U.S. Department of Justice
Civil Rights Division

Report on Enforcement of Laws Protecting Religious Freedom

Fiscal Years 2001-2006

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Office of the Attorney General

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Dear Reader:

Religious freedom is one of our most cherished inheritances. It is known as the "First Freedom" because our Founders saw fit to place it first in the Bill of Rights. But it is not merely first in order; it is a freedom on which other freedoms rest. As President George W. Bush said in his Religious Freedom Day proclamation last year, "The right to religious freedom is a foundation of America." He continued, "Our Founding Fathers knew the importance of freedom of religion to a stable democracy, and our Constitution protects individuals' rights to worship as they choose. We reject religious discrimination in every form, and we continue our efforts to oppose prejudice and to counter any infringements on religious freedom."

In addition to its important responsibilities of enforcing federal civil rights statutes prohibiting discrimination on the basis of race, sex, disability, and national origin, the Department of Justice is charged with enforcing a wide range of civil rights statutes designed to protect religious liberty: laws barring discrimination against individuals on account of religion in education, employment, housing, credit, public facilities, and public accommodations; laws barring local zoning authorities from discriminating against houses of worship and religious schools, or from imposing unjustifiable burdens on their religious exercise; laws protecting the religious rights of persons in state institutions; and criminal statutes such as the Church Arson Prevention Act that make it a federal crime to attack a person or a place of worship based on religion.

This report summarizes the Department's accomplishments during this Administration to protect religious liberty through enforcement of civil rights laws. Early in the Administration, the Department of Justice for the first time established a Special Counsel for Religious Discrimination to ensure that laws protecting religious freedom are enforced vigorously. The Department's recognition that these laws deserved greater attention has resulted in a dramatic rise in the number of cases brought to protect the religious rights of all Americans in category after category, as outlined in this report. Just as important as these enforcement statistics, however, are the types of cases brought. The Department has made a sustained effort through the cases it brings to demonstrate to the public and to state and local officials the variety of ways in which the law protects religious liberty. For example, the Department filed a lawsuit to protect the right of a Muslim student to wear a headscarf while attending public school, brought the first pattern-

or-practice discrimination lawsuit against a government entity to require it to accommodate employees' need to refrain from work on the Sabbath, defended in numerous cases the right of religious groups to meet in public facilities on an equal basis with secular groups, and defended the right of seniors to pray, sing religious songs, and hold Bible studies at a community senior center.

But this should be only the beginning. Preserving religious liberty requires an ongoing commitment to protecting this most basic freedom for people of all faiths. It is my hope that this report will help educate the public, community and religious leaders, and government officials about the range of religious freedom rights that all Americans possess, ways that these rights can be respected, and the Department's dedication to protecting them.

Sincerely,

Alberto R. Gonzales
Attorney General

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A. Background

Religious liberty has often been called our "first freedom," since it is the first right listed in the First Amendment. As the Founders recognized, it is an integral and foundational element of freedom itself. James Madison stated succinctly that "conscience is the most sacred of all property."[1] Many came to America precisely because of the recognition of religious liberty and the protection of this most basic of human rights. As George Washington said in his letter to the Hebrew Congregation at Newport: "It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support."[2]

"The right to religious freedom is a foundation of America. . . . . Our Founding Fathers knew the importance of freedom of religion to a stable democracy, and our Constitution protects individuals' rights to worship as they choose. We reject religious discrimination in every form, and we continue our efforts to oppose prejudice and to counter any infringements on religious freedom."

– President George W. Bush,
Religious Freedom Day Proclamation,
January 13, 2006

James Madison's Memorial and Remonstrance Against Religious Assessments explained that religious liberty is a right that belongs to all people. He wrote that it is a "fundamental and undeniable truth 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[3]

The United States Department of Justice's Civil Rights Division enforces a wide range of federal statutes that protect religious freedom. The Civil Rights Division, founded in 1957, is best known for its historic and ongoing work toward ending racial discrimination in education, voting, employment, housing, and other areas. Today the work of the Civil Rights Division encompasses many other areas of civil rights as well, such as the Americans with Disabilities Act,[4] the Civil Rights of

[1] James Madison, *Essay on Property* (1792), reprinted in 14 THE PAPERS OF JAMES MADISON 267 (Rutland *et al.* eds., University Press of Virginia 1983).
[2] George Washington, *Letter to the Hebrew Congregation in Newport, Rhode Island* (1790), reprinted in George Washington, WRITINGS 766, (Rhodehamel ed., The Library of America 1997).
[3] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in Adams and Emmerich, A NATION DEDICATED TO RELIGIOUS LIBERTY 104 (Univ. of Penn. Press 1990).
[4] 42 U.S.C. § 12101 *et seq.*

Institutionalized Persons Act,[5] the Trafficking Victims Protection Act,[6] and many others. The Division also enforces statutes that prohibit religious discrimination in a variety of contexts, criminalize interference with religious rights through threats or violence, and ensure that certain federal constitutional rights to religious freedom are protected.

Attorney General Alberto R. Gonzales speaking at the Orthodox Union's annual dinner in June 2005 about the Justice Department's enforcement of religious freedom laws.

Most of the provisions of the landmark Civil Rights Act of 1964 bar discrimination based on religion along with other suspect criteria such as race, national origin, or sex: Title II of the Civil Rights Act of 1964[7] bars discrimination based on religion in public accommodations like restaurants and hotels; Title III[8] bars discrimination based on religion in public facilities such as municipal recreation facilities and senior centers; Title IV[9] bars discrimination based on religion in public elementary and secondary schools, as well as in public colleges and universities; and Title VII[10] bars discrimination based on religion in employment. Title VII also has two unique provisions protecting religious liberty. In addition to making outright discrimination illegal, such as refusing to hire persons of a particular religion, Title VII also requires that employers make a reasonable accommodation of the religious observances and practices of employees, such as accommodating Sabbath observance or religious dress, unless the employer can demonstrate that doing so would be an undue hardship.[11] And § 702 of Title VII protects the independence and autonomy of religious institutions by

[5] 42 U.S.C. § 1997, 1997a-1997j.
[6] Pub. L. No. 106-386 (codified as various sections of 18 U.S.C. Chapter 77).
[7] 42 U.S.C. § 2000a *et seq*.
[8] 42 U.S.C. § 2000b *et seq*.
[9] 42 U.S.C. § 2000cc *et seq*.
[10] 42 U.S.C. § 2000e *et seq*.
[11] 42 U.S.C. § 2000e(j).

exempting them from the general restriction on consideration of religion in hiring.[12] The Fair Housing Act[13] and the Equal Credit Opportunity Act (ECOA)[14] also protect persons from discrimination based on religion. Title IX of the Civil Rights Act of 1964[15] permits the Attorney General to intervene in federal court cases seeking relief from denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of religion. All of these non-discrimination laws are enforced by the Department of Justice's Civil Rights Division.

In addition to these anti-discrimination laws, the Civil Rights Division also enforces a number of statutes designed to protect the religious liberty of citizens more broadly. The Division can bring actions against state and local governments for violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[16] The first part of RLUIPA protects houses of worship and religious schools from abusive land-use regulations, and the second protects the religious rights of inmates and other institutionalized persons. The Civil Rights Division also enforces the religious freedom rights under the Constitution of persons confined to institutions through enforcement of the Civil Rights of Institutionalized Persons Act (CRIPA),[17] and prosecutes arson and vandalism of houses of worship and religion-based bias crimes against individuals under a variety of federal criminal statutes.

B. Responding to a Need

Prior to 2001, except for prosecution of religious bias crimes and employment cases, the Civil Rights Division exercised its jurisdiction to enforce civil rights laws with respect to religion sparingly, and had never had an attorney charged with ensuring that these laws were comprehensively enforced. However, as the United States becomes more religiously diverse, preventing discrimination based on reli-

Worshippers at Hale O Kaula Church in Maui, Hawaii, who were able to expand their sanctuary with help from a Civil Rights Division lawsuit.

[12] 42 U.S.C. § 2000e-1(a).
[13] 42 U.S.C. §§ 3601-3619.
[14] 42 U.S.C. §§ 1691, 1691a-1691f.
[15] 42 U.S.C. § 2000h-2.
[16] 42 U.S.C. § 2000cc-1.
[17] 42 U.S.C. § 1997 *et seq.*

gion has become even more important. The United States today is home to more than 2,000 different faiths and denominations.[18] Religious discrimination is a growing problem. For example, from 1992 to 2005, complaints of religious discrimination in employment filed with the Equal Employment Opportunity Commission went up 69%.[19] During this same period, sex discrimination complaints rose 6%,[20] national origin discrimination complaints rose 8%,[21] and racial discrimination complaints actually decreased by 9.5%.[22] Similarly, in enacting RLUIPA in 2000, Congress found widespread discrimination against religious institutions by state and local officials regarding land-use decisions.[23] The attacks of 9/11, and the resulting increase in bias crimes and discrimination against Muslims, as well as Sikhs and others mistakenly perceived to be Muslim, underscored the need for rigorous enforcement of religious civil rights laws.

