REPORT from the Capital

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◆ Development Update ◆

When you read 'Report,' you are not alone

When you opened this month's *Report from the Capital* you were joining thousands of others who care about preserving religious liberty for all. Did you know that more than 11,000 households across the country receive *Report from the Capital* each month? Or that Report keeps over 1,500 churches up-to-date with the latest in church – state news? *Report from the Capital* is read from Oxford, Mississippi to Oxford, United Kingdom (with Oxford, North Carolina, and Oxford, Florida in between)

Report from the Capital is one of the primary ways we communicate with you about the latest religious liberty issues at hand. The BJC works tirelessly to protect your first freedom. *Report from the Capital* tells you how.

You can tell others about the importance of defending religious liberty for all by sharing this edition of *Report from the Capital* with a friend or neighbor. Encourage them to go online and read more about the work of the BJC, **www.BJConline.org**. Or, we are happy to send a free copy of *Report from the Capital* to them – so they can check us out. Just let us know by calling Kristin Clifton at 202-544-4226 or emailing her, **kclifton@bjconline.org**.

Your support means the world to us. Thank you!

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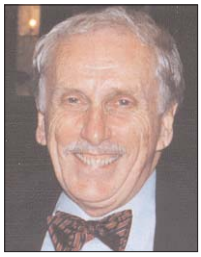
Dr. James M. Dunn, president of the Baptist Joint Committee endowment, will be honored by Baptists Today on Fri., April 24, at its ninth annual Judson-Rice Dinner. The event is being held in conjunction with the southeast regional gathering of the New Baptist Covenant at Wake Forest University Divinity School in Winston-Salem, N.C. The Judson-Rice Dinner is set for 5 p.m. at Wake Forest University's Bridger Field House. Tickets are $35 and may be purchased by calling **877-752-5658** or on the Web at **www.baptiststoday.org**.



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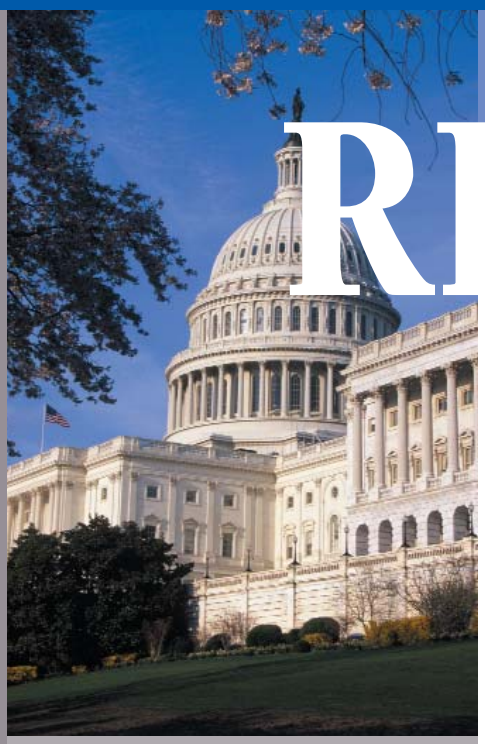

REPORT from the Capital

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INSIDE:

Supreme Court: Group cannot force city to erect monument

WASHINGTON — In a groundbreaking, but limited, free-speech case handed down Feb. 25, the Supreme Court said the city of Pleasant Grove, Utah, cannot be forced to accept the gift of a monument to a small religious group's precepts — even though the town already displays a donated monument to the Ten Commandments in its city-owned Pioneer Park.

But, in *Pleasant Grove City v. Summum* the opinion of a unanimous court also made clear the decision turned on whether the Decalogue monument was government speech or private speech — not on the religious content of the speech itself. That means the existing monument could still be open to a challenge under the First Amendment's Establishment Clause, which bans government endorsement of religion.

"The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were [city officials] engaging in their own expressive conduct? Or were they providing a forum for private speech?" wrote Justice Samuel Alito, who authored the court's opinion.

The decision overturns an earlier one by the 10th U.S. Circuit Court of Appeals. A panel of the lower court had said the sect, called Summum, has as much right to erect a monument in the park as the Fraternal Order of Eagles did in the 1970s, when it donated the Ten Commandments monument.

Leaders of the sect, based in nearby Salt Lake City, asked Pleasant Grove officials in 2003 to display the monument to the "Seven Aphorisms of Summum," which the 34-year-old group says were also handed to Moses on Mount Sinai along with the Decalogue.

