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REFLECTIONS ON *JEWES FOR JESUS*: TWENTY-FIVE YEARS LATER

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INTRODUCTION

Sometimes government restrictions on First Amendment rights can be shocking, and often religious speakers are the victims of such restrictions. My experience¹ with such restrictions began in 1983 when an airport officer at Los Angeles International Airport (“LAX”) ordered a man to stop distributing religious tracts on airport premises. The man was acting peaceably and was not interfering with the airport’s operations; rather, the city of Los Angeles had banned all First Amendment activities in the airport’s Central Terminal Area (“CTA”). As a result, this man, a member of a Messianic evangelical organization called “Jews for Jesus,” found himself violating the law by simply handing out religious pamphlets on public property. Jews for Jesus decided to challenge the Board of Airport Commissioners’ ban, and that case was the first I argued before the Supreme Court.

This Article marks the twenty-fifth anniversary of the Supreme Court’s decision in *Board of Airport Commissioners v. Jews for Jesus, Inc.*² The Court held, in a unanimous decision, that LAX Resolution No. 13787 (“the Resolution”) declaring that LAX’s CTA “is not open for First

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¹ This Article, although co-authored, is written from Jay’s first-person perspective.

² 482 U.S. 569 (1987).

Amendment activities by any individual and/or entity”³—which airport officials interpreted to allow “airport-related” expression and forbid other expression, such as religious leafleting⁴—violated the Free Speech Clause of the First Amendment.⁵ More broadly, *Jews for Jesus* contributed to the fight to provide equal footing for religious speech in the free speech arena, a development that has become all the more important since the Supreme Court abandoned the application of strict scrutiny in free exercise cases in 1990.⁶

This Article discusses the *Jews for Jesus* litigation and the Supreme Court decision’s impact on First Amendment jurisprudence. Part I provides legal background for the case, discussing various Supreme Court cases decided before *Jews for Jesus* that addressed restrictions on leafleting or assembly, laws that provided government officials with unfettered discretion, or claims of a free speech right to access various types of public property for expressive activities. Part II discusses the *Jews for Jesus* litigation, from the enactment of the Resolution to the issuance of the Supreme Court’s decision. Part III discusses the impact and continued legal relevance of *Jews for Jesus*. Part IV describes the effect of *Jews for Jesus* over the past twenty-five years from a legal, practical, and personal perspective, as well as the developments in the law of religious speech since the 1987 decision.

I. LEGAL BACKGROUND OF *JEWS FOR JESUS*

The Resolution implicated two different lines of Supreme Court First Amendment cases. First, *Jews for Jesus* was the latest in a line of cases reviewing statutes, ordinances, or policies that prevented individuals from distributing written materials on public property or that required prior approval from the government to do so. In particular, the Resolution and its enforcement raised concerns that it gave airport officials arbitrary, uncontrolled discretion to grant or deny permission to speak, similar to other policies that the Supreme Court had invalidated. Second, the case presented another opportunity for the Court to address how the First Amendment applies to a specific type of public property (airports) as it had done with numerous other types of public property (schools, fairgrounds, military bases, etc.).

³ *Id.* at 570–71.

⁴ *See id.* at 576.

⁵ *Id.* at 577.

⁶ *See infra* Part III.

*A. Cases Addressing Restrictions on Leafleting or Assembly or Laws
Providing Broad Enforcement Discretion to the Government*

Some of the Supreme Court's earliest cases addressing the scope of the First Amendment's protections involved restrictions on the distribution of literature. In *Lovell v. City of Griffin*, the Court held that a city ordinance that prohibited the distribution of any literature within city limits without the prior written approval of the city manager, including the distribution of free religious literature, was unconstitutional.⁷ The Court observed that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."⁸

Similarly, in *Hague v. Committee for Industrial Organization*, the Court held that an ordinance under which city officials prohibited the distribution of newspapers and pamphlets concerning federal labor law but allowed literature addressing other subjects to be distributed was unconstitutional.⁹ Although the city argued that its "ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof,"¹⁰ the Court stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.¹¹

Numerous other cases decided after *Lovell* and *Hague* upheld the right to leaflet or hold meetings in traditional public fora, such as public sidewalks and parks, and invalidated ordinances that gave local government officials discretion to arbitrarily grant or deny permission to speak.¹²

⁷ 303 U.S. 444, 451 (1938).

⁸ *Id.* at 452.

⁹ 307 U.S. 496, 501–02, 505–06, 518 (1939).

¹⁰ *Id.* at 514.

¹¹ *Id.* at 515. *Hague* and subsequent cases effectively overruled *Davis v. Massachusetts*, 167 U.S. 43, 46, 48 (1897) (upholding an ordinance requiring a permit from the mayor to make a public address on the Boston Common). *E.g.*, *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 785–86 (1988) (White, J., dissenting); *City of Seattle v. Mighty Movers, Inc.*, 96 P.3d 979, 982–83 (Wash. 2004); *In re Hoffman*, 434 P.2d 353, 355 n.4 (Cal. 1967).

¹² *E.g.*, *Poulos v. New Hampshire*, 345 U.S. 395, 402, 404, 414 (1953) (upholding a requirement to obtain a permit before holding religious services in public parks because it "require[d] uniform, nondiscriminatory and consistent administration of the granting of

In addition, in the half-century prior to *Jews for Jesus*, the Court reviewed numerous ordinances and statutes that restricted or prohibited door-to-door literature distribution or solicitation,¹³ once stating that

licenses” and “left to the licensing officials no discretion as to granting permits, no power to discriminate, no control over speech”); *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (invalidating an ordinance that prohibited the giving of a political or religious address in any public park, which, when applied, prohibited an address given by a Jehovah’s Witness minister while allowing other religious groups to hold more orthodox forms of religious services); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (holding that an ordinance prohibiting public worship meetings or speeches on city streets without a permit, which lacked any standards for deciding when permits should be granted or denied, was unconstitutional); *Niemotko v. Maryland*, 340 U.S. 268, 271–73 (1951) (holding that a city’s unwritten practice of having the park commissioner and the city council grant or deny permission to use city parks for events, with no standards limiting their discretion, was unconstitutional); *Jamison v. Texas*, 318 U.S. 413, 414, 417 (1943) (holding that an ordinance prohibiting the distribution of handbills on city sidewalks was unconstitutional); *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941) (upholding a requirement to obtain a permit before conducting a parade or procession on a public street or sidewalk that had been applied in a non-discriminatory manner, noting that the provision did not restrict the distribution of literature and was a reasonable time, place, and manner regulation); *Schneider v. State*, 308 U.S. 147, 162–65 (1939) (holding that several ordinances that prohibited the distribution of literature on sidewalks or in parks, or that required prior approval from the police before materials could be distributed house to house, were unconstitutional); *see also* *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417, 419–20 (1971) (overturning an injunction that prohibited individuals from leafleting anywhere within a town after they distributed leaflets near an individual’s home and church criticizing his business practices); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149–51, 153–54 (1969) (holding that an ordinance prohibiting any parade, procession, or public demonstration without a permit was unconstitutional as written because it authorized the government to consider the “public welfare, peace, safety, health, decency, good order, morals or convenience” in reviewing an application, but that a much narrower interpretation of the law provided by the state supreme court that eliminated arbitrary discretion would be constitutional).

