

RELIGIOUS LIBERTY PROTECTION ACT OF 1998

HEARINGS

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

H.R. 4019

JUNE 16 AND JULY 14, 1998

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RELIGIOUS LIBERTY PROTECTION ACT OF 1998

TUESDAY, JUNE 16, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in Room 2237, Rayburn House Office Building, Hon. Charles Canady [chairman of the subcommittee] presiding.

Present: Representatives Charles Canady, Robert C. Scott and Jerrold Nadler.

Staff Present: John Ladd, Chief Counsel; Robert J. Corry, Counsel; Cathleen Cleaver, Counsel; Michael Connolly, Staff Assistant; Susana Gutierrez, Clerk; and Brian Woolfolk, Minority Counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will be in order. This is the fourth hearing the subcommittee has conducted over the last year concerning the protection of religious liberty in the wake of the *Boerne v. Flores* decision of the Supreme Court.

Today's hearing will focus specifically on H.R. 4019, the Religious Liberty Protection Act of 1998, legislation which Mr. Nadler and I introduced last week.

[The information referred to follows:]

105TH CONGRESS
2D SESSION

H. R. 4019

To protect religious liberty.

IN THE HOUSE OF REPRESENTATIVES

JUNE 9, 1998

Mr. CANADY of Florida (for himself and Mr. NADLER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To protect religious liberty.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Liberty Protection Act of 1998".

SEC. 2. PROTECTION OF RELIGIOUS EXERCISE.

(a) **GENERAL RULE.**—Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise—

(1) in a program or activity, operated by a government, that receives Federal financial assistance; or

(2) in or affecting commerce with foreign nations, among the several States, or with the Indian tribes;
even if the burden results from a rule of general applicability.

(b) **EXCEPTION.**—A government may substantially burden a person's religious exercise if the government demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) **FUNDING NOT AFFECTED.**—Nothing in this section shall be construed to authorize the United States to deny or withhold Federal financial assistance as a remedy for a violation of this Act.

(d) **STATE POLICY NOT COMMANDEERED.**—A government may eliminate the substantial burden on religious exercise by changing the policy that results in the burden, by retaining the policy and exempting the religious exercise from that policy, or by any other means that eliminates the burden.

(e) **DEFINITIONS.**—As used in this section—

(1) the term "government" means a branch, department, agency, instrumentality, subdivision, or official of a State (or other person acting under color of State law);

(2) the term "program or activity" means a program or activity as defined in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a); and

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

SEC. 3. ENFORCEMENT OF THE FREE EXERCISE CLAUSE.

(a) **PROCEDURE.**—If a claimant produces prima facie evidence to support a claim of a violation of the Free Exercise Clause, the government shall bear the burden of persuasion on all issues relating to the claim, except any issue as to the existence of the burden on religious exercise.

(b) **LAND USE REGULATION.**—

(1) **LIMITATION ON LAND USE REGULATION.**—No government shall impose a land use regulation that—

(A) substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety;

(B) denies religious assemblies a reasonable location in the jurisdiction;

or

(C) excludes religious assemblies from areas in which nonreligious assemblies are permitted.

(2) **FULL FAITH AND CREDIT.**—Adjudication of a claim of a violation of this subsection in a non-Federal forum shall be entitled to full faith and credit in a Federal court only if the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(3) **NONPREEMPTION.**—Nothing in this subsection shall preempt State law that is equally or more protective of religious exercise.

(4) **NONAPPLICATION OF OTHER PORTIONS OF THIS ACT.**—Section 2 does not apply to land use regulation.

SEC. 4. JUDICIAL RELIEF.

(a) **CAUSE OF ACTION.**—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) **ATTORNEYS' FEES.**—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting "the Religious Liberty Protection Act of 1998," after "Religious Freedom Restoration Act of 1993,"; and

(2) by striking the comma that follows a comma.

(c) **PRISONERS.**—Any litigation under this Act in which the claimant is a prisoner shall be subject to the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(d) **LIABILITY OF GOVERNMENTS.**—

(1) **LIABILITY OF STATES.**—A State shall not be immune under the 11th amendment to the Constitution from a civil action, for a violation of the Free Exercise Clause under section 3, including a civil action for money damages.

(2) **LIABILITY OF THE UNITED STATES.**—The United States shall not be immune from a civil action, for a violation of the Free Exercise Clause under section 3, including a civil action for money damages.

SEC. 5. RULES OF CONSTRUCTION.

(a) **RELIGIOUS BELIEF UNAFFECTED.**—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) **RELIGIOUS EXERCISE NOT REGULATED.**—Nothing in this Act shall create any basis for regulation of religious exercise or for claims against a religious organization, including any religiously affiliated school or university, not acting under color of law.

(c) **CLAIMS TO FUNDING UNAFFECTED.**—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require government to incur expenses in its own operations to avoid imposing a burden or a substantial burden on religious exercise.

(d) **OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.**—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) **EFFECT ON OTHER LAW.**—Proof that a religious exercise affects commerce for the purposes of this Act does not give rise to any inference or presumption that the religious exercise is subject to any other law regulating commerce.

(f) **SEVERABILITY.**—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) **DEFINITIONS.**—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–2) is amended—

(1) in paragraph (1), by striking “a State, or subdivision of a State” and inserting “a covered entity or a subdivision of such an entity”;

(2) in paragraph (2), by striking “term” and all that follows through “includes” and inserting “term ‘covered entity’ means”; and

(3) in paragraph (4), by striking all after “means,” and inserting “an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief.”

(b) **CONFORMING AMENDMENT.**—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–3(a)) is amended by striking “and State”.

SEC. 8. DEFINITIONS.

As used in this Act—

(1) the term “religious exercise” means an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief;

(2) the term “Free Exercise Clause” means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion and includes the application of that proscription under the 14th amendment to the Constitution; and

(3) except as otherwise provided in this Act, the term "government" means a branch, department, agency, instrumentality, subdivision, or official of a State, or other person acting under color of State law, or a branch, department, agency, instrumentality, subdivision, or official of the United States, or other person acting under color of Federal law.



Mr. CANADY. From the outset of our history as Americans, concern about religious liberty has been central to our national experience. The bill we consider today is based on the conviction that the Congress has an ongoing responsibility to use its constitutionally established powers to protect the freedom of individual Americans to practice their faith against undue incursions by the force of government.

It is a fact of life that the actions of government will, from time to time, come into conflict with the religious practices of some individuals and institutions. As the scope of the activities of government has grown, the occasions for such conflict have increased. The bill on which we will hear testimony today simply attempts to ensure that such conflicts will be taken seriously and that the impact of governmental action on religious freedom will be given full consideration.

As our witnesses will explain, that does not mean that conflicts between the actions of government and the religious practices of individuals and institutions will always be resolved against the government. It does mean, however, that within the scope of the activities subject to protection by the Congress, the value of religious liberty will not be recklessly trampled by insensitive policies and thoughtless bureaucratic actions.

In America, we enjoy many important freedoms, but there is no freedom more fundamental than the freedom to practice one's faith without the interference of government. That is why we are here today, and I look forward to hearing the testimony of our witnesses who will explain the various aspects of the legislation under consideration.

Mr. CANADY. Mr. Scott is recognized.

Mr. SCOTT. Thank you, Mr. Chairman. And I appreciate the opportunity to participate in today's hearing on H.R. 4019, the Religious Liberty Protection Act, and I wholeheartedly agree with the bill's sponsors and their beliefs that too often certain religious practices are substantially burdened to the point where our constitutional freedoms of religious expression are compromised.

Reverend Wilson, a minister from my district, came to one of our hearings and testified that his church was prevented from serving meals to homeless people despite the fact that feeding the hungry is a core component of his church's religious beliefs, and that legislation that prohibited churches from serving food prohibited no other group from such service. And so churches were singled out in that case, and that is one of the cases that deserve our attention and response.

Our response, however, must be deliberate and within our authority to act. The Reverend Wilsons of the world deserve no less.

Now, I have not signed on to the language of H.R. 4019 because I am not convinced that the bill as currently drafted can pass constitutional muster. The bill is being vetted by constitutional law experts throughout the country, and as we begin to receive responses from our inquiries, a number of very significant concerns have been raised. RFRA was overturned because the Court held that the Congress lacked authority and failed to create a proper record that would justify any congressional authority, and I am delighted that we have had hearings, and numerous hearings, on this issue and hopefully are creating a record that can help us pass constitutional muster.

The Commerce Clause, the Spending Clause and section 5 authority of RLPA have been reviewed by a number of experts that contend that the authority that we are using in H.R. 4019 may be questionable. In addition, concerns have been raised in regard to the constitutionality of State sovereign immunity and the Prison Litigation Act provisions of the bill.

Mr. Chairman, I am delighted that we are focusing our attention to a specific bill, because it will help us focus our attention on certain—on specific language and not generalities, so that as we discuss the constitutionality, we will have the document before us.

It is my hope that we will have a series of hearings to ensure that H.R. 4019 is constitutional and that we are creating the proper record. We have excellent witnesses testifying before us today. They are all experts in this field, and many have been very closely associated with some of the cases that have created the confusion that we are in and the cases that we have to deal with as we consider the constitutionality of this bill.

So I want to thank you for putting together an excellent hearing, and I look forward to hearing the witnesses.

Mr. CANADY. Thank you, Mr. Scott.

We will now go to our first panel. I would ask that the members of the first panel please come forward and take your seats.

This morning we will hear from witnesses on two panels. Our first panel is composed of six witnesses, and the second panel will be composed of two witnesses.

On our first panel this morning, our first witness will be Professor Douglas Laycock, who is the associate dean for research at the University of Texas Law School.

Next will be Professor Thomas C. Berg. Professor Berg teaches at the Cumberland Law School in Birmingham, Alabama.

Following him will be Professor Christopher L. Eisgruber of the New York University School of Law.

The fourth witness will be Professor Marci Hamilton. Professor Hamilton comes to us from the Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in constitutional law, the First Amendment and Copyright law.

The next witness will be Mr. Gene Schaerr, who is with the law firm of Sidley & Austin in Washington, D.C.

And our final witness on this panel will be Mr. Marc Stern. Mr. Stern is the director of the legal department at the American Jewish Congress.

I want to thank all of you for being here with us this morning. Those of you who have been here before, I welcome you back.

I would ask that you do your best to summarize your testimony in 5 minutes or less and try to be governed by the light. When it is red, that means you should try to conclude as soon as possible.

But without objection, of course, your full written statements will be made a part of the permanent record of the hearing.

Mr. CANADY. With that, we will begin with Professor Laycock.

STATEMENT OF DOUGLAS LAYCOCK, PROFESSOR, ASSOCIATE DEAN FOR RESEARCH, UNIVERSITY OF TEXAS LAW SCHOOL

Mr. LAYCOCK. Thank you, Mr. Chairman, and Mr. Scott.

I strongly support this bill. The House unanimously concluded that a bill of this sort was necessary 5 years ago when it enacted RFRA, and now the question is what constitutional authority is available and how much of the religious liberties of the American people can Congress protect.

I have tried to address the constitutional and scope issues in detail in my written statement. I will try to summarize the highlights here.

First, as to the Spending Clause, the Spending Clause provisions of this bill are based squarely on the provisions in such familiar statutes as Title VI of the Civil Rights Act, Title IX on sex discrimination in education, and the Equal Access Act. The bill would ensure that the intended beneficiaries of federally-assisted programs are not excluded by unnecessary burdens on their religious exercise and would ensure that Federal funds are not spent contrary to congressional intent to unnecessarily burden religious exercise.

Those purposes are at the very core of the power to attach conditions to the grant of Federal funds, and I think in all but the most unusual applications the Spending Clause provisions would pass constitutional muster.

The Commerce Clause provisions track the language of the Clayton Act, the Federal Trade Commission Act, the Americans with Disabilities Act and many other familiar statutes. "In or affecting commerce" is the historic constitutional standard for what Congress can regulate. This provision is constitutional by definition.

Religious exercise beyond the reach of the Commerce Clause is simply outside the scope of the bill. Marc Stern's testimony later today will show that religious exercise has broad commercial consequences, and on standard economic models a substantial burden on religious exercise will reduce the volume of that exercise and reduce the volume of the resulting commerce.

I think this will have a broad range of applications. It won't reach all the religious liberty Congress would like to protect, but it will reach a very large part of it.

Section 3 is based on the power to enforce the Fourteenth Amendment. Section 3(a) would enforce the Free Exercise Clause as interpreted by the Supreme Court. There are important parts of *Employment Division v. Smith* that actually do protect religious liberty, but each of those exceptions to the *Smith* rule poses difficult factual questions where proof is elusive, where the evidence is often in the hands of the government and where the truth is uncertain.

Section 3(a) changes no element of the Supreme Court's test, but by shifting the burden of persuasion, it protects religious liberty when the case for suppression has not been fully proven.

Section 3(b) would impose prophylactic rules on church land use regulation. The record from the earlier hearings before this committee is overwhelming that land use regulation is administered in individualized processes with few generally applicable rules; that it is rife with discrimination against religious organizations and especially against minority churches and nonmainstream churches.

Each of these facts brings land use within one of the exceptions to the *Smith* rule, but these facts are very difficult to prove one case at a time. Only Congress has the ability to examine many cases and find the factual pattern that pervades across the cases. These facts support the need for section 3(b) as enacted to enforce the Fourteenth Amendment.

The Court said in *City of Boerne* that Congress may act where there is reason to believe that many of the laws have a significant likelihood of being unconstitutional. The standard is not certainty. It is reason to believe and significant likelihood, and that standard is, in my judgment, easily met by this hearing record.

With respect to prison litigation, the bill is subject to the Prison Litigation Reform Act, which is succeeding. In the first year of the Act, prisoner litigation was reduced by 31 percent. Further reductions can reasonably be expected as the bill becomes more fully effective.

Mr. Scott asked about challenges to the constitutionality of that Act, and I have been following those challenges. Six circuits have upheld the Act. Only the Ninth Circuit has struck it down, and even there only with respect to retroactive reopening of final judgments. That is a very sensitive issue, but it is not an issue that would be posed by any of the interactions of the Religious Liberty Protection Act and the Prison Litigation Reform Act. The provisions on frivolous prison litigation, so far as I know, have not even been challenged; I don't think they successfully could be challenged.

With respect to sovereign immunity, the law is fairly clear. Section 4(d) overrides the States' Eleventh Amendment immunity with respect to claims under section 3, which enforces the Fourteenth Amendment. That override is squarely authorized by Justice Rehnquist's opinion in *Fitzpatrick v. Bitzer*. *Fitzpatrick* is reaffirmed in the 1996 case of *Seminole Tribe v. Florida*. *Seminole Tribe* also holds that Congress cannot override the Eleventh Amendment in Commerce Clause legislation, and this bill does not do that. The override is squarely confined to the Fourteenth Amendment provisions.

With respect to the Establishment Clause, the bill does not violate that Clause. The Court has unanimously held that Congress can exempt religious exercise from burdensome regulation, and that those exemptions do not have to come packaged with similar benefits for secular activities. That was the *Amos* decision in 1987, reaffirmed after *Smith* and *Board of Education v. Grumet* in 1994.

Finally, I think the bill is consistent with federalism limitations on Congress' power. The bill declares a Federal policy that religious exercise should not be unnecessarily burdened. It preempts State

laws that are inconsistent with that policy. The structure and effect and even the syntax of the bill's Commerce and Spending Clause provisions is indistinguishable from the structure and effect of preemption bills such as the Airline Deregulation Act. That is no coincidence. This is effectively a religion deregulation act.

The Court recognized the validity of that sort of preemptive legislation in *United States v. Printz*, its most recent federalism decision, when it cited with approval its earlier decisions in *FERC v. Mississippi* and *Hodel v. Virginia*. There are similar statements in *New York v. United States*, and all of these statements are cited fully and quoted where appropriate in my written testimony.

I think the bill is constitutional under existing precedent. No one can predict the future, but Congress would act entirely responsibly to protect the liberties of the American people with this bill.

Thank you, sir.

Mr. CANADY. Thank you, Professor Laycock.

[The prepared statement of Mr. Laycock follows:]

PREPARED STATEMENT OF DOUGLAS LAYCOCK, PROFESSOR, ASSOCIATE DEAN FOR RESEARCH, UNIVERSITY OF TEXAS LAW SCHOOL

Thank you for the opportunity to testify this morning in support of H.R. 4019, the Religious Liberty Protection Act of 1998. This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

I have taught and written about the law of religious liberty, and also about a wide range of other constitutional issues, for more than twenty years. I have represented both religious organizations and secular civil liberties organizations, including important cases under the Religious Freedom Restoration Act. I wish to address Congress's constitutional authority to enact RLPA, the range of cases to which the bill might be applied, and some of the drafting choices presented by the bill.

But first let me say a little about the importance and universality of this bill. RLPA is not a bill for left or right, or for any particular faith, or any particular tradition or faction within a faith. There is an extraordinary diversity of beliefs about religion in America, from the very far left to the very far right both theologically and politically, from the most traditional orthodoxies to the most experimental and idiosyncratic views of the supernatural. RLPA will protect people of all races, all ethnicities, and all socio-economic statuses.

Religious liberty is a universal human right. The Supreme Court has taken the cramped view that one has a right to believe a religion, and a right not to be discriminated against because of one's religion, but no right to practice one's religion. To the extent that it has power to do so, Congress should enact more substantive protection for religious liberty.

I. THE SPENDING CLAUSE PROVISIONS.

Section 2(a) of RLPA tracks the substantive language of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (1994), providing that government shall not substantially burden a person's religious exercise, and applies that language to cases within the spending power and the commerce power. Section 2(b) also tracks RFRA. It states the compelling interest exception to the general rule that government may not substantially burden religious exercise.

Section 2(a)(1) specifies the spending power applications of RLPA. The bill applies to programs or activities operated by a government and receiving federal financial assistance. "Government" is defined in § 2(e)(1) to include persons acting under color of state law. In general, a private-sector grantee acts under color of law only when the government retains sufficient control that "the alleged infringement of federal rights [is] 'fairly attributable to the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

Section 2(a)(1) would therefore protect against substantial burdens on religious exercise in programs or activities receiving federal financial assistance and operating under color of state law. It would protect a wide range of students and faculty in public schools and universities, job trainees, workfare participants, welfare recipients, tenants in public housing, and participants in many other federally assisted

but state-administered programs. An individual could not be excluded from a federally assisted program because of her religious dress, or because of her observance of the Sabbath or of religious holidays, or because she said prayers over meals or at certain times during the day—unless these burdens served a compelling interest by the least restrictive means.

The federal interest is simply that the intended beneficiaries of federal programs not be excluded because of their religious practice, and that federal funds not be used to impose unnecessary burdens on religious exercise. The provision is modeled directly on similar provisions in other civil rights laws, including Title VI of the Civil Rights Act of 1964, which forbids race discrimination in federally assisted programs, 42 U.S.C. § 2000d (1994), and Title IX of the Education Amendments of 1972, which forbids sex discrimination in federally assisted educational programs, 20 U.S.C. § 1681 (1994).

Congressional power to attach conditions to federal spending has been consistently upheld since *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). Conditions on federal grants must be “[r]elated to the federal interest in particular national projects or programs.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Federal aid to one program does not empower Congress to demand compliance with RLPA in other programs; the bill’s protections are properly confined to each federally assisted “program or activity.” *Dole* upheld a requirement that states change their drinking age as a condition of receiving federal highway funds, finding the condition directly related to safe interstate travel. *Id.* at 208. The connection between the federal assistance and the condition imposed on that assistance by RLPA—ensuring that the intended beneficiaries actually benefit—is even tighter than the connection in *Dole*. I am confident that § 2(a)(1) is constitutional.

“Program or activity” is defined in § 2(e)(2) by incorporating a subset of the definition of the same phrase in Title VI of the Civil Rights Act of 1964. The facial constitutionality of that definition has not been seriously questioned, and I do not believe that it could be. If it turns out, in the case of some particularly sprawling state agency, that federal assistance to one part of the agency is wholly unrelated to a substantial burden on religious exercise imposed by some other and distant part of the agency, the worst case should be an as-applied challenge and a holding that the statute cannot be applied on those facts. Given the variety of ways in which agencies are structured in the fifty states, I believe that it would be difficult to draft statutory language for such unusual cases, and that they are best left to case-by-case adjudication.¹

Section 2(c) provides that the bill does not authorize the withholding of federal funds as a remedy for violations. This provision is modeled on the Equal Access Act, another Spending Clause statute that precludes the withholding of federal funds. 20 U.S.C. § 4071(e) (1994). Withholding funds is too harmful, both to the states and to the intended beneficiaries of federal assistance. Because the remedy is so harmful, it is rarely used. The individual right of action provided in § 4 of RLPA is a far more appropriate remedy. States may accept or reject federal financial assistance, but if a state accepts federal assistance subject to the conditions imposed by this bill, it is obligated to fulfill the conditions and the courts may enforce that obligation. Private rights of action have been the primary and effective means of enforcement under other important Spending Clause statutes, including Title IX (see *Franklin v. Winnett County Public Schools*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1978)), and of course the Equal Access Act (see *Board of Education v. Mergens*, 496 U.S. 226 (1990)).

The rule of construction in § 5(c) provides that RLPA neither creates nor precludes a right to receive funding for any religious organization or religious activity. The bill is therefore neutral on legal and political controversies over vouchers and other forms of aid to religious schools, charitable choice legislation, and other proposals for funding to religious organizations. The Coalition for the Free Exercise of Religion includes groups that disagree fundamentally on these issues, but all sides have agreed that this language is neutral and that no side’s position will be undermined by this bill.

¹*Cf.* *Salinas v. United States*, 118 S.Ct. 469, 475 (1997). *Salinas* interpreted 18 U.S.C. § 666(a)(1)(B) (1994), part of the federal bribery statute, to apply to any bribe accepted in a covered federally assisted program, whether or not the federal funds were in any way affected. The Court also concluded that under that interpretation, “there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case.” Preferential treatment accorded to one federal prisoner (the briber) “was a threat to the integrity and proper operation of the federal program,” even if it cost nothing and diverted no federal funds. The Court did not find it necessary to consider whether there might someday be an application in which the statute would be unconstitutional as applied.

As already noted, private-sector grantees not acting under color of law are excluded from the bill. This exclusion is important, because some private-sector grantees are religious organizations, and applying the bill to them would sometimes create conflicting rights under the same statute. The result in such cases might be to restrict religious liberty rather than protect it. Extending the bill to secular grantees in the private sector would sometimes overlap with other statutory protections, as in the employment discrimination laws and public accommodations laws. The free exercise of religion has historically been protected primarily against government action, with statutory protection extended to particular contexts where Congress or state legislatures found it necessary. This bill need not change the existing scope of protection in the private sector.

II. THE COMMERCE CLAUSE PROVISIONS.

Section 2(a)(2) protects religious exercise "in or affecting commerce." This language is taken verbatim from the Federal Trade Commission Act, and it tracks similar or identical language in the Clayton Act, the Americans with Disabilities Act, and many other statutes.² This language embodies the historic constitutional standard. The bill protects all that religious exercise, and only that religious exercise, that Congress is empowered to protect. This part of the bill is constitutional by definition; any religious exercise beyond the reach of the Commerce Clause is simply outside the bill.

In testimony prepared for this hearing, Marc Stern of the American Jewish Congress has documented some parts of the enormous volume of commerce that is based on religious exercise. This data makes clear that the activity of religious organizations substantially affects commerce; the religious exercise of these organizations is protected by the bill, subject to the compelling interest test. The religious exercise of individuals will sometimes be protected by the bill, as when religious exercise requires the use of property of a kind that is bought and sold in commerce and used in substantial quantities for religious purposes, or when an individual is denied an occupational license or a driver's license because of a religious practice.

Substantial burdens on religious exercise prevent or deter or raise the price of religious exercise. On standard economic models, such burdens reduce the quantity of religious exercise and therefore the quantity of commerce growing out of religious exercise. Religious exercise and associated commerce that is not prevented may be diverted or distorted, which are other ways of interfering with the free flow of commerce. Congress has plenary power to protect the commerce generated by religious exercise or inhibited by substantial burdens on religious exercise, and Congress's motive for acting is irrelevant. *United States v. Darby*, 312 U.S. 100 (1941).

Models for the Commerce Clause provisions include the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (Supp. II 1996), protecting papers and documents used in preparation of a publication in or affecting commerce, which has not been challenged, the commerce clause provisions of the Federally Protected Activities Act, 18

² See the Clayton Act, 15 U.S.C. § 18 (1994) ("person engaged in commerce or in any activity affecting commerce"); the Federal Trade Commission Act, 15 U.S.C. § 45 (1994) ("unfair or deceptive acts or practices in or affecting commerce"); the Federal Fire Prevention and Control Act, 15 U.S.C. § 2224 (1994) ("places of public accommodation affecting commerce"); the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 (1994) (trade, etc., "which affects any trade, transportation, exchange, or other commerce" between any state and any place outside of such state); the Semiconductor Chip Protection Act, 17 U.S.C. § 910 (1994) ("conduct in or affecting commerce"); the criminal provisions of the Health Insurance Portability and Accountability Act, 18 U.S.C. § 24 (Supp. II 1996) ("any public or private plan or contract, affecting commerce"); the Federally Protected Activities Act, 18 U.S.C. § 245 (1994) ("engaged in a business in commerce or affecting commerce"); the National Labor Relations Act, 29 U.S.C. § 152 (1994) ("affecting commerce"); the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402 (1994) ("industry affecting commerce"); the Age Discrimination in Employment Act, 29 U.S.C. § 630 (1994) ("industry affecting commerce"); the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 652 (1994) ("engaged in a business affecting commerce"); the Employment and Retirement Income Security Act (ERISA), 29 U.S.C. § 1003 (1994) ("in commerce or in any industry or activity affecting commerce"); the Employee Polygraph Protection Act, 29 U.S.C. § 2002 (1994) ("any employer engaged in or affecting commerce"); the Family and Medical Leave Act, 29 U.S.C. § 2611 (1994) ("industry or activity affecting commerce"); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994) ("if its operations affect commerce"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("engaged in an industry affecting commerce"); the Privacy Protection Act, 42 U.S.C. § 2000aa (Supp. II 1996) ("public communication, in or affecting interstate or foreign commerce"); the Energy Policy and Conservation Act, 42 U.S.C. § 6291 (1994) (trade, etc., "which affects any trade, transportation, exchange, or other commerce" between any state and any place outside of such state); the Americans with Disabilities Act, 42 U.S.C. § 12111 (1994) ("engaged in an industry affecting commerce"); the Commercial Motor Vehicle Safety Act, 42 U.S.C. § 31101 (1994) ("engaged in a business affecting commerce").

U.S.C. 245 (1994), which the Tenth Circuit has upheld, *United States v. Lane*, 883 F.2d 1484, 1489–93 (10th Cir. 1989), and the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994), forbidding racial and religious discrimination in places of public accommodation affecting commerce, which the Supreme Court has upheld.

The public accommodations law is particularly instructive. Congress's first public accommodations law was the Civil Rights Act of 1875, enacted to enforce the Thirteenth and Fourteenth Amendments. The Supreme Court struck that law down as beyond the enforcement power. *Civil Rights Cases*, 109 U.S. 3 (1883). Congress's second public accommodations law was the Civil Rights Act of 1964, enacted with substantially the same scope in practical effect but pursuant to the commerce power. The Court upheld this Act in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

The public accommodations law and the Federally Protected Activities Act are also instructive in another way. Each uses a variety of federal powers to protect as much as possible of what Congress wanted to protect. The public accommodations law applies to operations that affect commerce and also to those whose discrimination is supported by state action. 42 U.S.C. § 2000a(b) (1994). The Federally Protected Activities Act uses the enforcement power, the commerce power, the spending power, and power to prohibit interference with federal programs and activities (thus invoking all the powers which Congress used to create such programs and activities) to protect a broad list of activities. 18 U.S.C. § 245 (1994). RLPA is more focused and less miscellaneous, but it is similar in its use of those powers that are available to protect activities in need of protection.