The Aphorisms include such sayings as, "Everything flows out and in; everything has its season; all things rise and fall; the pendulum swing expresses itself in everything; the measure of the swing to the right is the measure of the swing to the left; rhythm compensates."

The courts have long established that government entities providing public forums for private speech — such as speakers' corners in city parks — cannot discriminate in what sorts of speech are allowed. But Alito said the Ten Commandments monument and other privately donated displays in the park have effectively become government speech, and therefore the city can refuse to endorse some messages.

This illustration by Summum shows its "Seven Aphorisms" monument (right) beside a Ten Commandments monument.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech," Alito wrote. "There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech."

Several justices wrote separate concurrences limiting the effect of Alito's opinion.

Justice David Souter, who concurred only in the judgment overall and not in Alito's reasoning, noted that the case is one of the first in which the relatively new government-speech doctrine has been illuminated regarding public monuments. But, he envisioned situations in which the doctrine may come into conflict with existing court precedent on the Establishment Clause.

—ABP and staff reports

Supreme Court to consider case of cross monument in Mojave Desert

The U.S. Supreme Court decided Feb. 23 to consider a case about a controversial eight-foot cross that was erected as a war memorial on federal property in California.

The legal battle surrounding the memorial in the Mojave National Preserve in San Bernardino County, Calif., has pitted veterans groups against advocates for church-state separation.

The 9th Circuit Court of Appeals ruled that the cross and a 2004 congressional statute designed to maintain its placement is unconstitutional.

"It is bad enough to say that the veterans' memorial is unconstitutional, but it is outrageous to say that the government cannot give the monument back to the people who spilled their blood and put it there in the first place,'' said Kelly Shackelford, chief counsel of Liberty Legal Institute and attorney for the VFW and other veterans groups, which sought the high court's review of the case.

After the National Park Service denied a request to erect a Buddhist shrine in the preserve, a visitor to the preserve sued in 2001 because the property was not "open to groups and individuals to erect other free-standing, permanent displays."

The American Civil Liberties Union has represented that visitor, Frank Buono, a former assistant superintendent at the preserve.

"The appeals court rightly found that the statute did not solve the Establishment Clause problem created by a large cross in the midst of a National Preserve," said Peter Eliasberg, managing attorney with the ACLU of Southern California. "In fact, it compounded the problem by continuing to favor this one religious symbol that had already been granted unique access to federal property."

The Supreme Court recently decided another case involving government property and religious symbols. It heard arguments in the fall about whether a small Utah religious group should be permitted to erect a monument of its beliefs in a city park that already includes a Ten Commandments monument. See page 1 for a report on the court's ruling.

— RNS and staff reports

High Court declines case of praying football coach

The U.S. Supreme Court has refused to hear an appeal from a high school football coach who was banned from bowing his head during student-led team prayers.

Without comment March 2, the nation's highest court ended Coach Marcus Borden's efforts to overturn a township decision that as a public employee, Borden cannot mix religion with his work as a coach.

The High Court's decision leaves intact a federal appeals court's April decision that Borden's desire to bow his head and take a knee during team prayer is an endorsement of religious activity at a public school.

Neither Borden, who has been the football coach at East Brunswick High School since 1983, nor his attorney, Ronald Riccio, could be reached for comment.

Borden has been fighting for the right to bow and kneel in prayer with his team since November 2005, when he filed a federal lawsuit arguing the school district's regulations were overly broad. He won a U.S. District Court ruling in July 2006 in which a judge decided those rules were unconstitutional, but that decision was reversed at the appellate level.

Riccio asked the Supreme Court in October to review the appeals court decision, arguing then that Borden's case was of national importance because "it addresses what public school educators are permitted to say and do when public school students engage in religious activities in their presence."

Richard Katskee, an attorney with Americans United for Separation of Church and State, which represented the board of education in court, said in a prepared statement that "children have a clear right to attend public schools without religious pressures being brought to bear by school personnel."

"Coach Borden was out of bounds, and the courts were right to blow the whistle," Katskee said. "I hope that other coaches and school personnel learn a lesson from this."