¹³ *E.g.*, *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 622 (1980) (holding that an ordinance that prohibited the door-to-door solicitation of charitable contributions by organizations that did not use at least seventy-five percent of their income for charitable purposes was unconstitutional); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 611, 620 (1976) (holding that an ordinance requiring individuals engaged in door-to-door solicitation for charitable or political causes to first identify themselves to local police was impermissibly vague); *Tucker v. Texas*, 326 U.S. 517, 518–20 (1946) (holding that a state law requiring peddlers of goods to leave the premises after having been told to do so by the occupant or owner was unconstitutional to the extent that it authorized the manager of a village to exclude religious speakers from the entire village at his discretion); *Follett v. Town of McCormick*, 321 U.S. 573, 576–77 (1944) (holding that applying a license tax for book salesmen to a minister who sold religious books in furtherance of his religious beliefs was unconstitutional); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (holding that an ordinance prohibiting the sale of books or merchandise in residential areas without first obtaining the mayor’s approval, who had authority to grant permits if he “deem[ed] it proper or advisable,” was unconstitutional); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (holding that a statute that prohibited door-to-door solicitation (including for a religious cause) without obtaining the prior approval of a state official, who granted or

“[d]oor to door distribution of circulars is essential to the poorly financed causes of little people.”¹⁴ For example, in *Murdock v. Pennsylvania*, the Court held an ordinance that required individuals to obtain a license and pay a license fee before soliciting orders for goods or merchandise, including offering religious materials in exchange for donations, was unconstitutional.¹⁵ The Court explained:

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.¹⁶

The Court also stated:

The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one’s views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.¹⁷

In light of these cases, a key issue presented to the Court in *Jews for Jesus* was whether the Resolution violated the free speech rights of those seeking to distribute religious literature because it too broadly restricted a fundamental right or gave arbitrary discretion to those responsible for its enforcement.¹⁸

denied permission based upon his determination of whether the cause was truly a religious one, was unconstitutional); see also *Staub v. City of Baxley*, 355 U.S. 313, 314 n.1, 325 (1958) (holding that an ordinance requiring the approval of the mayor and city council before soliciting membership in an organization that requires the payment of membership dues was unconstitutional).

¹⁴ *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

¹⁵ 319 U.S. 105, 106–08, 110 (1943).

¹⁶ *Id.* at 108–09 (footnotes omitted).

¹⁷ *Id.* at 111.

¹⁸ *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 570, 574–76 (1987).

B. Cases Addressing Free Speech Rights on Particular Types of Public Property

Although the Supreme Court recognized strong First Amendment protection for religious speech (including leafleting) in the previously cited cases, another line of cases addressed the often difficult question of the extent to which the public has a right to leaflet or engage in other expressive activities on various types of government property. Since *Hague*, which recognized a robust First Amendment right to use public parks and sidewalks for speech activities, the Court has addressed restrictions on picketing, leafleting, and other speech activities at, among other places, residences,¹⁹ schools,²⁰ businesses,²¹ courthouses,²² the sidewalks around the Supreme Court's grounds,²³ state capitol grounds,²⁴ state fairgrounds,²⁵ jails,²⁶ company-owned towns,²⁷ military bases,²⁸ mailboxes,²⁹ city buses,³⁰ and public school internal mail

¹⁹ *Carey v. Brown*, 447 U.S. 455, 457, 459–60 (1980) (holding that a state law prohibiting the picketing of residences or dwellings, except for the picketing of a business involved in a labor dispute, is unconstitutional).

²⁰ *Grayned v. City of Rockford*, 408 U.S. 104, 119–21 (1972) (upholding a local ordinance that prohibited the making of noises near a school building that tend to be disruptive of the school's functions while it is in session); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 92–94 (1972) (holding that an ordinance prohibiting picketing near a school around school hours, except for labor picketing, was unconstitutional because it distinguished between types of picketing based upon their content).

²¹ *Thornhill v. Alabama*, 310 U.S. 88, 91–92, 101 (1940) (invalidating an ordinance that prohibited picketing near a place of business for the purpose of encouraging individuals to not patronize that business).

²² *Cameron v. Johnson*, 390 U.S. 611, 612, 622 (1968) (upholding a statute prohibiting picketing that obstructs or unreasonably interferes with entry to or exit from county courthouses); *Cox v. Louisiana*, 379 U.S. 536, 537–38, 545, 547 (1965) (overturning convictions for disturbing the peace and obstructing public passages stemming from a peaceful demonstration outside of a courthouse).

²³ *United States v. Grace*, 461 U.S. 171, 172–73, 183 (1983) (holding that a ban on the display of banners or signs relating to a party, organization, or movement on the grounds of the Supreme Court was unconstitutional as applied to the public sidewalks around the Court's grounds).

²⁴ *Edwards v. South Carolina*, 372 U.S. 229, 234–35, 238 (1963) (overturning convictions for breach of the peace for a demonstration held on state capitol grounds).

²⁵ *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643, 654–55 (1981) (holding that it was constitutional for the organizers of a state fair to require all organizations desiring to distribute or sell literature, or to solicit donations, to obtain a license and do so only at an assigned location).

²⁶ *Adderley v. Florida*, 385 U.S. 39, 40, 47–48 (1966) (upholding trespass convictions for demonstrations held on the grounds of a city jail reserved for jail uses).

²⁷ *Marsh v. Alabama*, 326 U.S. 501, 508–10 (1946) (overturning a conviction for distributing religious literature on the premises of a company-owned town that was open to the general public).