I have given considerable thought to *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court struck down the Gun Free Schools Act as beyond the reach of the Commerce Clause. 18 U.S.C. § 922 (1994). The offense defined in that Act was essentially a possession offense; neither purchase nor sale of the gun nor any other commercial transaction was relevant. The Court emphasized that the offense “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms,” 514 U.S. at 561, and that the offense “is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567. *Lopez* appears to reaffirm the long-standing rule that Congress may regulate even “trivial” or “de minimis” intrastate transactions if those transactions, “taken together with many others similarly situated,” substantially affect interstate commerce. *Id.* at 556, 558. I will refer to this rule as the aggregation rule: in considering whether an activity substantially affects commerce, Congress may aggregate large numbers of similar transactions.

The aggregation rule is important to the scope of the bill, and especially to the protection of small churches and individuals. A small church with a RLPA claim need not show that it affects commerce all by itself; it is enough to show that churches in the aggregate affect commerce. An individual need not show that his religious practice affects commerce all by itself; it is enough to show that the practice affects commerce in the aggregate, or perhaps that a broad set of related or analogous religious practices affects commerce in the aggregate.

There will likely be cases in which the effect on commerce cannot be proved, and which therefore fall outside the protections of the bill. That is the nearly unavoidable consequence of being forced to rely on the Commerce Clause. But there will be many cases in which the burdened religious exercise affects commerce when aggregated with “many others similarly situated,” *Lopez*, 514 U.S. at 558, and in those situations, restricting or eliminating the religious exercise by burdensome regulation would also affect commerce. I am certain that the Commerce Clause provisions are constitutional, and I am confident that they will have a wide range of applications.

III. OTHER PROVISIONS IN § 2.

Section 2(d) states explicitly what would be obvious in any event—that the government that burdens religious exercise has discretion over the means of eliminating the burden. Government can modify its policy to eliminate the burden, or adhere to its policy and grant religious exceptions where necessary to avoid imposing burdens, or make any other change that eliminates the burden. The bill would not impose any affirmative policy on the states, nor would it restrict state policy in any way whatever in secular applications or in religious applications that do not substantially burden religious exercise. The bill would require only that substantial burdens on religious exercise be eliminated or justified.

The definition of “demonstrates” in § 2(e)(3) is incorporated verbatim from the Religious Freedom Restoration Act.

IV. THE ENFORCEMENT CLAUSE PROVISIONS.

Section 3 would be enacted primarily as a means of enforcing the Fourteenth Amendment. Section 3 attempts to simplify litigation of free exercise violations as defined by the Supreme Court, facilitating proof of violations in cases where proof is difficult. In some applications—church construction projects are the most obvious example—§ 3 could also be upheld as an exercise of the commerce power.

A. *Shifting the Burden of Persuasion.*

Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it. *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), of course reaffirms broad Congressional power to enforce constitutional rights as interpreted by the Supreme Court.

This provision applies to any means of proving a free exercise violation recognized under judicial interpretations. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990). Thus, if the claimant shows a burden on religious exercise and prima facie evidence of an anti-religious motivation, government would bear the burden of persuasion on the question of motivation, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religious exercise and prima facie evidence that the burdensome law is not generally applicable, government would bear the burden of persuasion on the question of general applicability, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religion and prima facie evidence of a hybrid right, government would bear the burden of persuasion on the claim of hybrid right, including all issues except burden on religion. In general, where there is a burden on religious exercise and prima facie evidence of a constitutional violation, the risk of nonpersuasion is to be allocated in favor of protecting the constitutional right.

The protective parts of the *Smith* and *Lukumi* rules create many difficult issues of proof and comparison. Motive is notoriously difficult to litigate, and the court is often left uncertain. The general applicability requirement means that when government exempts or fails to regulate secular activities, it must have a compelling reason for regulating religious activities that are substantially the same or that cause the same harm. See, e.g., *Lukumi*, 508 U.S. at 543 (“The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree”); *id.* at 538–39 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice). But there can be endless arguments about whether the burdened religious activity and the less burdened secular activity are sufficiently alike, or cause sufficiently similar harms, to trigger this part of the rule. The scope of hybrid rights claims remains uncertain. Burden of persuasion matters only when the court is uncertain, but, as these examples show, the structure of the Supreme Court's rules leave many occasions for uncertainty.

The one issue on which the religious claimant always retains the burden of persuasion is burden on religion. Note that in the free exercise context, the claimant need prove only a burden, not a substantial burden. The lower courts have held that where the burdensome rule is not generally applicable, any burden requires compelling justification. *Hartmann v. Stone*, 68 F.3d 973, 978–79 & nn.3–4 (6th Cir. 1995); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849–50 (3d Cir. 1994); *Rader v. Johnston*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996).

B. *Land Use Regulation.*

Section 3(b) enacts prophylactic rules for land use regulation. Section 3(b)(1)(A) provides that land use regulation may not substantially burden religious exercise, except where necessary to prevent substantial and tangible harm. Power to enact this standard without limitation to the scope of the commerce or spending power depends on a hearing record showing “reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997). Note that the standard is not certainty, but “reason to believe” and “significant likelihood.”

This is the fourth hearing before this Subcommittee on the subject matter of this bill. The record of these hearings is replete with statistical and anecdotal evidence of likely constitutional violations in land use regulation. More evidence to the same

effect is being offered at this hearing. I believe this factual record is ample to support § 3(b) as legislation to enforce the Fourteenth Amendment.

The hearing record shows that land use regulation is administered through highly individualized determinations not controlled by generally applicable rules. Land use regulation thus falls within the *Smith* exception for regulatory schemes that permit "individualized governmental assessment of the reasons for the relevant conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). The hearing record also shows that these individualized determinations frequently burden religion and frequently discriminate against religious organizations and especially discriminate against smaller and non-mainstream faiths. Even without the benefit of the Congressional hearing record, some courts have recognized that land use cases can fall within exceptions to the general rule of *Employment Division v. Smith*. See *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Hawaii 1998); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879 (D. Md. 1996).

The practice of individualized determinations makes this discrimination extremely difficult to prove in any individual case, but the pattern is clear when Congress examines large numbers of cases through statistical surveys and anecdotal reports from around the country. This record of widespread discrimination and of rules that are not generally applicable shows both the need for, and the constitutional authority to enact, clear general rules that make discrimination more difficult.

Sections 3(b)(1)(B) and (C) provide that governments may not deny religious assemblies a reasonable location somewhere within each jurisdiction, and that religious assemblies may not be excluded from areas where nonreligious assemblies are permitted. The record of individualized determinations and religious discrimination also supports these provisions, but they are not so dependent on that record. It is unconstitutional to wholly exclude a First Amendment activity from a jurisdiction. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). Section 3(b)(1)(B) codifies this rule as applied to churches. Discrimination between different categories of speech, and especially discrimination between different viewpoints, already requires strong justification;³ § 3(b)(1)(C) codifies this rule as applied to land use regulation that permits secular assemblies while excluding churches.

Section 3(b)(2) would guarantee a full and fair adjudication of land use claims under subsection (b). Procedural rules before land use authorities may vary widely; any procedure that permits full and fair adjudication of the federal claim would be entitled to full faith and credit in federal court. But if, for example, a zoning board with limited authority refuses to consider the federal claim, does not provide discovery, or refuses to permit introduction of evidence reasonably necessary to resolution of the federal claim, its determination would not be entitled to full faith and credit in federal court. And if in such a case, a state court confines the parties to the record from the zoning board, so that the federal claim still can not be effectively adjudicated, the state court decision would not be entitled to full faith and credit either.

Full and fair adjudication should include reasonable opportunity to obtain discovery and to develop the facts relevant to the federal claim. Interpretation of this provision should not be controlled by cases deciding whether habeas corpus petitioners had a "full and fair hearing" in state court. Interpretation of the habeas corpus standard is often influenced by hostility to convicted criminals seeking multiple rounds of judicial review. Whatever the merits of that hostility, a religious organization seeking to serve existing and potential adherents in a community is not similarly situated.

Subsection 3(b)(3) provides that equally or more protective state law is not preempted. Zoning law in some states has taken account of the First Amendment needs of churches and synagogues, and to the extent that such law duplicates or supplements RLPA, it is not displaced.

Subsection 3(b)(4) provides that § 2 shall not apply to land use cases. The more detailed standards of § 3(b) control over the more general language of § 2. But note that this provision does not say anything about sources of constitutional power. The land use provisions may be upheld in all their applications as an exercise of power to enforce the Fourteenth Amendment; they may also be upheld in many cases as an exercise of the commerce power. There may even be cases of federally assisted

³ See, e.g., *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1984); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 (1972).

land use planning processes in which these provisions would also be an exercise of the spending power. But however many sources of Congressional power support these provisions, the statutory standards to be applied in land use cases come from § 3, and not from § 2.

V. JUDICIAL RELIEF

A. General Remedies Provisions.

Section 4 of the bill provides express remedies. Section 4(a) is based on the corresponding provision of RFRA; it authorizes private persons to assert violations of the Act either as a claim or a defense and to obtain appropriate relief. This section should be read against a large body of law on remedies and immunities under civil rights legislation. Appropriate relief includes declaratory judgments, injunctions, and damages, but government officials have qualified immunity from damage claims.

Section 4(b) provides for attorneys' fees; this is based squarely on RFRA and is essential if the Act is to be enforced.

B. Prisoner Litigation.

Section 4(c) makes clear that litigation under the bill is subject to the Prison Litigation Reform Act. This provision effectively and adequately responds to concerns about frivolous prisoner litigation. In the first full year under the Prison Litigation Reform Act, federal litigation by state and federal prisoners dropped 31%. Administrative Office of the United States Courts, L. Meacham, *Judicial Business of the United States Courts: 1997 Report of the Director* 131-32 (Table C-2A). Further reductions may be reasonably expected, as the Act becomes better known; some provisions of the Act, such as the authorization of penalties on prisoners who file three or more frivolous actions, have not yet had much opportunity to work.

There has been substantial litigation over the constitutionality of some provisions of the Prison Litigation Reform Act, but that litigation does not affect RLPA. The courts of appeals have taken seriously the claim that provisions on existing consent decrees unconstitutionally reopen final judgments. Even so, six out of seven courts of appeals have upheld that part of the Act. Only the Ninth Circuit has struck it down, and only with respect to reopening final judgments.⁴

I have followed this litigation closely for my casebook, *Modern American Remedies*. I expect the Ninth Circuit to be reversed even in the highly problematic context of reopening final decrees, because the Act addresses only the prospective effect of those decrees. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (noting Congressional power to "alter[] the prospective effect of injunctions"). But however that difficult issue is resolved, it does not affect RLPA. RLPA does not require that any final judgment be reopened, and the provisions of the Prison Litigation Reform Act most important to RLPA are not the structural reform provisions that have drawn so much litigation, but the provisions that deter frivolous individual claims. I am confident that those provisions are constitutional in all but unusual applications.

If further legislative action on prisoner claims is needed, it should follow the approach of the Prison Litigation Reform Act, which addresses prisoner litigation generally. Congress should not exclude prisoners from the substantive protections of RLPA. RFRA did not cause any significant increment to prisoner litigation. The Attorney General of Texas has stated that his office handles about 26,000 active cases at any one time. Of those, 2200 are "inmate-related, non-capital-punishment cases." Of those, sixty were RFRA claims when RFRA applied to the states. Thus, RFRA claims were only 2.7% of the inmate caseload, and only .23% (less than one-quarter of one percent) of the state's total caseload. It is also reasonable to believe that many of these sixty RFRA cases would have been filed anyway, on free exercise, free speech, Eighth Amendment, or other theories. This data is reported in Brief of Amicus Curiae State of Texas 7-8, in *City of Boerne v. Flores* (No. 95-2074), 117 S.Ct. 2157 (1997).

Members are well aware that prisoners sometimes file frivolous claims. But they should also be aware that prison authorities sometimes make frivolous rules or com-

⁴ *Tyler v. Murphy*, 135 F.3d 594 (8th Cir. 1998); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), cert. petition filed (Apr. 13, 1998, No. 97-1693); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997), cert. petition filed (Mar. 2, 1998, No. 97-8120); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657-58 (1st Cir. 1997), cert. petition filed, 66 U.S.L.W. 3531 (Feb. 4, 1998, No. 97-1278); *Benjamin v. Johnson*, 124 F.3d 162 (2d Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. petition filed (Jan. 5, 1998, No. 97-7420); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), cert. denied, 117 S.Ct. 2460 (1997); but cf. *Taylor v. United States*, 1998 Westlaw 214578 (9th Cir., May 4, 1998).

mit serious abuses. Examples include *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997), in which jail authorities surreptitiously recorded the sacrament of confession between a prisoner and the Roman Catholic chaplain; *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997), in which a Wisconsin prison rule prevented prisoners from wearing religious jewelry such as crosses, on grounds that Judge Posner found barely rational; and *McClellan v. Keen* (settled in the District of Colorado in 1994), in which authorities let a prisoner attend Episcopal worship services but forbade him to take communion.

RLPA is needed to deal with such abuses to the extent that Congress can reach them. Whether RLPA applies will depend on whether the particular prison system receives federal financial assistance, on whether the prisoner can show a substantial effect on commerce, or on whether the prisoner can show a prima facie violation of the Free Exercise Clause. Probably some prisoner claims will be covered and others will not. But it is important not to exclude those that can be covered.

C. Sovereign Immunity.

Section 4(d) waives the sovereign immunity of the United States, and overrides the Eleventh Amendment immunity of the states, "in claims for a violation of the Free Exercise Clause under section 3." This waiver and override does not apply to claims under section 2.

Congress has power to waive the sovereign immunity of the United States whenever it chooses, so there is no doubt about the constitutionality of §4(d)(2). It is a discretionary choice, and not a constitutional requirement, that the bill confines the waiver of sovereign immunity to claims under §3.

Section 4(d)(1) fully conforms with constitutional limitations on Congressional power to override the Eleventh Amendment immunity of the states. The relevant law is clearly set out in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* holds that Congress can *not* override Eleventh Amendment immunity in legislation under the Commerce Clause. It concludes that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 73.⁵

But the Court's opinion twice distinguishes and apparently reaffirms *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). *Seminole Tribe*, 517 U.S. at 59, 65-66. *Fitzpatrick* holds that Congress *can* override Eleventh Amendment immunity in legislation to enforce the Fourteenth Amendment. Then-Justice Rehnquist's opinion for the Court concluded:

But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. . . . We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 456. *Fitzpatrick* was a Title VII suit for retroactive pension benefits to be paid by the state of Connecticut, so the holding unambiguously includes suits on statutory claims if the statute was enacted to enforce the Fourteenth Amendment. Accordingly, the override of Eleventh Amendment immunity can include both claims directly under the Free Exercise Clause and claims under §3 of RLPA, which would be enacted to enforce the Free Exercise Clause.

VI. RULES OF CONSTRUCTION.

The rules of construction in §5 clarify the bill and greatly reduce the risk of misinterpretation.

Section 5(a) is based on RFRA. It provides that the Act does not authorize government to burden any religious belief, avoiding any risk that the compelling interest test might be transferred from religious conduct to religious belief. Section 5(b) provides that nothing in the bill creates any basis for regulating or suing any religious organization not acting under color of law. These two subsections serve the bill's

⁵This conclusion probably does not include the Spending Clause. The Court noted "the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." *Id.* at 65. Congress may be able to require that states waive their Eleventh Amendment immunity with respect to programs for which they voluntarily accept federal financial assistance. Immunity would then be removed not by legislation under Article I, but by the consent of the state. But RLPA does not embody this theory; the override of immunity does not include claims under the Spending Clause provisions.

central purpose of protecting religious liberty, and avoid any unintended consequence of reducing religious liberty.

Sections 5(c) and 5(d) keep this bill neutral on all disputed questions about government financial assistance to religious organizations and religious activities. Section 5(c) states neutrality on whether such assistance can or must be provided at all. Section 5(d) states neutrality on the scope of existing authority to regulate private entities as a condition of receiving such aid. Section 5(d)(1) provides that nothing in the bill authorizes additional regulation of such entities; §5(d)(2), perhaps in an excess of caution, provides that existing regulatory authority is not restricted except as provided in the bill. Agencies with authority to regulate the receipt of federal funds retain such authority, but their specific regulations may not substantially burden religious exercise without compelling justification.

Section 5(e) provides that proof that a religious exercise affects commerce for purposes of this bill does not give rise to an inference or presumption that the religious exercise is subject to any other statute regulating commerce. Different statutes exercise the commerce power to different degrees, and the courts presume that federal statutes do not regulate religious organizations unless Congress manifested the intent to do so. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1990).

Section 5(f) states that each provision and application of the bill shall be severable from every other provision and application.

Section 6 is also a rule of construction, taken directly from RFRA, insuring that this bill does not change results in litigation under the Establishment Clause.

VII. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

Section 7 of the bill amends RFRA to delete any application to the states and to leave RFRA applicable only to the federal government. Section 7(a)(3) amends the definition of "religious exercise" in RFRA to conform it to the RLPA definition, discussed below.

VIII. DEFINITIONS.

Section 8 contains definitions. Section 8(1) defines "religious exercise" to mean "an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief." Section 7(a)(3) inserts the same definition into RFRA.

This definition codifies the intended meaning of RFRA as reflected in its legislative history. The decisions that most thoroughly examined the legislative history and precedent concluded that Congress intended to protect conduct that was religiously motivated, whether or not it was compelled.⁶

The Supreme Court's cases have not distinguished religiously compelled conduct from religiously motivated conduct. The Congressional Reference Service marshalled these opinions for the RFRA hearings, noting that the Court has often referred to protection for religiously motivated conduct. Letter from the American Law Division of the Congressional Research Service to Hon. Stephen J. Solarz (June 11, 1992), in *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 131, 131-33 (1992). Since that compilation, justices on both sides of the issue have treated the debate as one over protection for religious motivation, not compulsion.⁷

Congress nowhere expressed any intention to confine the protection of RFRA to practices that were "central" to a religion. This concept did not appear either in statutory text or legislative history; it was read into the statute by some courts after RFRA's enactment. Other courts rejected or ignored this misinterpretation; the most

⁶*Sasnett v. Sullivan*, 908 F. Supp. 1429, 1440-47 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997); *Muslim v. Frame*, 891 F. Supp. 226, 229-31 (E.D. Pa. 1995), *rehearing denied*, 897 F. Supp. 216, 217-20 (E.D. Pa. 1995), *aff'd mem.*, possibly on other grounds, 107 F.3d 7 (3d Cir. 1997); *Mack v. O'Leary*, 80 F.3d 1175, 1178-80 (7th Cir. 1996), *vacated on other grounds*, 118 S.Ct. 36 (1997).

⁷*City of Boerne v. Flores*, 117 S.Ct. 2157, 2173 (Scalia, J., concurring) ("religiously motivated conduct"); *id.* at 2174 (same); *id.* at 2177 (O'Connor, J., concurring) (same); *id.* at 2178 (same); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 ("conduct motivated by religious beliefs"); *id.* at 533 ("religious motivation"); *id.* at 538 (same); *id.* at 543 ("conduct with religious motivation"); *id.* at 545 ("conduct motivated by religious belief"); *id.* at 546 ("conduct with a religious motivation"); *id.* at 547 ("conduct motivated by religious conviction"); *id.* at 560 n.1 (Souter, J., concurring) ("conduct motivated by religious belief"); *id.* at 563 ("religiously motivated conduct"); *id.* ("conduct . . . undertaken for religious reasons") (quoting *Employment Div. v. Smith*, 494 U.S. at 532); *id.* at 578 (Blackmun, J., concurring) ("religiously motivated practice").

extensive opinion concluded that Congress did not intend such a requirement, that pre-RFRA cases did not contain it, and that courts could not resolve disputes about the centrality of religious practices. *Muslim v. Frame*, 891 F. Supp. 226, 230–31 (E.D. Pa. 1995), *aff'd mem.*, possibly on other grounds, 107 F.3d 7 (1997).

Insistence on a centrality requirement would insert a time bomb that might destroy the statute, for the Supreme Court has repeatedly stated that courts cannot hold some religious practices to be central and protected, while holding other religious practices noncentral and not protected. *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1985). The Court in *Smith* unanimously rejected a centrality requirement. 494 U.S. at 886–87 (opinion of the Court); *id.* at 906–07 (O'Connor, J., concurring); *id.* at 919 (Blackmun, J., dissenting). The Court's disagreement over whether regulatory exemptions are constitutionally required does not depend on any disagreement about a centrality requirement.

In the practical application of the substantial burden and compelling interest tests, it is likely to turn out that "the less central an observance is to the religion in question the less the officials must do" to avoid burdening it. *Mack v. O'Leary*, 80 F.3d 1175, 1180 (1996), *vacated on other grounds*, 118 S.Ct. 36 (1997). The concurring and dissenting opinions in *Smith* imply a similar view, in the passages cited in the previous paragraph. But this balancing at the margins in individual cases is a very different thing from a threshold requirement of centrality, in which all religious practices are divided into two categories and cases are dismissed as a matter of law if the judge finds, rightly or wrongly, that a practice falls in the noncentral category. Such an either-or threshold requirement greatly multiplies the consequences of the inevitable judicial errors in assessing the importance of religious practices. RLPA properly disavows any such interpretation.

Section 8(2) cautiously defines the Free Exercise Clause to include both the clause in the First Amendment and the application of that clause to the states through the Fourteenth Amendment.

Section 8(3) defines government to include both the state and federal governments. But note that for purposes of §2, government includes only state governments. The reason is straightforward. Section 2 adds nothing that will not be in RFRA as amended, and RFRA still applies to the federal government. *In re Young*, 1998 Westlaw 166642 (8th Cir., Apr. 13, 1998), *cert. petition filed* (Apr. 27, 1998); *EEOC v. Catholic University*, 83 F.3d 455, 470–71 (D.C. Cir. 1996). But §3 includes provisions not contained in RFRA, §4 provides remedies that apply to §3, and the rules of construction apply to §3. So all of the bill except §2 properly applies to both the state and federal governments.

IX. OTHER CONSTITUTIONAL OBJECTIONS.

A. *The Establishment Clause.*

Justice Stevens suggested that RFRA might violate the Establishment Clause. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2172 (1997). He got no vote but his own, and his view has no support in the Court's precedents. Government is not obligated to substantially burden the exercise of religion, and government does not establish a religion by leaving it alone. RLPA would not violate the Establishment Clause.

The Supreme Court unanimously upheld regulatory exemptions for religious exercise in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). There the Court held that Congress may exempt religious institutions from burdensome regulation. The Court so held even with respect to activities that the Court viewed as secular, *id.* at 330, even though the Court expressly assumed that the exemption was not required by the Free Exercise Clause, *id.* at 336, and even though the exemption applied only to religious institutions and not to secular ones, *id.* at 338–39. *Amos* held that alleviation of government-imposed burdens on religion has a secular purpose, *id.* at 335–36, and that the religious organization's resulting ability better to advance religious ends is a permitted secular effect, *id.* at 336–37. Exempting religious practice also avoids entanglement between church and state "and effectuates a more complete separation of the two." *Id.* at 339. *Amos* expressly rejected the assumption that exemptions lifting regulatory burdens from the exercise of religion must "come packaged with benefits to secular entities." *Id.* at 338.

The Court reaffirmed these principles, after *Employment Division v. Smith*, in *Board of Education v. Grumet*:

[T]he Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.

512 U.S. 687, 705 (1994).

The Supreme Court has at times questioned or invalidated exemptions that focus too narrowly on one religious faith or one religious practice, that do not in fact relieve any burden on religious exercise, or that shift the costs of a religious practice to another individual who does not share the faith. *Id.* at 703; *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). RLPA avoids these constitutional dangers. The bill minimizes the risk of denominational preference by enacting a general standard exempting all religious practices from all substantial and unjustified regulatory burdens; its even-handed generality serves the important Establishment Clause value of neutrality among the vast range of religious practices. By its own terms, the bill does not apply unless there is a substantial burden on the exercise of religion. And if particular proposed applications unfairly shift the costs of a religious practice to another individual, those applications will be avoided by interpreting the compelling interest test or by applying the Establishment Clause to the statute as applied.

Religion and the exercise of religion should be understood generously for purposes of RLPA, and unconventional beliefs about the great religious questions should be protected. But the Constitution distinguishes religion from other human activities, and it does so for sound reasons. In history that was recent to the American Founders, government regulation of religion had caused problems very different from the regulation of other activities. The worst of those problems are unlikely in America today, and our tradition of religious liberty is surely a large part of the reason. Today the greatest threat to religious liberty is the vast expansion of government regulation. Pervasive regulation regularly interferes with the exercise of religion, sometimes in discriminatory ways, sometimes by the mere existence of so much regulation written from a majoritarian perspective. Many Americans are caught in conflicts between their constitutionally protected religious beliefs and the demands of their government. RLPA would not establish any religion, or religion in general; it would protect the civil liberties of people caught in these conflicts.

B. Federalism.

RLPA is consistent with general principles of federalism that sometimes limit the powers granted to Congress.

In particular, RLPA would not violate *Printz v. United States*, 117 S.Ct. 2365 (1997). *Printz* struck down federal imposition of specific affirmative duties on state officers to implement federal programs. It held that Congress “cannot compel the States to enact or enforce a federal regulatory program,” and that it “cannot circumvent that prohibition by conscripting the State’s officers directly.” *Id.* at 2384.

The proposed bill does not impose any specific affirmative duty, implement a federal regulatory program, or conscript state officers. The substantive provisions of the bill are entirely negative; they define one thing that states cannot do, leaving all other options open. The bill thus pre-empts state laws inconsistent with the overriding federal policy of protecting religious liberty in areas constitutionally subject to federal authority.

The bill operates in the same way as other civil rights laws, which pre-empt state laws that discriminate on the basis of race, sex, and other protected characteristics, and in the same way as other legislation protecting the free flow of commerce from state interference. Congress could itself regulate all transactions affecting interstate commerce, and then exempt burdened religious exercise from its own regulation; it has instead taken the much smaller step of pre-empting state regulation that unnecessarily burdens religious exercise. *Cf. New York v. United States*, 505 U.S. 144, 167 (1992):

Where Congress has power to regulate private activity under the Commerce Clause, we have recognized Congress’s power to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

RLPA would pre-empt to the minimum extent compatible with the federal policy; it pre-empts the unjustified burden on religious exercise but leaves all other options open. As already noted, §2(d) makes explicit what would be clear in any event—states can pursue any policy they choose, and remove burdens in any way they choose, so long as they do not substantially burden religious exercise without compelling reason.

Printz distinguishes and leaves unchanged two important pre-emption cases upholding federal statutes in the era of *National League of Cities v. Usery*, 426 U.S. 833 (1976). In each case, the *Printz* majority noted that the federal law “merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field.” 117 S.Ct. at 2380.

The first of these cases was *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), which upheld a federal statute that required states either to affirmatively implement a specific federal regulatory program or turn the field over to direct federal regulation. The Court said that "nothing" in *National League of Cities* "shields the States from pre-emptive federal regulation of private activities affecting interstate commerce." *Id.* at 291. *Hodel* is reaffirmed not only in *Printz*, but also in *New York v. United States*, 505 U.S. 144, 161 (1992).

The Court reached similar conclusions in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (the *FERC* case). The statute there went further, and required the state to "consider" implementing an affirmative federal policy. But the state was not required to adopt the policy, and law's provisions "simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals." *Id.* at 765.

In *Hodel*, the Court commented that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining." *Id.* at 290. RLPA would not go nearly so far. It would prohibit only some state regulation of religious exercise—regulation that falls within the reach of spending or commerce powers, that substantially burdens religious exercise, and that cannot be justified by a compelling interest.

Hodel and *FERC* also went much further than RLPA in another way, because they required states either to implement or consider specific and affirmative federal policies or cede the field to federal regulation. RLPA imposes no specific policies, but only the general limitation that whatever policies they pursue, states can not substantially burden religious exercise without compelling reason.

Some provisions of the statutes in *Hodel* and *FERC* were directed expressly to the states and, in a sense, applied only to the states. Only the state agency could implement or consider the federal policy. But this did not render the statutes invalid for singling out the states. Congress was pursuing a policy for the appropriate regulation of private conduct, and it required the states to conform to that policy or to vacate the field. This is the classic work of federal pre-emption.