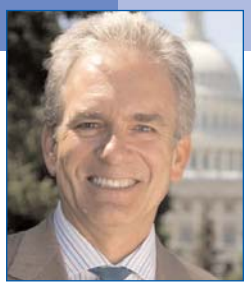
Todd Simmens, president of the East Brunswick Board of Education, in the same statement said "public school officials simply may not engage with students in religious activity."

"The board of education and district officials have, throughout this case, made certain no school employee supervises or otherwise participates in any type of prayer with our students," Simmens said. "Needless to say, the board is pleased that, in this case, the courts reaffirmed this long-standing constitutional principle."

The school district said Borden had a long history of leading prayers before he was ordered to stop after complaints from some parents. Borden resigned as coach in protest of the school board ruling in 2005, but rescinded the resignation within a week and hired Riccio to represent him in his quest to coach the team the way he had for more than two decades.

— RNS

REFLECTIONS



J. Brent Walker
Executive Director

National survey is propitious to BJC's planning

The recently released American Religious Identification Survey (ARIS, 2008) confirms what we have long known about religion in the United States: we are far less denominational than we used to be, religious diversity is on the rise, and an increasing proportion of the population claims no religious affiliation at all.

These results come in the midst of a Baptist Joint Committee strategic planning effort—our third since 1998—casting a vision for our mission over the next five years.

The timing of the survey's release is propitious since the manner in which the Baptist Joint Committee performs its ministry must be informed by the religious, cultural and political context in which we work.

According to the ARIS, Christianity continues to be the majority religion embraced by 76 percent of the population. (But this is a decline from a 1990 ARIS that found 86 percent.) Baptists comprise 15.8 percent of the population, the largest religious group after Catholics. Those claiming to be Christian, however, are far less inclined to embrace a particular denomination. They are more likely simply to say they are "Christian" or "evangelical/born again" or "non-denominational Christian."

Significantly, religious pluralism, outside traditional Catholic/ mainline Protestant communities, is on the rise, too. Mormons, Muslims, those who embrace a variety of Eastern religions, like Buddhism and Hinduism, and adherents of "new religious movements," including Wiccans, spiritualists and pagans, are growing fast.

Finally, the so-called "nones" —a category embodying atheists, agnostics, secularists, humanists and people who say they have "no religion"— are at 15 percent. This is up from 8.2 percent in 1990.

These religious and cultural demographics have influenced and will continue to inform the Baptist Joint Committee's strategic planning process. Along with a review of our core values, beliefs and assumptions, we spent a lot of time thinking about how the landscape had changed since the last strategic plan was adopted five years ago.

First of all, we unabashedly affirm our Baptist heritage. Even as we recognize the decline in denominational affiliation and, for many, relevance, the strategic planning committee understands we are who we are. The historic Baptist advocacy of religious liberty and church-state separation is a message that must be proclaimed today — particularly in an increasingly pluralistic and secular culture. The label "Baptist" may not be sacrosanct, but what the Baptist Joint Committee stands for surely is.

Secondly, we embrace in this strategic plan the Baptist Joint Committee's historic practice of working in coalition with other groups, including minority religions. America's increasing religious diversity demands that we be all the more assiduous in upholding the protections for the free exercise of religion embodied in the First Amendment. Our brothers and sisters in the Jewish, Muslim, Buddhist and other minority traditions deserve and expect the second largest religious group in America — Baptists!— to stand up for and with them. The Baptist Joint Committee is committed to do just that.

> "The historic Baptist advocacy of religious liberty and church-state separation is a message that must be proclaimed today — particularly in an increasingly pluralistic and secular culture."

Third, we have long said and continue to affirm that freedom of religion implies freedom from religion — at least freedom from state-sponsored religion. In a sense, if the Free Exercise Clause protects religious minorities, the First Amendment's Establishment Clause protects non-religious minorities. For religion to be vital it must be voluntary; no governmentally endorsed religion can be allowed. Compelled religion is an oxymoron.

It's important to remember that "nones" are a sizable segment of the American population — 15 percent of those surveyed. Of the various categories of the ARIS, that group comes in third, behind Catholics and Baptists. Indeed, "nones" are more numerous, according to the survey, than "mainline Protestants." They must be allowed to say no to religion without having their status as good citizens impugned.

Our strategic planning effort will continue for the next several months. We shall continue to be faithful to our heritage while preparing ourselves to advocate for the importance of religious liberty to an increasingly variegated, and sometimes apathetic, audience. That message will be grounded in our Baptist tradition but, hopefully, proclaimed in a way that is relevant to contemporary culture and understood by modern ears.