In addition to being religiously diverse, the United States is also a nation of deeply religious people, and conflicts can arise when people feel they should not have to check their faith at the door when they go to school or work, or participate in activities in the public square. Citizens using community centers and other public

Department of Justice attorneys (l-r) Irfan Saeed, Shaarik Zafar, and Special Counsel for Religious Discrimination Eric Treene at the 2004 Islamic Society of North America Convention in Chicago, Illinois.

facilities, and especially students at public schools, often are told by government officials that they cannot express their religion while on public property or in government-sponsored programs, based on a mistaken belief that the Constitution's prohibition on state establishment of religion bars individual religious expression. But as the Supreme Court has stressed, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[24] Schools, senior centers, public parks, and

[18] *The Religious Landscape of the United States*, U.S. Society and Values Vol. 2 (U.S. Information Agency 1997) (available at *http://usinfo.state.gov/journals/itsv/0397/ijse/ijse0397.htm*).
[19] EEOC Enforcement Statistics – Religion (available at *http://www.eeoc.gov/stats/religion.html*).
[20] EEOC Enforcement Statistics – Sex (available at *http://www.eeoc.gov/stats/sex.html*).
[21] EEOC Enforcement Statistics – National Origin (available at *http://www.eeoc.gov/stats/origin.html*).
[22] EEOC Enforcement Statistics – Race (available at *http://www.eeoc.gov/stats/race.html*).
[23] See H.R. Rep. No. 219, 106th Cong., 1st Sess. 18-24 (1999).
[24] *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302 (2000); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

other public facilities are not religion-free zones, and individuals may not be denied access, or have their expression censored, simply because of their religion.

To meet all of these concerns, in 2001 the Department of Justice began to step up enforcement of civil rights laws protecting persons from religious discrimination and violence. Then, in 2002, the Department of Justice created the position of Special Counsel for Religious Discrimination. The Special Counsel is charged with coordinating enforcement of the civil rights laws addressing religious freedom and religious discrimination within the Civil Rights Division. The Special Counsel also is charged with engaging in outreach to religious organizations, civil rights organizations, attorneys, and the general public to educate them about the Department of Justice's jurisdiction in this area and how to file complaints.

"The record of the Civil Rights Division shows a dramatic increase in the number of religious liberty cases from the period 1995-2000 to 2001-2006."

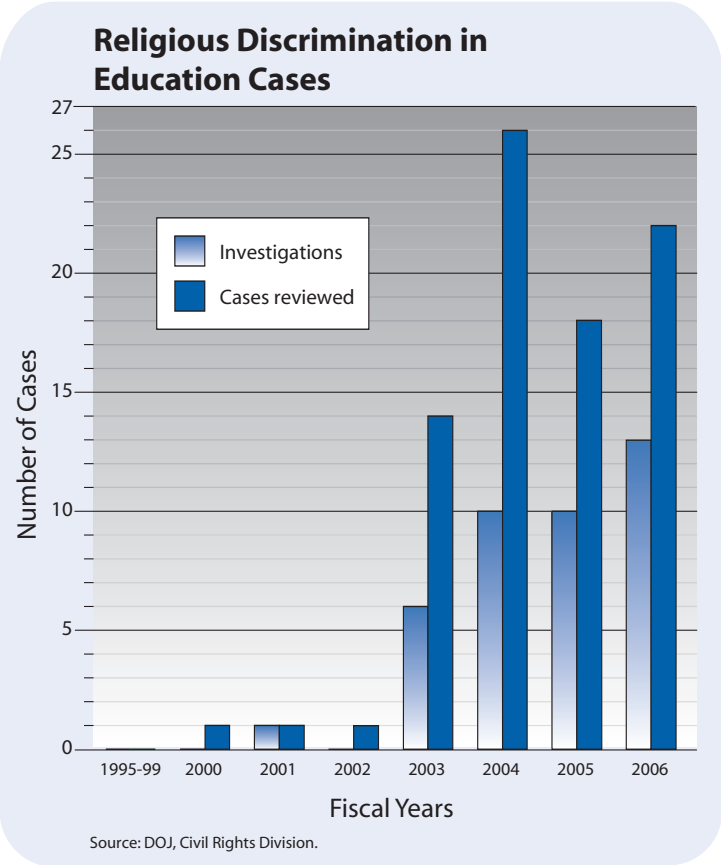
The record of the Civil Rights Division shows a dramatic increase in the number of religious liberty cases from the period 1995-2000 to 2001-2006.[25] For example, education discrimination cases involving religion increased from one case reviewed and no investigations in the earlier period to 82 cases reviewed and 40 investigations in the most recent six years; religion cases under the Fair Housing Act and ECOA rose from four investigations and one lawsuit in 1995-2000 to 18 investigations and six lawsuits from 2001-2006; religion-related appellate friend-of-the-court, or *amicus curiae*, briefs rose from one to 16; and enforcement of RLUIPA, enacted in 2000, included 118 cases reviewed and 26 investigations from 2001-2006, resulting in 15 favorable outcomes prior to litigation and 4 lawsuits.

But the record cannot be measured in numbers alone. The Civil Rights Division's efforts, as set forth in this report, have resulted in victories that have demonstrated to government officials, the courts, and the public that religious rights in the United States are rights that should be, and will be, protected. They include winning the right for a Muslim girl to wear a headscarf to school — a case that was reported throughout the world. They include winning the right of seniors at a Texas senior center to say prayers before meals, sing gospel music, and hold Bible studies — a case demonstrating that private religious speech that takes place on public property is not government religious speech forbidden by the Constitution. And they include multiple

[25] All numbers are for fiscal years.

cases winning the right of religious groups to equal access to public facilities. The following report details the successes of the Department's religious liberty enforcement in the full range of jurisdictional areas: education, employment, housing and credit, public accommodations and public facilities, zoning and landmarking, the rights of institutionalized persons, and bias crime prosecutions.

A. Education



Public primary and secondary schools, as well as public colleges and universities, should be open to all members of the public, regardless of their faith. Students should not face discrimination or harassment because of their faith background, their beliefs, their distinctive religious dress, or their religious expression. From 2001-2006, the Civil Rights Division dramatically increased enforcement of civil rights protections against religious discrimination in education. During that period, the Division's Educational Opportunities Section reviewed 82 cases and opened 40 investigations involving various types of religious discrimination.[26] This is in contrast to one review and no investigations for the period 1995-2000. From 2001-2006, the Civil Rights Division filed two consent decrees, reached one settlement, and filed thirteen friend-of-the-court briefs in education cases involving religion, versus none from 1995-2000.

The Civil Rights Division's Educational Opportunities Section enforces Title IV of the Civil Rights Act of 1964,[27] which prohibits discrimination based on religion in public primary and secondary schools, as well as public colleges and universities. Subsection (a)(1) authorizes the Attorney General to bring suit in response to a written complaint by a parent that a child is being "deprived by a school board of the equal protection of the laws." Subsection (a)(2) permits the Attorney General to bring suit upon receiving a written complaint that a student has been "denied admission to or not permitted to continue in attendance

[26] A case is classified as a review when the Division interviewed the complainant and witnesses, if any. Investigations include cases in which the Division contacted the school for interviews and/or document requests, or filed legal pleadings or briefs.

[27] 42 U.S.C. 2000c-6.

at a public college by reason of race, color, religion, sex or national origin." The Attorney General has delegated this authority to the Civil Rights Division.

Additionally, Title IX of the Civil Rights Act of 1964[28] permits the Attorney General to intervene in any action in federal court, involving any subject matter, "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, sex or national origin," if such intervention is timely made and the Attorney General certifies that the case is of "general public importance." Enforcement of this provision also has been delegated to the Civil Rights Division, and the Division has participated in a number of education-related religious discrimination cases under Title IX.

The cases in which the Educational Opportunities Section was involved from 2001-2006 covered a wide range of situations and included allegations of discrimination against Muslim, Christian, Jewish, Native American, and Santerian students. Of the forty investigations, fourteen involved harassment by teachers or allegations of indifference by the school toward harassment by students, eight involved religious expression by students, four involved equal access for religious organizations to school facilities, four involved exclusion from higher educational opportunities based on religious belief, four involved issues of student religious dress, three involved refusal to provide excused absences for religious holidays, two involved state scholarships that discriminate against students attending religious schools, and one involved an allegation of a university's failure to accommodate the religious dietary needs of students.

Nashala Hearn, who won the right to wear her headscarf to school, on a tour of Washington, D.C.

Complaints of harassment based on religion were the most common problem addressed in the Civil Rights Division's cases. Most involved complaints of indifference by schools to student-on-student religious harassment in public primary and secondary schools, but some of the cases involved allegations of harassment by college professors and public school teachers. For example, the

[28] 42 U.S.C. 2000h-2.

