in state and federal courts for decades. In the latest installment of this long-standing feud, plaintiffs asserted a variety of claims under 42 U.S.C. §§ 1983 and 1985 for alleged violations of their First and Fourteenth Amendment rights, and a claim under the Religious Land Use and Institutionalized Persons Act, (RLUIPA) for alleged discriminatory application of the village's zoning laws. The district court dismissed some of plaintiffs' claims on *res judicata* grounds, other claims on the basis of plaintiffs' lack of standing, and the rest on their failure to state a claim on which relief could be granted. The Second Circuit affirmed.

The Court first addressed the doctrine of *res judicata* as it applies to plaintiffs' constitutional and RLUIPA rights. Plaintiffs claimed that the Village violated these rights by requiring the dissident group to obtain certain permits in order to use Village property as a synagogue, while not requiring the same for members of the mainstream sect. The Court found that *res judicata* applied, as the same "nucleus of operative facts" had already seen final adjudication in two previous lawsuits in New York state court. Plaintiffs argued that preclusion was inappropriate because the action involved new factual allegations related to the property. This failed to persuade the Court. It found that the new facts were not new at all, and plaintiffs could not avoid the effect of *res judicata* by "simply splitting up claims".

The Court then addressed whether plaintiffs had standing to allege claims by individuals not party to the action. Generally, because Section 1983 rights are personal, organizations lack standing to assert such claims for their members. An organization may, however, bring a Section 1983 suit on its own behalf so long as it can independently satisfy the requirements for Article III standing. Plaintiff Kiryas Joel Alliance (KJA), an unincorporated, nonprofit association that advocates for the rights of the citizens of the Village, asserted that it had suffered an injury because it had diverted resources from other activities to provide security for non-party dissident citizens. The Court rejected this argument. KJA lacked standing because it had failed to allege that any of the non-parties were members of KJA. It also had failed to seek inclusion of the non-parties in the case.

Finally, the Court dismissed all remaining claims due to plaintiffs' failure to state a claim upon which relief could be granted. The Court held that the religion-based claims under the Equal Protection Clause failed because the plaintiffs had not shown that defendant's actions were animated by intentional religious discrimination, as opposed to political differences. Similarly, the Court found that the plaintiffs' Establishment Clause claim failed. Their allegations of an overlap between the Village's leadership and the religious sect, standing alone, were insufficient to establish an "excessive entanglement" under the *Lemon* test. The Court also dispensed with plaintiffs' conspiracy claim as vague and without merit. *Kiryas Joel Alliance v. Village of Kiryas Joel*, No. 12-217 (2d Cir. Sept. 10, 2012).

Tax Liens- Authority of FHFA

Local governments encourage the construction of energy-efficient buildings, "green" retrofits and local employment by providing development loans to commercial and residential property owners. These loans, issued under the localities' Property Assessed Clean Energy (PACE) programs, are classified as "assessments." If a scheduled loan payment is not made, the delinquent amount attaches to the subject property as a "tax lien" and remains with the property in the event of sale. In some instances, the localities provide that these tax liens are senior to pre-existing and underlying mortgages.

In 2008, responding to the nation's real estate crisis, the Federal Housing Finance Agency (FHFA) appointed itself conservator over the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). In July 2010, the FHFA issued a directive to Fannie Mae and Freddie Mac to take "protective actions" with respect to PACE programs that impose first-priority liens on participating properties. The same day, the Office of the Comptroller of the Currency (OCC) issued guidance that national banks should be aware of the FHFA directive and take action to mitigate exposure to first-lien collateral. Fannie Mae and Freddie Mac subsequently ceased purchasing first-priority PACE mortgages.

Given that Fannie Mae and Freddie Mac own or guarantee more than half the home loans in the United States and influence home mortgage practices generally, the directive posed a major threat to the viability of first-lien PACE programs. The Natural Resources Defense Council (NRDC) and the Town of Babylon, New York, a first-priority lien jurisdiction, challenged the authority of the FHFA to issue its cautionary directive in two cases brought in the Southern District and Eastern District of New York, respectively.

