



# RELIGIOUS INSTITUTIONS ALERT

## The Religious Institutions Practice Group of Sidley Austin Brown & Wood LLP

Sidley Austin Brown & Wood LLP's nationwide Religious Institutions Practice Group has assisted a diverse array of religiously affiliated organizations with legal issues and problems that uniquely affect those organizations. Churches, religious schools and universities, religious broadcasters, religious health care institutions, and religiously-affiliated philanthropic and community organizations have benefited from our depth of experience, not only with the constitutional and statutory protections for religion generally, but with many other features of the legal landscape that affect these institutions.

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## Recent Developments in the Law Affecting Religious Institutions

### California Court Rejects Diocese's Claim To Parish Property

In an opinion which may be significant for disputes within the Episcopal Church and other religious denominations, a California Superior Court recently rejected an attempt by the Episcopal Diocese of Los Angeles to regain control over a parish building located in Newport Beach, California. *Rasmussen v. Bunyan*, J.C.C.P. No. 4392 (Sup. Ct. Ca. Aug. 15, 2005). According to the Court's opinion, the core of the dispute related to St. James Parish's "publicly expressed disagreement with the Church's view concerning the consecration of homosexual clergy."

The case arose after St. James Parish made known its intentions to fall within the authority of the Bishop of Uganda, who is known to oppose ordination of homosexual clergy, rather than its historic, geographic ties with the Diocese of Los Angeles, which recognizes a homosexual bishop. As a result of this dispute, St. James Parish undertook a measure of self-help, and no longer permitted the Diocese of Los Angeles access to parish records or property and discontinued all financial support of the Diocese.

The Diocese of Los Angeles filed suit, alleging that it was the superior hierarchical body and that the parish held the property in "express trust for the benefit of plaintiff the Protestant Episcopal Church in the Diocese of Los Angeles." The Superior Court dismissed the suit under the California statute known as the Anti-SLAPP (Strategic Lawsuits Against Public Participation) law, which allows for a special early motion to strike in lawsuits arising from acts in furtherance of the freedoms of speech and petition. Cal. Civ. Proc. Code § 425.16.

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The Court first determined that this dispute was *not* primarily one involving property and that St. James Parish was being sued “for acts arising from and in furtherance of their publicly expressed disagreement with the Church’s views concerning the consecration of homosexual clergy, specifically by voting to break ties with the Church, by amending the parish’s articles of incorporation, and submitting a press release announcing the reasons for the separation.” If St. James Parish had not taken these actions, the Court reasoned, the Diocese would not have sued in an attempt to control the Parish’s property. In support of its conclusion, the Court pointed to numerous instances where the Complaint framed its argument as religious disagreements, rather than legal claims (claiming, for instance, that the clergy at St. James Parish had “violated their ordination vows”).

The Diocese argued that St. James Parish had severed ties with the Diocese based on disagreements on “core doctrinal issues” and urged the court to find that St. James Parish was required to “pursue their dissent through religious channels” and was not entitled to express their dissent through affiliation with the Bishop of Uganda. Specifically, the Diocese urged the court to defer to its view of the Episcopal Church’s canon law under which “centralized control over church property supersedes civil law disposition of church property,” and sought a declaration from the California state court “that the Church has already determined who are the loyal members of the Church and true members and leaders of the parishes, and who has the right to control and manage parish property.”

The California state court rejected the Diocese’s arguments for deference and analyzed the merits of the dispute under a “neutral principles” approach, citing *Jones v. Wolf*, 443 U.S. 595 (1979). In *Jones v. Wolf*, the Supreme Court recognized that States could constitutionally adjudicate church property disputes if they use “neutral principles” and avoid interjecting the courts into the resolution of religious controversy. Such a

“neutral principles” analysis contrasts with the Supreme Court’s earlier reluctance to resolve church property disputes, in cases such as *Watson v. Jones*, 80 U.S. 679 (1872) (deferring to a ruling by a church’s national governing body during a schism in the Presbyterian Church about the morality of slavery which led to disputes over church buildings) and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (rejecting the New York legislature’s attempt to insert itself into the issue of control of the property of Russian Orthodox churches within the United States).

Using such a “neutral principles” approach, the California court reasoned that “California courts are not bound by Canon law” with respect to church property. Significantly for the court’s analysis, there was no evidence that the title to St. James Parish’s property had been held by any entity other than St. James Parish. Although it noted that “the parish articles of incorporation state the parish is a ‘constituent part’ of the greater Church,” it concluded that they do not state that “the parish is a ‘subordinate body’ of the greater Church.” The Court, therefore, rejected the Diocese’s arguments and dismissed the case, leaving the parish property under the control of the parish.