Civil Rights Division reached a settlement in March 2005 with the Cape Henlopen, Delaware School District after a fourth-grade Muslim student filed a complaint that she had been harassed by her teacher about her faith in front of her class, including being ridiculed because her mother wore a headscarf. As a result, the student was repeatedly harassed by other students and missed several weeks of school due to emotional distress. The student alleged that the school failed to take adequate remedial action. The settlement required programs for teaching religious tolerance for both teachers and students, and special training and monitoring for the teacher at issue. Other investigations resulted in schools promptly taking corrective action. In some cases, student-on-student harassment was found but there was insufficient evidence of school officials' indifference to trigger liability.

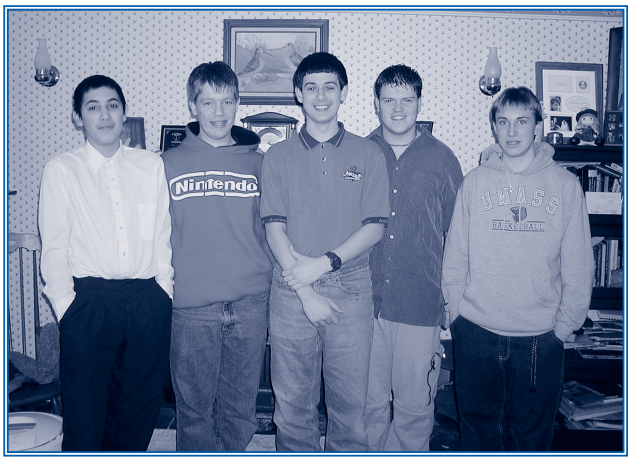
Assistant Attorney General Wan J. Kim, addressing religious discrimination against Muslims in a speech to the American-Arab Anti-Discrimination Committee.

The second largest number of cases involved religious expression. These cases have involved speech in two basic contexts. One context is speech by students outside any organized school activity. For example, the Division filed a friend-of-the-court brief in the case of a group of Massachusetts high school students who were suspended for handing out candy canes to other students with religious messages attached.[29] The court agreed that the students' First Amendment rights had been violated. The second context is school-sponsored, non-curricular expressive activities in which students are given freedom to choose their own speech, and then are censored when they choose something with religious content. For example, in *O.T. v. Frenchtown Elementary School District Board of Education*,[30] a federal court agreed with the Division that a public school student whose chosen song for an evening talent show at her school was unconstitutinally censored because it was a Christian song. An example of this in the higher education context is the case of Indian River Community College in Florida, which told the Christian Student Fellowship that it could not show *The Passion of the Christ* on campus purportedly on the grounds that it was R-rated. However, the Fellowship alleged that at least one other R-rated movie had been shown on campus and that a student-run "No Shame Theater Company" performed plays with sexually explicit themes. The school reversed itself and permitted the film's showing the same day that it received the Civil

[29] *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).
[30] No. 05-2623 (D.N.J. Dec. 12, 2006).

"At the heart of the school's argument lies a widely held misconception of constitutional law that has infected our sometimes politically overcorrect society: The Establishment Clause does not apply to private action; it applies only to government action. . . . [T]he uncontroverted evidence shows that those students finding the L.I.F.E. Club's religious message disagreeable merely set the messages aside and enjoyed a minty treat for their troubles."

— Judge Frank H. Freedman, Westfield L.I.F.E. Club v. City of Westfield



Members of the Westfield L.I.F.E. Club, who were suspended for handing out candy canes with religious messages attached.

Rights Division's letter opening an investigation.

The third category of education cases involves schools denying religious groups access to school facilities after-hours on an equal basis with other groups. The Civil Rights Division's Educational Opportunities Section opened investigations in four such cases, and the Division's Appellate Section filed appellate briefs in an additional three cases. In 2001, the Supreme Court ruled in *Good News Club v. Milford Central School*[31] that a school that opened its facilities after-hours to a wide range of community organizations offering "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community" could not bar the Good News Club, a Christian organization that holds weekly activities for children involving Bible stories, religious lessons, and songs, from using the facilities on an equal basis with other groups.

Despite the *Good News Club* decision, there has been continued resistance by school boards to its requirement of equal access. The Civil Rights Division has been involved in three types of equal-access cases involving resistance to *Good News Club*. In the first type, schools argue that while they understand that they must provide religious community groups with the same access as other youth-serving community groups, they do not have to provide the religious groups with the same means of communicating to students and distributing permission slips that are provided to other youth organizations. The Civil Rights Division filed friend-of-the-court briefs in two cases arguing that *Good News Club* requires equal access to communications media such as bulletin boards, tables at back-to-

[31] 533 U.S. 98 (2001).

school night, and "backpack mail." Courts of appeals agreed in both cases.[32] In the second type of equal-access case, schools admit that they must allow groups like the Good News Club to meet, but require them to pay a fee that other youth-serving organizations do not have to pay. The Civil Rights Division opened investigations in two such cases, both of which resulted in settlements. The third type of equal-access case has involved schools saying that while *Good News Club* allows religious organizations an equal right to meet in school facilities, they may not engage in worship. The Civil Rights Division filed briefs in two such cases, arguing that worship is a form of speech that may not be discriminated against, and in both cases the courts agreed.[33]

"The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."

– Justice Clarence Thomas, writing for the Court in Good News Club v. Milford Central School (2001)

The fourth category of education cases includes four cases in which students alleged that they were excluded from higher educational opportunities because of their religious beliefs. For example, the Division investigated Texas Tech University over the policy stated on a biology professor's official university website that he would only give medical school recommendations to students who would "truthfully and forthrightly affirm" a belief that humans came into existence through evolution. The investigation was closed when the professor agreed simply to require students to explain the scientific theory of evolution.

The fifth category of cases consists of investigations in which students are denied the right to wear religious headcoverings at school. For example, in *Hearn and United States v. Muskogee Public School District*,[34] the Civil Rights Division intervened in the case of a Muslim girl told that she could not wear a headscarf required by her faith to school. The Civil Rights Division's suit was based on the fact that the school was enforcing its uniform policy in an inconsistent manner. The case was settled by consent decree in May 2004. Two additional headcovering cases were resolved after initiation of investigations.

[32] *Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship v. Montgomery County Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004).

[33] *Bronx Household of Faith v. Board of Educ. of the City of New York*, 331 F.3d 342 (2d Cir. 2003); *Campbell v. St. Tammany Parish Sch. Bd.*, No. 98-CV-2605 (E.D. La. July 30, 2003). The *Bronx Household* brief was handled by the Civil Rights Division's Appellate Section and thus is not included in the statistics in this section of the report. As described in Section H below, the Civil Rights Division filed a second appellate brief in a further proceeding in the *Bronx Household* case, which is pending.

[34] No. Civ. 03 598-S (E.D. Okla. 2003).

The sixth category of education cases involves students who are denied excused absences for religious holidays. In *Scheidt v. Tri-Creek School Corporation*,[35] a boy in Indiana was threatened with suspension, and his mother was threatened with child neglect, when he missed several days of school for religious holidays. The school permitted only one excused absence per year for religious holidays, even though more days are permitted for secular reasons that included attending the state fair and serving as a page in the state legislature. The Civil Rights Division opened an investigation and submitted an amicus brief in a private suit filed by the boy's mother. The school board settled and changed its policy to permit excused absences for religious holidays. Cases in a different state involving similar facts are under investigation.

The next category involves states discriminating against students using neutrally available scholarships toward education at religiously affiliated schools. In *Colorado Christian University v. Weaver*,[36] the Division's Educational Opportunities Section filed a friend-of-the-court brief arguing that a Colorado program providing financial aid to Colorado residents unconstitutionally bars students from using their scholarships to attend religious colleges and universities. The brief argued that the Supreme Court's decision *Locke v. Davey*,[37] which permits states to bar students from using state funds to pay for ministry-training programs at seminaries, did not apply to students using scholarships for general education at colleges and universities that are religiously affiliated.

Finally, the Division investigated one case involving allegations that a university did not accommodate the dietary needs of Jewish students.

[35] No. 2:05-CV-204 (N.D. Ind., complaint filed May 18, 2005).
[36] No. Civ. 04-2512 (D. Colo., complaint filed December 6, 2004).
[37] 540 U.S. 712 (2004).

B. Employment

People should be hired or not hired because of their skills and merit, not because of their faith. And people should not be forced to choose between their faiths and their jobs.

Title VII of the Civil Rights Act of 1964[38] prohibits discrimination in public and private employment. It also requires employers to make reasonable accommodation of employees' religious observances and practices, unless doing so would cause undue hardship.[39] Section 702 of Title VII[40] protects the independence and autonomy of religious institutions by permitting them to consider religion in hiring decisions. The Civil Rights Division has responsibility for bringing suits under Title VII against state and local governmental employers. Under § 706 of Title VII,[41] individual cases of discrimination against state and local governmental entities must be filed in the first instance with the Equal Employment Opportunity Commission (EEOC), which can refer cases to the Civil Rights Division. The Civil Rights Division then opens a supplemental investigation, if warranted, to determine if a lawsuit is appropriate. When a pattern or practice of discrimination by a governmental entity is alleged, the Civil Rights Division may file suit on its own volition under § 707 of Title VII.[42]

The Civil Rights Division opened 31 supplemental investigations in religious discrimination cases referred by the EEOC from 2001 to 2006, compared to 26 in the prior six years. The Division reached five consent decrees or settlements from 1995-2000 and six from 2001-2006. The Civil Rights Division filed three pattern-or-practice cases under § 707 of Title VII involving religious discrimination from 2001-2006, compared to none during the prior six-year period.