They claimed that the FHFA directive violated the Administrative Procedures Act (APA) in that the FHFA had acted in an arbitrary and capricious manner and had failed to solicit notice and comment. They further challenged the directive as violating the National Environmental Policy Act because it did not provide an environmental impact statement.

The two district court cases examined the relevant FHFA enabling legislation, 12 U.S.C. § 4617, which clearly conferred on the agency broad powers to take precautionary measures. As conservator, the FHFA had authority to "take such action as is — (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D).

More importantly, Section 4617 expressly limited judicial review of the FHFA's exercise of powers as a conservator. Both district courts concluded that the challenge to the FHFA's issuance of the directive was precluded by 12 U.S.C. § 4617(f) and granted motions to dismiss by the FHFA and OCC.

On appeal, the City and the NRDC argued that the FHFA had issued its directive not as a conservator but as a regulator, which made its actions subject to the APA. The Second Circuit affirmed the decisions of the courts below: although the FHFA did have regulatory powers, in this context it was clearly acting as a conservator. *Town of Babylon v. FHFA, et al.; NRDC,*

Inc. v. FHFA, et al., Nos. 11-3408 and 11-3285 (2d Cir. Oct. 24, 2012).

First Amendment-Prohibition Against Picketing at Funerals

Shirley Phelps–Roper and her daughter are members of the Westboro Baptist Church of Topeka Kansas who contend that God punishes America for tolerating homosexuality. They picket at funerals, in particular those of soldiers killed in action, with signs saying "God Hates Fags" and "Thank God for Dead Soldiers."

Manchester, a city of 19,000 in St. Louis County, Missouri adopted an ordinance in 2007 to limit protests near funerals and burial services. The Manchester regulation prohibited picketing or other protest activities within 300 feet of a funeral service or burial beginning one hour before the service until one hour after the service ends.

Plaintiffs brought a facial First Amendment challenge to the Manchester ordinance, contending that it was overbroad and did not support any cognizable governmental interest. The District Court for the Eastern District of Missouri agreed, finding that the ordinance was an impermissible content-based restriction on expression. The district court's holding was guided by the Eighth Circuit's prior decisions on the subject, which had held that "the government has no compelling interest in protecting an individual from unwanted speech outside of the residential context." *Phelps-Roper v. Nixon*, 545 F.3d 685, 692 (8th Cir. 2008).

On appeal, the *Manchester* case provided the Eighth Circuit with another opportunity to review the legal landscape. In *Madsen v. Womens Health Ctr. Inc.*, 512 U.S. 753 (1994) and *Hill v. Colorado*, 530 U.S. 703 (2000) the Supreme Court had held that the freedom from unwanted communication extended to those entering abortion facilities. In 2008, in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), the Sixth Circuit had upheld an anti-picketing statute nearly identical to the Manchester ordinance. In 2011 the Supreme Court had affirmatively stated that funeral protesters did not enjoy unlimited scope; their picketing was subject to "reasonable time, manner and place restrictions." *Snyder v. Phelps*, 131 S.Ct. 137 (2011). And in August 2012 Congress had unanimously passed the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154, 126 Stat. 1165 § 601 (2012), which restricted protests at military funerals.

Under this constellation, the Eighth Circuit held that the Manchester ordinance created a permissible restriction on the time, manner and place of funeral protests. It rejected the district court's conclusion that the statute was content-oriented, finding that the regulation was content-neutral and only applied to conduct; therefore, the ordinance was subject to rational basis review. The Circuit Court looked to *Hill*, *Madsen*, *Strickland* and *Snyder* in discerning that there is a significant governmental interest in protecting the privacy of loved ones at funerals. Finally, it found that Manchester's ordinance was narrowly tailored and left open ample alternate channels of communication. The Eighth Circuit reversed the grant of summary judgment by the district court. *Phelps-Roper v. City of Manchester*, No. 10-3197 (8th Cir. Oct. 16, 2012). ML

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