

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan
Munich New York Orange County Rome San Diego Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

Edward P. Leibensperger
Attorney at Law
eleibensperger@mwe.com
+1 617 535 4046

BY EMAIL AND MAIL

March 15, 2010

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 beginning April 9, 2007 (the date of my last report) to the present.

United States Supreme Court

1. *Pleasant Grove v. Summum*

Pleasant Grove addresses the constitutionality of a city's decision-making process regarding privately donated statues placed in a public park. There are several privately donated statues displayed in a public park in Pleasant Grove City, Utah, including a Ten Commandments monument. The city denied the request of the respondent Summum, a religious organization, to erect a statue in the park related to the respondent's religious principles. The respondent moved for preliminary injunction, which was denied by the federal district court. The Tenth Circuit reversed, holding that the park was a traditional public forum. As such, the proposed statue was a form of protected speech, and its exclusion was unlikely to survive a strict scrutiny analysis.

The Supreme Court reversed the Tenth Circuit decision and found in favor of the city. The Court held that the placement of a permanent monument in a public park is a form of government speech and is therefore not subject to strict scrutiny analysis under the Free Speech Clause of the U.S. Constitution. Permanent monuments displayed on public property are a typical form of government speech, whether financed privately or publicly, and thus the government has control over the message.

The UUA joined an *amicus* brief filed by The American Humanist Association in support of the city, arguing that privately donated monuments are not private “speech” when they reside in public parks and are under the control of the government. The *amici* organizations also asked the Supreme Court to clarify previous decisions and rule that federal, state, and local governments should be prohibited from promoting or endorsing *any* religious viewpoint – an argument the Court did not address in its holding.

The Supreme Court’s decision on February 25, 2009 was unanimous.

2. *Harjo v. Pro Football, Inc.*

The UUA joined an *amicus* brief filed by the Social Justice Advocacy Group in support of the Petitioner’s petition for writ of certiorari, appealing the decision of the District of Columbia Court of Appeals. The petitioners, Native Americans, claimed that the National Football League team name and mascot of the Washington Redskins were offensive epithets that did not deserve trademark protection.

The *amici* organizations urged the Supreme Court to hear the case in order to resolve a split among the Circuit Courts of Appeals as to the applicability of the doctrine of laches to cancel petitions brought under Section 14(3) of the Trademark Act of 1946 (the Lanham Act). The doctrine of laches essentially prevents a party that has not acted on its rights in a timely manner from bringing suit at a later date. The *amicus* brief asks the Court to move beyond the technical laches argument to consider the social justice implications of the controversy.

The Supreme Court denied the petition for writ of certiorari on November 16, 2009.

Third Circuit Court of Appeals

3. *Borden v. East Brunswick School District* - update

The UUA joined the American Civil Liberties Union and other organizations in an *amicus* brief supporting the school district’s argument that a football coach’s actions, participating in prayers before and during football games, violated the Establishment Clause. Please refer to my April 9, 2007 letter for a more complete overview of the case.

On April 15, 2008, the Third Circuit reversed the district court and ruled in favor of the school district. The court determined that the coach’s conduct violated the Establishment Clause, and that the school district’s policy prohibiting his conduct was appropriate and did not violate any rights under the Constitution. The coach filed a writ of certiorari to the Supreme Court, which was denied on March 2, 2009.

Ninth Circuit Court of Appeals

4. *Jewish War Veterans v. City of San Diego*

The dispute in *Jewish War Veterans* centers around a 43-foot high Latin cross on Mount Soledad in San Diego, CA. The cross was erected by the Mount Soledad Memorial Association in 1952 on land owned by the city. Although its supporters claim that it stands as a secular symbol to honor veterans, the site has also been used for numerous religious gatherings for over 50 years. After the federal district court ruled in favor of the city, the plaintiffs appealed to the Ninth Circuit.

The UUA joined an *amicus* brief in support of the plaintiffs, arguing that the cross has been and remains a prominent symbol of Christianity. As such, it cannot be transformed into a secular symbol just by being placed in a veterans' memorial. Moreover, the cross sends an exclusionary message that the government prefers one religion over others, and therefore violates the Establishment Clause.

This case was withdrawn on December 14, 2009 pending a decision by the Supreme Court in *Salazar v Bouno*. *Salazar* addresses the constitutionality of another prominent cross displayed on public land.

Tenth Circuit Court of Appeals

5. *American Atheists, Inc. v. Duncan*

American Atheists involves the display of 12-foot high crosses along public highways in Utah to honor deceased Utah Highway Patrol officers. The crosses were erected by a private group with the permission of government entities. The plaintiffs filed suit against the superintendent of the Utah Highway Patrol, alleging that the state's allowance of the crosses violated the Establishment Clause. The federal district court granted summary judgment to the defendants, holding that the crosses were intended to have the secular purpose of honoring law enforcement officials, and that the crosses did not have the effect of promoting religion over non-religion. The plaintiffs appealed this decision to the Tenth Circuit Court of Appeals.

The UUA submitted an *amicus* brief in support of the plaintiffs to the Tenth Circuit, arguing that the proper way to honor law enforcement officers killed in the line of duty is through a secular memorial marker. The crosses used to memorialize officers violate the Establishment Clause because a reasonable observer would believe that the crosses are religious markers, and this has the effect of favoring or promoting religion over non-religion.