²⁸ *Greer v. Spock*, 424 U.S. 828, 830–31, 839–40 (1976). Fort Dix was an enclosed military reservation that permitted open civilian access to some unrestricted areas

systems.³¹ For example, in *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court held that it was constitutional for the organizers of a state fair to require all organizations desiring to distribute or sell literature, or to solicit donations, to obtain a license and do so only at an assigned location.³²

Additionally, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court held that a school district's internal mail system was not a public forum, and the First Amendment did not require the district to give a teacher group that was not the recognized teachers' union access to the system.³³ In what has become an oft-cited passage in subsequent cases, the Court outlined three categories of public property for purposes of the First Amendment:

The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks In these quintessential public forums, the government may not prohibit all communicative activity. . . .

A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . .

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an

including streets and sidewalks. *Id.* at 830. The Court upheld a regulation that prohibited partisan speeches and demonstrations of a political nature on the base and required prior approval for the distribution of literature due to the traditionally high level of control that military commanders have over bases. *Id.* at 831, 839.

²⁹ *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 115–16 133–34 (1981) (upholding a prohibition on the placement of unstamped literature in the mailboxes of individual homes).

³⁰ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299, 304 (1974) (plurality opinion) (upholding a ban on political advertising via car cards on city buses).

³¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39–40, 53 (1983) (holding that a teacher group, an unrecognized teachers' union, was not entitled to access a school district's internal mail system because the system was not a public forum).

³² 452 U.S. 640, 643, 654–55 (1981).

³³ 460 U.S. at 39–40, 53.

effort to suppress expression merely because public officials oppose the speaker's view.³⁴

Concerning the public forum status of airports, numerous lower court decisions from the mid-1960s to the mid-1980s invalidated all or portions of various ordinances and regulations that restricted or prohibited the distribution of literature or the solicitation of funds inside of airports.³⁵ The predominant view among the lower courts was that "airport terminals owned and administered by governmental entities are public forums in which efforts to regulate speech or religious activity must comport with First Amendment guarantees."³⁶ Recognizing these principles, an FAA regulation enacted in 1980 stated:

³⁴ *Id.* at 44–46 (citations omitted) (quoting *Council of Greenburgh*, 453 U.S. at 129).

³⁵ *See, e.g.*, *U.S. Sw. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 761, 774 (D.C. Cir. 1983) (concluding that the FAA's refusal to approve advertisement displays at Washington National Airport and Dulles International Airport due to their political nature violated the First Amendment); *Fernandes v. Limmer*, 663 F.2d 619, 623, 633 (5th Cir. 1981) (holding that an ordinance governing literature distribution and solicitation of funds in the Dallas–Fort Worth Airport was unconstitutional); *Rosen v. Port of Portland*, 641 F.2d 1243, 1244–45, 1252 (9th Cir. 1981) (invalidating an ordinance requiring individuals to register in advance and identify their sponsor before distributing literature in a public airport terminal); *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 816, 832–34 (5th Cir. 1979) (holding that the penalty provision of an ordinance governing the solicitation of funds and distribution of literature in airports owned by the City of Atlanta was unconstitutional); *Int'l Soc'y for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263, 268–70 (7th Cir. 1978) (holding that some provisions of regulations governing the solicitation of funds and distribution of literature in Chicago's municipal airports were unconstitutional); *Chi. Area Military Project v. City of Chi.*, 508 F.2d 921, 926 (7th Cir. 1975) (upholding an injunction that allowed the distribution of literature in O'Hare Airport terminal buildings but not in the corridors leading to the arrival and departure gates); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1130–31 (9th Cir. 1973) (*per curiam*) (holding that an ordinance restricting the distribution of written materials at the Oakland airport was unconstitutional); *Int'l Soc'y for Krishna Consciousness, Inc. v. Wolke*, 453 F. Supp. 869, 871, 874 (E.D. Wis. 1978) (holding that an ordinance requiring individuals seeking to distribute or sell written materials inside airports to obtain the permission of the airport director was unconstitutional); *Int'l Soc'y for Krishna Consciousness of W. Pa., Inc. v. Griffin*, 437 F. Supp. 666, 668, 670–73 (W.D. Pa. 1977) (holding that some provisions of an ordinance governing the solicitation of funds and distribution of literature at the Greater Pittsburgh International Airport were unconstitutional); *Int'l Soc'y for Krishna Consciousness, Inc. v. Engelhardt*, 425 F. Supp. 176, 178–80 (W.D. Mo. 1977) (holding that an ordinance requiring the permission of the director of the Kansas City International Airport before solicitation of funds or distribution of literature may occur was unconstitutional); *see also* *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 86 n.4, 93 (2d Cir. 1968) (holding that regulations prohibiting the distribution of literature inside public bus terminals without the permission of the terminal manager were unconstitutional); *In re Hoffman*, 434 P.2d 353, 353–54, 358 (Cal. 1967) (holding that a provision of an ordinance prohibiting loitering in a railway station or airport longer than reasonably necessary to travel or transact business was unconstitutional because it prohibited the distribution of literature).

³⁶ *Fernandes*, 663 F.2d at 626.

[T]here is a considerable amount of social and commercial interchange in the terminals and, in many respects, the terminals are like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. [Soliciting funds and distributing written material] enjoy the protection of the First Amendment, and they may not be regulated by airport authorities in the same manner as commercial activity.³⁷

The Resolution reflected an opposing viewpoint, similar to the government's position in *Hague*,³⁸ that the government's authority to control the airport included the ability to exclude individuals seeking to leaflet. As such, *Jews for Jesus* posed the question of what type of forum, if any, are the areas of a public airport that are open to the general public.

II. THE *JEWS FOR JESUS* CASE

A. *Enactment of Resolution No. 13787*

In the 1980s, LAX was a large, high-volume airport as it is today.³⁹ As of the mid-1980s, the CTA of LAX consisted of eight terminal facilities that contained large areas to which the general public had unrestricted access.⁴⁰ In 1983, LAX handled over thirty-three million passengers, and "at least an equal number of 'meeters and greeters' enter[ed] the CTA to pick up or drop off airline passengers."⁴¹ Over eight million passengers each year had layovers in LAX and never used the sidewalk area outside of the CTA facilities.⁴²

Prior to 1983, when various groups seeking to engage in First Amendment activities in the CTA requested permission to do so, the Board of Airport Commissioners ("Board") denied them permission.⁴³ Nevertheless, various religious and political groups used the CTA to distribute literature and solicit funds without advance notice to or permission from the Board.⁴⁴ In response, with the 1984 Los Angeles Summer Olympics around the corner, the Board adopted Resolution

³⁷ *U.S. Sw. Africa/Namibia Trade & Cultural Council*, 708 F.2d at 765 (quoting Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35314 (May 27, 1980)).