If RLPA seems in any way odd, it is because the federal policy with respect to the private sector is generally one of deregulation, not regulation. The Congressional policy is that religious exercise not be substantially burdened without compelling reason. Congress has no more affirmative or more specific regulatory policy for religion to substitute for the pre-empted regulation. But that is not unique either. As Professor Thomas Berg points out in a forthcoming article, the statutes deregulating the transportation industries broadly pre-empted state regulation and substituted only minimal federal regulation in its place. He cites the Staggers Rail Act of 1980, 40 U.S.C. § 10505 (1994), and the Airline Deregulation Act of 1978, 49 U.S.C. § 41701 et seq. (1994).

It is instructive to compare the pre-emption provision of the Airline Deregulation Act with the central provision of RLPA:

Airline Deregulation Act, 49 U.S.C. § 41713(b) (1994)	Religious Liberty Protection Act, § 2
Except as provided in this subsection,	Except as provided in subsection (b),
a State, political subdivision of a state, or political authority of at least 2 States	a government [defined elsewhere to mean states and their subdivisions]
may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier	shall not substantially burden a person's religious exercise
that may provide air transportation under this subpart.	(1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in or affecting commerce with foreign nations, among the several States, or with the Indian tribes;

There is no difference in structure or in principle between these two provisions. Both on their face regulate state laws and only state laws. Both in their operation pre-empt state laws that are inconsistent with a federal policy of deregulation. The Airline Deregulation Act provision was broadly construed, without constitutional challenge, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Nothing

in either *Printz* or the *National League of Cities* line of cases casts doubt on federal power to pre-empt state regulation inconsistent with federal policy in areas where Congress could regulate directly if it chose. That is all the Religious Liberty Protection Act would do.

X. CONCLUSION.

This bill is needed for the reasons set forth by other witnesses and in earlier hearings. The bill's opponents seem to be few in number, but they are able and creative; they can think of many arguments. In this testimony, I have tried to anticipate those arguments.

No one can predict how the Supreme Court might change the law in the future. But Congress should not be intimidated into not exercising powers that have been established for decades because of the risk that the law might change in the future. The bill is clearly within Congressional power under existing law, and I urge its enactment.

Mr. CANADY. Professor Berg.

STATEMENT OF THOMAS C. BERG, PROFESSOR, CUMBERLAND LAW SCHOOL, SAMFORD UNIVERSITY

Mr. BERG. Thank you, Mr. Chairman. I appreciate the opportunity to come today and testify about the religious liberty protection bill.

I have two themes to what I want to say today. First is that this bill is drafted with several components of congressional power, and there is a good reason for that. One of the moral advantages of the Religious Freedom Restoration Act was in its breadth of coverage; that it reached all claims of religious exercise brought by people of all faiths, majority faiths, minority faiths, popular ones, unpopular ones. It assured equal religious liberty for people of different faiths as opposed to a case-by-case kind of accommodation where the squeaky wheel gets the grease or the more powerful interest is accommodated over others.

Now, Congress cannot reach the same breadth of religious practices that it did under RFRA because of the Court's ruling in the *Boerne* case. It must rely on more discrete powers like the more limited Fourteenth Amendment powers that remain, the Spending Clause and the Commerce Power. But there still remains an important advantage, moral advantage, in general—in legislation that is as general as possible and protects as many religious faiths and claims as is possible. And that is a reason for Congress to try to exercise all of the powers that it has available to it and to think very carefully before it considers foregoing any reliance on any of these powers.

The second theme is don't make the perfect the enemy of the good. We can't have a statute that is quite as broad as RFRA was because of *Boerne*, but that shouldn't blind us to what this bill can actually accomplish.

Now I want to talk a little bit about constitutional power under the Spending Clause and the Commerce Clause and echo quite a bit of what Professor Laycock said. Under the spending power, the constitutional basis for the statute is extremely strong. There is—well, as Professor Laycock said, the statute tracks the established language in Title VI and other programs, other civil rights laws, involving federally—Federal funding of State programs.

There is a strong Federal interest in assuring that beneficiaries of those programs do not have their religious freedom burdened,

and particularly in assuring that they do not have to drop out of the program and lose the benefits of it because of conflicts with their religious belief. It is perfectly reasonable for Congress to conclude that that happens.

Just one example, I think, would be it is perfectly reasonable to think that a number—a number of parents who have left the public schools have done so because of conflicts between public school regulations and their religious beliefs. There are reported cases on those kinds of conflicts, and I think it is something that happens.

Now, the Spending Power would have important effects, as the public school cases show. In public schools alone there have been plenty of cases of religious freedom conflicting with school regulations over the years; objections to curriculum to force—for children being forced to be exposed to curriculums that violate their religious beliefs; questions about whether student religious groups can have as a criterion that their leaders be members of the faith. That has been an issue that religious groups have had to litigate; questions about whether students can wear nondangerous religious garb or jewelry in the schools. All of those cases would be within the coverage of the bill. The religious believer might not win in every case, but the Spending Clause would have important effects.

To reiterate the strength of the spending power basis constitutionally, the governing law on this is *South Dakota v. Dole*, written by Chief Justice Rehnquist and joined by Justice Scalia, which said that as long as there is a reasonable relation between the purpose of the expenditure and the condition, that the condition is constitutional.

I think even if the Court were to tighten up on that a little bit, this provision falls well within the Spending Power because of the Federal interests that I described.

Now, on the commerce power, I want to say something briefly about the nature of this statute. It may seem in some ways inappropriate to rely on the commerce power to protect a fundamental civil right such as religious freedom, but before we start thinking along those lines, we should remember that Congress has done that many, many times, and perhaps the major precedent here is the Civil Rights Act of 1964, which protected the human right of equality and nondiscrimination based on a rationale that discrimination affected interstate commerce.

On the constitutional power under the Commerce Clause, religious entities do affect commerce. Congress should make careful and detailed findings—detailed findings on that. There will be evidence to support that. But the whole range of Federal regulation, based on the Commerce Clause, has typically been applied to religious institutions, based on the premise that they affect commerce. When religious institutions have been free from the Fair Labor Standards Act or the National Labor Relations Board jurisdiction or other commerce statutes, Title VII, it has not been because courts have ever held that they fall outside the scope of commerce. It has been because of religious freedom concerns or because the statute was drafted in a way that did not reach them, did not reach to the full scope of the commerce power.

It seems to me that if religious entities can be regulated under the Commerce Clause, subject to First Amendment or other kinds

of exemptions, but if they can be within the scope of regulation under the Commerce Clause, then Congress certainly has the power to exempt them from State regulation under the Commerce Clause as well. That seems only to follow as a matter of fairness.

In some cases, the religious entity in itself may not affect interstate commerce in an individual case, but where the institution is engaged in some kind of commercial activity, the law is clear. Even under *United States v. Lopez*, that individual instances can be aggregated for the purpose of calculating the effect on interstate commerce, *Lopez* says that clearly. Numerous court of appeals decisions after *Lopez* have reaffirmed that the aggregation theory remains viable where there is some commercial component to the activity.

In the case of religious entities, employment is a commercial activity. Religious entities buy and sell materials in order to serve their parishioners or their beneficiaries or the general public. They engage in a number of different kinds of activities that would fall within the notion of commercial.

That applies to small entities as well, not just large entities that individually are involved in interstate commerce. Because of the aggregation theory, the valid aggregation theory, small entities can be covered as well.

Individual cases will sometimes be covered when the individual is engaged in commercial activity and the religious conflict comes up in that case, or when there is some kind of commercial connection. As Professor Laycock indicated, the bill won't cover the case unless some kind of connection to interstate commerce can be made.

Finally, I want to say something about the *United States v. Printz* decision, the State sovereignty question, and to echo Professor Laycock's point on that. There is a tremendous difference between the affirmative mandate to State officials that was struck down in the Brady bill case, *Printz*, and the simple displacing of State laws that happens—that would happen under a religious liberty bill, displacing of State laws for the purpose of deregulating, leaving unregulated, private activity, religious activity by private individuals and groups. In most cases—well, go back. The courts said that preemption, the displacing of State laws by preemption, even after *Printz* clearly remains within Congress' power. And in most cases, Congress replaces the State law with its own scheme of regulation, and that is why this case may seem a little different from other preemption cases, but it is not.

There are examples of deregulatory preemption. The deregulation of the trucking industry, Congress deregulated the trucking industry and preempted State laws that would continue to regulate it. The same thing, as Professor Laycock indicated, with the airline industry, and you should read his testimony to note the striking parallels between the provision in the Airline Deregulation Act and the provision of the religious liberty bill.

I will stop there and thank you for the opportunity.

Mr. CANADY. Thank you, Professor Berg.

[The prepared statement of Mr. Berg follows:]

PREPARED STATEMENT OF THOMAS C. BERG, PROFESSOR, CUMBERLAND LAW SCHOOL,
SAMFORD UNIVERSITY

I appreciate the opportunity to appear today and give testimony concerning the Religious Liberty Protection Act of 1998 (RLPA). I am friendly toward this bill, but I am not particularly an insider on it; I saw and commented on one early version but have had no further involvement in the drafting. I am testifying, of course, in my personal capacity and not as a representative of my institutions, Cumberland Law School or Samford University.

My testimony has two purposes, although they overlap. One purpose is to address some questions that have been raised concerning the constitutionality of various provisions of RLPA, or the maximum scope that those provisions could have and still be constitutional. The second purpose is to address some criticisms of the bill, primarily those raised by a few conservative organizations and individuals. Several of those criticisms are on constitutional grounds, hence the overlap. But before I discuss constitutional issues in detail, I want to say a few words about the value of legislation like RLPA and the superiority of such legislation to the alternatives.

A. THE VALUE OF GENERAL RELIGIOUS FREEDOM LEGISLATION

The premise of this testimony, and of RLPA itself, is that the proper scope of religious freedom requires that sometimes religiously motivated conduct be protected against generally applicable laws—not just against laws that single out religious conduct for prohibition. To the founding generation, religious conscience was worth protecting because it involved duties to a higher power, duties that in James Madison's words were "precedent, both in order of time and degree of obligation, to the claims of Civil Society."¹ Religious duties also tend, as a class, to be especially deeply felt and to provoke especially strong reaction when the believer is forced to violate them. These harms—the violation of deeply felt duties to a higher power—affect religious believers or groups whenever their religious practices are prohibited by law, whether or not the law applies to a host of other people or not. Particularly in this day of pervasive government regulation, religious conduct will be highly restricted if it is subject to every law that applies to the broader society.

We continue to return here because this vision of religious freedom is not fully protected under existing law. The Supreme Court held in *Employment Division v. Smith*² that the Free Exercise Clause usually is not violated by the application of a "neutral and generally applicable" law to prohibit religious conduct. This general rule has a number of possible limits and exceptions, which can be and have been used to protect religious freedom in particular circumstances. But litigation under those exceptions is complex and uncertain and still may produce insufficient scope for religious freedom in a highly regulated society.

For these reasons, Congress in 1993 passed the Religious Freedom Restoration Act (RFRA), which provided that even generally applicable federal and state laws could not impose "substantial" burdens on religious exercise unless they were supported by strong governmental interests. But the Supreme Court last year in *City of Boerne v. Flores*³ struck down RFRA as applied to state and local laws, holding that the statute exceeded Congress's Fourteenth Amendment power to enforce constitutional rights against states. The Court said that the Fourteenth Amendment power was limited to enforcing the Court's interpretation of the Free Exercise Clause. Since the largest number of restrictions on religious practice come from generally applicable laws at the state and local levels, *Boerne* returned religious freedom to the very uncertain state that existed before RFRA.

There are important reasons for Congress to try again to pass religious freedom legislation that shares some of the qualities of RFRA. It is important to protect religious exercise from generally applicable laws. Moreover, it is important to do so in a consistent, across-the-board fashion. RFRA, which protected all claims of religious exercise under the same standard, reflected a moral, constitutional, and practical insight: that religious freedom protection should be the same for all groups. In the words of the Coalition for the Free Exercise of Religion, RFRA was meant "to allow[] any faith, no matter how small, unpopular or politically ineffectual, to press its claims before a neutral arbiter under an objective and religiously neutral standard.

¹ James Madison, Memorial and Remonstrance Against Religious Assessments, para. 1.

² 494 U.S. 872 (1990).

³ 117 S. Ct. 2157 (1997).

The consideration and adjudication of [such] claims facilitates judicial review for fairness and minimizes favoritism.”⁴

The Religious Liberty Protection Act seeks to provide as broad a coverage of religious freedom claims as is possible after the *Boerne* decision, by relying on a variety of enumerated powers including but not limited to the Fourteenth Amendment enforcement power. As members of Congress discuss the several components of the legislation, I urge them to remember that it is an important goal to try to cover as wide a range of religious practices as is possible.

The value of general religious freedom legislation is shown by the fact that RFRA itself accomplished some important results during a very short time.⁵ Just in its application to state laws, the statute had preserved the confidentiality of Catholic confessions from invasion by prosecutors,⁶ enabled soup kitchens and homeless shelters to overcome or limit seriously burdensome zoning regulations,⁷ and permitted Amish buggy drivers, Sikh children, and prisoners of various faiths to follow religious practices in ways not causing danger to others.⁸

It is true that in recent years, religious believers and institutions have sometimes managed to protect themselves within the framework of *Employment Division v. Smith*, by arguing that the law burdening them was not generally applicable, that it was applied in a discriminatory fashion, or that it implicated some “hybrid” of another constitutional interest with religious exercise. But it would not be wise to rely solely on litigation under *Smith*. Discriminatory intent and discriminatory application of law are difficult to prove. There is no guarantee that the Supreme Court will end up maintaining the “hybrid”-rights category of analysis or that it will accept all of the broad assertions of hybrid rights, especially expressive rights, that have succeeded in some lower court decisions. In any event, RLPA would add an explicit form of protection to the claims that religious believers and institutions can raise. Lawyers representing churches and believers continue to report that while RFRA was in effect, it improved their position in negotiating with state and local government officials.

Some critics of RLPA, especially from the conservative side, acknowledge the need to protect religious freedom from generally applicable laws but claim that there are better ways to do so. This is the position of the recent memorandum from the Home School Legal Defense Association (HSLDA), the only written arguments of this kind of which I am aware. But the alternatives HSLDA suggests are simply not viable; dropping RLPA and pursuing them would truly make the perfect the enemy of the good.

Two of the alternatives HSLDA suggests cannot, with all respect, be taken seriously: “passing a Congressional resolution stating that RFRA is constitutional” and “re-enacting RFRA without changes as a demonstration to the Supreme Court that Congress believes RFRA to be constitutional.”⁹ These measures would either have no legal force or else would be struck down immediately in litigation, most likely with monetary sanctions imposed on the religious believers who raised the “reenacted” RFRA as a claim. There is no point in Congress merely thumbing its nose at the Court or precipitating a direct constitutional clash by reenacting a statute struck down a year ago.

The other two suggested options—state RFRA-type statutes or a federal constitutional amendments—are more serious, but those who have given the most thought to protecting religious freedom after *Boerne* have concluded that they are not adequate in themselves. The push for state constitutional amendments and RFRA-type statutes, of course, is vigorously underway and is already yielding fruits. But the state-by-state process moves very slowly, and its results are practically guaranteed to be uneven. Various states have proposed to immunize prisoner regulations, anti-

⁴ Brief Amicus Curiae of the Coalition for the Free Exercise of Religion, *City of Boerne v. Flores* (No. 95-2074), at 11.

⁵ It was only about two and a half years between the time the statute was enacted and the time RFRA litigation went largely on hold as a result of the pendency of the *Boerne* case in the Supreme Court.

⁶ *Mocklatis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997).

⁷ *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996); *Western Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994); *Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 Mich. App. 1996).

⁸ See, e.g., *State v. Miller*, 196 Wis. 2d 238, 538 N.W.2d 573 (Wis. App. 1995) (Amish drivers do not have to display bright orange emblems); *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (Sikh students permitted to wear sewn-up ceremonial knives); *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), vacated on grounds of *Boerne*, 117 S. Ct. 2502 (1997) (prisoners permitted to wear crucifixes as against ban on religious jewelry).

⁹ Memorandum from Michael Farris and Bradley Jacob, HSLDA, at 2 (“HSLDA Mem.”). See also *id.* at 10 (advocating that Congress should not “acquiesce[] in the atrocious *Boerne* decision”).

discrimination laws, and other kinds of laws from having to satisfy heightened scrutiny. Federal action would provide an important supplement to the patchwork of state rules.

That leaves a federal constitutional amendment. I am no expert on politics, but those who are and are closest to the religious freedom efforts have concluded unanimously that an amendment is not a viable option. Their reasons seem compelling. The process is long and arduous, and nothing would be accomplished unless the required three-fourths of the states ratified the amendment. Interest groups that oppose religious freedom in particular circumstances—groups from prison wardens to the architectural preservation lobby to public educators to animal rights activists—could force exceptions to be written into the amendment at the front end. More likely and more dangerously, they could defeat it entirely at the back end by blocking passage in just a few states. The experience could be similar to that of the Equal Rights Amendment, which shot out of the starting gate in 1972 but ran into insurmountable barriers in getting the last three states necessary to ratify. The amendment process would also tend to sweep in other issues in the contentious area of church and state, such as prayers in public schools and financial aid to religious schools. Congress knows from very recent experience that disputes over those matters would divide religious freedom advocates and doom any such amendment.

Given the value of religious freedom legislation, there would have to be strong reasons to justify opposing it. The criticisms I have seen, whether they are of policy or of constitutionality, do not seem to me to make a sufficient case against RLPA. I am going to address the criticisms by first discussing two of the major sources of power on which RLPA would rely—the Spending and Commerce powers—and then turn to other matters.

B. SPENDING POWER COMPONENT

Section 2(a)(1) of RLPA would apply heightened scrutiny to substantial burdens on religious exercise imposed “in a program or activity, operated by a government, that receives Federal financial assistance.” The basis for this authority is Congress’s power to tax and spend for the general welfare,¹⁰ under which Congress can set conditions on the use of its expenditures. The provision is modeled on the various anti-discrimination laws, which prohibit discrimination based on race, sex, handicap, or age in any program or activity receiving federal funds.¹¹ The purpose of the provision is to ensure that federal funds are not used to support burdens on the religious practice of beneficiaries, and that beneficiaries are not forced to withdraw from federally funded programs, and forego the programs’ advantages, because the programs impose burdens on their faith. For example, the federal government offers funding to most public school districts in order to help them provide a better education. When school districts impose unnecessary burdens on the religious conscience of parents and students—whether through forcing students to read objectionable materials or exposing them to unnecessary or excessive sex education programs¹²—those parents may well move their children to private schools, which would frustrate the federal purpose of aiding their education. RLPA might not require accommodations in all these cases, but it would require the school to prove that no accommodation can be made.

These purposes easily satisfy the current Spending Power test, set forth in *South Dakota v. Dole*.¹³ There the Court upheld Congress’s power to condition federal highway funds on a state’s adopting a 21-year-old minimum drinking age. The condition concerning teenage drinking, the Court said, bore a reasonable relation to highway construction because of concerns for highway safety. If such a loose connection was sufficient in *Dole*, certainly there is a sufficient interest in preventing federally subsidized programs from burdening or driving away their beneficiaries because of impositions on their faith.¹⁴

¹⁰ U.S. Const., art. I, sec. 8, cl. 1.

¹¹ Title VI, Civil Rights Act of 1964, 42 U.S.C. 2000d (race); Title IX, Education Amendments of 1972, 20 U.S.C. 1681 (sex); Rehabilitation Act of 1973, 29 U.S.C. 794 (handicap); Age Discrimination in Employment Act of 1975, Title III, 42 U.S.C. 6102 (age).

¹² See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (textbook series); *Brown v. Hot, Sexy, and Safer Productions*, 68 F.3d 525 (1st Cir. 1995) (explicit sex education program); *Curtis v. School Committee of Falmouth*, 420 Mass. 749, 652 N.E.2d 280 (1995) (distribution of condoms without notice to parents).

¹³ 483 U.S. 203 (1987).

¹⁴ Current law strongly supports the Spending Power standard; but if Congress is concerned that the Court will begin to impose federalism limitations on that power, it might do some incremental tightening to the definition of a covered “program or activity.” The goal would be to pre-

The HSLDA's objection to the Spending Power component of RLPA is not that it is inappropriate, but that it "will not often be of assistance to religious believers" because "very few free exercise cases come up in the context of federally funded programs."¹⁵ That is simply false. Most public school districts will be covered, and they have given rise to a number of religious freedom disputes—from the curriculum and sex education disputes mentioned above, to questions about whether student religious groups may limit their leadership or membership to adherents of their faith,¹⁶ whether students may wear religious items mandated by their faith,¹⁷ and whether schools may disregard the educational level and achievements of religiously home-schooled students when they enter the public system.¹⁸ When one adds in public universities, state welfare programs, and other state activities receiving federal funding, the number of likely religious freedom interests covered by RLPA is far from few.

C. COMMERCE POWER COMPONENT

Section 2(a)(2) of RLPA would apply heightened scrutiny to burdens on religious exercise "in or affecting commerce with foreign nations, among the several States, or with the Indian tribes." The basic theory of congressional power here is that, at least in some instances, religious believers and institutions are actors in commerce, buying or selling goods or services or employing people, and that government restriction of their activity may thereby reduce or distort commerce as well as religious exercise. This component of the bill has attracted the most criticism from the conservative side, and it also raises the most complicated constitutional issues. I would like to address several points concerning it.

1. Reliance on a Commercial Rationale

Some of the critics' objections to the Commerce Power component of RLPA are not on constitutional grounds, but on what might be called moral, rhetorical, or even theological grounds. They argue that a "reduction of faith and religious practice to commerce" is demeaning, "sacrilegious" and "at the very least silly."¹⁹ "Never before in our Nation's history," they cry, "has a fundamental right been reduced to a level of a commercial transaction."²⁰ They also complain that the commercial rationale will distract attention from the real task of restoring religious freedom by new Fourteenth Amendment legislation or by a constitutional amendment.²¹

These critics have a very short memory. The landmark Civil Rights Act of 1964 did precisely what RLPA does: protect a fundamental human right, in that case equality and nondiscrimination, using the Commerce Power as the means to that end. And almost exactly the same warnings and criticisms were made at the time. But the fact that Congress prohibited discrimination in employment and public accommodations based on their effect on commerce and interstate travel has scarcely deprived the Civil Rights Act of its moral force or of its status in American law.

Congress faced a similar constitutional problem in 1964 with civil rights that it faces today with religious freedom. Although the Fourteenth Amendment was the constitutional provision that spoke directly to the ideal of racial equality that motivated the Act, Congress thought it was foreclosed from relying on the Amendment (at least solely on it) because of the Court's interpretations. There, the Court had held decades earlier that a public accommodations law could not rest on the Fourteenth Amendment because the law reached beyond state action to private businesses.²² Here, although the Fourteenth Amendment speaks most directly to reli-

vent the provision of funds to one small part of a large state-wide agency, like the transportation or human services department, from justifying conditions on wholly unrelated parts of that agency.

¹⁵ HSLDA Mem. at 4.

¹⁶ *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.2d 839 (2d Cir. 1996) (indicating that Equal Access Act, 20 U.S.C. 4071 et seq., does not resolve all such questions).

¹⁷ See *Cheema*, 67 F.3d 883; see also *Chalifoux v. New Caney Indpdt. School. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (protecting students' rights to wear rosaries, based on First Amendment rationale).

¹⁸ See, e.g., *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991) (upholding school's discretion under *Smith* and rejecting "hybrid" claim).

For some unexplained reason, the HSLDA memorandum includes public school students on its list of persons who would have no protection under RLPA. HSLDA Mem. at 6.

¹⁹ HSLDA Mem. at 9 (arguing that "reduction of faith and religious practice to commerce" is "sacrilegious" and "at the very least silly"); Letter to Members of Congress from Michael Farris et al. (describing Commerce Power rationale as "an affront to our faith" because "[w]orship is not commerce" (emphasis in original)).

²⁰ Letter from Farris et al., *supra*.

²¹ HSLDA Mem at 6, 10.

²² Civil Rights Cases, 109 U.S. 3 (1883).

gious freedom against state laws, Congress is foreclosed from broadly protecting religious freedom under the Amendment because of *Boerne*.

The Commerce Power rationale for the Civil Rights bill prompted criticisms—even from some who supported the bill's goals—that are echoed by the criticisms today of RLPA. One senator complained that “[the] dignity of the individual should not be placed on lesser grounds such as the [commerce clause]”;²³ another argued that discrimination was wrong because of “the dignity of man, not because it impedes our [commerce],” and complained that relying on the Commerce Power to avoid the Fourteenth Amendment difficulties was “too careful, cagey, and cautious.”²⁴

There is one difference between the two situations that points in RLPA's favor. In 1964 some observers dismissed the Commerce Power basis for the civil rights law partly because they thought a viable basis could be developed under the Fourteenth Amendment: the Court's narrow state action decision was very old and more recent decisions had expanded that concept.²⁵ But today we are certain that the Court will not let Congress legislate strict scrutiny for religious exercise claims under the Fourteenth Amendment; *Boerne* said so only a year ago. The prospect of forcing the Court down by reenacting RFRA is laughable, as I have said. Outside of the Spending Power and the rather limited Fourteenth Amendment option, the Commerce Power is the only basis for legislating to protect religious exercise from generally applicable laws.

The parallels between the Civil Rights Act and RLPA should, I think, lead Congress not to be scared off too quickly by cries like “Worship is not commerce!” The Civil Rights Act has not lost its moral force or importance just because it used the fact that discrimination affects commerce as a means to support congressional power. Nor is there a lack of moral force in the federal statutes prohibiting child labor, toxic waste dumping, terrorism, arson against businesses, or a host of other activities that are condemned on primarily moral rather than commercial grounds—but where the federal prohibition rests on the Commerce Power.

2. The Constitutionally Permissible Scope of Protection

There have also been questions raised concerning the power of Congress to protect religious exercise based on its effect on interstate commerce. Strictly speaking, there can be no constitutional difficulty with the statute's text; it extends protection only to religious exercise “in or affecting [interstate] commerce,” a phrase intended to reach as far as, but only as far as, the Commerce Power permits. (Congress might wish to consider stating explicitly²⁶ that the provision is meant to extend to the limits of the Commerce Power.) The provision is thus constitutional by definition. It contains what *United States v. Lopez*,²⁷ the Court's recent Commerce Power decision, requires: a “jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce.”²⁸ The real question, then, is what religious activity can be held to affect interstate commerce under the Supreme Court's decisions. My judgment is that the Commerce Power component could have some significant effects, although its reach would be limited.

Religious activity and governmental regulation of it affect interstate commerce because religious entities are themselves actors in commerce. Worship is not commerce, but many of the entities that engage in it also engage in commerce. Churches, schools, social service agencies, and other religious entities purchase and produce goods and services and employ people commerce, and to a large degree: the total expenditure by religious organizations is probably more than \$100 billion a year, no doubt much of it the purchase of goods and services that move in interstate commerce.²⁹ Regulation of their activities affects how they engage in commerce. When

²³ See GERALD GUNTHER, CONSTITUTIONAL LAW 151 n.5 (12th ed. 1991) (quoting Sen. Cooper).

²⁴ *Id.* at 150–51 (quoting Sen. Pastore).

²⁵ See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (privately-owned restaurant that leased space in a municipal parking garage was a state actor and so could refuse to serve blacks). Thus, constitutional expert Gerald Gunther urged that the federal government *could* profitably “channel its resources of ingenuity and advocacy into the development of a viable interpretation of the Fourteenth Amendment, the provision with a natural linkage to the race problem.” See GUNTHER, *supra*, at 149 (quoting letter to Justice Department, June 5, 1963).

²⁶ In section 5, “Rules of Construction.”

²⁷ 514 U.S. 549, 115 S. Ct. 1624 (1995)

²⁸ 115 S. Ct. at 1631.