In *United States v. Los Angeles County Metropolitan Transit Authority*,[43] the Civil Rights Division filed a § 707 suit against the LA MTA over its policy of refusing to accept bus driver applications unless the applicant indicated that he or she was available to work 24 hours per day, seven days a week. The suit alleged that this policy discriminated against Sabbath-observant Jews and Christians, and others who must miss work on certain days for religious reasons, by failing to make any effort to provide them with the religious accommodation Title VII requires. The Civil Rights Division reached a consent decree that requires the MTA to accept the applications of Sabbath-observant applicants; provide applicants with information about their accommodation rights; permit drivers to swap assign-

[38] 42 U.S.C. § 2000e *et seq*.
[39] 42 U.S.C. § 2000e(j).
[40] 42 U.S.C. § 2000e-1(a).
[41] 42 U.S.C. § 2000e-5.
[42] 42 U.S.C. § 2000e-6.
[43] No. CV 04-07699 (C.D. Cal., consent decree entered October 4, 2005).

ments with other drivers, and when no acceptable assignment is possible either through use of seniority rights or swaps, permit drivers to take temporary leaves of absence; and provide information about religious accommodation in marketing literature and in its training programs for supervisors.

Special Counsel for Religious Discrimination Eric Treene speaking with Harpreet Singh of United Sikhs after a speech at a Gurdwara in Virginia.

In *United States v. New York Metropolitan Transit Authority*,[44] the Civil Rights Division alleges that the New York MTA discriminates against Muslim and Sikh bus and subway drivers by refusing to permit them to wear headscarves and turbans. The suit alleges that the Muslim and Sikh drivers are forbidden to wear these religious headcoverings with their uniforms, while other MTA workers are allowed to wear non-regulation headgear, such as baseball caps, without penalty. The case is pending.

In *United States v. State of Ohio*,[45] the Civil Rights Division filed suit against the State of Ohio over its refusal to accommodate certain employees' religious objections to supporting the state employees' union through compulsory fees. The suit alleged that employees who are members of churches that have "historically held conscientious objections to joining or financially supporting" unions were permitted to pay an amount equal to the union service fee to a charity mutually agreeable to the employee and the union. However, the suit alleged that Ohio had refused to extend this exemption to state employees with sincere religious objections to supporting the union, but who did not belong to such churches. The case arose out of a complaint from an employee of the Ohio Environmental Protection Agency, who is Presbyterian and objected to supporting the union because he alleged that the union and its affiliates supported abortion and same-sex marriage. In September 2006, the court approved a consent decree requiring that all sincere religious objectors be permitted to direct their fees to charity.

[44] No. CV-04 4237 (E.D.N.Y., complaint filed September 30, 2004).

[45] No. 2:05-CV-00799-GLF-NMK (S.D. Ohio, consent decree filed September 5, 2006). The Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO was also a defendant in the case pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

The Civil Rights Division also files briefs to ensure that Title VII is properly interpreted to prevent religious discrimination and protect religious liberty. In *Baker v. The Home Depot*,[46] the Civil Rights Division filed a joint friend-of-the-court brief with the EEOC, arguing that offering an employee only the morning off to attend worship services on the Sabbath was not a reasonable accommodation under Title VII when the employee's faith required refraining from work on the Sabbath altogether. The court of appeals agreed, and remanded the case to the trial court to determine whether permitting the employee to refrain from work on the Sabbath would be an undue hardship for the defendant.

"The notion that the Constitution would compel a religious organization contracting with the state to secularize its ranks is untenable in light of the Supreme Court's recognition that the government may contract with religious organizations for the provision of social services. . . . Just because the Constitution may require that the content of government-funded services be secular does not mean that the providers cannot feel a sense of spiritual fulfillment in providing them."

– Judge Sidney H. Stein
in Lown v. Salvation Army

In *Lown v. Salvation Army*,[47] a group of current and former Salvation Army employees sued the Salvation Army and New York City and State officials, claiming that because the Salvation Army contracts with the City to provide a variety of services, including adoption, foster care, hospice care, and many other social services, the Salvation Army could no longer use religious criteria in its hiring and staffing decisions. Section 702 of Title VII protects the independence and autonomy of religious organizations by exempting them from the prohibition against discrimination in employment on the basis of religion. The plaintiffs, however, argued that it would violate the Establishment Clause for the Salvation Army to invoke this provision when contracting with the government. The Civil Rights Division filed a brief arguing that so long as the services being provided under the contract were secular in nature, the Salvation Army did not lose its right to define and preserve its character and identity as a religious organization through its personnel practices. The court agreed and ruled in favor of the Salvation Army and the other defendants.

[46] 445 F.3d 541 (2d Cir. 2006).
[47] 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

C. Housing and Lending Discrimination

Finding the right home, and finding the financing necessary to pay for it, has long been part of the American dream. That dream should not be denied because of discrimination or harassment based on religion. Federal civil rights laws protect against denial of housing or credit based on religion. The housing protections apply to discrimination in the sale or rental of housing, but also apply to the "terms and conditions" of the sale or rental of housing. Thus, if people are permitted to put decorations on their apartment doors, religious individuals should be able to put religious items or decorations on their doors, such as a Jewish mezuzah or a cross. Similarly, when condominiums or apartments have a common room that can be reserved by residents for private activities like parties or book studies, residents seeking to hold a Bible study or other private religious activity may not be discriminated against. The Civil Rights Division has been actively protecting against all forms of religious discrimination in housing and lending.

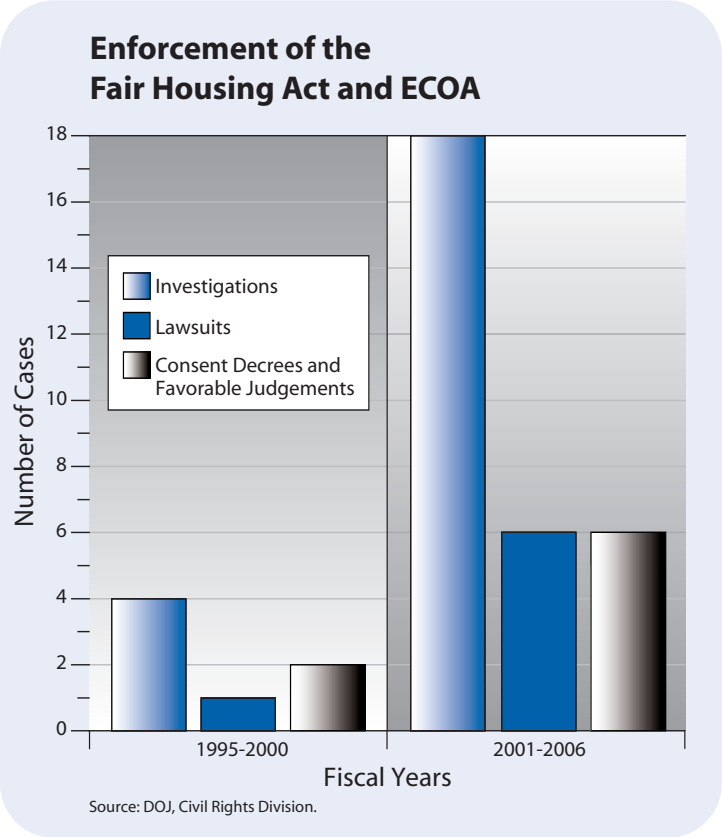
The Civil Rights Division's Housing and Civil Enforcement Section enforces the Fair Housing Act,[48] which prohibits housing discrimination on the basis of race, color, religion, sex, national origin, disability, or familial status. It also enforces the Equal Credit Opportunity Act (ECOA),[49] which prohibits discrimination against persons seeking home mortgages or other credit based on race, color, religion, national origin, sex, marital status, age, or because an applicant receives income from a public assistance program.

Finding the right home, and finding the financing necessary to pay for it, has long been part of the American dream. That dream should not be denied because of discrimination or harassment based on religion.

The Civil Rights Division has succeeded in increasing enforcement of the religious discrimination provisions of the Fair Housing Act and ECOA over the past six years. The Housing and Civil Enforcement Section opened eighteen investigations under the Fair Housing Act and ECOA in cases charging religious discrimination from 2001-2006,

[48] 42 U.S.C. § 3601.
[49] 15 U.S.C. §§ 1691, 1691a-f.

compared to four from 1995-2000. These cases covered a wide range of issues, including harassment based on religion, denial of housing because of the religion of the prospective purchaser or renter, and discrimination in the terms and conditions of housing, including display of religious items on doors and use of common rooms in apartments.



The Housing and Civil Enforcement Section filed six lawsuits under the Fair Housing Act and ECOA involving religious discrimination claims from 2001-2006, versus only one lawsuit in the prior six-year period. All six of these lawsuits resulted in consent decrees or settlements, providing comprehensive relief to the victims and instituting measures to ensure that the defendants would not engage in discrimination in the future.