³⁸ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514 (1939).

³⁹ *Jews for Jesus, Inc. v. Bd. of Airport Comm'rs*, 661 F. Supp. 1223, 1227 (C.D. Cal. 1985).

⁴⁰ *Id.* at 1226.

⁴¹ *Id.* at 1227.

⁴² *See id.* (noting LAX handled more than 33 million passengers in 1983 and approximately twenty-five percent of those passengers did not use the sidewalk area due to layovers).

⁴³ *Id.* at 1229–30.

⁴⁴ *Id.* at 1228.

13787 on July 13, 1983,⁴⁵ seeking to “limit the use of the terminal facilities to those uses which [the Board] believes directly aid the traveling public and thereby promote and accommodate air commerce and air navigation.”⁴⁶

Resolution 13787’s preamble asserted that “individuals and/or entities engaging in . . . First Amendment activities have significantly interfered with the free flow of passenger traffic in the [CTA] at [LAX] and substantially contributed to the congestion in said [CTA].”⁴⁷ The preamble further declared that “engaging in First Amendment activities in the [CTA] at [LAX] is incompatible with the character and function of said [CTA].”⁴⁸

The Resolution’s operative language stated, “[CTA] at [LAX] is not open for First Amendment activities by any individual and/or entity.”⁴⁹ The Resolution also stated, “[I]f any individual or entity engages in First Amendment activities within the [CTA] at [LAX], the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board”⁵⁰ The Resolution further stated that “if any entity or individual seeks to engage in First Amendment activities in the vicinity of the [CTA], those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as to not interfere with other persons.”⁵¹

The Board did not “attempt to restrict members of the general public who [had] no purpose or desire to utilize the transportation-related facilities within the terminal areas at LAX from walking, reading, shopping, eating, drinking, and conversing with other members of the general public in the interior of terminal areas.”⁵² In addition, the Board did not “prohibit persons wearing T-shirts or other articles of clothing imprinted with slogans, statements, or other forms of religious or political communication from walking in the interior terminal areas.”⁵³ The Board also continued to allow a Christian Science organization to lease and operate a reading room inside one of the terminals that was open to the public and displayed Christian Science literature,⁵⁴ and one of the LAX terminals continued to include a

⁴⁵ *Id.* at 1223–24.

⁴⁶ *Id.* at 1228.

⁴⁷ *Id.* at 1233.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1234.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1229.

⁵³ *Id.*

⁵⁴ *Id.* at 1232.

permanent display entitled “Think Before You Buy” that contained information relating to protected species.⁵⁵

B. Factual Background and Lower Court Litigation

Founded in 1973 by Messianic Jewish evangelist Moishe Rosen,⁵⁶ the mission of Jews for Jesus is to “make the messiahship of Jesus an unavoidable issue to our Jewish people worldwide.”⁵⁷ I first became involved with Jews for Jesus in February 1975 when a college friend invited me to go hear their singing group, The Liberated Wailing Wall. Though I was attending a Baptist college at the time, I came from a Jewish family. Born and raised in Brooklyn, New York, my Jewish heritage played an important role in my life, and I entered my Christian college with the notion that I could disprove any idea that Jesus was the Messiah. Listening to the choir on that February night, however, was the culmination of a journey that led me to believe that Jesus was indeed the Jewish Messiah. This young evangelical organization had an impact on my personal life—a lasting impact that motivates and inspires all I do. Little did I know that, in less than a decade, Jews for Jesus would again influence my career by igniting the start of a life-long vocation of fighting to protect religious liberties.

An important part of Jews for Jesus’ ministry has always been the distribution of religious leaflets in public places.⁵⁸ Alan Snyder, one of the organization’s missionaries located in Los Angeles, furthered this mission by distributing evangelistic tracts at LAX.⁵⁹ Members of Jews for Jesus, such as Snyder, had “distributed free religious literature within the terminal facilities at LAX” since 1973.⁶⁰ “Distribution of religious literature and leaflets, free of charge by members of Jews for Jesus, including Snyder, provides information to the general public about the religious teachings of Christianity and is a method by which [they] evangelize.”⁶¹

After the Board enacted the Resolution, Snyder distributed religious literature on a pedestrian walkway in the CTA without obstructing the free flow of pedestrian traffic.⁶² An airport officer handed Snyder a copy of the Resolution, ordered him to stop distributing literature in the CTA,

⁵⁵ *Id.* at 1228.

⁵⁶ RUTH A. TUCKER, NOT ASHAMED: THE STORY OF JEWS FOR JESUS 11, 85 (1999).

⁵⁷ *About Jews for Jesus: Our Mission Statement*, JEWS FOR JESUS, <http://www.jewsforjesus.org/about> (last visited Oct. 22, 2012).

⁵⁸ *What We Do: We Communicate Creatively!*, JEWS FOR JESUS, <http://www.jewsforjesus.org/about/what-we-do> (last visited Oct. 22, 2012).

⁵⁹ *Jews for Jesus*, 661 F. Supp. at 1229.

⁶⁰ *Id.*

⁶¹ *Id.* at 1231.

⁶² *Id.*

and advised Snyder that a failure to do so would subject him to legal action by the city attorney.⁶³ Snyder complied⁶⁴ and, along with Jews for Jesus, later sued the Board and the City of Los Angeles, alleging that the Resolution was unconstitutional.⁶⁵

Jews for Jesus made a strategic decision to rely upon the freedom of speech rather than the free exercise of religion. Free exercise claims raised outside the context of unemployment benefits had limited success before the Supreme Court,⁶⁶ while reliance upon the Free Speech Clause provided an opportunity to reinforce the idea that religious speakers stand on equal footing with non-religious speakers in the use of public property.

Jews for Jesus asked me to represent them in the case. During the almost ten years that had gone by since my first encounter with Jews for Jesus as a young college student, I had stayed in touch with the organization and eventually joined its board of directors. After receiving my law degree from Mercer Law School in 1980, I worked as a trial attorney for the Internal Revenue Service before opening a successful tax law practice in Atlanta, Georgia. LAX's crackdown on evangelism concerned me, but, at first, I declined to represent Jews for Jesus in its suit. I told Jews for Jesus to get a lawyer in Los Angeles since the case would not likely go far considering that every court to address the issue had decided that airports are appropriate for evangelism. While others kept telling me that they believed God wanted me to take the case, I remained resolved in my decision and focused on my Atlanta practice and business ventures.