²⁹ While other witnesses can provide more detailed statistics, I will cite just one indicator. According to a leading survey, charitable contributions to religious entities nationwide in 1996 totaled \$69.44 billion (a figure that appears even to leave out some contributions to religiously affiliated universities). AMERICAN ASSOCIATION OF FUND-RAISING COUNSEL, GIVING USA 1997 (summary available at <http://www.aafrc.org>). Since religious organizations also receive revenue

labor laws regulate a religious entity's employment practices—for examples, requiring a school to accept unionization of its teachers, or to pay unemployment benefits to employees discharged for conduct the school regards as sinful—the entity may hire fewer employees, or in a different pattern, than if it were not regulated. If a Roman Catholic hospital loses its obstetrics accreditation because it refuses to teach abortion techniques, the obstetrics services and the teaching program will shift to another hospital.

The fact that any single instance of restricted economic activity does not affect interstate commerce will not matter. Even in *Lopez*, which signaled the resurrection of judicial limits on the Commerce Power, the Court continued to allow Congress to regulate “economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”³⁰ A host of appeals decisions since *Lopez* have confirmed that Congress can reach local activity that in the “aggregate” would affect interstate commerce, at least if the activity is in some way economic or has a commercial connection.³¹ I do urge Congress to make as detailed findings as possible concerning the effect on commerce from different kinds of religious activity and from the regulation of them. I hope that the testimony presented at these hearings will be a significant step toward such findings.

Lopez, of course, indicates that the Court is beginning once again to set limits on the Commerce Power, and it is hard to know just how far that limiting process will go. But we can sketch some likely lines of reasoning and how they would affect the reach of RLPA.

First, I think it is almost certain that the Court will continue to regard some forms of activity as inherently economic or connected to commerce, and thus more easily subject to congressional action. The most important of these are employment practices—unionization, payment of wages and benefits, selection of employees, and so forth. The Court will continue to regard these as within the scope of commerce, even for fairly small or local entities, based on an aggregation theory. Thus it seems likely that RLPA would cover most of the instances where state labor laws—collective bargaining laws, anti-discrimination laws, unemployment benefits laws—would require religious institutions to violate their conscience or compromise their mission. The proposition that religious entities affect commerce is the premise for subjecting them to various federal labor laws, including ERISA, the Fair Labor Standards Act, the National Labor Relations Act, Title VII of the Civil Rights Act, and others. It cannot be that religious entities are engaged in commerce when Congress regulates them, but not when Congress decides to exempt them from regulation.

The HSLDA attack on the bill is misleading when it suggests that the Court may be moving toward a very strict reading of the Commerce Power that would encompass only “the power to regulate railroads, highways, and other means of transporting goods from state to state.”³² HSLDA seems to imply that encouraging such a reading is worthwhile, although it would render RLPA ineffective, because it would enable religious entities to avoid federal regulation by arguing that they do not affect commerce. I see little prospect for such a change. The Court is most unlikely to make a serious assault on the Civil Rights Act and other labor laws premised on aggregate activity under the Commerce Power.

The notion that religious entities could avoid federal regulation by arguing that they are outside commerce is a longshot, even after *Lopez*; it is not worth foregoing the protection against state regulation offered by RLPA. I have not found one decision in which a religious entity avoided federal regulation by showing it fell outside the Commerce Power; there are numerous decisions finding religious entities to be within commerce, even for their non-profit, spiritual activities.³³ Where religious en-

from investments, quid-pro-quo transactions, and direct or indirect government funding, it is easy to see that their yearly receipts—and thus presumably their expenditures—exceed \$100 billion.

³⁰ 115 S. Ct. at 1630 (reaffirming the “aggregation” theory of *Wickard v. Filburn*, 317 U.S. 111 (1942)).

³¹ Just a few of many examples include *United States v. Robinson*, 119 F.3d 1205, 1214–15 (5th Cir. 1997) (upholding federal law against extortion); *United States v. Chowdury*, 118 F.3d 742, 745 (11th Cir. 1997) (upholding federal law against arson); *United States v. Sodema*, 82 F.3d 1370, 1373–74 (7th Cir. 1996) (upholding federal law against blocking access to clinics); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (same).

³² HSLDA Mem. at 5.

³³ See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (Salvation Army was within commerce and covered by Title VII, although its ministerial relations were exempt because of First Amendment concerns); *Volunteers of America v. NLRB*, 777 F.2d 1386, 1388 (9th Cir. 1985) (church-operated alcohol rehabilitation center affected commerce and was subject to National Labor Relations Act); *NLRB v. Salvation Army Day Care Center*, 763 F.2d 1, 6 (1st Cir. 1985) (same, for religious day care center); *VOA-Minnesota-Bar None Boys Ranch v. NLRB*, 752 F.2d 345, 349 (8th Cir., 1985) (same, for religious residential children's home for children);

tities have escaped federal statutory coverage, it is because they have been carved out as an exception from full coverage of activities affecting commerce—sometimes because of First Amendment concerns,³⁴ sometimes as a matter of statutory or administrative decision.³⁵ Nothing in RLPA would interfere with such statutory or administrative exceptions; under section 5(e), proof that an entity affects commerce under RLPA “does not give rise to any inference or presumption that the religious exercise is subject to any other law regulating commerce.”

HSLDA is wrong, I believe, when it suggests that the protections of the Commerce Power component would probably apply only to large religious institutions and not to small entities such as “small churches,” “day care centers,” “Christian landlords,” or businesses owned by the religiously devout.³⁶ The employment and other commercially-related practices of small religious entities have an effect on commerce in the aggregate. As I have discussed, the law has clearly exposed these small entities to federal regulation under the Commerce Power; it would make no sense to say that they cannot be protected from state restriction under that same power.

A closer question is presented by forms of religious activity that have a less fully commercial nature but have some connections to commerce. For example, when prison rules forbid the distribution of religious literature or jewelry to inmates, the main restricted religious activity, the reading of literature or the wearing of jewelry, has little of a commercial nature (just as the Court in *Lopez* held that gun possession had little commercial nature). But another, connected religious activity, the production and distribution of religious literature or jewelry, has commercial element and may be affected on a large or interstate scale—especially if, for example, the restrictive policy is adopted by an entire state prison system. My guess is that such questions will have to be resolved on a case-by-case basis.

Most of the forms of religiously significant activity that are likely to be deemed economic—employment, the provision of medical or social services or instruction, the purchase of materials, the making of contracts—are engaged in by religious institutions such as churches, schools, or social service agencies. The commerce rationale will not apply as often to individual religious exercise, which usually does not have a direct commercial element. Some conflicts between individual religious exercise and the laws arise out of individuals’ commercial activity: for example, cases where landlords assert conscientious objections to being forced by law to accept unmarried cohabiting couples as tenants.³⁷ But many individual cases do not involve commercial activity, including some of the most compelling cases for protecting individual religious conscience. That cost simply follows from the fact that Congress’s power under the Commerce Clause is limited.

HSLDA views these limits on the Commerce Power as a reason to scrap RLPA altogether. I disagree; they are not even sufficient reason to scrap the Commerce Power component alone. The protection of religious institutions’ autonomy in matters like employment is an important benefit in itself. Many of the more compelling cases for religious accommodations involve the right of institutions to determine their mission, how it will be carried out, and by whom. And in areas like employment, small entities are likely to be protected as well as large ones. Finally, the limits on the Commerce Power component are surely not a good reason to reject the entire statute. As the examples about coverage of public schools show, many of the impositions on religious freedom that are beyond the Commerce Power can be addressed by the components of RLPA based on the Spending and the Fourteenth Amendment Enforcement powers.

3. Tenth Amendment Issues

Another constitutional issue that has been raised is whether a Commerce Power component would violate Tenth Amendment limits on congressional power. In two

St. Elizabeth Hospital v. NLRB, 715 F.2d 1193, 1196 (7th Cir. 1983) (same, for religious hospital); *Dole v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), aff’d, 899 F.2d 1389 (4th Cir. 1990) (church schools are within commerce under Fair Labor Standards Act); *Dole v. Rose City Pentecostal Church of God*, 1990 WL 127718 (E.D. Ark. 1990) (same).

³⁴ See, e.g., *McClure*, 460 F.2d 553 (exempting ministerial relationship from Title VII even though Salvation Army was within commerce); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (exempting church-operated schools from NLRA).

³⁵ See, e.g., Title VII, sec. 702, 42 U.S.C. 2000e-1 (exempting religious organizations from liability for hiring members of their own faith, but assuming that they affect commerce); 29 C.F.R. 103.1 (NLRB policy to refrain from jurisdiction over any private school with less than \$1 million annual revenues, not just over religious ones); *Catholic Bishop*, 440 U.S. at 497 (noting Board’s policy of setting jurisdictional limit based on revenues).

³⁶ HSLDA Mem. at 6.

³⁷ See, e.g., *Smith v. Fair Employment and Housing Comm.*, 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700, 913 P.2d 909 (Cal. 1996); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (Mass. 1994).

recent decisions, *United States v. Printz* and *New York v. United States*, the Court has held that Congress is prohibited from "compell[ing] the States to implement, by legislation or executive action, federal regulatory programs."³⁸ *Printz* struck down the Brady Act's requirement that sheriffs check the background of gun purchasers in their county; *New York* struck down a provision that required each state to develop a satisfactory plan for disposing of radioactive waste or else "take title" to the waste. It has been suggested that RLPA's Commerce Power component likewise directly orders states to pursue a certain policy toward religious exercise (namely, refraining from burdening it except for a compelling governmental interest).³⁹ Some of the language in those decisions would provide support for such an argument.

But the protection of religious freedom from state laws under RLPA presents a very different situation from the congressional "commandeering" of state officials struck down in *Printz* and *New York*. The key difference lies in the fact that RLPA does not put an affirmative mandate on state and local governments to carry out a federal program: rather, RLPA simply displaces state and local laws to the extent necessary to protect the activity of private religious individuals and organizations. Therefore, the Commerce Power rule of RLPA is more analogous to legislation preempting state and local laws, which is of course common under the Commerce Power.

Reading *Printz*, *New York* and *Lopez* to forbid Congress from displacing state laws would create serious difficulties with the power of preemption. Any preemption clause in a federal statute is in effect a direct regulation of state and local lawmaking. If *Printz* and *New York* (or even *Lopez*) mean that Congress cannot directly target state law in the sense of displacing it, then those decisions will cast doubt on the preemption power, for every preemption provision singles out state laws for displacement. That would fly in the face of the *New York* Court's assurance that the preemption power is not affected.

It is crucial to emphasize that the Commerce Power component of RLPA simply displaces state law (except where a compelling interest is present); it does not mandate any federal regulation or program. RLPA can be satisfied in any number of ways, indeed by any way that removes the burden on religious exercise. The bill provides that "[a] government may eliminate the substantial burden on religious exercise by changing the policy that results in the burden, by retaining the policy and exempting the religious exercise from that policy, or by any means that eliminates the burden."⁴⁰ Thus there is simply no argument that RLPA "commandeers" the states or "compel[s them] to enact or administer a federal regulatory program." This leaves the government with considerable flexibility, and it makes possible negotiations between religious believers and the government that often produce a solution acceptable to both. For example, when a public high school basketball league forbade an Orthodox Jewish student to wear a yarmulke while playing because the cap might fall off and trip other players, the federal court (applying the pre-*Smith* balancing test that RLPA would restore) suggested that a more secure form of headgear might satisfy the state's safety concerns while allowing the student to fulfill his religious duty. The parties eventually settled on similar terms.⁴¹

In many preemption situations, Congress replaces the displaced state law with a scheme of federal regulation; Justice O'Connor referred to this when she spoke of Congress "regulat[ing] interstate commerce directly."⁴² But in some federal statutes, the regulatory scheme that Congress imposes is one of deregulation. Congress intends to increase the freedom of private actors and in order to do so, forbids the application of state or local laws to the deregulated conduct. Congress replaces state law with no legal restrictions at all in some instances, and at most minimal and flexible ones. The preemption provision is, of course, crucial to the deregulatory goal, but it is not replaced with any significant federal regulation. Recent examples include the statutes deregulating airlines rates⁴³ and railroad and trucking industry

³⁸ *United States v. Printz*, 117 S. Ct. 2365, 2380 (1997); accord *New York v. United States*, 505 U.S. 144 (1992).

³⁹ See Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. Ark. Little Rock L. J. ____ (forthcoming 1998) (also making a similar argument based on *Lopez*).

These holdings, it should be noted, do not apply to the Spending Power; Congress may condition funds to a state or its agency on the condition that it follow federal directives in using them. *New York*, 505 U.S. at 173; *Printz*, 117 S. Ct. at 2376.

⁴⁰ RLPA section 2(d).

⁴¹ *Menora v. Illinois High School Assn.*, 683 F.2d 1030, 1035-36 (7th Cir. 1982).

⁴² *New York*, 505 U.S. at 166.

⁴³ Airline Deregulation Act of 1978, 47 U.S.C. 41701.

operations.⁴⁴ A few terms ago, the Court broadly interpreted the preemption provision in the Airline Deregulation Act to forbid state attorneys general from bringing enforcement proceedings against airline rate advertisements under generally applicable state laws forbidding false advertising.⁴⁵

The Commerce Power component of RLPA can be seen as a kind of deregulatory statute preempting state laws that impede on the freedom Congress wishes to assure to religiously grounded conduct. RLPA defines a zone of private conduct and prohibits state laws from interfering in that zone. At the least, the analogy to the accepted practice of preemption is close enough that the Court would be ill-advised to extend the restrictions of *Printz* and *New York* to this legislation that simply displaces state law. It is possible that the Court would take its federalism agenda that far, but it would be a dramatic step beyond those two decisions.

The Commerce Power does raise more questions of constitutional scope than the other aspects of RLPA. That is not a good reason to exclude it. I would emphasize again that broader coverage, based on several components, offers important benefits of fairness and neutrality, protecting as many religious practices as possible under the same standard.

D. ESTABLISHMENT CLAUSE AND OTHER CONSTITUTIONAL ISSUES

Some other constitutional issues merit shorter discussion. RLPA does not violate the Establishment Clause just because it protects religious exercise and not other kinds of conduct. In *Corporation of Presiding Bishop v. Amos*,⁴⁶ the Court unanimously upheld the Title VII provision exempting religious organizations from Title VII's prohibition against religious discrimination in employment. The Court explicitly held that Congress may accommodate religious exercise even where the Free Exercise Clause does not compel it to do so.⁴⁷ It also explicitly held that an accommodation of religious exercise need not "come packaged with benefits to secular entities."⁴⁸ Numerous other decisions hold or state that legislatures may exempt religious practice from generally applicable laws.⁴⁹

The fact that RLPA is a general accommodation, across a number of situations and laws rather than just one, has no effect on the Establishment Clause. The statute still does not establish religion just because it frees it from regulation; that interpretation would set the Establishment Clause at war with free exercise interests. Protection of religious conduct only constitutes an establishment if it shifts significant or disproportionate costs from belief directly onto nonbelievers, or if the religious conduct so coincides with self-interest that offering the protection will induce others to practice (or claim to practice) religion. RLPA avoids those situations because it only prevents "substantial" burdens on religion and because disproportionate, direct costs will usually implicate a compelling governmental interest. Even assuming that a few of RLPA's applications would produce excessive favoritism for religion, they are not nearly enough to call the statute into question on its face.⁵⁰ For these very reasons, the Eighth Circuit recently upheld RFRA itself, as applied to federal rather than state law, as against an Establishment Clause challenge.⁵¹

It is worth noting that one other constitutional objection made against RFRA is simply inapplicable to RLPA. Some critics of RFRA claim that even its federal applications are unconstitutional because they do not rest on any single enumerated power and thus are merely an effort to reinterpret the Free Exercise Clause.⁵² That

⁴⁴ Staggers Rail Act of 1980, 40 U.S.C. 10505. The Act's provision authorizing the Interstate Commerce Commission to exempt carriers from certain regulation, 40 U.S.C. 10505(a), has often been interpreted to preempt state regulations. *G&T Terminal Packaging Co. V. Consolidated Rail Corp.*, 830 F.2d 1230, 1233-36 (3d Cir. 1987); *Alliance Shippers Inc. v. Southern Pacific Transp. Co.*, 858 F.2d 567 (9th Cir. 1988) (per curiam).

⁴⁵ *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) (interpreting and applying 47 U.S.C. 41713(b)).

⁴⁶ 483 U.S. 327 (1987).

⁴⁷ *Id.* at 334, 336.

⁴⁸ *Id.* at 338.

⁴⁹ See *Gillette v. United States*, 401 U.S. 437 (1971) (upholding draft exemption for religious conscientious objectors); *Selective Draft Law Cases*, 245 U.S. 366 (1918); see also *Board of Education, Kiryas Joel School Dist. v. Grumet*, 512 U.S. 587, 114 S. Ct. 2481, 2492-93 (1994); *Employment Division v. Smith*, 494 U.S. 872, 890 (1990); *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 144-45 (1987) (all stating that legislatures may exempt religious conduct).

⁵⁰ See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (a statute should be upheld on its face unless "no set of circumstances exists under which [it] would be valid").

⁵¹ *Christians v. Crystal Evangelical Free Church*, 1998 WL 166642 (8th Cir. April 13, 1998).

⁵² See Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357 (1994);

argument is mistaken as to RFRA. But it is manifestly inapplicable to RLPA, which rests on specific enumerated powers over spending, commerce, and Fourteenth Amendment violations, and which protects religious freedom in those classes of disputes alone.

E. EFFECT ON CIVIL RIGHTS LAWS

Finally, I understand that concern has been raised about the effect that RLPA might have on the enforcement of civil rights laws prohibiting discrimination based on race, sex, or other characteristics. It is difficult to give such an opinion without the facts of a particular case, and moreover the supporters of RLPA have different views on how the statute would affect civil rights laws. But RLPA is presumably meant (like RFRA) to be mindful of the balancing analysis used in decisions before *Employment Division v. Smith*. That suggests at least a couple of points.

First, in some cases the application of anti-discrimination laws to religious entities is quite likely to be found to rest on a compelling interest. For example, the Supreme Court held, before *Smith*, that there was a compelling interest in denying tax exemptions to schools that practiced racial discrimination on religious grounds.⁵³ The interest was in denying any government support to racial discrimination in education, given the destructive history of such support in America.⁵⁴ I have no doubt courts would reach the same result under RLPA.

Second, however, the compelling interest test must also take account of all the factors in the particular case—not only the kind of discrimination, but the context in which it occurs and the nature of the government's restriction. Thus in *Bob Jones* the Court confined its decision to education, wisely leaving open questions such as whether a "purely religious institution[]," such as church, with sincere doctrinal beliefs could practice racial discrimination⁵⁵—for example, in its most fundamental religious operations such as the selection of clergy. Courts have properly barred government from intervening in the selection of clergy in all but exceptional cases. Some other civil rights laws serve less obviously compelling purposes than the prevention of racial discrimination. For example, it would be more difficult to show that the prevention of discrimination based on marital status is a compelling interest, since until few years ago cohabitation was the subject of widespread social and even legal condemnation. When religious landlords who refuse to rent to cohabiting couples have failed in their religious freedom claims, judges have sometimes said there was no "substantial burden" on the landlord's religious faith because her activity was purely commercial and profit-making.⁵⁶ I disagree and would uphold the landlord's claim; but the lesson for present purposes is simply that RLPA claims, like those under RFRA, will have to be decided according to all of their circumstances.

Mr. CANADY. Professor Eisgruber.

STATEMENT OF CHRISTOPHER L. EISGRUBER, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. EISGRUBER. Good morning. I would like to thank the committee for the opportunity to present my views this morning. I would also like to relay the thanks of my colleague and coauthor from the New York University School of Law, Professor Lawrence G. Sager. The testimony I present this morning is a result of a collaboration between the two of us, and he is fully in agreement with it.

Professor Sager and I take an expansive view of congressional power. And more specifically, we believe that even under the doctrine of *City of Boerne v. Flores*, Congress retains substantial power to protect the interests and special needs of religious Americans, and that Congress can and should exercise that power. However, the central message of *Boerne* is this: that power must be exercised

Eugene Gressman and Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L. J. 65 (1996).

⁵³ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

⁵⁴ *Id.* at 604.

⁵⁵ See *id.* at 604 n.29.

⁵⁶ See, e.g., *Smith v. Fair Employment and Housing Comm.*, 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700, 913 P.2d 909, 928–29 (Cal. 1996) (plurality opinion).

in a way that is done carefully and through tests that are appropriately drawn.

It is our view that the Religious Liberty Protection Act that this committee is now considering repeats and exacerbates the mistakes that led eventually to the decision in *Boerne* that struck down RFRA. We don't believe that RLPA is a sensible measure for the protection of religious liberty, and we believe that it is virtually certain to be held unconstitutional if ever it reaches the Supreme Court.

We have several objections to the statute. They are set out in detail in our written testimony and in greater detail in our academic work. I will, in my remarks this morning, confine myself to some of the objections that are related to the Federalism innovations made in the Religious Liberty Protection Act.

The easiest way to understand the Federalism problems involved in the Religious Liberty Protection Act is to begin with the message of the Supreme Court in *City of Boerne v. Flores*. That message is substantially more generous to congressional power in this sphere than it is sometimes portrayed as being.

As I understand the Court's decision in *City of Boerne v. Flores*, the Court does not deny that Congress may reasonably concern itself with ferreting out conduct by State governments that is hostile to religious liberty, that is insensitive to the needs of religious Americans or that discriminates against religious Americans. The Supreme Court in *City of Boerne* struck down the Religious Freedom Restoration Act not because those goals were inappropriate goals for Federal legislation, but rather because, in the words of the Court, the test incorporated by the Religious Freedom Restoration Act, the compelling State interest test, was out of all proportion to the legitimate goals that Congress was pursuing. It was not congruent to those goals, the Court said.

Congress might reasonably and effectively respond to the *City of Boerne* decision by enacting new legislation that uses a different test, one that is more nuanced to the goal of protecting religious interests against insensitivity, discrimination or hostility. Unfortunately, the Religious Liberty Protection Act this committee is now considering has not pursued that approach. RLPA does not abandon the compelling State interest test or modify it. Instead, RPLA simply moves it, looking for other portions of the constitutional test to which that particular test might be attached.

I think the strategy is unwise. I think it is certain to be held unconstitutional should the issue ever reach the Supreme Court.

This bill relies very heavily on both the spending power and the commerce power to justify the exercise of congressional power and the imposition of the compelling State interest test upon the States. If one takes the decision of the Court in the *City of Boerne* case seriously, I think it is exceedingly implausible that these strategies would survive judicial scrutiny. The committee's laudable concerns in enacting this legislation are concerns about religious liberty. They are concerns most appropriately articulated through the goals of the Fourteenth Amendment. They are not concerns about facilitating commerce or changing the nature of interstate commerce in any way. Nor are they goals that are in any eas-

ily understood fashion related to the extraordinary variety of spending programs that the Federal Government undertakes.

As we say in our testimony with respect to interstate commerce, religion is essentially a random vector. There is no reason to think that promoting religious conduct will increase, diminish, improve the quality of or affect in any other predictable way the interstate commerce of this country.

In conclusion, Professor Sager and I both commend the goals of this committee and the goal of Congress more generally in legislating to protect the religious liberty of Americans. We believe, however, that the Religious Liberty Protection Act is an inappropriate vehicle for doing that, that it is unlikely to work well, and that it raises serious constitutional problems which, in our judgment, exacerbate those that the Religious Freedom Restoration Act possessed.

Mr. CANADY. Thank you, Professor.

[The prepared statement of Mr. Eisgruber follows:]

PREPARED STATEMENT OF CHRISTOPHER L. EISGRUBER, PROFESSOR, NEW YORK
UNIVERSITY SCHOOL OF LAW

We thank the Chair and the Committee for providing us with the opportunity to submit our views regarding the constitutionality of the "Religious Liberty Protection Act" (draft dated May 14, 1998) (hereafter, "RLPA").

RLPA is a proposed effort to preserve what was valuable in the Religious Freedom Restoration Act ("RFRA"), which the Supreme Court held unconstitutional in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997).¹ We believe that RLPA would perpetuate the constitutional mistakes of RFRA. Indeed, as presently drafted, RLPA has defects that would make it less rather than more constitutionally acceptable than was RFRA.

INTRODUCTION & BRIEF SUMMARY

Religious liberty is a value of the highest order. In general, American public officials are sensitive to religious interests, and they often make commendable efforts to accommodate the needs of religious persons and practices. Nevertheless, there are undoubtedly times when officials—whether through prejudice, indifference, or misunderstanding—fail to show appropriate respect for the free exercise of religion. Congress has an important role to play in correcting these failures. If RLPA were a reasonable effort to discharge that responsibility, we would support it with enthusiasm.

Unfortunately, RLPA does something entirely different. By generating an extreme form of the "compelling state interest" test, and imposing it over a more sweeping range of cases than has ever been contemplated by the Supreme Court or by Congress, RLPA would undermine the government's capacity to pursue perfectly legitimate, even-handed, democratically chosen goals. In effect, RLPA would two classes of citizens: those who have religious reasons for their actions and who would thereby be privileged to defy otherwise perfectly valid governmental regulations, and those whose reasons for acting—however laudable and heartfelt—are not religious. RLPA's compelling state interest test goes far beyond protecting religiously-motivated people from hostility or insensitivity. Taken seriously, it would make religiously-motivated persons sovereigns among us.

Not surprisingly, Congress has no power to create the kind of special and arbitrary privileges that would result if RLPA were to become law. RLPA's peculiar statutory architecture amounts to a tacit admission of this problem: Even in an era when Congress retains broad license to act under its commerce clause and spending powers, RLPA stands out as depending upon a tenuous and improbable connection

¹ *Flores* clearly invalidated RFRA with respect to the regulation of state and local government behavior. Courts have divided about whether *Flores* should be understood to invalidate RFRA with regard to regulation of federal behavior. Yet, regardless of whether RFRA's federal applications survived *Flores*, we expect that the federal courts should, and will, ultimately declare them to be unconstitutional. For reasons that are equally applicable to RLPA and so are discussed in this memorandum, we believe that RFRA is unconstitutional under the Supreme Court's Establishment Clause doctrine.

between those powers and the subject of religious liberty. Far from curing the constitutional vices of RFRA, RLPA's somewhat desperate hunt for constitutional authority proliferates such difficulties.

Specifically, RLPA manifests five distinct constitutional vices. First, RLPA's sweeping application of the "compelling state interest test" unconstitutionally privileges religion. Because RLPA defines "the exercise of religion" in novel and unprecedented terms, it would likely violate the Establishment Clause even if its predecessor, RFRA, did not do so. Second, Section 2(a)(1) invokes Congress' spending power for purposes unrelated to the goals of any particular spending program. As a result, it exceeds the scope of Congress' enumerated powers. Third, Section 2(a)(2) likewise invokes Congress' commerce power for purposes unrelated to any goal related to interstate commerce. It, too, exceeds the scope of Congress' enumerated powers, and so would be held unconstitutional. Fourth, Section 3(b) limits the land use authority of state and local governments in a way that bears no relationship to any plausible claims that such governments are discriminating against religion. RLPA attempts to justify these limits by relying upon Congress' authority to enforce the Fourteenth Amendment. That effort is starkly inconsistent with the Supreme Court's decision in *Flores*. Fifth, Section 3(a) attempts to alter the judiciary's interpretation of the Free Exercise Clause. It thereby compromises the separation of powers and exceeds the authority of Congress under Section Five of the Fourteenth Amendment.