For example, in *United States v. Hillman Housing Corporation, Hy Meadows*,[50] the United States alleged that a couple's application to buy an apartment in New York had been denied because of their faith and ethnicity. The Department of Justice obtained a consent decree requiring the defendants to pay damages to the couple and to follow advertising, record-keeping, and reporting standards to ensure that they do not discriminate in the future. In *United States v. Fidelity Federal Bank*,[51] the Department reached a settlement with a bank in a case alleging, among other violations of ECOA, that the bank collected data on credit applicants' religious affiliation. In addition to paying compensation to victims denied credit, the settlement requires the implementation of a comprehensive change in policies and provision of fair-lending training to employees.

[50] No. 02-0626 (S.D.N.Y, consent decree entered October 27, 2004).
[51] No. 02-03906 (E.D.N.Y., filed July 8, 2002).

Religious harassment is a form of discrimination barred by the Fair Housing Act. The Civil Rights Division is committed to ensuring that people of all faiths are secure in their homes, free of harassment based on their religion. In *United States v. Altmayer*,[52] for example, the Civil Rights Division reached a consent decree in a case alleging that a man in a Chicago suburb harassed his neighbors and their children because of their Jewish religion and because they were of Israeli and Mexican origin. The consent decree required the defendant to pay $15,000 in damages, barred him from harassing his neighbors in the future, and required him to attend fair housing training. A similar consent decree was reached in *United States v. Schmock*,[53] in which the United States alleged that a Sikh family was harassed by neighbors.

While harassment suits usually are brought against the individual perpetrating the harassment, sometimes a pattern of harassment is so pervasive, and the indifference of a landlord so severe, that a landlord can be liable under the Fair Housing Act. Thus, in *United States v. San Francisco Housing Authority*,[54] the Civil Rights Division brought suit based on a number of claims, including the Housing Authority's failure to take measures to stop threats and violence against Muslim tenants following the September 11, 2001 terrorist attacks. The Division obtained a consent decree that included compensation for the victims, implementation of new policies to address civil rights complaints in public housing in San Francisco, and training for employees.

The Civil Rights Division also has investigated cases involving various forms of denial of equal terms and conditions of housing on the basis of religion that have been resolved prior to filing suit, or are pending. These include allegations of denying residents the ability to reserve common rooms for religious purposes on an equal basis with other private uses, to display a religious statue on the balcony of a residence, and to install mezuzahs on doorframes, among others.

[52] No. 05-1239 (N.D. Ill., consent decree entered January 18, 2006).
[53] No. 5:00-21289 (N.D. Cal., consent decree entered February 26, 2001).
[54] No. 4:02-04540 (N.D. Cal., consent decree entered January 16, 2004).

D. Public Accommodations and Public Facilities

People should not have to hide their faith when they go out in public. When going to a restaurant or other business open to the general public, people should not be turned away or harassed by the proprietors or patrons because they are wearing a cross, a headscarf, or a yarmulke.

The Civil Rights Division's Housing and Civil Enforcement Section enforces Title II of the Civil Rights Act of 1964,[55] which prohibits discrimination in public accommodations such as restaurants and motels on the basis of race, color, religion, or national origin. The Department of Justice may bring a suit under Title II when there is a pattern or practice of such discrimination. From 2001-2006, the Division opened eight Title II investigations involving religion, compared to one in the period from 1995-2000. These cases have involved a range of issues. For example, the Division settled a case in which a restaurant in Springfield, Virginia, told a Sikh man that he had to remove his turban to enter the restaurant. The settlement required posting of non-discrimination notices and other publication of its non-discrimination policies, and training for the restaurant company's employees. Two similar cases in Pennsylvania were resolved quickly by the establishments in response to Civil Rights Division investigations.

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination on the ground of race, color, religion, or national origin."

– From Title II of the Civil Rights Act of 1964

While Title II of the Civil Rights Act of 1964 protects against discrimination in public accommodations, which are privately owned businesses open to the general public, Title III of the Act[56] protects against discrimination in public facilities, which are publicly owned and operated facilities open to the public, such as parks and community centers. Title III authorizes the Department of Justice to bring suit when a person has been denied equal access to public facilities on account of race, color, religion, or national origin. Just as businesses should be open to people of all faiths, who should not be required to hide their faith to use them, so too should public facilities be open to use by all. The Division opened two Title III investigations involving religion from 2001-2006, versus none from 1995-2000.

In November 2003, the Civil Rights Division opened a Title III investigation of the City of Balch Springs, Texas, after the city-run senior center told seniors

[55] 42 U.S.C. § 2000a *et seq*.
[56] 42 U.S.C. § 2000b *et seq*.

that they could no longer pray before meals, sing Gospel songs, or hold Bible studies. All of these activities were initiated and engaged in by the seniors alone, and no employee of the center was involved. Nonetheless, the city mistakenly believed that the separation of church and state required it to implement the ban. In addition to the Civil Rights Division investigation, the seniors filed suit alleging that their constitutional rights were violated by the ban. After mediation by the Civil Rights Division, the city settled with the seniors on January 8, 2004.[57]

The Civil Rights Division also opened a Title III investigation of the City of Terrell, Texas, in May 2004 after the city refused to allow a local church to continue renting space in the town's YMCA, which was in a city-owned building that the YMCA leased. The city believed that permitting worship in a building owned by the city would violate the Constitution's Establishment Clause. The church filed suit against the city, arguing that based on a long line of Supreme Court decisions, cities and towns that offer space in government facilities to community organizations for private expression must provide them on an equal basis to community organizations that wish to use the space for religious expression. The city voted to reverse its policy in October 2004, and the Civil Rights Division subsequently closed its investigation.

Barney Clark, a member of the Balch Springs Senior Center, who joined a suit to protect the right to pray before meals, hold Bible studies, and sing Gospel songs at the center.

The Civil Rights Division also has filed friend-of-the-court briefs advancing the principle that citizens wishing to use community facilities for religious expression should be granted the same access as other citizens.

In *Barnes Wallace v. Boy Scouts of America*,[58] the Civil Rights Division submitted a brief arguing that the Boy Scouts' leasing of parkland from the City of San Diego does not violate the Constitution.

[57] *Barton v. City of Balch Springs*, No. 3:03-CV-2258-G (N.D. Tex., complaint filed September 30, 2003).
[58] Nos. 04-55732, 04-56167 (9th Cir., brief filed February 15, 2005).

The court below had held that the Boy Scouts of America is a religious organization, and therefore leases under which the Boy Scouts developed and operated a campground and a boating center on city parkland violated the Establishment Clause. The Civil Rights Division's brief argued that the Boy Scouts' requirement that Scouts be reverent does not make it a religious organization. The brief further argued that even if it were a religious organization, low-cost leases to the Boy Scouts, in return for which the Boy Scouts invested several million dollars and agreed to keep the facilities open to the public, were similar to leases San Diego made with other community groups to develop under-used city properties. Since the leasing program did not favor religious organizations, and since the particular leases in question involved making land available for the purely secular activities of boating and camping, the brief concluded that the lease with the Boy Scouts did not violate the Establishment Clause.[59]

[59] Other equal-access cases, involving community groups seeking access to school facilities after hours, are addressed in the Education section of this report. See Part II.A., *supra.*

E. RLUIPA — Land Use

Religious freedom would be an empty concept if people did not have the right to have a place to gather for worship, religious instruction, and other religious activities. Our Constitution recognizes that religious liberty is not merely a right to be exercised individually. The Supreme Court has stated that "the 'exercise of religion' often involves not only belief and profession but the . . . assembling with others for a worship service."[60]

The need for a place to worship has long been recognized. For example, the Connecticut constitution, enacted in 1817, provides explicitly that all religious societies and denominations shall have the right "to build and repair houses for public worship."[61] The right to build, buy, or lease a place to assemble for worship is an indispensable part of religious freedom. For many faith groups, the same is true of schools for religious instruction. Religious groups simply cannot exercise their faiths without facilities adequate for their needs.

But houses of worship and religious schools often face discrimination from local zoning authorities, or face unjustifiably burdensome restrictions on their ability to use their property for worship and religious instruction. In nine hearings over the course of three years that led to the enactment in 2000 of the Religious Land Use and Institutionalized Persons Act (RLUIPA),[62] Congress compiled what it termed "massive evidence" of widespread discrimination against religious institutions by state and local officials in land-use decisions.[63] In particular, Congress found that minority religions are disproportionately disadvantaged in the zoning process. For example, Congress found that while Jews make up only 2% of the U.S. population, 20% of recorded cases involved synagogues.[64] Faith groups constituting 9% of the population made up 50% of reported court cases involving zoning disputes.[65]

Congress found that even well-established religious denominations frequently faced discrimination and exclusion. Zoning codes and landmarking laws, Congress found, sometimes exclude religious assemblies in places where they permit fraternal organizations, theaters, meeting halls, and other places where large groups of people assemble for secular purposes. In other situations, Congress found that zoning codes or landmarking laws may permit religious assemblies only after highly discretionary proceedings before zoning boards or

[60] *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).
[61] C.G.S.A. Const. Art. 7.
[62] 42 U.S.C. § 2000cc *et seq*.
[63] *See* H.R. Rep. No. 219, 106th Cong., 1st Sess. 18-24 (1999).
[64] *Id*. at 21.
[65] *Id*. at 20.

landmarking commissions, which can and often do use that authority in discriminatory ways.[66]

To address these concerns, Congress unanimously enacted RLUIPA. RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions unless it is the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where (i) the state or local government entity imposing the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.[67]

"The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes."