Jews for Jesus eventually took the case to trial where it alleged that the Resolution violated its members' First Amendment rights for three reasons:

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1223–24.

⁶⁶ *See, e.g., Bowen v. Roy*, 476 U.S. 693, 695, 712 (1986) (rejecting a free exercise challenge to government agency's use of an individual's social security number in administering welfare benefits); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (rejecting a free exercise challenge to an Air Force regulation prohibiting the wearing of a yarmulke while in uniform); *United States v. Lee*, 455 U.S. 252, 254 (1982) (rejecting a free exercise challenge to compulsory participation in the social security system); *Gillette v. United States*, 401 U.S. 437, 439–40, 448, 463 (1971) (rejecting free exercise challenges to the government's refusal to provide military service exemptions for individuals who conscientiously object to participation in a particular war rather than to participation in all wars); *Braunfeld v. Brown*, 366 U.S. 599, 600–01, 609 (1961) (rejecting a free exercise challenge to state law prohibiting the sale of certain goods on Sundays). *But see* *McDaniel v. Paty*, 435 U.S. 618, 620, 629 (1978) (holding that a state law prohibiting ministers from serving as delegates in a state constitutional convention violated the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (holding that a state compulsory school attendance law violated the free exercise rights of Amish families).

(1) . . . [I]t is unconstitutional on its face because it totally bans First Amendment activity in a public forum; (2) . . . the Resolution is unconstitutional as applied to plaintiffs because it only has been used to ban certain kinds of communicative conduct such as leafletting by plaintiffs; and (3) . . . it is unconstitutionally vague and overbroad because the term “First Amendment activities” does not give guidance to officials or the public as to what activity is prohibited.⁶⁷

The district court held that the Resolution was unconstitutional on its face and did not address the other two arguments.⁶⁸ The court determined that the key question was “whether a municipally owned and operated airport terminal is a public forum” and concluded that “[t]he question is easily answered” in light of the various courts of appeals decisions holding that airport terminals are public fora.⁶⁹ The court held that “LAX is a public forum and the challenged Resolution is unconstitutional. . . . First Amendment activity cannot be banned at LAX.”⁷⁰

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed.⁷¹ The court stated, “Both parties agree that the determinative legal issue in this case is whether the CTA is a public forum.”⁷² In light of the court’s prior cases, as well as similar cases decided in other circuits, the court concluded that “the [CTA] at LAX is a traditional public forum.”⁷³ The court concluded that the Board had not narrowly tailored the Resolution to achieve a compelling government interest, stating, “The Board has not shown that its desire to limit the uses of the terminal facilities to airport-related purposes is sufficiently compelling to justify the uniform and absolute prohibition on all First Amendment activity in the CTA.”⁷⁴ The court noted that “[t]he Board is free to promulgate reasonable time, place, and manner restrictions on the distribution of literature in the CTA,” but “[b]ecause the 1983 resolution proscribes all First Amendment activity rather than setting forth reasonable time, place, and manner restrictions on such activity, it is unconstitutional on its face.”⁷⁵ At the time, it seemed as if Jews for Jesus had won a major victory for religious freedom.

⁶⁷ *Jews for Jesus*, 661 F. Supp. at 1224.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1224–25.

⁷⁰ *Id.* at 1225–26.

⁷¹ *Jews for Jesus, Inc. v. Bd. of Airport Comm’rs*, 785 F.2d 791, 791–92 (9th Cir. 1986).

⁷² *Id.* at 793.

⁷³ *Id.* at 795.

⁷⁴ *Id.*

⁷⁵ *Id.*

C. Supreme Court Litigation

Jews for Jesus and I were disappointed to hear that the Supreme Court granted the Board's petition for a writ of certiorari to review the case. Review by the Supreme Court is rare, and a grant of certiorari often bodes well for the losing side at the lower court. Consequently, there was genuine concern that the Court would rule for the Board and reverse the Ninth Circuit's decision.

At that time, my own practice had taken an unforeseen turn for the worse. Changes to the tax code contributed to the closure of my young practice and the evaporation of my construction business. Three hundred employees lost their jobs, and my family lost everything, including our home. Meanwhile, people had continued to tell me that they sensed that God wanted me to take on Jews for Jesus' case. I finally got the message. In 1986, I became general counsel for Jews for Jesus, and I spent the next six months preparing for my encounter with the Supreme Court.

Jews for Jesus presented the Court with three questions: (1) Was the Resolution an impermissible regulation of a forum; (2) Did the Resolution provide impermissible enforcement discretion, making it an improper prior restraint; and (3) Did the Resolution authorize impermissible content and religious discrimination?⁷⁶

In our brief, we argued that the CTA at LAX was a traditional public forum because it was "open to members of the general public without restriction, regardless of their intent or desire to utilize the transportation related facilities."⁷⁷ We wrote:

Places such as a middle eastern market, or a street like the arcades of Paris and London, or the Galleria Vittorio Emanuele II of Milan, would, were they to be transplanted into an American city, doubtless be "quintessentially public forums." Indeed, the historical places from which the modern metaphor of "forum" derives [such as the Roman basilicas and the Greek agora] were often enclosed spaces.⁷⁸

In addition, we wrote, "Today, major airports are the primary gateways to the cities, if not cities in themselves, and they have supplanted waterfronts and railroad terminals as primary public forums."⁷⁹ Our brief also discussed numerous lower court decisions and FAA regulations recognizing that airport areas that are open to the general public are forums for speech.⁸⁰ Furthermore, while the Board asserted that it needed the Resolution to prevent disruption of airport

⁷⁶ Brief for Respondents at i-ii, *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (No. 86-104).

