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# THE DEFENDER

DOING JUSTICE WITH THE LOVE OF GOD

## U.S. Supreme Court To Decide Cases on Boy Scout Leaders and Partial Birth Abortion

The U.S. Supreme Court announced on January 14, 2000, that it will rule on two cases of special interest to CLS's Center for Law and Religious Freedom. Center Director Carl H. Esbeck emphasized the significance of these cases, indeed of the entire term, when he said "Since the Center's founding in 1975, there has not been a more important term in the U.S. Supreme Court than the term beginning October 1999. Presently before the Supreme Court are virtually all the matters of historic interest to the Christian Legal Society: student-initiated public school prayer, aid to religious schools, parental rights, the freedom of associations to set moral standards for their leaders, protecting the life of the unborn child, and freedom of speech which includes the 'right not to speak'."

CLS's Center filed a friend-of-the-court brief in support of the Boy Scouts in *Boy Scouts of America v. Dale* because the right of an organization to determine its own moral and creedal standards for its leaders has been a priority of the Center for many years. In the past ten years, the Center has advocated on behalf of religious groups when public universities and high schools across the country have attempted to prevent the groups from meeting on campus unless they agreed not to discriminate on the basis of sexual orientation and/or religion in its selection of officers.

The case originated when James Dale, a former scout, was removed by the Monmouth (NJ) Boy Scout Council as an Assistant Scoutmaster when it became aware that he was co-president of Rutgers University Lesbian/Gay Alliance and

was actively promoting the gay lifestyle. Dale sued under the New Jersey Law Against Discrimination, which prohibits discrimination defined by the statute to include "homosexuality or bisexuality by inclination, practice, identity or expression."

The trial court sided with the Scouts, but the New Jersey Supreme Court held that the Boy Scouts are a place of public accommodation and that the "words 'morally straight' and 'clean' [in the Scout Oath and Laws] do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral."

Although the Boy Scouts assert a moral rather than religious reason for their prohibition on gay activists serving as leaders, the decision in this case will directly impact the ability of religious organizations, such as CLS chapters on law school campuses, to resist public university officials' imposition of "nondiscrimination" provisions against a group requiring adherence to a statement of faith as a criterion for officers.

Center Senior Legal Counsel Kim Colby wrote CLS's friend-of-the-court brief. Campus Crusade for Christ, InterVarsity Christian Fellowship/USA, ReJOYce in Jesus Campus Fellowship and the Southern Center for Law and Ethics joined. The case will be argued April 26.

One day earlier, April 25, the high court will hear oral argument in *Stenberg v. Carhart*, which challenges the constitutionality of a Nebraska law banning partial birth (or D&X) abortion. The case will probably determine whether states may place any restrictions on partial birth abortion. If the



Kim Colby, Senior Legal Counsel for CLS's Center, at a press conference in New York City in November. Colby wrote CLS's amici brief in *Boy Scouts v. Dale*

law is found constitutional, it will be the first time the Supreme Court has upheld a direct prohibi-

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tion on abortion since its *Roe v. Wade* decision in 1972.

The Nebraska statute prohibits a person from partially delivering a child, performing a procedure the person knows will kill the child, and then completing the delivery of the child. Typically, the baby is delivered up to his/her head; the abortionist extracts the child's brain, crushes his/her head, and then completes the delivery of the now dead baby.

Nebraska is one of over thirty states that have passed laws banning D&X abortions. Most of these laws have been challenged as void for vagueness. With few exceptions courts have struck down the laws. The U.S. Court of Appeals for the Eighth Circuit ruled the Nebraska law was unconstitutional, but similar laws in Illinois and Wisconsin were upheld by the Seventh Circuit.

CLS's Center joined a friend-of-the-court brief filed by National Right to Life in support of the State of Nebraska. The brief argues that Nebraska has a substantial interest in protecting the life of the child, and that that interest increases as the child "approaches the status of a legal person under the law upon completion of live birth."



"...Your eyes saw my unformed body. All the days ordained for me were written in your book before one of them came to be." Ps. 139:15b-16.


The Supreme Court is expected to decide both cases by the end of June. 

## Teachers and Religion in Public Schools

**M**any educators are confused about the role of religion in public schools. Christian teachers often wonder what their rights and responsibilities are in the public school setting.

CLS Senior Legal Counsel Kim Colby has written *Teachers and Religion in Public Schools*, a booklet printed in cooperation with Christian Educators Association International, to give guidance regarding the current status of the law. The question and answer format uses helpful symbols of a *traffic light* to indicate practices that are likely to be permitted, a *stop sign* to indicate matters that would probably be prohibited, and a *caution sign* for those areas that are questionable.

Where the law is not clear (caution areas), the guidelines make the teacher aware of problems that may be encountered if he or she moves forward with a questionable activity.

The 8 1/2 x 11", 91-page book serves as a valuable resource to answer the questions most frequently asked by Christian educators in public schools. Copies are available from Christian Legal Society for \$9.00. 



## Center Attorneys' Speaking Engagements

**C**arl H. Esbeck was a panelist on February 25 at an American Enterprise Institute Forum "Is 'Charitable Choice' a Good Way to Aid the Poor?" Other panelists were Michael Horowitz, Hudson Institute, and Michael Breger, a law professor from Catholic University. The seminar was broadcast live

on C-Span.