– Joint Statement of Senators Orrin G. Hatch and Edward M. Kennedy, Senate Sponsors of RLUIPA

In addition, RLUIPA prohibits zoning and landmarking laws that (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions; (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination; (3) totally exclude religious assemblies from a jurisdiction; or (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.[68]

In addition to creating a private cause of action, RLUIPA authorizes the Attorney General to bring suits to enforce it. The Attorney General has delegated this responsibility to the Civil Rights Division. Cases under the land-use provisions are handled by the Division's Housing and Civil Enforcement Section. Since 2001, the Division has reviewed 118 RLUIPA matters. The Division has opened 26 full-field investigations, 16 of which have been resolved favorably prior to filing a lawsuit. The Division has also filed four lawsuits, two of which it won through settlement or consent decree, and two of which are pending. The Division's cases have been quite diverse. They have involved the rights of a Muslim school, two mosques, a Jewish boarding school, several synagogues, a Buddhist temple, a Sikh Gurdwara, and churches and schools of various Christian denominations. The Division has also filed seven friend-of-the-court briefs in significant federal appellate cases involving RLUIPA.

[66] *Id.* at 19-24.
[67] 42 U.S.C. § 2000cc(a).
[68] 42 U.S.C. § 2000cc(b).

The Muslim Community Center in Morton Grove, Illinois, which reached an agreement with the city to build a mosque with the help of Department of Justice mediators.

Five of the Division's 26 investigations have principally involved issues of discrimination based on religious or ethnic animus toward the particular group denied the ability to build or expand a religious school or house of worship or to occupy an existing property. For example, the Division filed suit in April 2005 against the city of Hollywood, Florida, after it denied a permit to an Orthodox Jewish synagogue located in a residential neighborhood which, the suit alleged, was routinely granted to other houses of worship.[69] The suit alleged that the denial and subsequent enforcement actions taken by the city against the synagogue were a result of discrimination toward Orthodox Jews. The Division reached a consent decree with the city and the synagogue that permits the synagogue to continue to operate at the location and to expand in the neighborhood in the future. It also requires training for city officials. A separate agreement signed at the same time required the city to pay $2 million in damages and attorneys fees to the synagogue.

Similarly, a Muslim school in Morton Grove, Illinois encountered community opposition to its plans to build a mosque on its property, some of which appeared to be driven by animus against Muslims. The Civil Rights Division opened a RLUIPA investigation, and, after mediation by the Department of Justice's Community Relations Service, the village reached an agreement that permitted the school to build the mosque subject to certain conditions. Favorable outcomes were also reached prior to filing suits in the case of a predominantly black Christian church that was denied a use permit for a church that it purchased from a predominantly white Christian church in West Mifflin, Pennsylvania, and in the case of a Muslim school in Loudoun County, Virginia that faced zoning problems that the school alleged

[69] *United States v. City of Hollywood*, No. 05-60687 (S.D. Fla., consent decree entered July 7, 2006).

were due to anti-Muslim bias. In *United States v. Village of Airmont*,[70] the United States alleges that a New York village enacted a ban on boarding schools specifically to keep Hasidic Jews, who educate their young men in boarding schools called yeshivas, from settling in the village. The case is pending.

Many of the Division's RLUIPA cases have involved jurisdictions that facially discriminate against houses of worship in their zoning laws by either banning them from zones where fraternal organizations, movie theaters, and other places of assembly are permitted, or by minimum-acreage requirements for houses of worship that do not apply to secular assemblies. For example, Brighton Township denied a permit for an Assemblies of God church to build on a 3.25 acre lot, since the zoning code had a five-acre minimum for churches. However, the zoning code specifically stated that there was no minimum acreage requirement for adult movie theaters and cabarets, assembly halls, and fraternal organizations. The Civil Rights Division opened an investigation, and the Township amended its zoning code. The Division opened a similar investigation of Douglas County, Georgia after Victory Family Life Church was denied the ability to build a new sanctuary on land it had occupied for 20 years because its 2.8 acres were below the 3 acres now required for churches, despite other assemblies being permitted on small plots. The Division closed its investigation after a state court judge struck down the limit and the County Board of Commissioners granted the necessary permits.

Victory Family Life Church in Douglas County, Georgia, barred from expanding because its 2.8 acres put it below the zoning code's 3-acre minimum for churches, a requirement that did not apply to secular assemblies.

In *Midrash Sephardi v. Town of Surfside*,[71] two Orthodox Jewish Congregations were barred from meeting in space they had rented above a bank in the city's commercial district. The City's zoning code permitted private clubs, lodge halls, dance studios, music studios, and language schools in the com-

[70] No. 05-Civ. 5520 (S.D.N.Y., filed June 10, 2005).
[71] 366 F.3d 1214 (11th Cir. 2004).

mercial district, but excluded houses of worship. The Civil Rights Division submitted a friend-of-the-court brief in the U.S. Court of Appeals for the Eleventh Circuit, which ruled that the exclusion of houses of worship from the commercial district violated RLUIPA.

The third category of RLUIPA cases handled by the Civil Rights Division involves zoning decisions that allegedly impose a substantial burden on the religious exercise of a congregation or religious school. These cases often involve elements of the prior two categories of cases — allegations of possible discrimination on the basis of religion or ethnicity, or more favorable treatment given to secular assemblies than religious ones. For example, in *United States v. Maui County*,[72] the Civil Rights Division sued the city of Maui after it denied a permit for Hale O Kaula, a small, nondenominational Christian church that has held services on Maui since 1960, to build a church on 5.85 acres of land in an agricultural district. The church encourages practitioners to grow food in accordance with Biblical principles and live in harmony with the land, and being in an agricultural district was integral to its worship needs. The county permitted various secular assemblies in the district, including rodeo facilities, petting zoos, and sports fields. The county subsequently settled with the church, permitting it to build and paying it damages and attorney's fees. Other cases in this category include Balch Springs, Texas, where an investigation led to a small, predominantly Hispanic church being given the building permits to which it was entitled as of right under the zoning code,[73] and *Guru Nanak Sikh Society v. County of Sutter*,[74] in which a Sikh congregation in a California county that only permits houses of worship in residential and agricultural districts first purchased land in a residential district, was denied a permit, and then purchased land in an agricultural district, only to be denied a permit there as well. The United States intervened in this case and argued that the congregation's rights under RLUIPA had been violated, and the court of appeals agreed.

The Department of Justice also has been active in defending the constitutionality of RLUIPA. The Civil Division has intervened in 29 privately filed lawsuits to defend the constitutionality of the land-use provisions of RLUIPA.

[72] 298 F. Supp. 2d 1010 (D. Haw. 2003).
[73] *Templo La Fe Worship Ctr., Inc. v. City of Balch Springs*, No. 04-1369 (N.D. Tex. 2004).
[74] 456 F.3d 978 (9th Cir. 2006).

F. Rights of Institutionalized Persons

The Civil Rights Division's Special Litigation Section is charged with enforcing federal laws protecting the rights of persons in certain state institutions, including prisons, juvenile detention facilities, mental institutions, and nursing homes.

Section 3 of RLUIPA[75] provides that if a regulation imposes a substantial burden on the religious beliefs or practices of persons confined to certain institutions, the government must show a compelling justification, pursued through the least restrictive means. In addition to creating a private cause of action for institutionalized persons, RLUIPA also authorizes the Attorney General to bring suits to enforce this provision.

Under the Civil Rights of Institutionalized Persons Act (CRIPA),[76] the Special Litigation Section of the Civil Rights Division can investigate institutional conditions and file lawsuits to remedy a pattern or practice of unlawful conditions. From 2001 to 2006, the Civil Rights Division opened 67 new CRIPA investigations and issued 51 "findings letters," which are statements to the state or governing authority of violations found. In two of these CRIPA investigations, the Civil Rights Division found that juveniles in detention facilities in Raymond and Columbia, Mississippi and in Alexander, Arkansas were being denied their constitutional rights by being required to participate in religious programs or face discipline. In the findings letters in both cases, the Division stressed that religious activities can help further a juvenile facility's rehabilitative mission, and moreover that juveniles confined to a facility have a right under RLUIPA to engage in religious activities. Thus the institutions can, and should, provide opportunities for religious instruction and worship, the letters stated. However, the Civil Rights Division further stated that the institutions had created situations forbidden by the Establishment Clause where juveniles were required to participate in Christian services. In response, the Mississippi facilities changed their policies, and now inform juveniles in the facility handbooks that they may request alternatives to the Christian services offered at the facilities and that they are not required to attend services. Similarly, the Arkansas Divisions of Youth Services and Human Services developed a policy and protocol that have remedied the constitutional problem.