ANALYSIS

I. Establishment Clause Issues

1.1. The Compelling State Interest Test. Like RFRA before it, RLPA incorporates the compelling state interest test. That test appears in Section 2(b) of RLPA, and it is the heart of the proposed legislation. We have criticized this test extensively. Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 *N.Y.U. L. Rev.* 437 (1994); see also Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty after City of Boerne v. Flores*, 1997 *S. Ct. Rev.* 79 (1997). If honestly applied, the "compelling state interest test" is the most demanding standard known to constitutional law. Accordingly, the test is suitable only where it is appropriate to entertain a broad presumption of unconstitutionality—where, in other words, almost all of the cases that trigger the test will be abhorrent to the best standards of government behavior. Such a presumption rightly applies, for example, to laws intended to censor speech or to discriminate against racial or religious minorities. This presumption is badly suited to religious exemption cases, however. Many perfectly sound, even-handed laws will impose incidental burdens on some religious practices. The breadth and variety of religious belief make such collisions inevitable; but this does not offer a reason for depriving ourselves of the capacity to govern. Nor does the mere fact that a person's conduct is motivated by religious belief offer a good reason for permitting that person to defy reasonable, even-handed laws.

As applied in RFRA and RLPA, the "compelling state interest test" offers religiously motivated persons a sweeping privilege to disregard the laws that others are obliged to obey. It indefensibly favors religious commitments over the other deep concerns and interests of members of our society—concerns and interests like the welfare and integrity of one's family, deep moral and political commitments not recognizably grounded in religious beliefs, and professional, artistic and creative projects to which individuals may be passionately committed. Under RLPA or RFRA, for example, a church charity might ignore rules that a secular charity, devoted to identical causes, would have to respect. This sweeping preference for religiously motivated projects is a violation of the Establishment Clause of the First Amendment.

The idea that some persons are entitled to ignore the laws that others are required obey, and that this privilege depends upon the actors' system of beliefs, is extraordinary and transparently inconsistent with our constitutional values. In the debate over RFRA, the degree to which this idea was alien to our constitutional tradition was obscured by a misreading of the Supreme Court's religious liberty jurisprudence in the three decades preceding the Court's decision in *Department of Employment Services v. Smith*, 474 U.S. 872 (1990). During that period, the Court gave lip-service to the proposition that government behavior that penalized persons for doing that which was essential to their religious commitments should be measured against the rigors of the compelling state interest test.

Two crucially important facts went largely unobserved during the RFRA debate. First, while the Court spoke broadly, it acted extremely narrowly. Only one isolated group was ever permitted to defy a general legal rule on the basis of the compelling

interest test. That was the Amish, who were permitted to direct the development of their teenage children outside the framework of what the State of Wisconsin recognized as a school. One other group prevailed in the Court's many pre-*Smith* exemptions cases. The Court protected people who were presumptively entitled to claim unemployment insurance benefits; who had deep religious reasons for refusing an available job; and who faced a serious danger that those reasons might be treated with hostility by state bureaucrats. Outside of these two small groups, every other attempt by any religious person or group to invoke the compelling state interest test failed. In every other branch of constitutional jurisprudence, the compelling state interest test was strict in theory, but fatal in fact; here it was strict in theory but notoriously feeble in fact. The *Smith* Court did not cause or even precipitate the test's demise. The Court merely announced what had long been true.

The second thing that went largely unobserved in the RFRA debate was the fact that RFRA—and now, even more, RLPA—proposed a much more sweeping form of the compelling state interest test than had ever been even the nominal rule in the Supreme Court. As the Court observed in *Flores*, RFRA imposed “a least restrictive means requirement . . . that was not used in the pre-*Smith* jurisprudence RFRA purported to codify.” 117 S. Ct. at 2171. Sections 2(b)(2) and 3(b)(1)(A) of RLPA repeat this innovation. As constitutional commentators widely recognize, the least restrictive means requirement is the element that gives the compelling state interest test its special rigor in other contexts. More significantly still, through its extraordinarily capacious definition of the exercise of religion RLPA extends the potential coverage of the compelling state interest test to a far wider range of cases than was ever contemplated by the Supreme Court's most sweeping statements. We explore the implications of this last observation in the section that follows.

1.2. RLPA's Novel and Unprecedented Definition of the Exercise of Religion. RLPA exacerbates RFRA's Establishment Clause problems. Section 6(1) of RLPA defines “religious exercise” to mean “an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.” RLPA also amends RFRA to incorporate this new language. Section 7(a)(3). This definition is new. It appeared neither in RFRA nor in the Supreme Court's pre-*Smith* jurisprudence. Under RFRA, few courts had insisted that religious exercise be “compulsory” in order to trigger the statute's provisions, but most courts had held, in effect, that RFRA applied only to “substantial burdens” upon beliefs which were in some way and to some degree “important” to religious believers.²

RLPA's definition of religious exercise threatens to increase the extent to which RFRA favored religion over non-religion. Under RFRA, it was possible to argue that a burden upon religious exercise was not “substantial” if it affected only optional practices for which adequate substitutes were available. For example, under RFRA, several churches running soup-kitchens in residential neighborhoods sought zoning exemptions which, they conceded, were unavailable to comparably situated secular charities. In these cases, it was possible to argue that no “substantial burden” upon religious practice existed: the churches were free to run soup-kitchens in other locations, and they were free to engage in other charitable practices which, as a matter of their own religious doctrine, were equally worthy. See, e.g., *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1560 (MD Fla. 1995). When successful, arguments of this kind mitigated the RFRA's favoritism for religion.

It is not clear that these arguments would remain available under RLPA. To be sure, Sections 6(1) and 7(a)(3) define “religious exercise,” not “substantial burden.” Courts might find burdens upon religious exercise insubstantial if they affected only unimportant practices or if they left religious believers other, equally acceptable

² See, e.g., *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (“a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that maintains a central tenet of a person's religious belief, or compels conduct or expression that is contrary to those beliefs”); *Bryant v. Gomez*, 46 F. 3d 948, 949 (9th Cir. 1995) (to meet the substantial burden standard, plaintiffs must point to a burden that is “more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.”) (quoting *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680 (1988)); *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (“To exceed the ‘substantial burden’ threshold, government regulation ‘must significantly inhibit or constrain conduct or expression that manifests some central tenet of . . . [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion” (quoting *Werner v. McCotter*, 49 F. 3d 1476, 1480 (10th Cir. 1995) (brackets and ellisions added by the *Thiry* Court)); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden results if a government action “leaves ample avenues open for plaintiffs to express their deeply held beliefs”).

means by which to pursue their religious convictions. That construction of the “substantial burden” test, however, might render Section 7(a)(3) nugatory; if so, courts would be loathe to accept it. For that reason, RLPA exacerbates RFRA’s already troubling disparity between the treatment of religious and non-religious interests. RLPA might fail to survive scrutiny under the Establishment Clause even if RFRA (without RLPA’s amendments) could have done so.

II. Federalism Issues.

II.1. Spending Power Issues. Section 2(a)(1) of RLPA attempts to regulate the ability of state and local governments to “substantially burden . . . religious exercise . . . in a program or activity . . . that receives federal financial assistance.” That Section is an effort to draw upon Congress’ spending power. The Supreme Court has held that Congress has broad discretion to impose conditions upon the use of federal money by state and local governments. The leading case is *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Dole*, the Court upheld a statute which provided that states would lose federal highway funds if they did not raise the drinking age to 21. South Dakota objected to the statute on the ground that, under the Twenty-First Amendment, liquor laws were a matter of state rather than national control. The Supreme Court rejected this argument, reasoning that states could retain control over their drinking ages if they were willing to reject the offer of federal funds.

The Court’s construction of the spending power in *Dole* was generous, but it was not unlimited. The Court emphasized that “our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.” In *Dole*, the Court reasoned that “the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.” By raising the drinking age, the Court suggested, states would further the purposes of federal transportation law. Yet, unless *Dole*’s nexus requirement is entirely meaningless, RLPA cannot possibly satisfy it. RLPA applies to all religious conduct and it applies to all federal spending programs. It defies belief to think that accommodating religious conduct, regardless of its nature, supports the goals of every federal expenditure, regardless of its purpose. Indeed, RLPA’s compelling state interest test is blatantly inconsistent with that idea: it would require states to accommodate religious conduct even *at the expense* of the core goals of any given program unless those goals rose to the level of a “compelling state interest.”

In effect, RLPA assumes that once federal dollars touch some activity or program, the activity or program is federalized top-to-bottom: it then becomes fair game for congressional regulation regardless of whether the regulation has anything to do with the federal government’s initial spending program. That is not what the Supreme Court said in *Dole*, and it is not a sensible reading of the Constitution.

These considerations are sufficient to scuttle Section 2(a)(1) of RLPA, but it suffers from an additional constitutional defect. In *Dole*, states remained free to legislate whatever drinking age they preferred. If they departed from the federal standard, the penalty was forfeiture of federal funding. RLPA is not written that way. It does not provide that states will forfeit federal funds unless they enact state-law versions of RFRA or RLPA; instead, it subjects the states directly to private rights of action under federal law. This objection is somewhat technical in character, and there are ways around it. For example, the Court might construe RFRA as imposing conditions on every offer of funding which the national government makes to the states; on this theory, RLPA’s regulation would effectively result from a “contract” between the states and the federal government, rather than from direct regulation by the federal government. It is not obvious, however, that this theory would or should succeed.³

II.2. Commerce Clause Issues. Section 2(a)(2) of RLPA attempts to regulate the ability of state and local governments to “substantially burden religious exercise in or affecting commerce.” That Section is an effort to draw upon Congress’ commerce

³ RLPA’s use of the Spending Power may also raise additional Establishment Clause problems beyond those discussed above. RLPA in effect uses every federal spending program as a device to favor religion. The use of spending programs to favor religion (and only religion) has always been regarded as a paradigmatic example of an Establishment Clause violation. We believe that Section 2(a)(1) of RLPA would be clearly unconstitutional on this ground alone. This point is in fact related to the absence of any nexus between RLPA and the purposes of particular government spending programs. Were there such a nexus, it might be difficult to say that RLPA was designed *only* to benefit religion: it could be regarded as incidental to the goals of some particular program (say, an anti-discrimination program or a cultural affairs program) which bore a plausible relationship to some forms of religious conduct. Absent that nexus, however, RLPA is nothing more than a naked effort to use government spending to improve the position of religious persons and institutions.

power. The Court has construed the commerce power generously including, of course, in connection with congressional efforts to prohibit discrimination. The case most often cited in this connection is *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *McClung*, the Court upheld application of Title II of the Civil Rights Act of 1964 to Ollie's Barbecue, a restaurant in Birmingham, Alabama. The Court said Congress had power to prohibit race discrimination by Ollie's Barbecue on the following theory: by refusing to serve African-Americans, Ollie's Barbecue diminished the volume of business it did, and it thereby diminished demand for food products that moved in interstate commerce. The effect of one restaurant's actions might be small, but Congress was entitled to consider the aggregate effects of all restaurants similarly situated.

McClung grants Congress expansive authority, but that authority is not unlimited. Even in *McClung*, the Court insisted that Congress must identify some "connection between discrimination and the movement of interstate commerce." The Court upheld Title II only because the legislative record included "ample basis for the conclusion that . . . restaurants . . . sold less interstate goods because of . . . discrimination." It is impossible to imagine, much less substantiate, any such basis for RLP. Religious conduct varies tremendously and unpredictably. From the standpoint of interstate commerce, religious activity is a random vector. There is no reason to believe that it promotes, diminishes, obstructs, or facilitates interstate commerce. Nor is there any reason to think that requiring government to accommodate religion would have any predictable effect whatsoever upon interstate commerce.

The theory of Section 2(a)(2) of RLP is largely parallel to the theory of Section 2(a)(1): it presupposes that once the congressional commerce power touches some activity or practice, that activity or practice becomes federalized top-to-bottom: it becomes fair game for congressional regulation regardless of whether the regulation has anything to do with promoting interstate commerce. That is not what the Supreme Court said in *McClung*. It is flatly inconsistent with the Supreme Court's recent decision in *United States v. Lopez*, 115 S.Ct. 1624 (1995), which held, *inter alia*, that Congress cannot regulate guns simply because they at one time entered the stream of interstate commerce.

II.3. Issues Pertaining to Section Five of the Fourteenth Amendment. In Section 3(b), RLP purports to limit the zoning authority of state and local governments. This Section of RLP appears under the heading, "Enforcement of the Free Exercise Clause." It is meant to apply to all land use cases, not just to those where the legislation's dubious invocations of the spending and commerce clause are apt. Apparently, this Section, like RFRA before it, depends for its validity on Congress' power to enforce the Fourteenth Amendment. That power was, of course, the focus of the Supreme Court's decision in *Flores*. There, the Court emphasized that Section Five does not permit Congress to displace the Court's judgments about the content of constitutional rights. Exercises of power under Section Five are valid only so long as they serve to put in place a scheme of remedies for rights which the Court itself is willing to recognize. *Flores*, 117 S. Ct. at 2163-64, 2171-72.

In *Flores*, the Court emphasized that "Congress must have wide latitude in determining" what measures are well-suited to remedy constitutional violations. *Id.*, at 2164. Nevertheless, Section 3(b) of RLP unquestionably repeats the vices that proved fatal to RFRA. Section 3(b) involves a sweeping and unwarranted federalization of local decision-making. It is no exaggeration to say that, under RLP, any encounter between a religious organization and a local zoning authority would become a matter for federal adjudication. This remarkable preemption of local authority cannot be defended as a reasonable mechanism to remedy or prevent discrimination against religious interests. No doubt zoning administrators sometimes abuse their authority to harm unpopular churches. But that problem is not reasonably attacked by extending all churches—no matter how rich, how powerful, or how favored in law—a blanket writ to challenge the zoning ordinances which every other citizen and institution must respect. What the Court said about RFRA is equally true of Section 3(b) of RLP: "The stringent test [it] demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." 117 S. Ct. at 2171. Section 3(b) of RLP is therefore starkly unconstitutional under *Flores*.

III. Separation of Powers Issues.

Section 3(a) contains a remarkable assault on the judiciary's authority to make independent judgments about the meaning of the Constitution. It presumes, under the guise of enforcing the Fourteenth Amendment, to articulate "presumptions" which courts must respect when applying its First Amendment jurisprudence. In particular, the Section purports to increase the government's burden of persuasion

in Free Exercise Clause cases. Because Section 3(a) attempts to deprive the courts of the authority to interpret the Constitution, it is patently unconstitutional. There are two doctrinal paths to that conclusion. The simplest runs through *Flores*. The Court said clearly in *Flores* that Congress may not use its Fourteenth Amendment powers to alter the substance of the Court's interpretations of the Fourteenth Amendment. Section 3(a) of RLPA offends this conclusion more blatantly than RFRA did, and the Court would undoubtedly find it unconstitutional.

There is, however, an even more fundamental doctrinal objection to Section 3(a). In *United States v. Klein*, 80 U.S. (3 Wall.) 128 (1871), the Supreme Court held that Congress may not specify a "rule of decision" for courts. Courts must be able to decide for themselves how to apply statutes or the Constitution. In the realm of statutory interpretation, *Klein* is difficult to apply: in some sense, of course, Congress specifies a "rule of decision" for courts every time it writes a statute. Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 470 (1994). RLPA, however, is a text-book violation of *Klein*. It attempts to compel judges to respect Congress' judgment, rather than their own, when interpreting the Constitution. And it forces judges to act as though they and adopted Congress' constitutional judgment as their own. Congress has the power and responsibility to arrive at its own view of constitutional substance, of course. But Congress is obliged to permit the Court this same independence of judgment.

CONCLUSION

RLPA's constitutional defects are not technicalities. On the contrary, they all reflect strong claims on the policy judgment of the members of Congress who wish to act on behalf of religious liberty. Congress may well want to assure that religiously-motivated persons are treated fairly and that their interests are reasonably accommodated. But Congress surely does not want to sweepingly favor religiously-motivated persons over the vast majority of citizens conscientiously leading their lives, and to do so at the expense of the democratically-shaped rule of law. Likewise, Congress surely does not want to generate what Justice Kennedy in *Flores* correctly characterized as "... a considerable intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." And finally, Congress should want to act as the Supreme Court's partner in the pursuit of political justice for American citizens, not as its adversary. That is the admirable tradition into which, for example, Title VII and the Voting Rights Act fall. RFRA was a false start, and Congress need not and should not perpetuate RFRA's mistakes.

Of course, RFRA was motivated by a legitimate and important goal: the goal of assuring that religiously-motivated conduct is reasonably accommodated, that governmental actors are not insensitive or hostile to religious beliefs and commitments. Congress has an extremely important role to play in pursuing that goal. It can play that role in two different ways.

First, Congress can continue to police state and federal conduct for egregious failures of the duty of reasonable accommodation and correct those failures. This is a role that Congress has traditionally played to the great benefit of constitutional justice in the United States. Thus, for example, Congress directed the armed forces to make reasonable accommodation for the wearing of religiously mandated apparel (see 10 U.S.C. §774); and thus, Congress withdrew funding for a Forest Service road that would have harmed a sacred Native American site (see House Committee on Appropriations, Dept. of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Congress, 2d Sess. 72 (1988)); and thus, Congress has provided church employers with exemptions from certain tax obligations that are inconsistent with their religious beliefs (see 26 U.S.C. §3121(w)(1)); and thus, Congress acted to specifically assure members of the Native American Church the ability to use Peyote as part of their sacrament of worship (see 42 U.S.C. §1996). This effort requires ongoing vigilance and nuance of legislative response, but Congress' performance in this context has been superb.

And second, Congress can enact more general legislation that offers broad protection to religiously-motivated persons against the possibility that their beliefs and commitments will be treated with insensitivity or hostility. This memorandum is not a good setting in which to explore the content of such legislation, but we would be glad to pursue the question with the Committee or any of its members.

What is critical to recognize for the moment is that RLPA is not such legislation. RLPA offers a distorted and untenable view of what religious liberty is, a view that Congress on reflection should not endorse; and RLPA stretches notions of congressional authority to their breaking point, inviting the judicial articulation of constitu-

tional limitations that Congress should not welcome. RLPA is unconstitutional, and if it were enacted, the Court would find it so to be. Congress has good reasons at the outset to choose a different vehicle to realize its altogether laudable concern for religious liberty.

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Mr. CANADY. Professor Hamilton.

STATEMENT OF MARCI HAMILTON, PROFESSOR, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY

Ms. HAMILTON. Good morning. And thank you to the committee, Mr. Chairman, and the members for inviting me to speak today.

I have spent the last 5 years thinking about religious liberty legislation, litigating it, and writing about it, and I am grateful for this opportunity to express my views.

The U.S. Supreme Court, in *Boerne v. Flores*, said that Congress' declarations, its acts, only deserve deference when Congress takes responsibility to investigate independently the constitutionality of its actions. That, I think, is a very, very important message that the Court is sending Congress; that it must act with extreme care, and if it is going to act in the First Amendment arena, it must act with even more care than usual.

H.R. 4019, the Religious Liberty Protection Act of 1998, is plainly unconstitutional. There is no question about it. It clearly violates the Separation of Powers. You need only read two cases to understand that. You need to read *Boerne v. Flores* and *Marbury v. Madison*. This is another attempt by Congress to rewrite the First Amendment. It is an attempt to amend the Constitution without Article V procedures. That cannot be done. It is not right, and it is not right for the people.

Secondly, H.R. 4019 is a frontal assault on the States. Libertarians will tell you that the last bastion of liberty in the United States is local land use control. This bill will provide a blueprint for the Federal Government to regulate local government in every arena. There is no question that the decision by Congress to federalize local land use law would be a mistake from a constitutional perspective, but also a mistake from a policy perspective.

Finally, the bill has no basis in any enumerated power. It cannot be enough for the Congress to say that religious liberty is important, and, therefore, all Federal financial assistance by the Federal Government has some nexus to a Federal interest.

I urge this body to get a comprehensive list from the GAO, the General Accounting Office, of every Federal dollar and where it lands, because if a government gets that dollar—because there is no dollar minimum in this bill—if it gets that dollar, it will then be regulated by this bill. This bill has enormous impact.

I have asked my research assistants to start doing a list themselves of what will be the programs that will be affected by this bill. It is a huge project, and I urge you, Congress, to investigate it yourself as well.

The Framers of the United States Constitution created this Congress to serve the Nation and the people. They made Members of Congress independent of the people. Members of Congress are not required to do what they are told; they have independent decision-making authority. It doesn't matter what faction or factions are in front of you; you are required by the Congress to act independently in the best interest of the Nation. James Madison, the leading structuralist framer, predicted that this experiment in democracy would not succeed if Members of Congress failed to act virtuously, and what he meant is if they failed to act for the greater good because they were captured by factions.

In this area, more than any other, this area of religious liberty, it is absolutely essential that Congress investigate and acknowledge the source of this bill, and also its huge effect.

In my written testimony, I provide a list of those groups in the society, those constituencies, that will be affected by this bill, perhaps unwittingly: Children, women in domestic violence situations, pediatricians who have labored hard for mandatory immunizations, the handicapped, women, minorities, homosexuals, departments of correction, artistic and historical preservation interests, neighborhoods, school boards, and State and local governments.

That is just the tip of the iceberg, and I urge you, this committee, to investigate the facts of the actual impact of this bill.

Thank you very much.

Mr. CANADY. Thank you, Professor Hamilton.

[The prepared statement of Ms. Hamilton follows:]

PREPARED STATEMENT OF MARCI HAMILTON, PROFESSOR, BENJAMIN N. CARDOZO
SCHOOL OF LAW, YESHIVA UNIVERSITY

Thank you, Mr. Chairman, for inviting me to speak today on this important constitutional law topic. I am a Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional law. I was also the lead counsel for the City of Boerne, Texas in the case that ultimately invalidated the Religious Freedom Restoration Act (RFRA). See *Boerne v. Flores*, 117 S. Ct. 2157 (1997). I have devoted the last five years of my life to writing about, lecturing on, and litigating the Religious Freedom Restoration Act and similar religious liberty legislation in the states. For the record, I am a religious believer.

As you know, the *Boerne v. Flores* decision unequivocally rejected RFRA. Not a single member of the Supreme Court defended the law in either the majority, the concurrences, or the dissents. The Court's decision was not a result of any hostility on the part of the Court toward this body. That is evident in its calm, evenhanded tone. Nor was it the result of mistaken understandings of its own precedents. The decision was inevitable. Contrary to Professor Laycock's and the Congressional Research Service's confident assurances in the RFRA legislative record, RFRA was plainly *ultra vires*.

I will not belabor RFRA's faults here, but rather refer you to the bibliography that follows this testimony. I also refer you to my letter of November 11, 1997 to Rep. Jerrold Nadler, which is attached, in which I explain the limited options open to Congress to aid religion.

When I first read The Religious Liberty Protection Act of 1998, I thought someone was playing a prank on me. If I had been commissioned to write a law post-*Boerne v. Flores* that contains multiple constitutional violations, I could not have done a better job. There is no enumerated power that would support this bill. Moreover, it violates a score of structural constitutional principles.

That this bill, which is a slap in the face of the Framers and the Constitution, is receiving a hearing indicates that what I say today may not make much difference. If Congress wants to be perceived as the savior of religious liberty and wants to defer to the most powerful coalition of religions in this country's history, there is absolutely nothing that I can do about it. Thus, I will not offer detailed critique of each of this bill's glaring constitutional errors. Instead, I will offer a summary of those errors.

Then I will share with you the interests that will be hurt by granting religion this unprecedented quantum of power against the government.¹ I represent none of these interests, but I have heard their stories in my travels around the country these five years.

RLPA'S MOST SEVERE CONSTITUTIONAL DEFECTS

RLPA Violates the Separation of Powers. Like RFRA, RLPA is an undisguised attempt to reverse the Supreme Court's interpretation of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), and to take over the Court's core function of interpreting the Constitution. See Secs. 2(a) and 3(a). For a clear discussion explaining why this is beyond Congress's power, see *Boerne v. Flores*, 117 S. Ct. at 2172.

RLPA Violates the Constitution's Ratification Procedures. Like RFRA, RLPA attempts to amend the Constitution by a majority vote, bypassing Article V's required ratification procedures in direct violation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a plain discussion in which the Court reasserts its allegiance to *Marbury*, see *Boerne v. Flores*, 117 S. Ct. at 2168.

RLPA Is an Assault on States' Rights. Despite its rote recitation of language from cases discussing federalism issues, see, e.g., Sec. 2(d) ("state policy not commandeered"), this bill federalizes local land use law and (if good law) would eviscerate this final stronghold of local government. Local land control is one of the key elements of personal liberty. It violates the letter and the spirit of the modern Court's emerging structural constitutional jurisprudence. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. U.S.*, 505 U.S. 144 (1992). If good law, RLPA's intervention in local land use law would set the pace for the most expansive invasion of state and local government authority in this nation's history.

If RLPA becomes law, it will haunt any representative who attempts to climb onto the limited federal government platform.

RLPA Fails to Satisfy the Enumerated Power Requirement. RLPA is *ultra vires*. There is not a single statute that provides a model for RLPA's claim to be grounded in either the Spending Clause or the Commerce Clause. Congress has not identified any specific arena of spending or commerce. Rather, it has identified all religious conduct as its target and attempted to cover as much religious conduct as possible by casting a net over *all* federal spending and commerce. Like RFRA, its obvious purpose is to displace the Supreme Court's interpretation of the Free Exercise Clause in as many fora as possible. It is a transparent end-run around the Supreme Court's criticism of RFRA in *Boerne v. Flores*.

RLPA Violates the Establishment Clause. RLPA privileges religion over all other interests in the society. While the Supreme Court indicated in *Smith* that tailored exemptions from certain laws for particular religious practices might pass muster, it has never given any indication that legislatures have the power to privilege religion across-the-board in this way.

RFRA's and RLPA's defenders rely on *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), for the proposition that government may enact exemptions *en masse*. This is a careless reading of the case, which stands for the proposition that religion may be exempted from a particular law (affecting employment) if such an exemption is necessary to avoid excessive entanglement between church and state. RLPA, like RFRA, creates, rather than solves, entanglement problems. RLPA, which was drafted by religion for the purpose of benefitting religion and has the effect of privileging religion in a vast number of scenarios, violates the Establishment Clause. For the Court's most recent explanation of the Establishment Clause, see *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

The following is a list of interests that will be affected adversely if RLPA is adopted, because it elevates religion above all other societal interests. As Oregon recently discovered when a prosecutor attempted to prosecute a religious community for the death of three children, particular exemptions from general laws can have real con-

¹ Professor Douglas Laycock tilts at windmills when he attempts to argue that the test instituted by RLPA (and RFRA), the compelling interest/least restrictive means test, was the test regularly employed in all free exercise cases before 1990. He neglects to mention *Turner v. Safley*, 482 U.S. 78 (1987), which makes explicit that strict scrutiny does not apply in the prison context or any of other cases in which the Court demonstrated great deference to government interests. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986). Whatever Professor Laycock's interpretation of the Supreme Court's free exercise jurisprudence may be, the Supreme Court itself made absolutely clear in *Boerne v. Flores* that the least restrictive means test is "a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 117 S. Ct. at 2171.

sequences. Before blindly passing this law with its mandate to exempt religion from general laws in an infinite number of scenarios, Congress should know that it risks responsibility for harming the following constituencies:

- *Children* in religions that advocate and practice abuse
- *Women* in religions that advocate male domination
- *Children* in religions that refuse medical treatment, including immunizations
- *Pediatricians*, who have lobbied vigorously for mandatory immunizations
- *The handicapped, women, minorities, and homosexuals*, whose interests are currently protected by antidiscrimination laws and may well be trumped by religions exercising the compelling interest/least restrictive means test
- *Departments of correction and prison officials* attempting to ensure order in prisons populated by increasingly violent criminals
- *Artistic and historical preservation interests*, including whole communities that depend on historical districts for revenue and jobs
- *Neighborhoods* attempting to enforce neutral rules regulating congestion, building size, lot size, and on- and off-street parking
- *School boards* desperately attempting to ensure order and safety in the public schools
- *State, local, and municipal officials* who will be forced to bear the cost of accommodating every religious request (whether from a mainstream religion or a cult) or bear the cost of litigating refusals to do so
- Last, but not least, *citizens* who will bear the extreme increase in litigation costs created by these new rights coupled to an attorney's fees provision (a virtual invitation to sue)

In sum, RLPA is no better than RFRA. In fact, it is worse. Congress has a duty to investigate its wide-ranging effects with care before taking this plainly unconstitutional path.