Native American issues play key role in free exercise law

By James Gibson

Recently, the 9th U.S. Circuit Court of Appeals announced its decision in *Navajo Nation v. U.S. Forest Service*. The court ruled that the Religious Freedom Restoration Act of 1993 does not prohibit the U.S. Forest Service from expanding a commercial ski area and using artificial snow manufactured from sewage water on the San Francisco Peaks, lands sacred to a number of Native American tribes.

This is far from the first case implicating pivotal Native American religious liberty issues. In fact, Native American religious freedom issues have played a key role in modern free exercise jurisprudence. It was a dispute over Native American free exercise rights that led to the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*, which scaled back the reach of the free exercise clause.

Congress, at the urging of the Baptist Joint Committee and others, enacted the Religious Freedom Restoration Act in 1993 – the very legislation at issue in the *Navajo Nation* case – to restore free exercise jurisprudence to pre-*Smith* status. *Bowen v. Roy*, a 1986 Supreme Court decision, is another notable Native American free exercise case dealing with qualifications for welfare benefits. A plurality in *Bowen* foreshadowed the Court's decision in *Smith*.

As the U.S. Supreme Court considers several tribes' request to review the Ninth Circuit's decision in the *Navajo Nation* case, it is appropriate to reflect on the myriad religious liberty challenges faced by Native Americans, the longest-tenured of our fellow citizens.

These issues were the impetus for a Freedom Forum conference on Native American Religious Freedom that I attended last year at the University of South Dakota in Vermillion, S.D. The three-day event was attended by academics, attorneys, and several Native American leaders who have committed their adult lives to securing for their people the religious liberty that is the birthright of every American. The conference delved into some of the key issues in Native American religious freedom with which those of us who support religious freedom for all should be familiar: protection of, and respect for, Native American sacred places; repatriation of Native American human remains removed from burial grounds for study and display; and free exercise rights for Native American inmates of the federal prison system, allowing them the right – subject, of course, to the realities of incarceration – to practice their faith while imprisoned.

Sacred Places

Native American sacred places are areas where Native Americans go to practice their religion. These places are considered sacred because they are burial grounds, areas conducive to communicating with spiritual beings, the site of notable past events, or contain certain natural resources.

Native American religions were outlawed under the "Civilization Regulations" of the late nineteenth and early twentieth centuries. One consequence of these laws was the destruction or desecration of many sacred places. The American Indian Religious Freedom Act of 1978, as well as other legislation and Carter Administration executive orders, was enacted in part to protect sacred places but many Native Americans argue that enforcement has been inconsistent and is complicated by the fact that none of these laws contain a discrete legal cause of action that

would allow Native Americans to go to court to protect their sacred places.

The sacred places issue has been heavily litigated. In addition to the *Navajo Nation* case, a dispute over sacred places reached the U.S. Supreme Court in 1988 with *Lyng v. Northwest Indian Cemetery Prot. Ass'n*. In *Lyng*, the Court held that the U.S. Forest Service did not violate the Free Exercise Clause by constructing a paved road through lands considered to be sacred places by certain Native Americans.

Repatriation

Like many cultures in America and elsewhere, Native American religious and cultural traditions include specific beliefs regarding burial of the deceased. Yet throughout the centuries numerous of Native American graves have been exhumed, with the remains in the possession of scientists for study or to museums for public display. This violates the religious beliefs of many Native Americans tribes, a number of whom advocate for repatriation, the return of exhumed remains to the deceased's tribal descendants.

Native Americans' struggle for repatriation often pits them against the scientific community, which maintains that the burial remains and funerary objects are of intrinsic scientific value. As such, scientists argue, they should be studied and displayed in museums, and not returned to tribal descendants.

How did this mass exhumation of Native American gravesites happen in the first place? Although historically non-Native American gravesites were protected by law, this was not the case with Native American burials and bodies, which resulted in a large number of remains and funerary objects being exhumed. The situation worsened in 1906, when Congress passed the American Antiquities Act of 1906, which classified Native American burials on federal and reservation lands as "cultural resources" and federal government property.