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* at 10.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.* at 17-23.

functions, we noted, “There is not even a scintilla of evidence of ‘disruption’ put forth by the Board in support of its position. . . . To the contrary, the record clearly shows the compatibility of the expressive First Amendment activities with the operation of the airport at LAX.”⁸¹

Our brief also discussed numerous Supreme Court cases holding that government officials may not exercise arbitrary discretion to decide who may speak and who may not.⁸² The Resolution did not define or provide guidelines for determining what types of speech were prohibited under its restriction of “First Amendment activities” that did not “directly aid the travelling public.”⁸³ Additionally, we argued that the Resolution was discriminatory because it prevented one-on-one evangelism by Jews for Jesus but permitted the continuation of evangelism and religious activity in the Christian Science Reading Room.⁸⁴ Various organizations across the ideological spectrum, from the American Federation of Labor and Congress of Industrial Organizations to the Christian Legal Society, filed amici curiae briefs supporting our position.⁸⁵

On the morning of March 3, 1987, I ascended the steps of the Supreme Court in Washington D.C. I made sure to arrive early, and I lowered the courtroom podium to allow the nine Justices to see my five-foot, seven and a half-inch frame without me having to stand on tip-toes for the entirety of my argument. After six months of preparation, I knew that my time before the Court would be brief and intense. Despite nervousness during the previous couple of weeks that had, for a while, left me physically sick, I experienced a calmness on the day of the argument—I felt God’s presence. Before the arguments began, I looked at the back row and saw my friends and family who were there in support of me and Jews for Jesus. Sitting there were my good friends, Moishe Rosen (founder of Jews for Jesus) and three other members from Jews for Jesus’ Board of Directors. Most important to me was seeing the support of my wife, Pam, and my parents who were also present.

When the nine Justices walked into the courtroom, they began the proceedings by announcing their verdicts in previous cases. Sitting next to Barry Fisher, a civil rights attorney who was assisting me, I waited anxiously for them to begin that day’s business—our case was first on the docket. Finally, I heard the announcement: “We will hear arguments first this morning in No. 86-104, Board of Airport Commissioners of the

⁸¹ *Id.* at 23, 32 n.40.

⁸² *Id.* at 35–39.

⁸³ *Id.* at 39.

⁸⁴ *Id.* at 46.

⁸⁵ *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1987).

City of Los Angeles versus Jews for Jesus and others.”⁸⁶ The time of reckoning was finally here.

James Kapel, arguing on behalf of the Board, was the first to present arguments.⁸⁷ I had met Kapel a few days before when I came to D.C. for the argument. When we met, I asked him why the Board had bothered to take this case all the way to the Supreme Court. As Kapel shrugged in response, what I perceived as his rationale was an indictment of me and all American Christians. From our conversation, I gathered that the Board never thought that Christians would put up a fight. The Board members wanted to test a regulation, and they thought they had found an easy target in Christians who would do little more than fold their hands and fret. Well, we had shown them that we were willing to fight, that we were confident in our rights, and that we were willing to defend those rights in the highest court of the land.

Kapel began by arguing that the Resolution was a permissible regulation of speech in a non-public forum.⁸⁸ He asserted that the dispositive issue was what type of forum the CTA was, but the Justices repeatedly questioned him about the potential for arbitrary discretion as they noted that the ban on First Amendment activities could encompass all conversations inside an airport if applied literally.⁸⁹ As Kapel argued, Barry and I began changing the focus of our argument based on the dialogue we were hearing between Kapel and the Court.

Finally, Kapel sat down and I heard someone say, “Mr. Sekulow?” I stood up, walked to the podium, and quickly collected myself before I began my argument. I opened my argument with a carefully crafted statement, knowing that it would likely be my best chance to succinctly state Jews for Jesus’ position:

Local governments have important responsibilities concerning their efficient operation of airports under their control.

However, the record in this case is clear. There is no justification for a sweeping ban on First Amendment activities which would subordinate cherished First Amendment freedoms.

In fact, four circuit courts and numerous district courts have determined that airport terminals are public fora.⁹⁰

That was all of my prepared argument I got to share. A question from the Chief Justice cut short my intention of launching into a speech

⁸⁶ Transcript of Oral Argument at *1, *Jews for Jesus*, 482 U.S. 569 (No. 86-104), 1987 U.S. Trans. LEXIS 80.

⁸⁷ *Id.*

⁸⁸ *Id.* at *3-4, *6.

⁸⁹ *Id.* at *16-20.

⁹⁰ *Id.*

concerning the American history and tradition of free speech.⁹¹ For the next thirty minutes, the Justices hit me with a barrage of questions.

The first half of the questions dealt with the forum status of the terminals at LAX.⁹² The Justices then shifted their questioning to the discretion the Board exercised to decide what “airport-related” expression and activities would be permitted⁹³ and concluded back on the public forum issue.⁹⁴ One legal commentator characterized my argument presentation as “rude, aggressive, and obnoxious,”⁹⁵ although my mother said I was only rude and aggressive. Looking back, I probably was a little rude—I cut off the Chief Justice in the middle of one of his questions! Having been cut off in the middle of my opening, I felt determined to deliver my closing with the two minutes I had remaining. Though I have been able to finely tune my style of delivery before the Supreme Court after much practice, I still find that the aggression—or passion—behind the argument empowers it by giving it purpose and by engaging the heart of the listener. I had determination to prove that Christians not only cherished their religious freedoms, they could also fight for those freedoms with a passion.

As I left the courtroom that day, I felt both a huge sense of relief and confidence. I had just survived the most intense thirty minutes of my life, and I believed that our arguments had withstood scrutiny. As we stood at the courthouse after the arguments, Moishe Rosen turned to me and said, rather prophetically, “You will be back here often.” I laughed, knowing that very few lawyers get the chance to argue even once before the Supreme Court. Little did I know that this would be the first of many such trips to the Court. For now, I was just glad that the arguments were over, and I prepared to play the waiting game over the next few months before the Court announced its decision.

On June 15, 1987, I called the Supreme Court from a payphone in Chicago to check the status of the case (there was no remote electronic access to case dockets in 1987). The clerk said that a unanimous decision had been reached in favor of Jews for Jesus. Christians, in their defense against encroachment of their religious free speech, had not only fought back—they had won! The win was not only significant for defending free speech for Christians, but also for all those desiring to share their message on public property.

⁹¹ *Id.* at *24.

⁹² *Id.* at *24–37.

⁹³ *Id.* at *38–40.

⁹⁴ *Id.* at *46–52.

⁹⁵ David G. Savage, *Evangelicals’ Champion to Argue Case at High Court*, L.A. TIMES, Dec. 2, 2003, at A1.

The opinion for the Court, authored by Justice O'Connor, stated, "Because we conclude that the resolution is facially unconstitutional under . . . the First Amendment overbreadth doctrine regardless of the proper standard, we need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable when access to a nonpublic forum is not restricted."⁹⁶ The Court explained:

On its face, the resolution . . . reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the [CTA] that might create problems such as congestion or the disruption of the activities of those who use LAX The resolution . . . does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.⁹⁷

The Court also addressed the Board's assertion that the Resolution should be interpreted narrowly to allow airport-related speech while excluding other speech:

Such a limiting construction . . . is of little assistance in substantially reducing the overbreadth of the resolution. Much nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be "airport related," but is still protected speech even in a nonpublic forum The line between airport-related speech and nonairport-related speech is, at best, murky In essence, the result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident."⁹⁸

In short, the decision was a major victory for all groups and individuals that seek to share a religious, political, or other message through the time-tested means of distributing literature to passersby on public property.