For those who take comfort from the fact that RLPA is supported by a wide cross-section of religions, I leave you with the words of Framer Rufus King, one of the youngest members of the Constitutional Convention but a Harvard graduate who was highly respected on structural issues: "[I]f the clergy combine, they will have their influence on government."

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BENJAMIN N. CARDOZO SCHOOL OF LAW,
YESHIVA UNIVERSITY,
New York, NY, November 11, 1997.

Hon. JERROLD NADLER,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR REPRESENTATIVE NADLER: Thank you for asking me to comment on the measures that Congress could take to ensure religious liberty. I am a legal scholar who teaches and specializes in constitutional law and First Amendment issues at Benjamin N. Cardozo School of Law, Yeshiva University. Over the last several years, I have spent the vast majority of my time studying, writing, and speaking about the Religious Freedom Restoration Act. As lead counsel for the City of Boerne, Texas before the United States Supreme Court, I was instrumental in the invalidation of the Religious Freedom Restoration Act. See *Boerne v. Flores*, 117 S. Ct. 2365 (1997).

I understand that various members of Congress are now interested in providing some protection for religious liberty in ways that accord with the Constitution. I am happy to provide my insights into this difficult project.

I have divided my remarks into three sections. First, I will address the question whether current Supreme Court doctrine leaves religion unprotected and therefore justifies congressional action at this time. My answer is "no." Second, I will provide some background guidance on the structure of the Constitution and its implications for congressional regulation of religious liberty. Finally, I will turn to potential means by which Congress could effect religious liberty and explain why various proposals will face difficult constitutional challenges.

I. THE STATE OF RELIGIOUS LIBERTY UNDER *EMPLOYMENT DIV. V. SMITH*

The impetus for the Religious Freedom Restoration Act ("RFRA") was the outcry against the United States Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). The decision was met with loud complaints from religions, civil liberties groups, and some legal scholars, who claimed (erroneously, in my view) that free exercise claims were treated demonstrably better under the law preceding *Smith*.

In fact, the *Smith* standard is not as bad and the pre-*Smith* case law is not as good for religion as they have been depicted.

Before *Smith*, the Supreme Court applied a context-dependent balancing approach in free exercise cases. That is, it applied a range of standards of review, depending on the context. Different standards were applied in the military, prison, government services, government lands, and unemployment compensation cases. At no time did the Court require the compelling interest test in every free exercise case. Moreover, the Court has never applied the "least restrictive means" test in its free exercise cases. The Court says as much in the *Boerne* decision. 117 S. Ct. at 2171.

The legislative history of RFRA makes it abundantly clear that Congress understood that it was enacting a law that protected religion significantly more than the Supreme Court's pre-*Smith* case law. At one point, Representative Henry Hyde proposed an amendment to RFRA for the purpose of transforming RFRA into an actual "restoration" statute. That amendment was defeated and Congress was on plain notice that it was not simply adopting the Court's pre-*Smith* case law. Rather, it was giving more to religion than it had ever received under the Court's free exercise doctrine. In addition, the Congressional Research Service's Reports made it clear that RFRA would exceed the Court's pre-*Smith* case law.

Thus, the claim that legislative action is needed to "restore" previous federal law is a red herring. The outcry against the *Smith* decision was based on false presuppositions about the Court's free exercise jurisprudence. While protecting religious belief absolutely, the Court traditionally has disfavored free exercise claims impinging on religious conduct. See Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 Ohio St. L.J. 713, 746-49 (1993). Indeed, the *Smith* decision is not demonstrably worse for religion than the preceding case law, and it certainly does not signal the end of religious liberty.

The *Smith* decision does not leave religion in as unprotected a position as those advocating federal regulation insist. The Court holds that the Constitution does not require exemptions for religious conduct burdened by neutral, generally applicable law, which is a fair summary of its preceding case law. The decision also provides a variety of additional theories on which one could peg a religious liberty claim.

The following are the means by which current Supreme Court precedent protects religious liberty:

1. As the Supreme Court stated in its first free exercise decision, *Reynolds v. United States*, 98 U.S. 145 (1879), religious belief is absolutely and categorically protected. This is a principle that was reaffirmed in *Smith* and has never been questioned in any Supreme Court decision.

2. Discrimination against and persecution of religion is forbidden. Any law that is not neutral and generally applicable receives the strictest scrutiny under the Court's decision in *Church of the Lukumi Babalu Awe, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). As I read that case, strict scrutiny in this context is strict in theory and fatal in fact. Moreover, even when a law looks neutral, the Court will inquire into whether it is in fact neutral and generally applica-

ble. The targeting of a religion or religion in general for deleterious treatment violates the Free Exercise Clause, period.¹

3. Strict scrutiny may be appropriate in instances where there is "individualized governmental assessment." *Smith*, 494 U.S. at 884. This notion echoes various First Amendment cases involving the freedom of speech and officials with unfettered discretion and has yet to be developed in the courts.

4. Combined, or "hybrid," constitutional claims are subject to strict scrutiny. *Smith*, 494 U.S. at 881-82.

5. Lawmakers are encouraged to provide exemptions for religious conduct burdened by generally applicable laws. *Smith*, 494 U.S. at 890.

In sum, the Court's decision in *Smith* is more complicated and more favorable to religious liberty than its opponents have acknowledged. Moreover, *we simply do not know how the Smith rules are likely to play out in the courts*. The Religious Freedom Restoration Act was passed only three years after *Smith* was decided, which was insufficient time for any significant number of cases to make their way through the trial and appellate courts. *Under the current state of federal law, a wait-and-see attitude is the wisest course for Congress*. The situation is not as dire as the legislatures are being told.

II. THE STRUCTURE OF THE CONSTITUTION AND CONGRESSIONAL POWER TO REGULATE RELIGIOUS LIBERTY

Congress has authority to pursue national interests through a discrete set of enumerated powers found in Article I. It has also the authority to *enforce* constitutional rights that are violated or very likely to be violated *by the states* under Section 5 of the Fourteenth Amendment. The Religious Freedom Restoration Act was invalidated on separation of powers, Article V, and federalism grounds because it did not enforce constitutional guarantees but rather attempted to redefine them.

There is no constitutional provision like Section 5 of the Fourteenth Amendment that permits Congress to enforce liberty guarantees against itself. A particular federal law might have the effect of easing a burden on religious conduct, but that law will stand or fall depending on whether it is a valid exercise of an enumerated power. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The Congress is limited to acting under a substantive, enumerated power. It is not enough for Congress to invoke the Necessary and Proper Clause, which was characterized by the Court last Term as the "last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 117 S. Ct. 2365, 2378 (1997). If the constitutional base of its action is not "visible to the naked eye," Congress is obligated to demonstrate through findings or by explanation the constitutional source of its action. *United States v. Lopez*, 514 U.S. 549, 563 (1995).

Thus, if Congress is inclined to protect religious liberty, it has one of two options: it can identify violations of the guarantees of the Free Exercise Clause by the states and enact a law aimed at enforcing those guarantees under Section 5 of the Fourteenth Amendment or it can act pursuant to an enumerated power.

Even if Congress acts upon a constitutional base, *e.g.*, under an enumerated power or Section 5, its enactment will still face serious constitutional challenge under the Establishment Clause of the First Amendment. Congress may not act for the purpose of benefitting (or inhibiting) religion and its actions must not have the effect of benefitting (or inhibiting) religion. *See Agostini v. Felton*, 117 S. Ct. 1997 (1997).

The principle that Congress must act very carefully when it is urged to act pursuant to requests from religion is evident in the story of RFRA's enactment and invalidation. RFRA had both the purpose and the effect of benefitting religion. As Justice Stevens stated in *Boerne* regarding RFRA, "[t]his governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." 117 S. Ct. at 2172 (Stevens, J., concurring).

Congress should take little comfort from the fact that other Justices did not join Justice Stevens' concurrence in *Boerne*. The concurrence was unnecessary to reach a decision in the case; there were six votes in the majority to invalidate RFRA on separation of powers and federalism grounds and an additional seventh vote (Justice

¹ One of the empirical questions left to be answered in the wake of *Smith* is the actual incidence of truly neutral, generally applicable laws. Having listened to a number of very smart lawyers for various religions, I am now persuaded that the burden of proving a law is not neutral may not be particularly heavy. We do not know how this issue will be determined in the courts yet, because RFRA made the Court's doctrine superfluous from 1993 until 1997, and *Smith* only became the law in 1990.

O'Connor) for the reasoning of the majority on those issues. Indeed, no member of the Court criticized or even referred to Justice Stevens' concurrence, and several members of the Court at oral argument were plainly concerned that RFRA violates the rule against benefitting religion over irreligion.

III. THE POSSIBLE MEANS BY WHICH CONGRESS MIGHT REGULATE RELIGIOUS LIBERTY AND THEIR CONSTITUTIONAL VIRTUES AND DEFECTS

The following suggests options for congressional action regarding religious liberty and their likely constitutional problems and virtues:

1. *Section 5 of the Fourteenth Amendment.* If, after due consideration, Congress were able to identify an arena in which religious conduct is subject to (or is highly likely to be subject to) unconstitutional burdens, Congress would have the power to enact laws for the purpose of enforcing the Fourteenth Amendment's due process clause. Congress may not go forward, however, unless there is evidence that the states have engaged in or are likely to engage in behavior that unconstitutionally burdens religious conduct. See *Boerne*, 117 S. Ct. at 2166 (citing the Civil Rights Cases, 109 U.S. 3 (1883)). If an actual or imminent violation of the Constitution is evident on its face, the Court can take judicial notice of it, but the restraints of federalism forbid the validation of legislative action against the states unless the claims to constitutional violations are self-evident or documented. RFRA was built on the weakest of foundations under these requirements, because no imminent constitutional violations were self-evident and none (at least within the last 40 years) were documented. The legislative record for RFRA fell far short of what would be needed to support Section 5 legislation regarding religious liberty at this time in our nation's history. *Id.* at 2169.

2. *Commerce Clause.* The Commerce Clause has become one of the most elastic of Congress's powers, though the Court has begun to articulate some meaningful boundaries to the power. Under *United States v. Lopez*, 514 U.S. 549 (1995), the Congress may regulate activity only if the activity has a "substantial relation to interstate commerce." 514 U.S. at 559. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 514 U.S. at 560. The Court was unwilling to uphold the Gun-Free School Zones Act of 1990 because the Court "would have been required to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. at 567.

In addition, there are federalism limits on the exercise of the Commerce Clause. Congress may not regulate in areas that traditionally have been left to local control. 514 U.S. at 567-68 (emphasizing importance of "distinction between what is truly national and what is truly local").

I understand that it has been proposed that Congress might regulate local zoning laws for the benefit of religion pursuant to the Commerce Clause. Any attempt to federalize local land use law is likely to be greeted with a chilly reception in the courts, especially the Supreme Court. The only arena that has been left almost exclusively to local control is land use. If there is a Commerce Clause power to regulate religion, I strongly doubt that it lies in land use regulation.

3. *Spending Clause.* Some have proposed that Congress might enact spending legislation in which Congress conditions federal receipt of funds, for example, highway funds, on the adoption of the RFRA standard in the courts of that state. Not to state the matter too bluntly, but it is my firm conviction that this is tantamount to waving a red flag to a bull.

In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court upheld a law that permitted the Secretary of Transportation to withhold highway funds from states in which minors under 21 could purchase alcohol. Per Chief Justice Rehnquist, the Court upheld the law as an appropriate exercise of Congress's power under the Spending Clause because there was a reasonable connection between driving, drinking, and the legitimate national goal of highway safety. Justice O'Connor dissented on the ground that the nexus between highway funds and underage drinking laws was too attenuated to pass constitutional muster under the Spending Clause.

Because the relationship is so obviously distant, any attempt to condition highway spending on issues involving religious liberty are likely to invite the Court to revisit its pronouncements in *South Dakota v. Dole* and to move closer to Justice O'Connor's position.

4. *Exemptions.* Congress might consider whether national exemptions are appropriate with respect to particular burdens on religious conduct imposed by federal law. The history of *Goldman v. Weinberger*, 475 U.S. 503 (1986), provides helpful guidance. In that case, the Court held that the military was not constitutionally required to permit the wearing of yarmulkes in violation of a generally applicable rule governing military uniforms. Congress followed the decision with a targeted exemption for headgear for religious purposes. That exemption was the sort of exemption envisioned by the Court in *Smith*.

Congressional exemptions are only constitutional to the extent that the exemption is crafted through the appropriate exercise of one of Congress's enumerated powers and only if the exemption is in the national interest intended to be served by that particular enumerated power. Congress does not have general, plenary authority to aid religion through exemptions. Such an approach would violate the enumerated powers requirement and, most likely, the Establishment Clause.

I would not urge Congress to consider exemptions that would apply to state law, because such exemptions may well violate the inherent principles of federalism at the core of the Constitution. In contrast, state and local governments have a freer hand to provide exemptions because they hold the very sort of generalized lawmaking authority not permitted Congress. It should be noted, though, that state and local government exemptions will likely face Establishment Clause challenges.

As the foregoing indicates, the Framers crafted a constitutional scheme that makes it difficult for the federal government to act in a way that benefits religion. Whatever law is considered is due the most careful scrutiny as Congress navigates these appropriately difficult waters between Scylla and Charybdis.

CONCLUSION

At this stage in the history of religious liberty in the United States, I strongly urge Congress to stop, look, and listen. It makes sense to take a breather from legislative action regarding religion for a reasonable period of time so that the courts can work out the meaning of the various aspects of the decision in *Employment Div. v. Smith* and so that a more detailed record of the need for such legislative action can be built. The case for legislative action may be weakened considerably as the doctrine is developed.

Hasty action, taken at the behest of organized religion, is likely to lead to invalidation on either an enumerated powers or an Establishment Clause theory. Congress should act in this terribly sensitive area only if it has sound knowledge and understanding of the state of religious liberty and the members are firmly persuaded that a real problem exists. No matter what tack Congress takes in the area, it would be prudent to build a persuasive legislative record.

Finally, if Congress were to decide to bide its time, it may take some comfort in the Framers' views of religious liberty. The Framers did not believe that religion is always an unalloyed good for society or that the state is always in error when it burdens religious conduct. To the contrary, *the Framers intended to achieve a pragmatic balance of power between church and state.* At the Constitutional Convention, James Madison considered religious sects as factions that have the capacity to do good and the capacity to exceed their appropriate boundaries. Society will be best served if Congress listens to the concerns of religious interests with care but only if the legislature engages its independent judgment in evaluating those concerns.

Thank you for this opportunity to share my views with you. I would be happy to discuss these general issues or any particular proposal with you at your convenience.

Sincerely,

MARCI A. HAMILTON, *Professor of Law.*

Mr. CANADY. Mr. Schaerr.

STATEMENT OF GENE SCHAERR, ATTORNEY, SIDLEY & AUSTIN, WASHINGTON, DC

Mr. SCHAERR. Thank you. Good morning, Mr. Chairman and members of the committee. Today I would like to explain why I believe the constitutional objections that have been raised to this proposed legislation are, in my view, clearly misguided and why the act is very likely to be upheld if it is challenged, once it is enacted.

If time permits, I would also be happy to explain why, as a conservative Republican concerned about issues of Federalism, I believe the act is an appropriate use of Federal power and why I believe it will provide significant protections for religious freedom.

One key reason why the key provisions of the act are likely to be upheld is that unlike RFRA, this legislation's key provisions are tied to the Supreme Court's own interpretation of the Constitution. For example, the reach of Section 2(a)(1), which imposes a compelling interest test on government decisions in or affecting interstate or foreign commerce, that provision necessarily depends on the Supreme Court's view of the extent of Congress' power to regulate such commerce.

It is like a statutory accordion. It can bring within its sweep more or fewer government decisions, as the Supreme Court's interpretation of the commerce power expands or contracts. And in part, for that reason, I think it is most unlikely that that provision could ever be invalidated as exceeding Congress' commerce power. Something that is beyond Congress' commerce power simply won't be included in the statute at all.

And contrary to Professor Eisgruber's suggestion, the *Lopez* decision does not require that legislation promote or regulate commerce per se in order to fall within Congress' power. All it requires is that the subject matter of the legislation have some substantial effect on interstate commerce.

Now, the same is true of Section 3(a), which in some ways could be the most important provision of this legislation. That provision takes the Supreme Court's view about the scope of the Free Exercise Clause as a given, and then it simply makes it easier to enforce whatever free exercise rights the Supreme Court is willing to recognize. And it does that, for example, by specifying that the government has the burden of proof on certain issues in litigation.

Now, again, like an accordion, this provision would also expand or contract if the Supreme Court's interpretation of the Free Exercise Clause expands or contracts in the future, but it is certainly not unconstitutional. And this is just the kind of thing that the *Flores* decision said that Congress clearly can do under section 5 and the kind of thing Congress has always done in the area of civil rights. It is clearly proportionate, to use the words of the *Flores* decision, to the legitimate goal of enforcing the Free Exercise Clause.

And with all respect to Professor Eisgruber, again his argument that section 3(a) violates the Separation of Powers by allocating the burden of proof to the government defendants on most issues, that argument in my view is frivolous. There is no case law support for it, and it is refuted by Supreme Court decisions upholding Congress' power to do just that in constitutional civil rights cases. If the Court were to adopt his argument, a whole wide swath of the civil rights laws would fall.

Now, to the extent that the act relies upon section 5 to reach beyond what the Supreme Court recognizes as a constitutional violation, the legislation also does that in a way that the *Flores* decision said was appropriate. *Flores* said that Congress has the power under section 5 to enforce the Free Exercise Clause through substantive legislation on two conditions: First of all, that there is reason to believe that many of the laws affected by the new law have

a significant likelihood of being unconstitutional; and, second, there has to be a congruence or a proportionality between the injury to be prevented and the means adopted to that end.

Now, the land use restrictions in section 3(b) simply follow that road map that the Supreme Court gave us in *Flores*. There is in the record strong evidence that land use decisions are being used to discriminate against religious minorities, and we will hear more testimony about that later today. And this type of discrimination is clearly unconstitutional, and yet it is very difficult to detect and prevent.

And so the act's remedy, which requires that land use regulations satisfy a kind of compelling interest test, is certainly proportion—excuse me, proportional to and congruent with the injury that has been documented in this record of this legislation and will be further documented today.

And unlike RFRA, the remedy under section 3(b) is limited to a very defined class of particularly problematic government decisions.

Now, to the extent that the act relies upon Congress' Spending Power, it also does that in a way that is uncontroversial. For example, under Title VI of the Civil Rights Act, Congress has long required that State participants in Federal programs not engage in racial discrimination. No one could seriously question the validity of that condition under the Spending Clause. So, too, here. Section 2(a)(2), which is the Spending Clause provision, simply requires that all those, State and private entities, all those who operate federally-funded programs respect religious freedom in the administration of those programs, and that is no different in principle from Title VI.

It is also, in my view, even easier to defend than the law that was upheld in *South Dakota v. Dole*. As you will recall, that law permitted the Secretary of Transportation to withhold all highway funds from a State if it did not have a law on its books that prohibited minors from purchasing alcohol. So in that case, the Federal Government was essentially forcing the States to take action that was separate from their operation of a federally-funded program, and the Federal Government required that as a condition of their being able to operate those programs. It would be kind of like if Congress directed the States to enact their own miniature RFRA as a condition of participating in the Medicaid program.

But that is obviously not what this provision in this legislation does. In this legislation, the spending condition, namely respecting religious freedom, applies only on a program-by-program basis and does not require the State to take any external action at all.

I think the Establishment Clause issue has been adequately addressed.

Finally, on the issue of Separation of Powers, I also believe that argument is weaker here than a similar argument that Ms. Hamilton made in the *Flores* case, and which got no votes in the United States Supreme Court, and was, in fact, recently rejected by the Eighth Circuit Court of Appeals in the case of *Christians v. Crystal Evangelical Free Church*. Now, yes, there is no question that Justice Kennedy's majority opinion in *Flores* discussed Separation of Powers principles, but it did so only in the context of justifying the Court's interpretation of section 5. The Court did not suggest or

certainly hold that RFRA violated separation of powers principles in addition to being beyond Congress' authority under section 5.

One other point about this legislation. Unlike RFRA, this act does not purport to be a full-blown restoration by Congress of the rules that were applicable to free exercise claims prior to the *Smith* decision. So no one can plausibly claim, in my view, that Congress, in this legislation, would somehow be trying to second-guess or overrule the Supreme Court on the proper interpretation of the Constitution; and, therefore, in my view, there is no plausible argument that this is in effect an amendment of the Constitution that requires ratification.

Thank you.

Mr. CANADY. Thank you, Mr. Schaerr.

[The prepared statement of Mr. Schaerr follows:]

PREPARED STATEMENT OF GENE SCHAERR, ATTORNEY, SIDLEY & AUSTIN,
WASHINGTON, DC

Good morning Mr. Chairman and members of the Committee. I am honored to appear before this Committee in the company of such distinguished legal scholars and to discuss the proposed Religious Liberty Protection Act ("the Act").

During the past five years, I have had the privilege of representing a number of Senators and Congressmen in their efforts to defend the Religious Freedom Restoration Act (or "RFRA") in court, including the Supreme Court in the *Flores* case. I can report that we have done quite well so far in defending RFRA as it applies to the federal government—but, as you know, not quite so well in defending it as applied to state and local governments. And that is why the Religious Liberty Protection Act is needed.

Today I would like to respond to one major concern that has been expressed in some circles: that passage of the Act will be futile because the Supreme Court is likely to strike it down on federalism-related grounds, just as the Court invalidated the state portion of RFRA. As I will explain in a moment, I believe that concern is misguided. And, as a conservative Republican—and one who served in the White House during the last Republican Administration—I will also briefly explain why I believe the Act is an appropriate use of federal regulatory power, and why I believe it will provide significant protection for religious freedom.

WILL THE ACT BE UPHeld?

The principal constitutional arguments against RLPA have been ably refuted by Professor Laycock and others, so I will not repeat the analysis in detail. But let me emphasize a few of the key reasons why I believe those arguments will not be adopted by the Supreme Court.

First, unlike RFRA, many of the Act's central provisions are tied to the Supreme Court's own interpretation of the Constitution. For example, the reach of Section 2(a)(1)—which imposes the compelling interest test on government decisions "in or affecting" interstate or foreign commerce—necessarily depends on the Supreme Court's view of the extent of Congress's power to regulate such commerce. Like an accordion, that provision could bring within its sweep more or fewer government decisions as the Supreme Court's interpretation of the commerce power expands or contracts. But I think it most unlikely that the provision itself could be invalidated as *exceeding* Congress's commerce power.

The same is true of Section 3(a). That provision takes the Supreme Court's views on the scope of the Free Exercise Clause as a given, and then simply makes it easier to *enforce* whatever free exercise rights the Court is willing to recognize. Thus, like Section 2(a)(1), this section could also expand or contract if the Supreme Court's interpretation of the Free Exercise Clause expands or contracts in the future. And for that reason, I don't think anyone could plausibly argue that this provision exceeds Congress's authority under Section 5 of the Fourteenth Amendment. To the contrary, this is just the kind of thing the *Flores* decision said Congress can always do under Section 5.¹

Second, to the extent the Act relies upon Section 5 to reach *beyond* what the Supreme Court recognizes as violations of the Free Exercise Clause, it does so in pre-

¹ *City of Boerne v. Flores*, 117 S.Ct. 2157, 2162–63 (1997).

cisely the way *Flores* said was appropriate. In *Flores*, the Court explicitly recognized that Congress has the power under Section 5 to enforce the protections of the Fourteenth Amendment through substantive or even “preventive” legislation where two conditions are satisfied: (1) “there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional”; and (2) there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²

The land-use restrictions contained in the Act are a prime example of legislation that is constitutional under this formula. Land-use regulation is usually administered through highly individualized processes, often without regard to generally applicable rules. As the legislative record shows, there is strong evidence that these processes have been and are repeatedly being used throughout the United States to discriminate against religious minorities, denying them houses of worship in communities where they—and perhaps religion in general—are unpopular. This type of discrimination is clearly unconstitutional, but is often extremely difficult to detect and prevent.

For this reason, it is entirely appropriate for Congress to adopt the kind of remedy embodied in Section 3(a). That remedy—requiring that the regulation be the least restrictive means to prevent substantial and tangible harm to the government’s compelling interest—is certainly “proportional” to and congruent with the constitutional injury documented in the record. Unlike RFRA, the remedy is limited to a defined class of particularly problematic government decisions, and does not apply more broadly. Thus, the land-use provisions of the Act simply follow the road map laid down in *Flores*, and I think the Supreme Court will recognize that if anyone challenges them.

Third, the Act’s limited abrogation of sovereign immunity for violations of the Free Exercise Clause is constitutionally uncontroversial even under recent Supreme Court precedent. That is because this aspect of the Act is based on the Fourteenth Amendment rather than a constitutional provision pre-dating the Eleventh Amendment.³ And the abrogation of sovereign immunity here is similar to those contained in the civil rights laws.⁴ Moreover, in this regard the Act simply treats state governments the same as the federal government, which is also deprived of its sovereign immunity as to free exercise claims.

Fourth, to the extent the Act relies upon Congress’s spending power, it does so in a way that is similarly uncontroversial. Congress has frequently attached conditions to the use of federal funds to ensure that such funds are not used in a manner that undermines the interests of the United States or the rights of its citizens. For example, under Title VI of the Civil Rights Act of 1964, Congress has long required that state participants in federal programs not engage in racial discrimination,⁵ and no one could seriously question the validity of that requirement under the Spending Clause.

So too here: Section 2(a)(2) simply requires that all those who operate federally funded programs respect religious freedom in the administration of those programs. That is no different in principle from Title VI.

It is also far easier to defend than the law that was upheld in *South Dakota v. Dole*,⁶ and which permitted the Secretary of Transportation to withhold all highway funds from states in which minors could purchase alcohol. There, the federal government essentially forced the states to take action that was entirely separate from operating federally funded programs as a condition of participating in those programs—kind of like forcing the states to enact religious-freedom legislation as a condition of participating in Medicaid. Here, by contrast, the spending condition—respecting religious freedom—applies only on a program-by-program basis, and does not require the state to take any external action.⁷

Fifth, because RLPA is narrower than RFRA, the Establishment Clause argument against the Act is even weaker than the Establishment Clause argument that garnered only one vote in *Flores*. The Supreme Court has repeatedly upheld laws that exempt religious beliefs and practices from generally applicable rules against Establishment Clause claims.⁸ That is all RLPA does. And the Court has never remotely suggested that to preserve religious freedom in more than one area of public policy

² *Flores*, 117 S.Ct. at 2164, 2170.

³ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

⁴ *E.g.* Civil Rights Act of 1964, § 701 et seq., 706(k) as amended.

⁵ See 42 U.S.C. § 2000d et seq. (1994).

⁶ 483 U.S. 203 (1987).

⁷ Moreover, as with all federal spending conditions, the recipients of federal money are free to decline payment for a particular program if they do not wish to comply with the requirements established by Congress for that program.

⁸ *E.g.*, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

at the same time is an “establishment of religion,” whereas to do so on a statute-by-statute basis is perfectly acceptable.

Sixth and finally, the separation-of-powers attack on the Act is also weaker than a similar argument that Ms. Hamilton made in *Flores*—which got no votes there and was recently rejected by the Eighth Circuit in *Christians v. Crystal Evangelical Free Church*.⁹ To be sure, Justice Kennedy’s majority opinion in *Flores* discussed separation-of-powers principles, but only in the context of justifying and explaining the Court’s interpretation of Section 5.¹⁰ The Court did not suggest, much less hold, that RFRA violated the constitutional separation of powers in addition to being beyond Congress’s authority under Section 5.¹¹

In contrast to RFRA, moreover, the Act does not purport to be a full-blown “restoration” by Congress of the rules applicable to free-exercise claims prior to the Supreme Court’s decision in *Employment Division v. Smith*.¹² So no one can plausibly claim that Congress in this legislation is somehow trying to second-guess or “over-rule” the Court as to the proper interpretation of the Constitution in litigated cases. Nor, for the same reason, can anyone plausibly claim that the act is an effort to “amend the Constitution” without proper ratification procedures.