In 1989-90, Congress passed several laws, including the Native American Graves Protection and Repatriation Act (NAGPRA), that criminalized trafficking in Native American remains and allowed repatriation of remains and funerary objects upon application of descendants who could demonstrate a tribal affiliation to the requested remains. Although it is a step in the right direction, many Native Americans maintain that NAGPRA has not fully alleviated the problem, because it does not apply to Native American tribes not recognized by the federal government, and because it allows the institution in possession of the remains to determine whether cultural affiliation exists – a regulation that some Native Americans contend invites abuse.

Inmates in the Federal Prison System

Religious minorities often struggle for the right to religious accommodation in both state and federal prisons, and Native American inmates – a distinct minority within the federal prison system – are no exception. From grooming policies that proscribe growth of the long hair required by their religious beliefs and access to Native American religious leaders, to observance of holy days and access to sacred objects (such as medicine bags) and ceremonies (such as sweat lodges), Federal Bureau of Prison policies sharply curtail Native American inmates' free exercise of religion. Although notable progress was made in these areas with regulatory changes in the late 1990s and the Baptist Joint Committee-supported Religious Land Use and Institutionalized Purposes Act of 2000, the situation has regressed due to post-9/11 security regulations. While there are – and should be – instances when an inmate's free exercise rights must bow to the realities of prison security and administration, the successes of the 1990s-era regulations demonstrates that these two competing concerns can be balanced to allow Native Americans the free exercise of their religion without impeding the government's legitimate correctional concerns.

Americans have just experienced a harried and historic election season, a time during which we heard a lot about religion, most often in the context of America's Christian religious majority. But our commitment to religious freedom is best served when we contemplate and respect the religious traditions of all faiths, including those of Native Americans – our country's original occupants.

James Gibson is staff counsel at the Baptist Joint Committee.

K. Hollyn Hollman
General Counsel

After decision, questions remain about government speech vs. Establishment Clause principles

In *Pleasant Grove City, Utah, et al., v. Summum* the United States Supreme Court held that a city's decision to accept and display a Ten Commandments monument donated by private citizens, while rejecting other displays, does not violate the First Amendment's Free Speech Clause. It leaves the question: What about the ban on government preferring one religion over another?

While this case does not directly impact religious liberty law, it protects the status quo. At least for now, those famous monuments donated by the Fraternal Order of Eagles in the 1970s and placed among other monuments on public land around the country remain standing without threat of being crowded by less popular religious markers. In short, the government's duty to protect the Free Speech rights of its citizens in a public park does not imply a rule of equal treatment for the placement of donated monuments.

"The government's duty to uphold the strong Free Speech rights of its citizens in a public park does not imply a rule of equal treatment for the placement of donated monuments."

As a practical matter, it is hard to see how this case could come out differently. While concerns about government endorsement of religion lurked in the background of this litigation, no Establishment Clause claim was presented. Instead, the case was pursued as a violation of the Free Speech rights of Summum, a religious group that sued and won when the City declined to display its "Seven Aphorisms" monument. The U.S. Court of Appeals for the Tenth Circuit ruled the park was a public forum and Summum had been kept out wrongfully.

Justice Samuel A. Alito, Jr., writing for the Court, reversed that decision, explaining: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Moreover, the Court found that "[p]ermanent monuments displayed on public property typically represent government speech."

To support its conclusion that the monuments were government speech, the Court noted that governments have used monuments to speak to the public since ancient times as a means of indicating their authority and power. By definition, the Court said, a monument is a structure designed as a means of expression, whether the government entity arranges and finances the construction of it or accepts a donated display. The point is "to convey some thought or instill some feeling in those who see the structure."

As a general proposition, this seems fine. The BJC has argued similarly in other religious display cases that the government should be presumed to endorse religion when it permanently displays scripture. While the Court's conclusion that monuments typically represent government speech makes sense as a general matter, when applied to a privately donated monument of the Ten Commandments, it raises a significant Establishment Clause problem. Why should the authority and power of the government be used to convey "thoughts and feelings" about Scripture?

In fact, the Court noted explicitly that "government speech must comport with the Establishment Clause." While Justices Antonin Scalia and Clarence Thomas offered a concurring opinion to express their view that the display was indistinguishable from the Ten Commandments display upheld in *Van Orden v. Perry* (2005) and thus would not violate the Establishment Clause, others indicated that such questions should be left for another day. In a concurring opinion, Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, warned that this "newly minted doctrine" should not go too far and was limited by the Establishment Clause, the Equal Protection Clause, as well as the "checks imposed by our democratic processes."