While this case may be significant for those parties confronting potential divisions within a religious denomination, it is uncertain the persuasive effect this opinion will have given its procedural posture and the variations in state property law.

Procedurally, the court dismissed based on California’s very broad Anti-SLAPP provisions. Many states lack similar provisions or, like Hawaii, Massachusetts and Utah, limit the protection of their anti-SLAPP statutes to actions that are “solely based on the party’s public participation before a governmental body,” rather than the more general free speech protection the court found in California’s Anti-SLAPP statute. Haw. Rev. Stat. § 634F-1; Mass. Ann. Laws. ch. 231 § 59H; Utah Code Ann. § 78-58-103. Other states, such as Georgia, simply require a certification of good

faith when a case is brought based on actions which “could reasonably be construed as an act in furtherance of the right of free speech.” Ga. Code Ann. § 9-11-11.1. In cases brought outside California, it is not clear that a similar dismissal could be obtained.

The case is also potentially limited on the merits in that the court relied on California property case law and found in this case that there was no evidence that the Diocese of Los Angeles ever had title to the property in question. Given the variations in state property laws and the specific language of property titles, highly predictable rules about the proper control of church buildings have yet to emerge.

### **Tenth Circuit Rejects Establishment Clause Challenge to Statue**

The Tenth Circuit recently rejected an Establishment Clause challenge to a statue displayed on the campus of a public university. In a twist on the recent Ten Commandments cases, the statue was challenged as being anti-Catholic and hostile to religion. In *O’Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005), the court held that even if the statue sent an anti-Catholic message, a reasonable observer would not conclude that the state had endorsed that message.

Washburn University in Topeka, Kansas, selects five sculptures each year for a temporary outdoor exhibition. One of the statues in the 2003 exhibition, entitled *Holier Than Thou*, was a bronze bust of a Roman Catholic bishop with a “grotesque,” contorted facial expression. The miter on the figure’s head is shaped differently than a traditional bishop’s miter, leading many viewers to see the miter as a phallic symbol. (A photo of the sculpture is available online at <http://www.washburnreview.org/PDFArchive/03-04/0304Issue14b.pdf>). In an attached caption, the artist describes the sculpture as resulting from his memory of his first confessional at age seven. Within days of installation, Washburn began receiving numerous complaints from staff

and students. The regents voted to leave the statue in place to foster freedom of speech and to “create a positive educational experience.” Dr. Thomas O’Connor, a professor of biology, and Andrew Strobl, a full-time student, filed suit alleging that the statue violated the Establishment Clause by conveying a message of state-sponsored disapproval of their religious beliefs.

The Court first considered several grounds for not reaching the merits of this issue, holding first that the plaintiffs’ claim for an injunction to remove the statue was moot because the statue had already been removed and was not likely to return. Similarly, the plaintiffs’ request for a declaratory judgment was moot because it could have no effect on the defendant’s behavior. The case was not “capable of repetition” because there was no reason to believe that the university would return the statue to the campus in the future. And the court could not rule on the constitutionality of any future statue because Establishment Clause cases depend so heavily on the “context and content of the display.”

Nevertheless, the court found that a demand for nominal damages was not mooted by the removal of the statue. The plaintiffs’ statement that they had a direct, unwelcome contact with the statue was enough injury to give them standing to bring the claim. In evaluating the constitutionality of the statue, the court applied Justice O’Connor’s *Lynch* “endorsement” test, under which government action “impermissibly endorses religion” if the action’s purpose or effect favors one religion or belief over others.

In evaluating the purpose of the statue, the endorsement test asks whether the “government’s actual purpose is to endorse or disapprove of religion.” The court found no evidence that the statue was selected out of hostility towards Catholicism. The selection committee saw the sculpture only as a “very fine piece of bronze.” The court also accepted the university’s arguments that the purpose of the statue was to enhance the educational experience and to beautify the campus. Campus beautification was an acceptable reason for displaying the

sculpture where there was no evidence of improper motive. Similarly, there was no evidence of improper purpose in placing the statue on the main lawn, in placing the caption on it, or in refusing to move the statue to a less prominent location on campus.

To determine the effect of the statue, the court considered whether a knowledgeable, reasonable person would find that the display favors or disfavors religion. The court acknowledged that the placement of the statue in a prominent location on campus weighed in favor of endorsement, but reasoned that because the statue was one of 30 on campus, several of which were in sight of the challenged statue, the reasonable observer would see it as a part of an outdoor museum. This “typical museum setting,” while not “neutralizing the religious content” of the statue,” did “negate any message” of state endorsement for the court. The state may display both religious and anti-religious artwork in a museum setting. Further, the university’s role as a “marketplace of ideas” gave the state further latitude for the display of both religious and non-religious art. The court concluded that it did not need to decide whether the statue was anti-Catholic. Even if the sculpture conveyed an anti-Catholic message, it held that a reasonable observer would understand that the university had not endorsed that message.