Indeed, by enacting this legislation, Congress is simply taking up the Supreme Court’s invitation in *Smith* to resolve issues of religious freedom through the democratic process. In *Smith*, the Court characterized its decision as “leaving [religious] accommodation to the political process,” and further stated: “Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”¹³ That same invitation was reiterated by Justice Scalia, the author of *Smith*, in his concurrence in *Flores*: “The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of [religious accommodation] cases. . . . The historical evidence . . . does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.”¹⁴ Given this explicit invitation in *Smith* and *Flores* to the people’s elected representatives, it is highly unlikely that the Court would fault Congress for having carried out the will of the people within the sphere of Congress’s enumerated powers.

Finally, with all respect to Professor Eisgruber, the argument that Section 3(a) violates the separation of powers by allocating the burden of proof to defendants on most issues in free exercise cases is frivolous. There is no case-law support for that position. And it is refuted by Supreme Court decisions upholding Congress’s power to do just that in constitutional civil-rights cases.¹⁵

IS THE ACT A WISE USE OF FEDERAL POWER?

Now I recognize—and strongly believe—that even if a statute does not exceed Congress’s power under existing interpretations of the commerce clause, or Section 5, or whatever provision Congress invokes, it may still be objectionable on federalism grounds as a matter of policy. But this is not such a statute.

First of all, the Act’s impact on the States is carefully limited in key ways. For example, Section 2(d) expressly gives a state or local government great latitude in choosing a remedy for a violation of the statute. The government may not only change the policy that results in a burden on religion; it may also leave the policy in place but grant religious exemptions—or do anything else that eliminates the religious burden. Section 2(c) also prevents the federal government from denying or withholding financial assistance as a remedy for violations. And Section 4(c) greatly reduces the litigation burden on states by subjecting prisoner claims brought under the Act to the Prison Litigation Reform Act of 1995 and subsequent amendments.

⁹ 1998 WL 166642 (8th Cir. 1998).

¹⁰ 117 S.Ct. at 2162–72.

¹¹ The argument that the Act violates the “enumerated powers requirement” is frivolous. Of the key operative provisions, Section 2(a)(1) is obviously based on Congress’s commerce power under Article I, Sec. 8, cl. 3; Section 2(a)(2) is plainly based on the spending power under Article I, Sec. 8, cl. 1, & Sec. 9; and Section 3 is expressly based on Section 5 of the Fourteenth Amendment. And the fact that the Act does not identify a specific arena of commerce or spending is irrelevant. The Act’s opponents have not cited a single decision suggesting that such a requirement applies.

¹² 494 U.S. 872 (1990).

¹³ 494 U.S. at 890.

¹⁴ 117 S. Ct. at 2176.

¹⁵ *Rome v. United States*, 446 U.S. 156, 174 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

By contrast, as I have already explained, the Act does not “push the envelope” of Congressional power. All it does is extend to religious exercise the same types of protections that Congress has traditionally used to protect other values such as non-discrimination.

And so the fundamental policy issue presented by the Act is this: Is religious freedom as important as the value of non-discrimination, or even other values—such as access to abortion clinics—that have been protected through similar uses of federal power? If not, then perhaps an additional application of the federal commerce power is not worth the price. But if religious freedom is as important as the other values that Congress has protected through similar measures, the Act is a wise and sensible use of that power.

For me, other than the rule of law itself, there is no value more deserving of protection than religious liberty. I believe religious liberty is central to God’s entire plan of happiness for us, His children.¹⁶ And I believe that is one of the principal reasons He inspired our Founding Fathers to organize this nation as they did, and why He has protected it to this day.¹⁷ Because of these beliefs, I have no difficulty concluding that the value of religious liberty is at least as important as other values that Congress has previously protected through means similar to those used in the Act. But that is the key issue each Member will have to decide for himself or herself.

WILL THE ACT HELP PROTECT RELIGIOUS LIBERTY?

This leads me to the final issue: Will the Act actually help protect religious liberty?

Preliminarily, it is important to remember that the Act is carefully crafted to avoid any unintended, *adverse* impact on religion. Section 5(e), for example, makes clear that a finding under the Act that a particular religious exercise affects commerce “does not give rise to any inference or presumption that the religious exercise is subject to any other law regulating commerce.” Similarly, Section 5(b) precludes any effort to use the Act as a basis for any claims against a religious organization, including a religiously affiliated school or university, whose activities do not rise to the level of “acting under color of law.” Under the Supreme Court’s decisions, that is a very difficult showing to make.¹⁸

Nor do I think Section 2(a) would create discrimination in favor of large, mainstream religions and religious groups against smaller or less mainstream groups. The test under Section 2(a) is not whether the particular group has a discernible impact on commerce, but whether the *type* of religious exercise has such an impact. Thus, the religious practices of a wide range of religious groups could and should be aggregated in determining whether the commerce requirement has been satisfied. This greatly reduces any advantage large religious groups might otherwise enjoy in establishing an impact on interstate commerce.

Nor do I believe the commerce requirement of Section 2(a) would in any way “cheapen” religion, as some have claimed. That provision does not require a claimant to show that his or her religious exercise is a commercial activity. All it requires is some impact on commerce. I think religious people are smart enough to draw a distinction between actions that are themselves commercial, and actions that in the aggregate have an *impact* on commerce. Thus, I do not believe the Act will in any way harm religious freedom.

By contrast, each of the three main operative provisions of the Act will materially increase the level of legal protection for religious liberty throughout the nation. First, Section 3(a) will provide a means of redressing a broad range of violations of the Free Exercise Clause that cannot be enforced effectively today because some of the elements of a violation are so difficult to detect and prove. As a litigator, I can tell you that shifting the burden of proof on some of those elements will, by itself, have a powerful, salutary impact on the way in which government bodies respond to actual or potential free-exercise claims.

Consider for example a school district that rents its facilities to private users on weekends, but because of hostility to religion, is considering whether to prevent those facilities from being used for worship services. If the school district knows that an adversely affected religious group would have to prove that the district acted with an anti-religious purpose, they may simply agree to adopt the restriction, keep

¹⁶ E.g., Joshua 24:15; *The Book of Mormon, Another Testament of Jesus Christ*, 2 Nephi 2:11–12, 26–27; *The Pearl of Great Price*, Moses 7:32.

¹⁷ E.g., *The Book of Mormon, Another Testament of Jesus Christ*, 2 Nephi 1:6–7; 10:10–12; Ether 2:12; *Doctrine & Covenants of the Church of Jesus Christ of Latter-Day Saints* 101:76–80.

¹⁸ E.g., *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

silent about their motivations, and hope for the best. But if they know they will have to prove affirmatively that they acted for legitimate reasons, they will think twice before adopting the restriction. Or at least their lawyers will so advise them.¹⁹

Second, as will be explained in greater detail by Professor Cole Durham, Section 3(b) will provide a very important institutional benefit to churches and other religious bodies by making it more difficult for local land-use regulators to exclude religious buildings. Few things are more central to most peoples' religious practice than the ability to worship in a nice building, in a nice location, and not too far from one's home.

Third, by reinstating the "compelling interest" test for government decisions falling within Congress's power under the commerce and spending clauses, Section 2 will go some distance toward closing the remaining gap between the level of protection provided for religious freedom prior to *Smith* and the protection that currently exists. Exactly how far will depend to some extent on how the Supreme Court construes the scope of the commerce power. But even if the Supreme Court significantly narrows its interpretation of that power, Section 2 would still likely protect a great deal of religious activity. At a minimum, religion would be protected under federal law to the same extent as other important values such as non-discrimination. And that is perhaps the most anyone can hope for.

At the end of the day, I believe a combination of RFRA and RLPA, supplemented by the Supreme Court's existing interpretation of the Free Exercise Clause, will likely cover about 95 percent of the religious-liberty problems that were covered by the compelling interest test prior to *Smith*. And that of course means that this patchwork of statutory and constitutional protections will be about 95 percent as effective as a constitutional amendment restoring the compelling interest test in *all* cases alleging a deprivation of religious freedom. Given the difficulty and uncertainty surrounding any constitutional amendment, I believe it is wise to take a statutory approach again before proposing and submitting a constitutional amendment. With so much at stake, Congress should not let the perfect become the enemy of the good.

In sum, the proposed Act is plainly constitutional. It is a wise and prudent use of federal power. And it will have an enormous, positive impact on religious freedom in this country. Thank you again for the opportunity to testify on this important subject.

Mr. CANADY. Mr. Stern.

**STATEMENT OF MARC STERN, DIRECTOR, LEGAL
DEPARTMENT, AMERICAN JEWISH CONGRESS**

Mr. STERN. I want to thank you for putting me on last. The first time the committee held hearings I spoke after some very eloquent ministers. This time I get to speak after a number of law professors. It is going to be a lot easier to sound interesting this time.

I have two tasks today. One is to demonstrate the substantial economic impact of religious activity, and the second is to discuss the impact of RLPA on civil rights laws.

My grandmother supported herself and my mother during the Great Depression by operating a little kosher chicken market. And the way the business operated was that she would buy chickens from a local wholesaler. Somebody would come in and want to buy a chicken, and my grandmother would arrange for the ritual slaughterer to come in and slaughter the chicken. It was a local business.

Today the kosher poultry market is dominated by two or three large firms located in Indiana, Pennsylvania, and Iowa, all of which distribute nationally.

On the desk in front of me are two piles of catalogs. One comes from a Baptist Association, of which there are 1,200 in the United

¹⁹ See, e.g., June 4, 1998 memorandum from Steve McFarland of the Center for Law and Religious Freedom to Hon. Charles Canady at 6 ("McFarland Memorandum") (attached) (citing this and other examples).

States. One is taken from the shelves of a Baptist church in Virginia. These are catalogs of materials sold to religious organizations, especially designed to meet religious needs. I have from the Catholic Directory, which is the national how-do-you-find-things-in-the-Catholic-Church directory, an advertisement for a Munich firm of stained glass makers, which has its American offices 2 or 3 miles from where I live in New Jersey. Pictured are stained glass windows installed in churches in Covington, Kentucky; Seattle, Washington; Philadelphia, Pennsylvania, and Germany.

I have as well as catalogs addressed to synagogues. One sells synagogue furniture. The furniture is made in Israel and custom-designed for synagogues across the United States. The other is a catalog of a business that started out 100 years ago on the lower east side selling locally; now does 70 percent of its business nationwide by mail order.

The economic impact of religion, of course, is not limited to what churches buy and what they sell. Estimates range between \$44 billion and \$66 billion a year of charitable donations to houses of worship. When one adds to that the amounts paid in tuition to just the three largest streams of church schools, Catholic schools, about \$6.5 billion; \$1.2 billion to Christian schools; about half a billion dollars to Jewish schools, (there are yet others that I haven't calculated), when one adds all of that together and then one takes into account hospitals, which operate under church auspices and frequently under church rules that come into conflict with Government regulation—e.g., abortion and end-of-life decision-making. Catholic hospitals are very large networks. They are 10 of the 20 largest HMO networks in the country, and, again, billions of dollars flow through those institutions. They buy and sell things in interstate commerce. They hire people, and those people spend the money they earn, and that has an impact on religious commerce.

I don't think there can really be any serious question about the extent to which religion is a significant player on the American economic scene. It doesn't mean religion, as Karl Marx might have had it, simply another economic enterprise. It doesn't mean that everything that happens in the name of religion affects interstate commerce. There are lots of small and private religious activities that may have no larger connections. But religion as a whole is clearly a major economic factor.

I would say two things. In my view, the Commerce Clause question was settled last year by the Supreme Court in the case of *Camps Newfound Town of Harrison*, in which there was a passive Commerce Clause question. The camp was not tax-exempt under Maine law because many of its campers came from out of Maine. That limitation was challenged as interfering with interstate commerce. And the town, in defense of its tax scheme, said this wasn't commerce at all, campers weren't articles of commerce, and that camps were not in the business of making a profit and therefore could not invoke the Commerce Clause.

The Court, in a very short paragraph that I quote in my written testimony, just rejected that out of hand. People move interstate. The camp buys and sells things interstate. That puts it in interstate commerce.

When you take that small camp and you multiply it across the scope of religion in the United States, it seems to me perfectly clear that Congress is within its authority in using the Commerce Clause here.

Let me say just quickly on this as well: Congress often uses its Commerce Clause power to protect an industry to allow it to grow, to allow it to function, depending upon the needs of that industry. With regard to the Internet, it may mean exempting Internet commerce from local taxation. With regard to railroads, it means that States can't regulate what size cars or when railroads run. Each industry has its own needs to work as a national player on the economy. What religion needs is deregulation from State control.

Very briefly about civil rights laws, I would emphasize again what is frequently lost sight of. RLPA is not a statute that by itself trumps any particular practice or statute. It simply says you have got to look at it again and see if the statute or practice meets these standards: Does it serve a very important government interest, and does it do so in a way least burdensome to religion?

It invalidates no civil rights law or any other law. In that respect, it is much narrower than existing exemptions from civil rights laws that give carte blanche to religious institutions to engage in religious discrimination, which is a typical feature of civil rights laws. Many civil rights laws have broader provisions—apply that same standard to anything a religious institution does.

RLPA is not that broad. It gives the government a chance to justify its regulation. As I say in detail in the testimony, there aren't any religious organizations of any significance, and I don't know of any altogether, that practice or encourage racial discrimination. There are very few, and here the picture is a little more cloudy with regard to sexual discrimination. Moreover, it is settled by case law, that outside the area of hiring ministers, the claims of sexual equality are going to prevail over religious exemptions. That is even for religious institutions, to say nothing of for-profit institutions. I don't know of a single for-profit institution that has ever raised a successful religious freedom claim as against a civil rights claim. We can go into later, if there are questions, about how it would apply to marital status discrimination and gay rights discrimination, but I would expect largely that same pattern would hold.

Why, then, is it necessary to include civil rights laws within the scope of RLPA? There are several answers, one political. Once you start making exceptions, you are going to find it very hard—lots of interest groups, (Professor Hamilton has already listed some of them), are going to come and say, we also have important interests, we ought to be outside the scope of RLPA, and soon we won't have anything worth doing.

But the second reason particularly relates to gay rights legislation and marital discrimination, marital status discrimination in particular. Those discrimination laws embody a particular view of hotly contested moral issues, issues where we may agree that in public we won't discriminate, but the underlying moral issue is very much in dispute in our society. To say in RLPA that some moral views are outside the universe of polite discourse, we are not even going to allow them to be questioned, is in effect to use RLPA

to say that certain religious views ought not to be even heard, ought not to be considered. And given the political controversy and the genuine moral debate over those issues in the country, it seems to me that that would be unwise, particularly since it is unlikely that many people raise those claims and that they will be successful in any number of cases to change our commitment to equal treatment of all citizens, to note these cases out of court from the outset.

Thank you. I am sorry I ran late.

Mr. CANADY. Thank you.

[The prepared statement of Mr. Stern follows:]

PREPARED STATEMENT OF MARC STERN, DIRECTOR, LEGAL DEPARTMENT, AMERICAN JEWISH CONGRESS

Article I, § 8, cl. 3 authorizes Congress to “regulate Commerce with foreign nations, and among the several States.” I am not here as an expert on the Commerce Clause. For me to claim such expertise would border on perjury. I rather come to lay out some of the economic facts about religious life in the United States.

I

The *Commerce Clause* is the constitutional hook on which Congress rests its authority to act, not a characterization of the interests involved. *City of Boerne* teaches that broad religious liberty protection needs to rest on an enumerated power of Congress within the list in Art. I, § 8, other than § 5 of the Fourteenth Amendment. The *Commerce Clause* is one such power on which this bill rests, albeit not the only one.

The use of the *Commerce Clause* as a hook for legislation whose political and social heart is a moral principle is hardly unprecedented. Some of the nation’s most important pieces of social legislation rest on the *Commerce Clause*. The most visible (and successful) recent examples are Titles II and VII of the 1964 *Civil Rights Act*, banning racial, sexual and religious discrimination in places of public accommodation and employment. (Earlier still, Congress used this power to ban child labor and the interstate transportation of women for immoral purposes—the *Mann Act*). No one believes that the principle of non-discrimination embodied in these landmark pieces of legislation is tainted because it rests on the *Commerce Clause*. The clients I represent who seek religious accommodation in the workplace are not in the slightest offended that the Act upon which their cases is premised rests on the *Commerce Clause*. Those to be protected by the *Religious Liberty Protection Act* will no doubt also not be offended that their rights are protected by the *Commerce Clause*.

II

We know authoritatively that many activities of religious not-for-profit corporations come within the *Commerce Clause*. The Supreme Court told us so last Term in *Camps Newfound/Owatanna v. Town of Harrison*, 117 S.Ct. 1590 (1997). The summer camps were religious, operated by Christian Scientists, to allow children to grow “spiritually and physically in accordance with the tenets of their religion.” *Id.* at 1594. It challenged (ultimately, successfully) a preference in the operation of a real property tax exemption for camps serving Maine residents primarily as a violation of the *Commerce Clause*.

At the outset, this claim was met with the twin objections that campers were not articles of commerce, and that the camps were not in the business of making a profit, and hence that the camps could not raise a *Commerce Clause* challenge. The Court rejected these defenses:

Even though petitioner’s camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, see *Katzenbach v. McClung*, 379 U.S. 294, 300–301 (1964); *United States v. Lopez*, 514 U.S. 549 (1995), but also as a provider of goods and services. It markets those services, together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who are attracted to its facility from all parts of the Nation.

Id. at 1596.

Moreover, as we will show, the very size of an action can bring it within the *Commerce Clause* if it affects interstate commerce. *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *Wickert v. Fillburn*, cited in *Hodel v. Virginia Surface Mining Assn.*, 452 U.S. 264, 308 (1981). In that case, Justice Rehnquist insisted upon a substantial ef-

fect on interstate commerce, *id.* At 310–11. *Accord Lopez v. U.S.*, 115 S.Ct. 1624, 1630 (1994). “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” *Lopez* also reaffirms *Wickert’s* holding that the cumulative effects of small-scale economic activity can bring an activity within the *Commerce Clause*.

Much religious activity will fall within these rules. Although, perhaps *contra* to Karl Marx, religion is not primarily an economic activity, in all its various forms, institutional and personal, it surely has a substantial effect on commerce.

A caveat before I turn to the statistics. As a consequence of the American tradition that religion is not the business of government, the government appears to have relatively little relevant data. Churches are not required to file the informational return required of other not-for-profits (Form 990). The Census Bureau asks no questions about religious affiliations, nor, as best as I can discover, does it survey churches to assay their economic activity. The Department of Housing and Urban Development does a biennial survey of housing, and inquires into those factors which lead people to select a home, but it asks no questions about religion. (*I.e.*, whether the presence of a church makes a difference. Is the presence of a significant body of fellow believers a prerequisite for moving into a community?) The Commerce Department does keep figures on religious construction, but these may well substantially underestimate the extent of that activity.

As I will discuss, there are private studies by Independent Sector and others, notably the National Association of Fund Raising Counsel and Empty Tomb, which attempt to quantify the extent of philanthropic activity directed toward the support of religious activity. These data are imprecise in part because no government agency collects official data. Moreover, there are religious institutions involved in a variety of activities likely to come within the scope of *RLPA* which are not houses of worship, and are lumped together with other apparently secular categories. On the other hand, the possibility of some dual reporting cannot be eliminated, either. Still, the numbers I describe are the ones that experts and others in the field point to with some regularity, and in some measure, cross-check with each other.

Most churches and religious not-for-profit organizations support themselves with membership dues and fees for services. Independent Sector’s 1990 survey¹ reports that 60 percent of national household charitable giving totaling 122.5 billion dollars² was given to religious institutions, or a total of 65.76 billion dollars. More recently some have argued that the amount of religious giving is exaggerated by some 20 percent, and that the total of giving to churches is only (!) 44 billion dollars.³ The *Not-for-Profit Almanac* (1996–7), p.175 reports that revenues for religious institutions in 1992–93 were 58.3 million dollars. The *Almanac* also reports that religious congregations had current operating expenditures of 41 billion dollars. Some of the difference is no doubt savings or reserves, but much of the rest is no doubt spent on capital improvements—new buildings and upgrading old ones, a fact which makes *RLPA’s* zoning provisions quite important. To the extent that localities interfere with the ability of religious institutions to build, they reduce the amount of commerce in construction—much of which involves the interstate movement of goods (stained glass, furnishings) and services.

Even as to houses of worship these figures on philanthropy understate the impact of houses of worship—themselves only a subset of the religious community. According to the *Almanac*, income from endowments (for 1992) is another 1.3 billion dollars. In 1992, some 6 billion dollars was spent on capital improvements and new construction (*Almanac*, p. 190, Table 4.2), up from 4.8 billion dollars in 1987. (By comparison, all educational institutions—a category which includes many religious institutions, the figures were 6.4 and 4.9 billion dollars respectively.) In 1982, religious institutions had endowment investment income of 1 billion dollars, and spent \$800,000,000 on construction. In short, in recent years there has been a substantial leap in the amount of capital construction by religious organizations.

These figures include only current financial expenditures. Even more capital is invested in religious institutions in the form of real property and buildings, some of which have been dedicated to church use for centuries. Recent studies indicate that these facilities are used by other community groups, often at reduced rents; this multiplies their effect both on the economy and the well-being of our communities and the nation.

Data, however, is hard to come by. In almost all states, statistics on exempt property are maintained locally, not at the state level. I have not had the resources to

¹ *From Belief to Commitment* (1993), p. xi.

² *Giving USA* (1990), p. 101.

³ J. & S. Ronsvalle, *How Generous Are We?* *Christian Century*, June 3–10, 1998, pp. 579–80.

compile this data piecemeal. Two states, however, do maintain such data: New York and Wisconsin.

The most recent figures for New York show 13.5 billion dollars of property (In some 23,000 parcels) held as houses of worship, and an additional 3.6 billion dollars of parsonages. Other property used by religious organizations (cemeteries, schools, hospitals, and the like) are not broken out separately. This amounts to about 5 percent of the total exempt property (a category which includes government buildings and public parks).⁴

The most recent figures for Wisconsin (1996) show that church/religious property amounts to almost \$5 billion of tax exempt property, which constitutes 40.6% of all exempt private real property.⁵ As in the case of New York, other property used by religious organizations are not broken out separately.

Houses of worship do not exhaust the economic extent of religious activity. At this point, though, certainty becomes even less possible. Religious enterprises include schools, hospitals, and social welfare institutions. Some of the latter two categories may be largely indistinguishable from their secular counterparts, but surely not all. Catholic and Baptist hospitals operate under a series of religious directives. These have in the past clashed with various regulations. Given the consolidation in the health care industry, it is likely that there will be more such clashes. In any event, these hospitals are a significant economic player.

The Catholic health care sector has a huge economic impact. There are 625 Catholic hospitals in 48 states; 713 long-term care facilities, and 51 HMO's in 32 states. They make up 16 percent of the total U.S. community hospital admissions and outpatient visits. They produce over \$44 billion in hospital revenues, much of which is spent, obviously, in interstate commerce in pharmaceutical and other supplies. The assets of these facilities also exceed 44 billion dollars.⁶ Catholic health care systems account for 10 of the 20 largest health care systems in the country.⁷ These figures do not, of course, include the large Baptist, Jewish and other religiously affiliated hospitals.

The economics of parochial schools are somewhat different than for houses of worship. To varying degrees, depending largely on the vagaries of each denomination's organization, these institutions derive much support from tuition. Catholic schools enroll (according to the National Catholic Education Association) during the most recent school year for which figures are available—1997–98—some 2.5 million students, in 8,200 schools at an average per pupil cost of \$2,414, for a rough total of 6.24 billion dollars.

Conservative Christian schools, according to the National Center for Educational Statistics (March 1998) enroll about a half million students in 3,300 schools. Some 172,000 Jewish students attend some 688 schools. I have been unable to locate average costs for the Christian schools supplying. Applying the Catholic schools' costs to these students, gives a (conservative) total of 1.2 billion dollars.

Jewish schools are more expensive. The Avi Chai Foundation⁸ did a study of Jewish schools outside the New York area concerning the 1995–96 school year and non-New York Metropolitan area schools calculated an average cost of between \$5,000 and \$6,000 per student. Using the lower figure for the entire student population including those in schools in the New York area, we conclude that the tuition costs are \$860,000,000. These three streams—and they by far do not exhaust the spectrum—lead to a total of tuition costs of 8.3 billion dollars. These numbers (admittedly rough) do not include fees and charitable contributions, as well as endowment income to the schools, which educate together three-fifths of all non-public school students.

Some of the funds go to salaries; others go to textbook publishers and computer manufacturers, and sellers of school supplies, all of whom are regularly involved in interstate commerce. These institutions build and maintain buildings with supplies purchased in interstate commerce by companies which are nationwide in scope. The number of buildings (over 12,000) is itself so substantial as to necessarily have an impact on interstate commerce.

These figures include only elementary and secondary schools. But religious education does not stop there. Institutions of religious higher education also exist. I do not have figures for the economic impact of the many colleges under religious auspices, even if defined to mean school where religion plays a significant and more

⁴ *Statewide Summary of Exemptions by Property Group and Exemption Code, 1995 Assessment Roles*, pages B.85–959, Table B.4

⁵ *State of Wisconsin Summary of Tax Exemption Devises*, Feb. 1997, p. 100, Table 1.

⁶ *1996 Profile of Catholic Health Care*.

⁷ *Modern Healthcare Multi-Unit Providers Survey*, May 20, 1996.

⁸ M. Shick & J. Dauber, *The Financing of Jewish Day Schools*, (1995).

than a nominal role in the life of the school, but also in schools of theology. The Association of Theological Schools, representing mainline Protestant schools of theology, represents some 220 schools, enrolling some 65,000 students in the 1996-97 school year at an average cost to student of \$6,200 per student for a total of \$406,000,000.⁹ Again, this figure would not include grants or endowment income. And it says nothing of Catholic seminaries, smaller Bible schools, or *yeshivot* (rabbinical schools).

Nor is it beyond the realm of the possible that these schools—and hence interstate commerce—would be affected by state imposed substantial burdens. During the 1980's state regulators and operators of so-called Christian schools frequently clashed. In Nebraska, where courts had upheld the broad power of regulation, many schools singly closed their doors rather than operate in violation of their religious principles. Those closures reduced purchases in interstate commerce.

Another area not included until now is that of charitable giving under religious auspices. *The Chronicle of Philanthropy*¹⁰ annually lists the top 400 charities in the United States. The largest charity in the United States is the Salvation Army, with an annual income of over 2 billion dollars—and it has on several occasions clashed with the government over religious liberty and government regulation. Number 5 is Catholic charities at 1.1 billion dollars. Numbers 7 and 8 were also religious affiliates—the YMCA and Habitat for Humanity. Number 19 at one quarter of a billion dollars is Campus Crusade for Life. Many other religious charities—not individual houses of worship—are scattered through this list.

So far what has been said relates to income and capital expenditures of religious institutions. Religious life also has a personal side, one which commands expenditure of funds by believers in furtherance of their religious beliefs and practices, from ritual object to ritually acceptable food to books, music and mass media. Much of these move in either international or interstate commerce.

The Christian Bookseller Association is the trade association of Christian product suppliers. It has 12,500 member stores in the U.S. selling books, records, apparel and videos. It estimates that its members do 3 billion dollars of annual business, with many stores doing over 1 million dollars a year in annual business. In 1997, it had a convention in Georgia, attended by over 13,000 people, and over 400 exhibitors from across the country and the world.

The Catholic and Jewish communities also have their own publishers and distributors of religious articles, including furnishings for synagogues and ritual objects. Increasing, these businesses work not as small local bookstores, but as catalog sales business selling objects made in various state and foreign locations across the United States. One such seller to the Jewish market, J. Levine Booksellers, started out as a small bookstore on New York's lower east side 90 years ago. Today, it does 70 percent of its business (\$2.5 million) in national mail order business.

Other enterprises sell church and synagogue furniture by mail order catalog to houses of worship nationwide, as can be seen in particular from the ads in the Catholic Directory. Copies of these will be entered in the record.