In addition to enforcing the rights established by RLUIPA through CRIPA investigations, the Civil Rights Division's Special Litigation Section has opened 24 preliminary inquiries under RLUIPA since 2001. In a preliminary in-

[75] 42 U.S.C. § 2000cc-2.
[76] 42 U.S.C. § 1997 *et seq.*

quiry, attorneys from the Division correspond with or interview the institutionalized persons, family members, and clergy, review applicable institution regulations, review other factual materials, and determine if a potential violation has been established that justifies opening a formal investigation of the facility. These have resulted in one RLUIPA investigation since 2001. The subject matters of the Division's RLUIPA cases have included prisoners seeking access to clergy, prisoners seeking kosher meals or other special diets, prisoners seeking access to religious items or texts, and issues involving religious objections to grooming or uniform requirements.

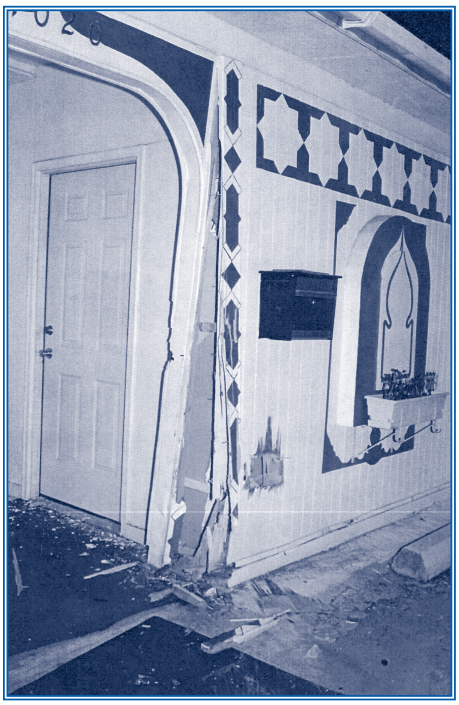
> *"RLUIPA . . . protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion. . . . We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."*
>
> *– Justice Ruth Bader Ginsburg, writing for the Court in Cutter v. Wilkinson (2005)*

The Department of Justice has also been active in defending challenges to the constitutionality of the institutionalized persons section of RLUIPA. The Department's Civil Division has intervened to defend the constitutionality of this section of RLUIPA in 40 cases. One of these cases, *Cutter v. Wilkinson*,[77] went to the Supreme Court, which rejected the claim that RLUIPA amounted to favoritism toward religion in violation of the Establishment Clause. Rather, the Supreme Court unanimously held: "[W]e find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."[78] The Court observed that "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[79] The Court, however, stressed that it did not view RLUIPA as leading to prisoners obtaining their desired religious accommodation in all cases, stating: "We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. . . . Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions."[80]

[77] 544 U.S. 709 (2005).
[78] *Id*. at 720.
[79] *Id*. at 721.
[80] *Id*. at 722-23.

G. Crimes Against Persons and Property Based on Religion

There is perhaps no religious right as basic as the right to gather for worship or simply walk down the street without fear of being attacked because of one's faith. The Civil Rights Division's Criminal Section, in conjunction with U.S. Attorney's Offices around the country, prosecutes violations of criminal civil rights statutes. In the area of religion-based bias crimes against individuals, these encompass 18 U.S.C. § 241 (conspiracy to deprive a person of his or her civil rights), 18 U.S.C. § 245 (criminal interference with federally protected activities), and 42 U.S.C. § 3631 (criminal interference with housing rights).



The front door of the Islamic Center of Tallahassee, after Charles Franklin drove his pick-up truck into it as revenge for the 9/11 attacks. Franklin was found guilty and sentenced to 27 months in prison.

Two provisions specifically address vandalism and arson of religious property and interference with persons' exercise of their religion at houses of worship. The Church Arson Prevention Act, 18 U.S.C. § 247, makes it a crime to deface, damage, or destroy religious real property, or interfere with a person's religious practice, in situations affecting interstate commerce. The Act also bars defacing, damaging, or destroying religious property because of the race, color, or ethnicity of persons associated with the property. Additionally, 18 U.S.C. § 248 also makes it a crime to, "by force or threat of force or by physical obstruction, intentionally injur[e], intimidat[e] or interfer[e] with or attemp[t] to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship" or to "intentionally damag[e] or destro[y] the property of a place of religious worship."

The number of prosecutions of religion-based attacks on individuals rose slightly from 1995-2000 compared to 2001-2006, with four prosecutions in the former and six in the latter. Prosecution of arson, threatened arson and vandalism against houses of worship declined over these periods, however, from 75 in the former to 26 in the latter. This was due in large part to a rash of church arsons in the

mid 1990s, which has since ebbed. Fifty of these prosecutions were during the three-year period from 1996-1998. These numbers reflect the decline in all categories of religious bias crimes, which, notwithstanding a rise in bias-motivated attacks on Muslims after the 9/11 terrorist attacks, overall went down by 20% from 1994 to 2003.[81]

The Civil Rights Conspiracy Statute, 18 U.S.C. § 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Examples of recent criminal cases involving religion include:

- *United States v. Laskey, et al.* (D. Or. 2006), in which four members of the white supremacist group known as the Volksfront pleaded guilty to throwing rocks with swastikas etched in them through the windows of a synagogue in Eugene, Oregon during services. One defendant was sentenced to 15 months imprisonment. The other sentencings are pending

- *United States v. Nunez-Flores* (W.D. Tex. 2005), in which a man pleaded guilty to throwing a Molotov cocktail at an El Paso mosque and placing another on its utility meter, resulting in a 171-month prison sentence.

- *United States v. Dropik* (E.D. Wis., W.D. Mich. 2005), in which a man pleaded guilty to burning two churches because he was angry at African-Americans, resulting in a 63-month sentence.

- *United States v. Bryant and Martin* (W.D. Va. 2004), in which two men pleaded guilty to vandalizing a historical African-American church by breaking windows in the sanctuary and smashing items throughout the church, resulting in sentences of 27 and 21 months in prison.

[81] Hate Crime Trends in the United States 8 (Federal Bureau of Investigation, November 21, 2005).

- *United States v. Franklin* (N.D. Fla. 2003), in which a man was convicted of driving his truck through the front door of a Tallahassee mosque and was sentenced to 27 months imprisonment.

- *United States v. Goldstein et al.*, (M.D. Fla. 2003), in which several individuals conspired to attack an Islamic Center and gathered weapons and explosives to carry out their conspiracy, resulting in a sentence for the lead defendant of 151 months in prison.

H. Religious Liberty in the Courts of Appeals

Through participation as friend-of-the-court in significant cases in the courts of appeals, the Department of Justice is committed to ensuring that the courts protect religious liberty. From 2001 to 2006, the Civil Rights Division filed 16 appellate friend-of-the-court briefs in a broad range of religion cases, compared to one brief from 1995-2000. This effort so far has been very successful. The courts, in the cases decided during 2001-2006, have agreed with the position advocated by the Civil Rights Division in almost every case. These appellate briefs, some of which are addressed more fully above, are:

- *Westchester Day School v. Village of Mamaroneck*, No. 06-1464 (2d Cir.) (brief filed August 11, 2006, pending decision) (arguing that the district court correctly held that a village violated a Jewish school's rights under the Religious Land Use and Institutionalize Persons Act (RLUIPA) when it denied it permission to expand its dilapidated and overcrowded facilities).

- *Bronx Household of Faith v. Board of Education of the City of New York*, No. 06-0725 (2d Cir.) (brief filed July 16, 2006, pending decision) (arguing that the school board's refusal to rent school facilities after hours to a church on an equal basis with other community organizations violated the Constitution; at an earlier stage of the proceedings, as described below, the appeals court agreed with the United States and upheld a preliminary injunction in favor of the church).

- *Lighthouse Institute for Evangelism v. City of Long Branch*, No. 06-1319 (3d Cir.) (brief filed June 7, 2006, pending decision) (arguing that a church bringing a claim based on RLUIPA's "equal terms" provision need only show discrimination against churches as compared to equivalent secular assemblies, and need not additionally show a "substantial burden" on its religious exercise).

- *Faith Temple Church v. Town of Brighton*, No. 06-0354 (2d Cir.) (brief filed May 24, 2006, case settled while appeal was pending) (arguing that abuse of eminent domain power to seize church land can violate RLUIPA).

- *Living Waters Church of God v. Meridian Charter Township*, No. 05-2309 (6th Cir.) (brief filed March 15, 2006, pending decision) (arguing that a church denied a permit to build in excess of 25,000 square feet was substantially burdened under RLUIPA because the church cannot carry out all of its ministries in a smaller building).

- *Faith Center v. Glover*, No. 05-16132 (9th Cir. 2006) (brief filed November 22, 2005) (arguing that a library that offered space to a wide

range of community groups for meetings could not exclude a religious group on the ground that part of its meetings would include worship activities; court ruled for defendants, finding worship to be distinguishable from speech with a religious viewpoint; petition for rehearing pending).