Oral arguments were heard on March 9, 2009 and submitted to Judges Tacha, Ebel, and Hartz of the Court of Appeals for the Tenth Circuit. The court has not yet released its decision.

California

6. *In Re Marriage Cases*

On May 15, 2008 the Supreme Court of California held that marriage is a fundamental civil right for all citizens, and is protected by the California Constitution's guarantee of equal protection of the laws. Therefore, the court held that same-sex couples have the right to marry in California.

The UUA joined with many other religious organizations in an *amicus* brief in support of the petitioners, same-sex couples seeking to marry. The brief states that the *amici* represent hundreds of religious denominations and congregations, all of whom share the belief that marriage is a fundamental civil right that the state cannot refuse to same-sex couples. Furthermore, the *amici* argue, there are important legal considerations at stake: the California Constitution's religion clauses guard against undue entanglement between church and state. Because denying same-sex couples the right to marry flows out of traditional religious beliefs, the law is unnecessarily enmeshed with religious beliefs. Therefore, the law does not have a secular purpose and violates the Establishment Clause of the California Constitution.

7. *California Council of Churches v. Horton*

On November 4, 2008, California voters passed Proposition 8, a ballot measure that modified the California Constitution to allow marriage only between a man and a woman, effectively overruling the *In Re Marriage Cases* decision. On November 18, 2008, the UUA, along with other religious organizations including the California Council of Churches, sought a writ of mandate or prohibition from the Supreme Court of California to enjoin enforcement of Proposition 8.

The Supreme Court of California deferred the writ petition because of the pending action in *Strauss v. Horton* (see below). The court invited the *amici* religious organizations to re-file an *amicus* brief in the *Strauss* case.

8. *Strauss v. Horton*

In *Strauss v. Horton*, the Supreme Court of California consolidated three cases in which the plaintiffs sought writs of mandate against Proposition 8. In ruling against the plaintiffs, the court determined that Proposition 8 was a valid amendment to the state constitution, and that it prospectively prohibited same-sex couples from marrying. However, Proposition 8 was not retroactive: the marriages of same-sex couples in the time between the decision in *In Re Marriage Cases* and the enactment of Proposition 8 are still recognized under California law.

The UUA's *amicus* brief argues that equal protection of the laws is an inalienable right under the California Constitution, and therefore protects the right of same-sex couples to marry.

Because it is a constitutional right, it cannot be undermined by the ballot initiative process that was used to enact Proposition 8 and instead could only be changed by a 2/3 vote of the California legislature or a constitutional convention.

The Supreme Court of California released its decision on May 26, 2009.

9. *Perry v. Schwarzenegger*

This case is a challenge to California's Proposition 8 based on federal law. Because Proposition 8 has been held constitutional under California law, the plaintiffs claim that Proposition 8 violates their Due Process and Equal Protection rights under the U.S. Constitution. The plaintiffs seek a preliminary and permanent injunction to bar the state from enforcing Proposition 8.

The UUA, joined by many other religious organizations, submitted an *amicus* brief arguing that Proposition 8 reflects strongly negative religious views toward homosexuality and marriage that are not shared by all faiths. The brief also disputes the contention that Proposition 8 protects the religious liberty of Californians. Rather, the ability of same-sex couples to marry has no impact on the religious liberties of any Californians, even those whose religious beliefs dictate that same-sex marriage is immoral.

A bench trial commenced on January 11, 2010 in front of the Honorable Vaughn R. Walker of the United States District Court for the Northern District of California. The court has not yet released its decision in the case.

Iowa

10. *Varnum v. Brien*

In *Varnum*, the Supreme Court of Iowa affirmed the right of same-sex couples to marry in the state. Six same-sex couples had filed suit to challenge an Iowa law that limited civil marriage to a union between a man and a woman. The petitioners' theory of law was based on the Equal Protection guarantees of the Iowa Constitution. The trial court found in favor of the couples, and the defendant, a county recorder and registrar, appealed. The Supreme Court of Iowa affirmed the lower court's ruling, holding that the law violated the Equal Protection Clause of the Iowa Constitution.

The UUA joined an *amicus* brief arguing in favor of marriage equality for same-sex couples, arguing that it is an issue of civil, not religious, rights. Additionally, the *amici* organizations argue that the free exercise of religion is not constrained by recognizing civil marriages between same-sex partners, and the separation of church and state requires an interpretation of Iowa law free from any debate about what is "moral" from a religious point of view.

The *Varnum* decision was released on April 3, 2009.

Pennsylvania

11. *Kalman v. Cortes*

The plaintiff in *Kalman* is challenging the so-called “Blasphemy Prohibition,” a Pennsylvania law that prohibits blasphemy, profanity, or curse words in corporate names. The law was enforced against the plaintiff when he attempted to incorporate his business under the name “I Choose Hell Productions, LLC.” The plaintiff claims that the Pennsylvania law is an unconstitutional establishment of religion in violation of the U.S. Constitution, and that the law as applied to him violates his right to free speech.

UUA joined parties in an *amicus* brief supporting the Plaintiff’s legal arguments. In addition, the *amici* argue that no blasphemy law can be constitutional because such laws are unconstitutional attempts to establish religion over non-religion.

Oral arguments on cross motions for summary judgment in this case are scheduled for April 1, 2010 before the Honorable Michael M. Baylson of the U.S. District Court for the Eastern District of Pennsylvania.

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

Sincerely,



Edward P. Leibensperger