**Esbeck** was a featured speaker at the Alliance Defense Fund's (ADF) Mini-Summit February 15 in Atlanta, Georgia. The summit brought together 20 - 30 key attorneys for strategic planning in religious liberty, sanctity of life and family values litigation. Center attorneys Kim Colby and Greg Baylor and

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Christian Legal Society is a nationwide organization of more than 4,000 Christian attorneys, law professors, judges, law students and supportive citizens. Its legal advocacy ministry, the Center for Law and Religious Freedom, equips and leads a network of volunteer attorneys defending religious freedom and the sanctity of human life in their communities, in the courts and in Congress.

# FCC Says Religious Broadcaster Can Consider Religion in Hiring

The Federal Communications Commission (FCC) on January 20, 2000, released new rules clarifying certain restrictions on employment decisions by religious broadcasters. For nearly three decades, religious broadcasters chafed under the FCC's equal employment opportunity rules prohibiting discrimination on the basis of religion in selecting their employees, except for jobs involving on-air broadcasting.


In 1996 and 1999, CLS filed comments on behalf of Focus on the Family and Concerned Women for America asking the FCC to allow religious broadcasters to take into account an employee's religious faith, or lack thereof, in deciding whether to hire

the person for any job. Other religious broadcasters and religious liberty groups also filed comments. Professor Tom Berg wrote CLS's initial comments, with subsequent comments augmented by Senior Legal Counsel Kim Colby.

During this time, a radio station affiliated with the Lutheran Church-Missouri Synod challenged the application of the FCC's old rules to its radio station. A federal court of appeals ruled in favor of the church; the decision forced the FCC to adopt new rules.

The FCC's new rules largely follow the changes CLS advocated in its comments. A religious broadcaster (defined as a licensee

who is "closely affiliated with a church, synagogue, or other religious entity") may now establish specific religious criteria as a requirement for employees. The FCC will consider several factors in deciding whether a broadcaster is religious, including its nonprofit status, its history, and its articles of incorporation.

After a long battle, this is a significant win for religious broadcasters and their listeners. 

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## Interns and Administrative Assistant Help Center

Two interns from the American Studies Program of the Council for Christian Colleges and Universities invested a semester of their college careers in a cooperative program with ASP and CLS's Center for Law and Religious Freedom. Mailee Harris, a senior at Greenville

College in Greenville, Illinois, interned at the Center from September to December. Mailee has been admitted to the honors program at Valparaiso School of Law, where she will begin study in

August. Leah Boyd, from Meade, Kansas, is a junior at Azusa Pacific University in Azusa, California; she is interning at the Center from January to April, and plans to attend law school after she graduates.

Mari Foreman of Wenatchee, Washington graduated from Harvard



Mailee Harris (left) interned with CLS's Center in fall 1999. Mari Foreman (right) has worked as an Administrative Assistant in CLS's Center for the 1999-2000 academic year after graduating from college and before attending law school at a later date.



Leah Boyd interned with CLS's Center in Spring 2000.

University in June of 1999 and came to the Center in August. She has worked diligently with Sam Casey on a federal Religious Liberty Protect Act (RLPA) and assists with other Center projects. Mari plans to attend law school. 

# News Briefs

## **Fifth Circuit Says Disclaimer in Science Curriculum Is Unconstitutional**

The U.S. Court of Appeals for the Fifth Circuit by a vote of 8-7 denied a petition for rehearing en banc in *Freiler v. Tangipahoa Parish (La.) Board of Education* on January 25. Thus a disclaimer in science curriculum regarding the Darwinian theory of evolution was held to be unconstitutional. CLS's original friend-of-the-court brief to the Fifth Circuit was written by Prof. Ed Gaffney. The school board plans to appeal the case to the U.S. Supreme Court.

## **Frozen Pre-Embryos to Remain Frozen**

The Michigan Court of Appeals ruled December 17, 1999, that frozen human pre-embryos must remain frozen until the divorced parties reach agreement. After a couple divorced, the ex-husband sought to destroy the zygotes, but the ex-wife wanted them implanted. As a result of the court decision in *Bohn v. Ann Arbor Reproductive Medicine Associates*, neither spouse has unilateral power to dispose of the pre-embryonic life, and the zygotes will remain cryopreserved.

CLS's Center joined a friend-of-the-court brief of the National Right to Life.

## **CLS Opposes NIH Guidelines for Stem Cell Research**

On February 2, 2000, CLS filed comments opposing the National Institute of Health's (NIH) Guidelines for Research on human embryo stem cells. The comments urge NIH to immediately withdraw its guidelines, which circumvent federal law banning federally-funded human embryo research. CLS's comments were prepared by Executive Director Sam Casey.

## **CEF Club to Pay Same Fee as Other Clubs**

The Sequim (Washington) School District charged Child Evangelism Fellowship (CEF) a higher fee to use school meeting space after hours than it did non-religious community groups. In response to a letter from CLS's Religious Liberty Advocates' Greg Baylor, the school district reduced the fee charged to CEF.


## Center Attorneys' Speaking Engagements

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CLS Executive Director Sam Casey also attended the meeting. Following the summit, Esbeck lectured at an ADF training academy in Atlanta for attorneys to prepare them for religious liberty and sanctity of life defense.

On March 24, Esbeck will present a paper at a Symposium on Religion Clauses at the William and Mary School of Law.

Kim Colby will serve as a panelist in a discussion of "The Bible and the Religious Liberty Rights of Students" at a conference

on "Teaching the Bible in Public Schools," sponsored by Freedom Forum's First Amendment Center. Key education leaders from across the country will attend the conference. 



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