### **Archdiocese Forced To Produce Clergy Formation Documents**

The California Court of Appeals recently refused to allow the Roman Catholic Archdiocese of Los Angeles to avoid a grand jury’s subpoena of internal Church records relating to child sexual abuse allegedly committed by two diocesan priests. See *The Roman Catholic Archbishop of Los Angeles v. Superior Court of Los Angeles County*, 131 Cal.App.4th 417, 32 Cal.Rptr.3d 209 (Cal.App.2 Dist. 2005). Seeking to have the subpoena quashed, the Petitioners (the Archdiocese and the unnamed clergymen) argued the Church had a religious obligation to care for the spiritual and emotional well-being

of its priests and that turning over the requested records would violate that obligation.

Rejecting all of the Petitioners’ constitutional arguments, the court held that the subpoena violated neither the United States Constitution’s First Amendment nor California’s free exercise clause, and that no state evidentiary privilege prevented production of most of the materials. In reaching this conclusion, the California court joins courts in Illinois, Pennsylvania, and Massachusetts in forcing the production of confidential documents developed during the clergy formation process.

Like many of the other cases, the California case arose out of grand jury investigations into allegations that Roman Catholic priests have sexually assaulted children. In the course of the investigation, a Los Angeles County grand jury subpoenaed a series of Church documents related to the alleged assaults and the implicated clergy. After producing the documents, the Archdiocese and the individual priests separately sought to quash the subpoena. A discovery referee presiding in the consolidated case found the subpoena valid for the vast majority of the documents originally requested.

On appeal, the Petitioners claimed that, under the Church’s “formation of clergy” doctrine, a bishop or his appointed representative is charged with the responsibility of caring for the emotional, physical, and spiritual problems of the priests under his charge. According to this Church doctrine, when a priest is experiencing problems concerning chastity or sexual conduct, it is the responsibility of the bishop to intervene and conduct a canonical investigation. The Petitioners claimed that canon law requires that the results of an inquiry remain confidential and separate from the priest’s personal file. They argued that forcing the Church to violate what they characterized as a canonical mandate impermissibly infringed on the operation of the Church and violated the federal Free Exercise Clause. In essence, the Petitioners claimed that communications

made as part of the clergy formation process should be privileged in much the same way as the law protects communications made during confession in the context of the priest-penitent relationship.

Significantly, the District Attorney contested the Petitioners' interpretation of Catholic Church teaching, submitting declarations from Fr. Thomas Doyle, a Roman Catholic priest and canon law scholar, who stated that "[t]he information contained in the record may be sensitive and is to be treated accordingly with due regard for the reputation of those involved. It may however, be licitly and properly disclosed to civil law enforcement agencies if it involves [a] matter as serious as sexual abuse." 131 Cal.App.4th at 429. The prosecutor analogized these communications to any other employer's internal investigation of employee malfeasance, rather than as having some material religious component.

Relying upon *Employment Division v. Smith*, 494 U.S. 872 (1990), the court opined that compliance would not impermissibly burden petitioners' religious beliefs or practices. Although *Smith* involved a criminal statute, rather than a subpoena, the California court held that a grand jury subpoena would not be treated differently than neutral legislation.

The court also rejected the petitioners' assertion that the subpoena violated the federal Establishment Clause by creating an impermissible government entanglement with internal church affairs under the oft-criticized and oft-cited test established in *Lemon v. Kurtzman*. 403 U.S. 602 (1971). Applying the *Lemon* test, the court held that judicial review must focus on the law's primary or principal effect, not on the incidental effects which may, as in this case, burden the exercise of religion.

Petitioners also claimed that the Free Exercise Clause of the California Constitution precluded the enforcement of the subpoena. Because the language of the state free exercise

clause differs from the federal free exercise clause, the court assumed a compelling interest standard, only to find that "the grand jury's investigation into suspected child molestation serves a compelling state interest and is narrowly tailored to achieve that interest."

As this case demonstrates, the public's right to every person's evidence continues to result in the narrow construction of religious privileges. Religious litigants will thus face substantial challenges when a criminal investigation requires information that some consider privileged under established religious practice or teaching. Although courts have been willing to recognize religious exemptions or privileges in certain spheres, such as with confessional communications, courts remain reluctant to recognize such protection in the criminal context.