⁹⁶ *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573–74 (1987).

⁹⁷ *Id.* at 574–75 (second alteration in original).

⁹⁸ *Id.* at 576 (citation omitted) (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135–36 (1974) (Powell, J., concurring)).

III. THE IMPACT AND CONTINUED RELEVANCE OF *JEWS FOR JESUS*

One obvious question is the extent to which *Jews for Jesus*, arising from a dispute over access to airport terminals for speech activities by non-passengers, retains factual relevance in a post-September 11 world. Although much has changed in American law and culture since 1987, the decision in *Jews for Jesus* continues to have an impact.

The airports of the 1970s and 1980s, which were often widely open to, and visited by, countless members of the general public who had no travel-related business for activities like shopping, exercise, and meals, seem like a distant memory. The vast majority of the terminals and common areas of most modern airports are limited to ticketed passengers and those who work at the airport in some capacity, and *Jews for Jesus* does not guarantee non-passengers a right to enter these restricted areas for speech purposes. Additionally, in 1992, the Supreme Court held that public airport terminals are non-public fora,⁹⁹ giving the government broader leeway to restrict speech there than in a traditional public forum.

A key principle of *Jews for Jesus*, however, is that government officials cannot exercise arbitrary discretion to decide that some types of speech, but not others, will be permitted on its property under overbroad or vague statutes or rules.¹⁰⁰ That holding is not limited to airport terminals opened to the general public, but it extends to numerous public properties. For instance, courts considering various factual circumstances have relied upon or cited *Jews for Jesus* concerning the doctrine of overbreadth.¹⁰¹ Other cases have relied upon or cited *Jews for Jesus* in the context of standing,¹⁰² facial challenges,¹⁰³ applying a

⁹⁹ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (concluding that a public airport terminal is a non-public forum, not a traditional public forum, and a ban on repetitive solicitation of money within terminals was reasonable).

¹⁰⁰ *Jews for Jesus*, 482 U.S. at 576.

¹⁰¹ *See, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 750–51 (4th Cir. 2010); *Berger v. City of Seattle*, 569 F.3d 1029, 1049, 1055–57 (9th Cir. 2009); *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1316–18 (Fed. Cir. 2008); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1315–17 (D.C. Cir. 2005); *Odle v. Decatur Cnty.*, 421 F.3d 386, 393 (6th Cir. 2005); *Huminski v. Corsones*, 396 F.3d 53, 92–93 (2d Cir. 2005); *Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir. 2001); *Schultz v. City of Cumberland*, 228 F.3d 831, 848 (7th Cir. 2000); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 748 (1st Cir. 1995); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir. 1992); *ACORN v. City of Tulsa*, 835 F.2d 735, 743–44 (10th Cir. 1987).

¹⁰² *See, e.g.*, *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (“The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others.” (citing *Jews for Jesus*, 482 U.S. at 574)); *Odle*, 421 F.3d at 393; *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998).

narrowing construction to uphold otherwise unconstitutional laws,¹⁰⁴ and the exercise of unrestrained power.¹⁰⁵ In other words, the legal principles discussed and applied in *Jews for Jesus* retain relevance today in many contexts despite the innumerable changes made at airports over the past twenty-five years.

In addition, the decision to emphasize free speech over free exercise of religion in the *Jews for Jesus* litigation took on added significance after the Supreme Court's decision three years later in *Employment Division v. Smith*.¹⁰⁶ Prior to *Smith*, the Court required government actions that substantially burdened religious practice to be justified by a compelling governmental interest (at least in some circumstances).¹⁰⁷ In *Smith*, however, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹⁰⁸ In hindsight, had the Court been presented with solely a free exercise claim in *Jews for Jesus*, rather than a free speech claim, it may have considered issuing a *Smith*-like decision in favor of the Board (although the arbitrary discretion retained by the Board may have justified the application of strict scrutiny even under the *Smith* standard).

In any event, the *Smith* decision signaled a sea change in litigation involving religious individuals or groups seeking to share or exercise their faith, making the Free Exercise Clause effectively irrelevant in many situations. In addition, although Congress enacted the Religious Freedom Restoration Act to bolster free exercise protections,¹⁰⁹ it only

¹⁰³ See, e.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992) (relying on *Jews for Jesus* for the proposition that an overbroad regulation is subject to a facial challenge); *Griffith v. Lanier*, 521 F.3d 398, 400 (D.C. Cir. 2008) (citing *Jews for Jesus* for the proposition that even "[a] limiting construction that is 'fairly' possible can save a regulation from facial invalidation"); *Parks v. Finan*, 385 F.3d 694, 702–03 (6th Cir. 2004) (relying, in part, on *Jews for Jesus* to hold that a regulation that required individuals to obtain a permit prior to engaging in "activities of a broad public purpose" was unconstitutional).

¹⁰⁴ See, e.g., *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) (relying on *Jews for Jesus* for the proposition that a court may apply a narrowing construction when a law faces a constitutional challenge); *Metro. Wash. Airports Auth. Prof'l Fire Fighters Ass'n Local 3217 v. United States*, 959 F.2d 297, 306 (D.C. Cir. 1992).

¹⁰⁵ See, e.g., *Stewart v. D.C. Armory Bd.*, 789 F. Supp. 402, 406 (D.D.C. 1992) (citing *Jews for Jesus* in holding that stadium operators had impermissibly broad power to decide whether certain activities "pertain[ed] to the event" at hand).

¹⁰⁶ 494 U.S. 872 (1990).

¹⁰⁷ *Id.* at 883; *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

¹⁰⁸ *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

¹⁰⁹ 42 U.S.C. § 2000bb(a)–(b) (2006).

applies to actions taken by the federal government in light of the Court's decision in *City of Boerne v. Flores*.¹¹⁰ The freedom of speech has become the principal source of protection for religious actors in many situations, further cementing the importance of *Jews for Jesus* to religiously motivated individuals and organizations.

