Amicus* Participation

Dear Kay:

I am pleased to present the following summary of the cases in which the UUA joined in filing an *amicus curiae* brief. This report is for the period from March 15, 2010 (the date of the last report) to the present.

United States Supreme Court

1. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*

Hosanna-Tabor addresses the scope of the "ministerial exception" to laws prohibiting discrimination in employment. The ministerial exception is designed to allow religious bodies to practice their religion and convey their message without government interference.

In *Hosanna-Tabor*, an elementary school teacher at a religious school alleged that her employment had been terminated due to her disability in violation of the Americans with Disabilities Act. The school argued that, under the ministerial exemption, the employee's suit should be dismissed. The teacher was a commissioned minister who taught math, language arts, social studies, science, gym, art, and music. The teacher also, for a total of approximately forty-five minutes per seven-hour school day, taught a religion class, led a chapel service, led prayer, and engaged in a devotional.

The Sixth Circuit ruled that the ministerial exception did *not* bar the teacher's employment discrimination claims against the school. The Supreme Court agreed to hear the school's appeal.

The UUA joined an amicus brief with, among others, the American Civil Liberties Union Foundation and the Americans United for Separation of Church and State. The brief made three arguments: that (a) application of the ministerial exception to immunize employment-related conduct unrelated to religion would undermine the enforcement of important nondiscrimination laws; (b) the ministerial exception should not prevent courts from assessing whether an

employer's asserted religious motivation for employment action is pretextual; and (c) even if the ministerial exception were to apply to the teacher, the ministerial exception should protect the church only if the challenged employment decision arose from religious concerns rather than from secular animus or retaliation.

Oral argument was held on October 5, 2011. A decision is expected by next June.

2. *Brown v. Plata, et al.*

In *Brown*, California prisoners with serious mental disorders brought a class action against the Governor alleging that due to prison overcrowding, they received inadequate mental health care in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Inmates with serious medical conditions brought a separate class action alleging similar violations.

The case was initially filed in 2001. Shortly thereafter, the State conceded that deficiencies in prison medical care violated the prisoners' Eighth Amendment rights and stipulated to a remedial injunction. When the State had not complied with that injunction by 2005, the court appointed a Receiver to oversee remedial efforts. Three years later, the Receiver described continuing deficiencies caused by overcrowding. Believing that a remedy for unconstitutional medical and mental health care could not be achieved without reducing overcrowding, the inmates moved for an order requiring California to reduce its prison population. The trial court ordered the State to reduce its prison population to 137.5% of design capacity within two years, even if the order required the prison system to release inmates. The Governor appealed.

The UUA joined an amicus brief with, among others, Christian, Jewish, and Muslim organizations, arguing that the order of the lower court be upheld.

In May, 2011, the Supreme Court (5-4) upheld the trial court order. It concluded that the cap of 137.5% of design capacity was not clearly in error, and that the two-year deadline for relief was not unreasonable.

3. *Arizona Christian School Tuition Organization v. Winn*

In *Winn*, taxpayers brought an action alleging that Arizona's tuition tax credit, which allowed Arizona income taxpayers who voluntarily contributed money to a "student tuition organization," to receive a dollar-for-dollar tax credit of up to $500 towards their annual tax liability, violated the First Amendment's prohibition against the establishment of religion.

The UUA joined an amicus brief with several humanist organizations that sought affirmance of the Ninth Circuit's ruling that the taxpayers had standing to pursue their Establishment Clause claim. The brief argued that state taxpayers have long had standing to

challenge actions taken under the spending and taxing power that allegedly violated the Establishment Clause, and that they had made a prima facie case of violation of the Establishment Clause inasmuch as the primary purpose and effect of the Arizona statute was state funding of private religious instruction.

In April, 2011, the Supreme Court (5-4) held the taxpayers did not have standing because they challenged a tax credit rather than a governmental expenditure. It reasoned that when the Government spends funds from the General Treasury, dissenting taxpayers know that they have been made to contribute to an establishment in violation of conscience. In contrast, a tax credit allows dissenting taxpayers to use their own funds in accordance with their own consciences. Here, because the student tuition organization tax credit did not "extract and spend" a conscientious dissenter's funds in service of an establishment, or force a citizen to contribute to a sectarian organization, the taxpayers did not have standing to challenge the credit.

Ninth Circuit

1. *Log Cabin Republicans v. United States of America*

In *Log Cabin Republicans*, the plaintiffs argued that Congress' "Don't Ask, Don't Tell" regulation was facially unconstitutional under the due process clause of the Fifth Amendment, the right to equal protection guaranteed by that Amendment, and the First Amendment right to freedom of speech. The trial court ruled that DADT violated due process and the First Amendment, and permanently enjoined the Government from applying it. The Government appealed.

The UUA joined an amicus brief that sought affirmance of the trial court's decision.

While the appeal was pending, Congress enacted the "Don't Ask, Don't Tell Repeal Act of 2010. DADT was repealed effective September 20, 2011. Less than ten days later, the Ninth Circuit held that the case was moot, and vacated the judgment of the trial court. The Court ruled further that no one may use the trial court's rulings and findings in future litigation.

2. *Perry v. Schwarzenegger*

In *Perry*, the opponents of Proposition 8—which prohibited same-sex marriages in California—sought declaratory and injunctive relief against enforcement of the law on the grounds that the law was unconstitutional. Neither the governor nor any of the other named defendants charged with the law's enforcement defended the action or appealed the trial court judgment in favor of the opponents. The proponents of Proposition 8 appealed the trial court judgment.

The UUA joined an amicus brief with various national and California-based religious organizations arguing that Proposition 8 was unconstitutional, and asked that the trial court judgment be affirmed.

The Ninth Circuit, rather than deciding the merits of the case, asked the Supreme Court of California whether, as a matter of California law, the proponents had standing to appeal the trial court judgment.

California Supreme Court

1. *Perry v. Brown*

This is the follow-on to *Perry v. Schwarzenegger*. As noted above, the issue before the California Supreme Court is whether the proponents of Proposition 8 have standing to appeal the federal trial court's judgment.

The UUA joined an amicus brief with various national and California-based religious organizations arguing that the proponents of Proposition 8 did not have standing to appeal the declaration that Proposition 8 was unconstitutional.

The case has not been decided as of this date.

United States District Court, Eastern District of Pennsylvania

1. *Cradle of Liberty Council, Inc., Boy Scouts of America v. City of Philadelphia*

In 1928, the City of Philadelphia granted to the Philadelphia Council of the Boy Scouts of America permission to build its headquarters on a parcel of land owned by the City. The City enacted an ordinance that permitted the Boy Scouts occupy the property rent-free as long as it maintained the building and the lot; the ordinance did, however, the City to terminate the arrangement on one year's notice.

Because of the BSA's discrimination against homosexuals, the City passed a resolution evicting the BSA from the property unless the BSA began to pay fair market rent. The BSA sued the City alleging that the City's resolution violated, among other things, its First and Fourteenth Amendment rights.

The UUA joined a brief submitted by multiple religious organizations and faith leaders arguing that the City was not required to subsidize an organization that practiced invidious discrimination.

The Court entered an order preliminarily enjoining the City from evicting the BSA, but did require the BSA to post a bond. The case remains pending on the merits.

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It is a pleasure to assist the UUA with amicus briefing.

Very truly yours,

Thomas O. Bean