- *Baker v. The Home Depot*, No. 05-1069 (2d Cir. 2006) (joint brief with EEOC arguing that offering a Sabbath-observing employee the morning off to attend worship was not a reasonable accommodation under Title VII, since the employee's religious requirement was that he refrain from all work on the Sabbath; the appeals court agreed and reversed the decision of the district court).

- *Barnes Wallace v. Boy Scouts of America*, Nos. 04-55732, 04-56167 (9th Cir.) (brief filed February 15, 2005, pending decision) (arguing that San Diego's low-cost lease with the Boy Scouts to allow it to operate a campground and a boating center that are open to the public does not violate the Establishment Clause in light of the fact that the Boy Scouts' requirement of reverence does not make it a religious organization, and since similar leases are offered to many other community groups offering benefits to the public).

- *Saints Constantine & Helen Greek Orthodox Church v. City of Berlin*, No. 04-2326 (7th Cir. 2005) (arguing that a church need not show that there is no plot of land in a city where it could locate before it can show a substantial burden under RLUIPA; court agreed and ruled for the plaintiff).

- *Guru Nanak Sikh Society v. County of Sutter*, No. 03-17343 (9th Cir. 2006) (arguing as intervenor/*amicus curiae* that when the only zones in a county in which a house of worship could locate were in agricultural and residential districts, a Sikh congregation that was denied permits to build on land it purchased first in a residential district, and then in an agricultural district, and was willing to accept various reasonable conditions to ameliorate community impact, had demonstrated a substantial burden under RLUIPA; court agreed and held for the congregation).

- *Midrash Sephardi v. Town of Surfside*, No. 03-13858-CC (11th Cir. 2004) (arguing that a town barring two small Orthodox Jewish congregations from locating in its commercial district, but permitting fraternal organizations and other secular assemblies, violated the equal-terms provision of RLUIPA; court agreed and ruled for the plaintiff).

- *Child Evangelism Fellowship v. Montgomery County Public Schools*, No. 03-1534 (4th Cir. 2004) (arguing that a school that permitted various youth-serving organizations to dis-

tribute permission slips and informational literature about meetings could not discriminate against religious-oriented youth organization; court agreed and ruled for the plaintiff).

- *Child Evangelism Fellowship v. Stafford Township*, No. 03-1101 (3d Cir. 2004) (similar facts to *Montgomery County*; court also found for the plaintiff).

- *Donovan v. Punxsutawney School District*, No. 02-3897 (3d Cir. 2003) (arguing that barring a student-run Bible club from meeting during a school activity period when other noncurricular clubs could meet violated the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, and the Constitution; court agreed and ruled for the club).

- *Bronx Household of Faith v. Board of Education*, No. 02-7781 (2d Cir. 2003) (arguing that a church was likely to succeed on its claim that the school board's refusal to rent it facilities on an equal basis with other community organizations violated the Constitution; court agreed and upheld preliminary injunction for the church).

- *Bush v. Holmes*, No. 04-2323 (Fla. 2006) (arguing that were the court to construe Florida's Opportunity Scholarship Program to exclude students in religious schools under the State's "no aid to religion" provision, the exclusion would likely violate the United States Constitution; court did not reach this issue, instead striking down the entire program under a provision of the state constitution requiring "a uniform, efficient, safe, secure, and high quality system of free public schools").

Outreach

Experience in enforcing civil rights over the past 50 years has taught that a key to success is developing good working relationships with civil rights and community organizations. It is such groups on the ground that bring many cases to the Department of Justice's attention, help identify trends and issues, and help spread the word about people's rights. The Justice Department's partnerships with diverse groups and stakeholders are indispensable.

In the area of religious liberty, since 2001 the Civil Rights Division has met with more than 60 civil rights groups and religious denominations about religious liberty issues, including organizations representing Christians, Jews, Muslims, Hindus, Sikhs, and Native Americans. Senior Department of Justice officials have given speeches on religious liberty at events sponsored by the Union of Orthodox Jewish Congregations, Campus Crusade for Christ, Christian Leadership Ministries, Agudath Israel, United Sikhs, the Muslim Public Affairs Council, the North American South Asian Bar Association, the National Association of Muslim Lawyers, the American-Arab Anti-Discrimination Committee, and the Sikh American Legal Defense and Education Fund, among others.

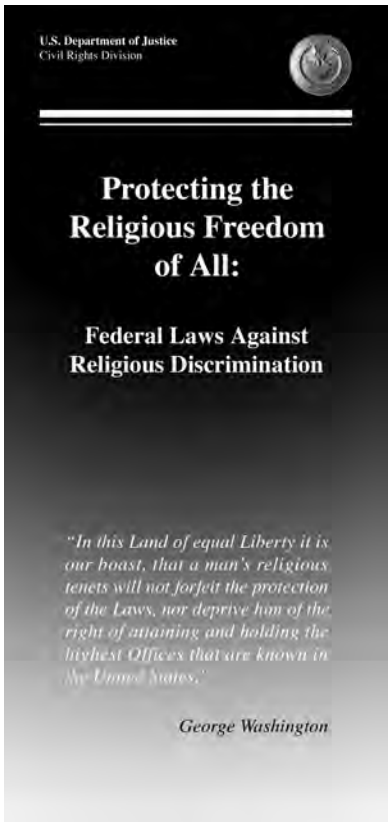
The Department of Justice provides a number of publications about religious liberty. In July 2006 the Civil Rights Division sent a letter to every religious denominational organization in the country, as well as every regional interfaith organization, providing information about its religious liberty efforts and enclosing copies of several informational brochures. Individual or bulk copies of these documents, or additional copies of this report, can be obtained free of charge by calling the Special Counsel for Religious Discrimination at (202) 353-8622 or by writing to:

Attorney General Alberto R. Gonzales speaking to Agudath Israel on religious discrimination and other issues at a briefing in Washington, D.C.

Special Counsel for Religious Discrimination
Office of the Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

These documents also can be downloaded from the Civil Rights Division website, *www.usdoj.gov/crt:*

1) PROTECTING THE RELIGIOUS FREEDOM OF ALL: FEDERAL LAWS AGAINST RELIGIOUS DISCRIMINATION: This 4" x 9", 11-page color booklet outlines the various religious liberty laws that the Department of Justice enforces, including information for filing complaints. A web-based version of the booklet can be printed by going to *http://www.usdoj.gov/crt/religdisc/religionpamp.htm.*

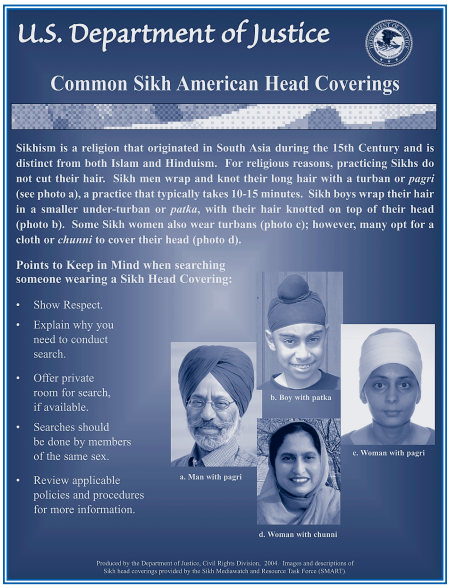


2) A GUIDE TO FEDERAL RELIGIOUS LAND USE PROTECTIONS: This three-page color information sheet explains the basics of RLUIPA and how the Department of Justice can assist congregations and religious schools when their rights are violated. The guide is available at *http://www.usdoj.gov/crt/religdisc/rluipa_guide.pdf.*

3) KNOW YOUR RIGHTS: FEDERAL LAWS PROTECTING RELIGIOUS FREEDOM: This one-page color fact sheet provides a brief overview of the laws protecting individuals and institutions from religion-based discrimination, and can be printed from the web at *http://www.usdoj.gov/crt/religdisc/know_your_rights.pdf.*

4) RELIGIOUS FREEDOM IN FOCUS: This periodic email update highlights religious liberty cases brought by the Department of Justice. To subscribe, send an email to *Jacqueline.Greene@usdoj.gov.* Back issues of this publication are available at *http://www. usdoj.gov/crt/religdisc/newsletters.html.*

An online version of this report, which can be viewed, downloaded or printed, is available at: *www.usdoj.gov/crt/religious_freedom_report.pdf.*



Posters produced and distributed by the Civil Rights Division encourage tolerance and accommodation by educating government officials, particularly law enforcement, about common headcoverings worn by Muslims and Sikhs.

The Civil Rights Division's experience over the past six years has shown that there is much that the Department of Justice can do to protect people from religious discrimination and enhance the religious freedom of all. The Department of Justice has already done much to expand enforcement in this area, but with the continued help of civil rights, community, and religious organizations, and with the sustained commitment of the Department to this important area, there is even more progress to be made.

United States Department of Justice
Civil Rights Division
www.usdoj.gov/crt