IV. TWENTY-FIVE YEARS LATER: RELIGIOUS LIBERTIES BATTLES CONTINUE

On a personal note, *Jews for Jesus* helped send my career in a new direction, contributing to the creation of the American Center for Law and Justice in 1990.¹¹¹ *Jews for Jesus* was the first of many Supreme Court arguments for me involving a range of issues from equal access for student religious groups on public school campuses to, most recently, a local government's authority to select and permanently display monuments and historical items of its choosing on public property.¹¹² In working on these and other cases since *Jews for Jesus*, it has become apparent to me that the need for continued defense of religious liberty is unmistakable.

My first Supreme Court argument after *Jews for Jesus* was in *Board of Education v. Mergens*, in which I represented a high school student, Bridget Mergens.¹¹³ Her public school had denied her permission to start a Christian club at her school, even though the school allowed many other non-academic clubs to organize.¹¹⁴ In *Mergens*, we defended this student's rights using the Equal Access Act,¹¹⁵ a federal

¹¹⁰ 521 U.S. 507, 511, 536 (1997); see also *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

¹¹¹ *About the American Center for Law & Justice*, ACLJ, <http://aclj.org/our-mission/about-aclj> (last visited Oct. 22, 2012).

¹¹² See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129–30, 1138 (2009) (holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (holding that minors have a First Amendment right to support political candidates); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 361, 377, 380 (1997) (holding that injunction provisions prohibiting free speech activities opposing abortion within fifteen feet of individuals heading to or from an abortion clinic violated the First Amendment); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 393–94 (1993) (holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 232–34 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause).

¹¹³ 496 U.S. at 230–32.

¹¹⁴ *Id.* at 231–32, 243–45.

¹¹⁵ 20 U.S.C. §§ 4071–4074 (2006) (“It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”).

statute enacted to protect students from this kind of discrimination.¹¹⁶ The policy under which the school denied Mergens's request stated that all clubs must have a faculty sponsor, but a religious club could not be formed because the policy prevented such clubs from having a faculty sponsor.¹¹⁷ Although the Court issued four separate opinions, it held by an 8-1 vote that the school violated the Equal Access Act by allowing secular clubs to meet while rejecting a proposed religious club.¹¹⁸

A few years later, in *Lamb's Chapel v. Center Moriches Union Free School District*, I represented an evangelical church. A public school board policy had denied the church after-hours use of school facilities, providing that "[t]he school premises shall not be used by any group for religious purposes."¹¹⁹ The school board had a policy allowing use of school facilities for "social, civic, or recreational uses,"¹²⁰ and Lamb's Chapel wanted to show a film series produced by a Christian psychologist and professor discussing his "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage."¹²¹ Although there were two concurrences, all nine Justices agreed that the school board violated the Constitution by prohibiting Lamb's Chapel from showing its film series merely because it "appeared to be church related."¹²²

¹¹⁶ See *Mergens*, 496 U.S. at 233.

¹¹⁷ *Id.* at 232–33. School officials also asserted that allowing a "religious club at the school would violate the Establishment Clause." *Id.* at 233. The Court squarely rejected this contention. *Id.* at 253 ("[W]e hold that the Equal Access Act does not on its face contravene the Establishment Clause"); see also *id.* at 261 (Kennedy, J., concurring) ("[N]o constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment."); *id.* at 263 (Marshall, J., concurring) ("The Establishment Clause does not forbid the operation of the Act").

¹¹⁸ *Id.* at 229–30, 246–47, 258, 262, 270 (plurality opinion).

¹¹⁹ 508 U.S. 384, 387–88 (1993). The school district offered numerous justifications in support of its discriminatory exclusion of Lamb's Chapel. State law permitted after-hours use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," *id.* at 386, but a New York appellate court ruled that the statute prohibited religious uses because the statute did not list them as a permitted activity. *Id.* at 386–87 (citing *Trietley v. Bd. of Educ.*, 409 N.Y.S.2d 912, 915 (App. Div. 1978)). The school district's policy had been drafted with this interpretation in mind, and both the Second Circuit and the New York Attorney General agreed with this interpretation. *Id.* at 387. Additionally, the school district argued that it was justified in excluding Lamb's Chapel because the church was "radical" and allowing it to meet at the school "would lead to threats of public unrest and even violence." *Id.* at 395.

¹²⁰ *Id.* at 387.

¹²¹ *Id.* at 387–88.

¹²² *Id.* at 396–97.

Jews for Jesus, *Mergens*, *Lamb's Chapel*, and other cases decided in the past twenty-five years¹²³ illustrate that religious (often Christian) individuals and groups have continued to face obstacles in obtaining equal footing to promote their messages. The Free Speech Clause has proven to be a successful tool for churches and other religious organizations in defending their ability to express their religious viewpoints.

CONCLUSION

The decision in *Jews for Jesus* not only opened the door for speakers to access an audience of millions of people every year, it helped to further reinforce the prominent role of the Free Speech Clause in litigation concerning the expression and exercise of religious faith. In particular, it continues to impact free speech jurisprudence regarding laws and policies that allow public officials to arbitrarily decide who may, and who may not, use public property to speak. Despite the countless changes that have occurred in American law and society over the past twenty-five years, the recurring conflict between individuals and groups seeking access to various types of public property for speech purposes and those seeking to exclude speakers from those properties ensures that *Jews for Jesus* and the principles it stands for will continue to remain a fixture of First Amendment jurisprudence.

While much progress has been made in the fight to protect religious freedom and expression since *Jews for Jesus*, the fight is not over. Governmental entities continue to restrict the use of public facilities by religious organizations, and in some instances courts have permitted the exclusion of organizations seeking to engage in religious speech that is deemed to be religious worship.¹²⁴ My hope is that Christians will continue to peaceably battle for equal treatment when faced with violations of their rights to assemble, speak, and worship.

¹²³ *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103, 120 (2001) (holding that an elementary school engaged in viewpoint discrimination by excluding a religious group from hosting after-school activities such as “singing songs, hearing a Bible lesson and memorizing scripture”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822, 827, 837 (1995) (holding that the University of Virginia violated the First Amendment by refusing to fund a student newspaper dedicated to publishing a Christian viewpoint in the same manner that it funded other student newspapers that published from a secular perspective).

¹²⁴ *See, e.g.*, *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 36, 39–40 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 816 (2011) (upholding a school board rule prohibiting after-hours use of school facilities for “religious worship services”); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 911 (9th Cir. 2007) (holding that “exclusion of [a religious group’s] religious worship services from the Antioch Library meeting room is a permissible limitation on the subject matter that may be discussed in the meeting room, and that it is not suppression of a prohibited perspective from an otherwise permissible topic”).