Justice David Souter, concurring in the judgment only, expressed doubt that public monuments should necessarily be considered government speech. A better approach, he suggested, would be to analyze them in context, recognizing that in some circumstances government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington National Cemetery are a good example. I agree with Justice Souter that such a "reasonable observer test" to determine if something is governmental speech, like the approach for determining governmental endorsement of religion in Establishment Clause cases, would be more helpful. It remains to be seen how governments that maintain religious monuments will avoid breaching the Establishment Clause prohibition on denominational preferences. In the absence of more clarity from the Court, Justice Souter's statement is apt: "The interplay between government speech and Establishment Clause principles has not begun to be worked out."

Tennessee elementary school sued for censoring religious message

An elementary school in Mt. Juliet, Tenn., is being sued for censoring the word "God" out of posters promoting a student-led prayer event.

A lawsuit filed March 3 by the Alliance Defense Fund said administrators at Lakeview Elementary School ordered students and parents to either remove signs promoting a "See You at the Pole" event or edit out religious language. With too little time to redo the posters, parents in the suit complied by covering the phrases like "In God We Trust," "Come and Pray" and a theme Bible verse with green paper.

Filed on behalf of 10 parents and the children, the lawsuit claims school officials violated the plaintiffs' First Amendment rights both by limiting their free speech and establishing hostility toward their religion. It seeks injunctive relief, nominal damages and court costs.

It is not the first time the school has landed in hot water over religion. Last year a federal judge ruled the school unconstitutionally endorsed religion by allowing a group of parents to pray in the school cafeteria and pass out fliers to students during school hours.

Federal District Judge Robert Echols ruled that such accommodation excessively entangled the school with the religious purposes of Praying Parents, a loose-knit organization of parents who gather to pray for the school. Echols said the Constitution demands that public schools be neutral toward religion and that by promoting the group administrators effectively promoted its religious views.

Echols said students could still make flyers for "See You at the Pole," though. School policy allows such posters as long as they contain a disclaimer that the event is not sponsored by Lakeview.

For that reason, some members of the Praying Parents group said they were astonished last September when a school employee told them that posters their children made could not be displayed because they contained the word "God."

The parents obscured the religious phrases as directed but later complained about what they viewed as censorship and an attempt to belittle their religion. They said their children want to participate in future public prayer events, but now fear reprimand if they do.

"Christian students shouldn't be censored for expressing their beliefs," Alliance Defense Fund Senior Counsel Nate Kellum said in a press release about the lawsuit. Kellum said school officials "appear to be having an allergic reaction to the ACLU's long-term record of fear, intimidation and disinformation" with regard to religious expression in public schools.

Brent Walker, executive director of the Baptist Joint Committee for Religious Liberty, said he sympathizes with school administrators attempting to negotiate complicated church-state issues amid competing voices, but based on what he knows about the case, "It looks to me like the school clearly overreacted" by censoring religious content altogether.

—ABP

Groups try to strip atheist provision from Arkansas Constitution

A religious liberty watchdog group has joined a campaign to strip the Arkansas Constitution of a provision that prohibits atheists from holding office and testifying in court.

The Becket Fund for Religious Liberty sent a letter Feb. 17 to the Arkansas legislature in support of a bill to amend Article 19, Section 1, of the Arkansas Constitution, which states: "No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court."

"The free expression of religious belief, together with what James Madison called 'the full and equal rights of conscience,' should apply to people of all religious traditions — including atheists. Government should no more penalize a person for professing atheism than for professing a belief in Christianity, Buddhism, or Islam," the Becket Fund letter said.

Although the letter acknowledged the atheist provision is not likely to be enforced, it compared it to laws currently in nations such as Saudi Arabia and Iran that discount court testimonies of non-Muslims, denying them of full civil and political rights.

Eric Rassbach, national litigation director at the Becket Fund for Religious Liberty, believes that removing this portion of the constitution is more than mere symbolism.

"It signals to U.S. citizens and to the rest of the world, that the freedom and sanctity of conscience — including the right to believe there is no God at all — is a fundamental right for all people," Rassbach said.

The U.S. Supreme Court declared a similar Maryland law discriminating against atheists unconstitutional in 1961, according to the Becket Fund. South Carolina's constitution was amended in 1997. Texas and Tennessee still have similar provisions in their state constitutions.

—RNS