### **The Future of Religious Freedom Under the New Roberts Court**

With a new Chief Justice and (soon) a new Associate Justice on the Supreme Court, there is a real possibility of dramatic change in the constitutional contours of religious liberty. The Religious Institutions Practice Group is in the process of organizing a conference that will explore how this new Court may approach the legal issues that affect religiously-affiliated organizations. Some topics to be considered include "Politics and the Pulpit," "Faith-Based Social Services," "Legislating Workplace Religious Freedom," "The RLUIPA Legal Landscape," "Revisiting the Establishment Clause," and other important questions that are likely to come before the Court. We welcome your participation at this early stage of our conference planning. If you are interested in suggesting topics for discussion or participating in one of the sessions — or are just eager to attend — please let us hear from you. Contact Ed McNicholas at (202) 736-8010 or [emcnicholas@sidley.com](mailto:emcnicholas@sidley.com).

### Other Recent Religion Cases of Interest

*Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005): *Hoevenaar* is a RLUIPA prisoner case remanded from the Supreme Court for further consideration in light of *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). In this opinion, the Sixth Circuit deferred to the prison's rules banning a religious "kouplock" hair style, continuing a trend of substantial deference in prisoner regulations.

*Gospel Missions of America v. City of Los Angeles*, 419 F.3d 1042 (9th Cir. 2005): A homelessness ministry was unsuccessful in challenging the language of a Los Angeles ordinance on freedom of speech over-breadth and vagueness grounds.

*ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc): In a follow-on to the Supreme Court's Ten Commandments decisions from last Term, the

Eighth Circuit approved a display of the Ten Commandments that had been donated by the Fraternal Order of Eagles during the 1960s. Despite the fact that the Supreme Court's *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), decision dealt with a nearly identical display by the Eagles, Judges Bye and Arnold noted their strong dissent.

*Valov v. Dep't of Motor Vehicles*, 132 Cal. App. 4th 1113, 34 Cal. Rptr. 3d 174 (Cal. App. 2 Dist. 2005): An intermediate appellate court in California upheld a DMV photo ID requirement under *Smith* despite the plaintiff's sincerely-held Molokan religious opposition to graven images, including photographing of a person's image. (Molokans broke from the Russian Orthodox Church in the beginning of the modern era).

**Sidley wishes to acknowledge the contributions of our former summer associates, Sarah Newman and Baird S. Allis, to this Alert.**

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## RELIGIOUS INSTITUTIONS PRACTICE GROUP

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We believe that effective representation of religious organizations requires a depth of experience, not only with the constitutional and statutory protections for religion generally, but also with many other features of the legal landscape that affect these institutions' ability to carry out their missions. Effective representation also requires an appreciation of the unique relationship between these institutions and their members. Although such organizations face many of the same legal hurdles encountered by for-profit businesses—and then some—their religious status almost always affects, and often constrains, the manner in which they can appropriately respond to those hurdles. The result is a varied and complex set of legal challenges.

In meeting these challenges, Sidley's experience in representing religious institutions is enhanced by the firm's preeminent national practices in such areas as labor and employment law, trial and appellate litigation, constitutional law, health care, higher education law, administrative law, land-use and zoning, intellectual property, and communications. We look for creative solutions that will not only prevent potential liability, but also provide maximum latitude to the institution to pursue its long-term goals while preserving its distinctive religious mission and standards.

We also take great pride in our ability to work harmoniously with in-house counsel and counsel from other law firms in those efforts. We view ourselves as supplementing, not sup-

planting, existing relationships between our clients and their other counsel.

In recent years, we have had the opportunity to apply and develop these skills in representing a number of religious institutions at both the national and local level. For example, we have represented such institutions as the Catholic Archdioceses of Chicago and Los Angeles, the Seventh-day Adventist Church, the Unification Church, the Lutheran Church-Missouri Synod, The Salvation Army, the Church of Jesus Christ of Latter-day Saints, Brigham Young University, Texas Christian University, the Kamehameha Schools, Loma Linda University, Maharishi International University, and Adventist Health.

To provide all of our clients with a comprehensive array of legal services, the Religious Institutions practice is fully integrated with Sidley's other practice groups, such as the Colleges and Universities group, the Not-for-Profit Organizations group, the Charitable Trust Counsel Services group, and the Tax group. Particularly relevant experience includes:

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- Land Use and Zoning
- Labor and Employment
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- Broadcast Regulation
- Trusts and Estates
- Intellectual Property and Marketing Practice
- Tax
- Employee Benefits
- Immigration Law
- Affiliated Colleges and Universities
- Affiliated Health Care Institutions

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