Some faiths have ritual diet requirements, and these, too, have a substantial impact on interstate commerce, and these, too, have been involved in questions of religious liberty.

Dr. Joseph Regenstein, a expert on ethnic and religious diets at Cornell University, estimates that there are between 2 and 3 billion dollars in directed sales of kosher food, that is, sales of items where the consumer seeks out a kosher product. A total of some 35 billion dollars of food products are sold which are under rabbinical supervision. A total of 41,000 products are under rabbinical supervision. *Grappa to Scones*, New York Times, 12/3/97. I can speak here with personal expertise. These foods are available nationally, and their availability in the national market in ordinary groceries and supermarkets has greatly facilitated travel and business by those like myself who observe the kosher food laws. And by the same token, the transition to a national market in Kosher food has greatly simplified the life of those who in pursuit of economic advantage seek to move away for the largest Jewish communities. Kosher food is now more less available everywhere. One large producer, Manishevit, distributes its products to more than 18,000 supermarkets (out of a national total of 30,000 stores).

This development has had important implications for the kosher food industry. In *Schacter v. U.S.*, 295 U.S. 495 (1935), the so-called sick chicken case, the Supreme Court invalidated the National Industrial Recovery Act at the behest of a small wholesaler of kosher chickens who purchased some live chickens from other states, but who slaughtered, dressed and sold the chickens for the local market. That was

⁹ *ATS Fact Book* (1997-98), pp. 27, 103.

¹⁰ October, 1997 pp. 1, 45.

the typical pattern in that era—and again I speak from personal experience because my grandmother (coincidentally named Schacter—the name means ritual slaughterer) owned a small poultry store at the time.

Today, the industry is different as is *Commerce Clause* doctrine. Almost no poultry is ritually slaughtered at the point of sale. Most is slaughtered and prepared by a few large companies. Hebrew National (owned by Conagra), Empire (located in Mifflintown, PA) and Rubashkin (Agra-processor located in Pottsville, Iowa). These companies distribute their products nationally—as a trip to almost any supermarket will disclose. The same pattern holds for beef with Hebrew National, Sinai/48 (owned by Sara Lee) and Rubashkin increasingly dominating the market and pushing out of business small local sellers—in just the way small hardware stores have yielded to large national chains like Home Depot.

The Muslim community too, has some dietary restrictions, notably with regard to the slaughter of beef and the avoidance of pork. It has three or four supervising agencies (there are some 80 or 90 Jewish agencies, but only 4 national ones), one of the biggest of which is the Islamic Food and Nutrition Board of America located in Illinois. Much of the work of the councils involves certifying the export of American products for the overseas Islamic market.

There is a domestic market as well. I spoke to the manager of the largest Hallal market in the Washington area, Hallalco in Falls Church. Hallalco does its own slaughtering. Much of its work involves the slaughter of local beef within Virginia, but when the supply of local beef is insufficient, Hallalco imports live animals for slaughter from Texas. It has now began slaughtering operations in Maryland. It does not produce its own Hallal delicatessen. These it imports from a Hallal producer in Iowa.

What has been said does not begin to exhaust the extent of the economic impact of churches on interstate commerce. I have not discussed religious broadcasting, nor the many large religious conventions. Does anyone think that Salt Lake City welcomed the Southern Baptists because of their desire to proselytize Mormons? Religious conventions, like other conventions make a real economic contribution to a community. Multiply that by all the conventions held yearly, to say nothing of large revivals, and again the cumulative impact on the national economy is substantial. Add to that the funding that flows from around the country to national and international affiliates or parents of the local religious organization, and one again confronts an important factor on the national economy. I am sure that economists could tell you how that sum multiplies through the economy. Even without it, the impact of religion on the economy is significant to allow Congress, should it choose to do so, to protect this segment of the economy.¹¹

III

The simple fact is that the *Commerce Clause* has frequently been applied to religious activities, *Camp Newfound*, cited earlier, unequivocally establishes that religious institutions can claim the protection of the *Commerce Clause* even though they are not in the business of making money. Presumably, if such institutions can claim the benefit of the dormant *Commerce Clause*, whose existence is disputed by some Justices of the Supreme Court, it would seem to follow that Congress can invoke the *Clause* as an affirmative grant of power to protect the viability of this sector of the economy.

It would be particularly odd if this were not the case because the courts, including the Supreme Court have routinely applied *Commerce Clause* legislation to church activities. Thus, in *Tony and Susan Alamo Foundation v. United States*, 471 U.S. 290 (1985), the Court upheld the minimum wage provisions of the *Fair Labor Standards Act* to businesses which were part of a church's ministry. In *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (5th Cir. 1991), the Court upheld the application of the *National Labor Relations Act* to the non-teaching staff of a religious home.

Courts have upheld application of various *Commerce Clause* anti-discrimination laws to various religious institutions. See, e.g., *Lukasewski v. Nazareth Hospital*, 764 F.Supp. 57 (E.D. Pa. 1991) (age); *EEOC v. Southwestern Seminary*, 651 F.2d 277 (5th Cir. 1981) (religious, racial and gender discrimination); *Brock v. Wendell's Woodwork, Inc.* 867 F.2d 196 (4th Cir. 1989) (child labor).

One could multiply examples. Religious broadcasting, itself a multi-billion dollar enterprise, is subject to the Federal Communication Commission's regulations, again based on the *Commerce Clause*, in the same way that secular broadcasters are. Ritual slaughter is subject to the federal *Humane Slaughter Act*, and the processing of kosher food is subject to the FDA supervision, all under the *Commerce Clause*.

¹¹ That Congress has the power to regulate religion does not mean that it should do so lightly.

It is, it seems to me, hard to sustain the proposition that religion is commerce for purposes of regulations which may limit its reach, but it is not commerce when it come to legislation which allows it to flourish.

Congress frequently has utilized its power under the *Commerce Clause* to foster business which operates interstate. Sometimes this requires the limitation of the power of states to tax, a power Congress is considering exercising with regard to the Internet. Sometimes it provides that national rules for the operation of an industry preempt local regulation, notably in the case of transportation. No one could run a railroad if each state could regulate the times of operation, and the types of equipment which could be utilized. Congress long ago exercised its power to protect interstate commerce by preempting contrary state regulations.

Religious enterprise depends on the ability of citizens to exercise free religious choice, not only to the bare holding of beliefs, but to putting them in practice. An important segment of interstate commerce would evaporate if states decide to ban ritual slaughter as inhumane, as several European countries do. Municipalities that ban religious structures altogether restrict commerce in services and materials designed for the church market. If Congress can protect the Internet by barring state laws which would interfere with its functioning, such as taxes and libel laws, why can it not protect the practice of religion which also has an impact on the economy? I think there is no relevant distinction.

IV

I have also been asked to address the question of the impact of the *Religious Liberty Protection Act* on the civil rights laws. This question has arisen not only in regard to *RLPA*, but with regard to state religious freedom statutes. Probably no question surrounding *RLPA* has been discussed with greater passion than this one.

Let me note first that many civil rights acts already contain substantial exemptions for religious institutions. Thus, Title VII of the 1964 Act allows religious corporations to engage in religious discrimination without restriction. At least as to not-for-profit corporations, this provision is constitutional even as to positions with no religious content. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Killinger v. Sanford University*, 113 F.3d 196 (9th cir. 1997). In *Amos*, the Court left open the question of whether the exemption applied to for-profit corporations and whether if so applied it was constitutional. Justice Brennan indicated that he thought such application unconstitutional. Title VIII allows religious corporations to engage in religious discrimination in the operation of housing owned by them. New York State's Human Rights law allows religious organizations the right to engage in any form of discrimination if necessary to further its religious purposes. (The exact scope of the exemption is unclear. The one case to reach the New York Court of Appeals gave the section a narrow reading—*Schacter v. St. Johns University*, 84 N.Y.2d 120 (1993).) The proposed federal gay rights legislation (*ENDA*) has a broad exemption for not-for-profit organizations, negotiated by gay rights groups and religious organizations, at least some of whom could not support the legislation without such an exemption, but could support it with it.

In addition to these statutory exemptions, courts have uniformly refused to intervene the decision of a church to hire or fire ministers, even where there are allegations of racial or secular discrimination outside the scope of the statutory exemptions.

The federal statutory exemptions are both narrower and broader than *RLPA* would be. They are narrower in that they generally apply only to religious discrimination by religious corporations, and *RLPA* would in theory apply to all forms of discrimination by religious institutions and religious individuals. The statutory exemptions are broader—and the significance of the point cannot be overestimated—because they are total and absolute. No matter how important the interest in eliminating a particular form of discrimination, an organization exempt under the statute wins. Not so under *RLPA*. A person or institution claiming under *RLPA* must overcome the government's showing of compelling interests—experience indicated that the barrier will frequently be insurmountable.

How great is the likelihood that *RLPA* would be used to frustrate the important policies behind the civil rights acts question that should be addressed before one discusses whether *RLPA* should or should not reach these statutes. Based on past experience in the years predating *Employment Division v. Smith*, 494 U.S. 872 (1990) the answer as to race is clear—not likely at all. Bans on sexual discrimination will survive *RPLA* analysis most of the time. There is not much case law for other forms of discrimination, although we have some indications for marital status. There has been a fair amount of litigation as regards marital discrimination, but almost none with regard to sexual orientation discrimination.

The leading case with regard to racial discrimination is *Bob Jones University v. Simon*, 461 U.S. 574 (1983). There a religious university lost its tax exemption because it enforced a ban on inter-racial dating. The University challenged the decision on, *inter alia*, the grounds that it denied it the Free Exercise of religion. The argument merited only a footnote, in which the Court easily found a compelling interest. I do not know of a single subsequent case in which the claim was advanced that racial discrimination was religiously based and hence immune from regulation. If made, I have no doubt that it would be rejected.

Claims of sexual discrimination in employment are more frequent. Typically, the cases have arisen in the context employment by a religious organization, there being to the best of my knowledge no claim by a private for-profit employer that his or her religion required discrimination against women, and certainly no such claim has ever been—nor is it likely that one ever would be—upheld. This is not surprising, given the general tendency of the law to equate sexual discrimination with racial discrimination. Title VII's exemption for religious institutions is inapplicable because it deals only with religious discrimination.

A typical case is *EEOC v. Pacific Press*, 676 F.2d 1272 (9th Cir. 1980), involving the publication arm of a church. On the grounds that women should not be heads of households, Pacific Press paid women workers less than men. It offered a religious liberty defense, roundly rejected by the Ninth Circuit.

Less even in results are cases involving parochial school teachers. A typical case involves the single female teacher who becomes pregnant out of wedlock. The school claims such teachers are "ministers" and that it can insist that ministers set a moral example. The response typically is that the school does not enforce a similar rule as to male teachers who have sex out of wedlock. The case law is divided on this subject. See, e.g., *Dolter v. Wahlert H.S.*, 483 F.Supp. 266 (N.D. Iowa 1980). The Supreme Court once considered a slight variation on this theme. A parochial school refused to allow mothers (but not fathers) of young children to teach because it believed mothers should be home with their children. The state claimed a compelling interest in ending such sexual role casting, no doubt an important and impelling interest, but which in this case came perilously close to amounting to the suppression of a religious idea. See *Hurley v. Boston Gay & Lesbian & Bisexual Group*, 515 U.S. 587 (1995). The Supreme Court decided the case on procedural grounds. *Ohio Civil Rights Comm'n v. Dayton Christian*, 477 U.S. 619 (1986). The case subsequently settled.

These cases are typically outside statutory exemptions because they involve sexual, not religious discrimination. At least in the context of the parochial school teachers, they also come close to the rule of non-interference in the selection of ministers. On the other hand, they also expose children to sexual stereotypes which the state surely does not wish to see perpetuated. In short, these are hard cases and do not for me admit of across the board answers. And, indeed, the courts have not given uniform answers, differing both on their statements of the legal balance to be struck and on their evaluations of the specific facts observed in each case. *RLPA* would not change this result.

What can be said with certainty about these cases are the following propositions:

- (1) claims for outright race and sex discrimination outside the ministerial or teaching professions are almost certain to be rejected;
- (2) for-profit employees, and by extension private persons under the statutes (i.e., public accommodation laws) will not be heard to successfully argue that *RLPA* exempts them from civil rights law compliance;
- (3) when the compelling interest test was the law, i.e., before *Employment Division v. Smith*, the free exercise defense was rarely made successfully with regard to sex discrimination, and never with regard to racial discrimination;
- (4) the cases where a free exercise claim was given serious consideration involved substantial and conflicting values, which should not be summarily and broadly decided; and
- (5) the existence of the ability to raise such claims, sometimes even successfully, did not in any substantial way impede national progress toward reducing the general incidence of illicit and invidious discrimination.

I know of no denomination that purports to regard racial discrimination as a religious duty. Most, if not all, regard it as a heinous sin. And while there still is substantial disagreement over sex roles, I am unaware of any church or religious organization which encourages its followers to discriminate against women in the private workplace. These facts do not eliminate the possibility of a religiously based

claim to practice discrimination in the workplace, but they greatly reduce its likelihood.¹²

The hardest questions involve relatively new civil rights—those of marital status and sexual orientation. As to the latter, there has been as yet relatively little litigation, in part because these statutes tend to exempt religious organizations. This is the case by terms of New York City's "gay rights" law, and presumably most other gay "rights" laws because they fit into the general framework of human rights laws which have such exemption. In the case of New Jersey, where the legislation seemed (at least to one church) unclear on whether the ban on sexual orientation discrimination would apply to its hiring of youth ministers and the like (perhaps because the statute exempted only religious discrimination by religious groups). After lengthy procedural battles, the state conceded that the statute would not apply to such decisions in keeping with the general rule that courts will not police the hiring of ministers. These exemptions for religious organization would continue under the proposed *ENDA*. Thus, to the extent that *RLPA* would be invoked by religious organizations would break no new ground, and change nothing.

RLPA would be available to private parties seeking to avoid "sexual orientation" discrimination. Such challenges were available under *RFRA*, and none seem to have been brought. The closest case is one involving the discharge of a public official who criticized homosexuals. The court found that the state had a compelling interest in ensuring an end to sexual orientation legislation, sufficient to justify discharge of the official. *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997). While not dispositive, perhaps, of the rights of private parties, I think the decision is indicative of the likely result—that an end to discrimination of the basis of sexual orientation furthers a compelling interest.

Case law on the question of claims for exemption from bans on marital status discrimination are mixed. Alaska, in *Swanner v. Anchorage Equal Right Comm'n*, 874 P.2d 274 (1994). California reached the same result, but by different (and quite questionable) reasoning in *Smith v. FEHC*, 12 Cal.4th 1143 (1996). Massachusetts, however held in *Attorney General of Massachusetts v. Desilets*, _____ Mass. _____ (1994), that a private landlord was entitled under the state constitution to prove that the state's interest in making housing available for cohabitating couples was not seriously compromised by allowing a small landlord with religious exemptions to such rentals not to do so. Illinois and Minnesota have each had similar cases, but neither resulted in an opinion on the issue confronting the Committee today.

Against this background, it can be said that the courts have not rushed to allow religious freedom claims to trump civil rights claims. With regard to marital status, where we have more litigation, the most that can be gotten from the only decision to (partially) favor a religious landlord is that she or he might be exempt if their personal refusal to rent to unmarried couples will not significantly affect their chance for finding housing and only in such circumstances will such a claim succeed.

Now it is fairly debatable whether the purpose of the ban on marital status discrimination is only or primarily to ensure the availability of housing—or if it is also to prevent the psychological and social stigma caused by such discrimination, in which case it may be wrong. Either way, however, the practical effects of following *Desilets* would still be, in practical terms, very small. Surely no large, or even mid-sized commercial landlord would be able to use *RLPA* to avoid compliance with an anti-marital status discrimination ordinance.

Understandably, precisely because there is in our society an ongoing moral debate about the wisdom and morality of granting unmarried couples and gay and lesbian couples equal rights with traditional heterosexual married couples, those who favor equal rights for these groups—as my organization does—are reluctant to countenance exemptions because they may be seen as encouraging wide-spread evasion of the newly adopted legal norms against discrimination.

I understand the argument, but am not persuaded that it is so powerful that it ought to foreclose inquiry into whether the state's interest is sufficiently important to outweigh the burden on religious practice.

First, given the importance of egalitarianism in our political and legal culture, it seems unlikely that allowing the inquiry will result in any wide-scale sanctioning of invidious discrimination. Second, there are cases nominally within the scope of the anti-discrimination laws where exemption is certainly appropriate, such as the case of the pro-life printer sued under the public accommodation law for refusing to print pro-choice flyers, or the Catholic church sued for refusing to rent a parish

¹² Take the recent case of the truck driver who refused to do long distance runs with a female partner, who would sleep in the back of the truck cabin. As I understand the case, he did not claim that women should not be truck drivers, only that he should be assigned a different partner. I believe he lost even this claim.

hall to one of its theological critics. Exempting civil rights from *RLPA* would leave these cases untouched. Third, in the analogous area of clashes between the freedom of association and the rights to be free of discrimination, the Supreme Court, applying compelling interest analysis, has refused to follow a *per se* rule, preferring instead a case-by-case adjudication. Compare *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) with *Hurley v. Irish-American Gay & Lesbian & Bisexual Group*, 515 U.S. 587 (1995). No reason appears why the right of religious practice should not be treated the same way. Fourth, it bears repeating again, that *RLPA* does not command blind deference to religious objections to complying with the civil rights laws, or any other law. It compels only a second look; a weighing of competing interests. *RLPA* does not cut a wide swathe through the civil rights laws.

Allowing religious claims to be heard accords those who hold them a level of moral respect and seriousness which in my experience greatly facilitates acceptance of any ultimate judgment compelling compliance with the civil rights laws. That alone would be an important reason not to exempt civil rights laws from *RLPA*'s reach.

A second reason is political. Consider *ENDA*. Would its chances of passage be enhanced or reduced if religious believers thought it would apply to youth ministers or Sunday school teachers, or church day care? *RLPA* goes even less far—because it is not a blanket exemption, but only a second look—but it does make legislation in many controversial areas more palatable to religious believers of both left and right. And excluding civil rights laws from *RLPA* would simply fuel endless calls from supporters of this or that cause to place their cause beyond question.

The third reason is, I think, most important. On issues such as marital status and sexual orientation there are profound moral differences in this society. Those moral debates are serious, weighty and unresolved. Exempting civil rights claims from *RLPA* amounts to a declaration that some principles are beyond serious question, are not, in fact, morally serious. At least with regard to marital status and sexual orientation that is surely not factually accurate, whatever view one ultimately takes on both the underlying moral issue or the narrower question of how a *RLPA* claim should be resolved. (It may be true with regard to race, but as to such claims there is only a slightly greater than zero chance that such a claim would prevail.) So declaring would alienate many morally decent individuals, relegating their most deeply held moral beliefs to beyond the pale.

If there were a serious danger that even considering the claim for exemption would threaten this nation's fundamental egalitarian commitment, there might be reason to exempt civil rights laws from *RLPA*. But in my judgment, that is not the case. I recognize that discrimination still exists, and its victims are understandably reluctant to tolerate any questioning of their right to equal treatment. But in my judgment, it is not the case. The commitment to equal treatment is too well settled, too broadly and deeply held, to be shaken because in some few instances we allow those with profound moral objections to particular policies to question these egalitarian values, and perhaps in some even smaller number of cases, exempt themselves from them. To do so is simply to acknowledge that our society honors numerous values, equal treatment being one, and religious liberty another, and we must, if at all possible, do our best to honor both.

Mr. CANADY. Mr. Scott.

Mr. SCOTT. Mr. Chairman, part of my concern about the constitutionality of this bill stems from some of the language in *Boerne*, where the Court expresses almost a hostility to this kind of legislation and gives me the idea that it won't take much for them to throw out the next one. And the language that I am referring to says in governments—where they stated in the *Smith*—where they remind in *Boerne* what they said in the *Smith* case, which says, government's ability to enforce generally applicable prohibitions of socially harmful conduct cannot depend on measuring the effects of governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling, contradicts both constitutional tradition and common sense.

That kind of suggests that if they find something to throw this out with, it just suggests to me that they are going to.

Much has been said today about the Commerce Clause and how we can do this under the Commerce Clause. I have a couple of questions, particularly since comparisons have been made to the civil rights laws. I just throw it out to whoever wants to comment.

Didn't the Court in *Boerne* specifically go out of its way to show how the civil rights laws were different in that there was a much stronger record and that the laws were narrowly tailored to address the problem, whereas RFRA was a broad, kind of unfocused law that covered a lot more and a lot—frankly a lot of out of proportion to whatever the law was? Does somebody want to comment?

Ms. HAMILTON. Representative Scott, I would be happy to talk about that. That actually is precisely in the opinion, and it was in our briefs as well. It was clear from the beginning to me that the problem with RFRA was that it was an unfocused attempt to exert congressional power. This bill seems to have the same problem, that it is a scattershot approach attempting to embrace as much religious conduct as possible without examining the particular Federal interest that is or could be implicated. I think you are right to say that there is a high degree of risk that the Supreme Court would invalidate RLPA rather quickly.

Mr. EISGRUBER. May I also speak to that?

Congressman Scott, I agree with your interpretation of the Court's opinion in *Flores*, and I think it points to an important aspect of the remarks that have been offered in defense of RLPA today, wherein an effort has been made to assimilate this statute to an antidiscrimination statute.

From a constitutional perspective, it is easy to understand why people would want to invoke the authority of the antidiscrimination laws. Obviously they have done wonderful things. And in addition, the Court in *Boerne* was quite clear about the existence of constitutional authority to enact those laws.

As I said in my earlier remarks, I think that authority extends to any law that would be reasonably understandable as an effort to protect against discrimination on the basis of religious interests. There is no reason that this should be construed as an authority that Congress has only with respect to some forms of discrimination and not others. On the other hand, RLPA is not plausibly construed as an antidiscrimination statute.

Let me give an example of the kind of law that would come under scrutiny under the zoning provisions of RLPA which I think cannot be justified in terms of an antidiscrimination theory. There are some cities which have greenbelt ordinances, zoning restrictions around the city designed to preserve open space. These greenbelt ordinances prevent any kind of building from taking place in those open spaces. It may well be cheaper to build in those open spaces. Some of that land may be farmland, and if you have got a greenbelt around a city that is filling up, the land outside of the city may well be less expensive to purchase. But those restrictions are going to operate on any enterprise that wants to build there, on anybody who wants to build there regardless of how charitable or salutary their motives are.

As I understand the land use section of this bill, it creates, as Mr. Schaerr said earlier, something like the compelling interest

test that would have to be satisfied in order to apply that kind of ordinance to a church which sought to construct in that area simply for the reason that it would be cheaper to do so.

That kind of a law goes much further than anything plausibly construed as an antidiscrimination statute, and I think this law for that reason will be unable to claim the benefits of the Court's doctrine on antidiscrimination laws.

Mr. LAYCOCK. Can I speak to that question?

Mr. CANADY. The gentleman's time has expired. Without objection, the gentlemen will have 5 additional minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. LAYCOCK. Mr. Scott, I think you are right that the Court is hostile to the protection of religious liberty, but I don't think we should infer from that that it will run amuck with Commerce Clause doctrine and Spending Clause doctrine to implement that hostility and strike down legislation that presents questions that are very different from the constitutional questions presented in *Boerne*.

Everything in the *Boerne* case is in the context of whether RFRA was an act to enforce the Fourteenth Amendment. And the Court said, in order for it to be an act to enforce the Fourteenth Amendment, it has to be an act to enforce the Fourteenth Amendment as interpreted in the *Smith* case.

So all the talk about proportionality and connection and whether there is discrimination was in the context of whether there was sufficient evidence of widespread violations of the free exercise clause as the Court interpreted it in *Smith*.

Mr. SCOTT. You are talking about that entire analysis with the Commerce Clause? They went through it with the section 5, and now we have to go through the same thing as to whether or not a law that the Supreme Court is expressing hostility to—I mean, you had five or six votes to begin with, and then another one said, well, you are establishing a religion, so I don't have to hear any more. I mean, you have got some that are extremely hostile to this idea. So in your commerce evaluation, wouldn't you have to assume that they are going to be as restrictive as possible in that analysis?

Mr. LAYCOCK. They may interpret the connection to commerce more narrowly here than they do in other contexts, and that will have the consequence that the bill doesn't cover as much as we might like it to cover. But the point I was trying to make is that when they say in *Boerne* that there is no sufficient showing here that this bill protects against constitutional violations, this is simply a question that is not relevant under the Spending Clause and Commerce Clause provisions. They are not worried about the Spending or Commerce Clause anywhere in the *Boerne* opinion, and they couldn't have been. It would have been utterly irrelevant. And when they say the civil rights cases are different—first of all, it was the Voting Rights Act of 1965 that they said in some detail was different, but again, it is in the context of whether there was a showing of a constitutional violation. There is not a word in *Boerne* that suggests that the commerce power to protect against racial discrimination is any different from the use of the commerce power to project religious liberty. That issue simply was not presented.

Mr. SCOTT. Well, when you are talking about the Commerce Clause, if the—I think Mr. Stern has shown that churches obviously are involved in commerce. Does the law, if you are going to use the Commerce Clause, have to affect commerce, or does it just have to deal with an entity in commerce?

Obviously, the civil rights laws, when you are using the Commerce Clause, have an effect on how commerce is going to take place. And we have had testimony today that this bill, whatever effect it may have, will not affect commerce.

Mr. STERN. Well, I would—

Mr. LAYCOCK. Go ahead, Marc.

Mr. STERN. You know, there are several things to be said. First I would not—

Mr. SCOTT. It would not affect commerce?

Mr. STERN. Yes. First, I would not yield by silence the notion that we haven't demonstrated extensive religious discrimination in the zoning area. I think we have. My own town in the last couple of months has turned down a Muslim mosque because there is not enough parking. It has turned down interracial, nondenominational church because there is not enough parking; and when a Methodist church wants to come in, somehow there is enough parking. And so, you know, I don't want that to go by silence.

Mr. SCOTT. Well, that would be a situation where the law, if it just dealt with zoning—

Mr. STERN. Right.

Mr. SCOTT [continuing]. Would be narrowly tailored to address a specific problem.

Mr. STERN. And, in fact, the statute specifically addresses zoning separately for precisely that reason, because we thought we made the record with regard to zoning, and we have special rules that apply to zoning. I think Professor Eisgruber was reading the act incorrectly. I think in his case it would not be the compelling interest test, which would be relevant, but the special rule for zoning that we have laid out, assuming the town made reasonable provision elsewhere for churches.

But even as to commerce, several years ago there was a lawsuit in New York City about the way child care was delivered. It was mostly an Establishment Clause case. The city insisted, after a settlement, that Catholic youth homes, Catholic children's homes, were required to provide birth control teaching and materials, actual birth control devices, to children in its care. I have forgotten who the Cardinal was at the time, but he said he would close all of Catholic charities rather than violate church doctrine and teach contraceptive use to children in his care.

And the same is true of Catholic and Baptist hospitals. If a State—and there are places where this is conceivable were to say that anybody who has got a license to operate a hospital has to perform abortions, I would expect that Catholic and many Baptist hospitals would simply close their doors. Now, that is going to have an impact on commerce.

In many parts of the country—I think, as Professor Laycock has said elsewhere about southern California, it is practically impossible to build a church anymore. Now, if you can't build churches in southern California, that is going to have an impact on the

building industries and on these industries that deal with the provision of interiors of churches. So there are lots of things that will be affected.

Will there be things that do not affect interstate commerce? Yes. We will not reach—we know that we do not reach every religious exercise under the Commerce Clause. It may well be, for example, that home schooling is not reached under the Commerce Clause. So there are things that are cut out, but there are lots of things that are in commerce and that are—we know from actual litigation experience, or actual regulatory conflicts, where if you don't have protection, commerce will dry up. The pool of commerce will be made smaller because government is allowed to regulate religion in ways that religion simply finds intolerable. In response religion will simply walk out of the marketplace.

Ms. HAMILTON. If I could just add one point to that.

Mr. CANADY. Well, I will tell you, I don't want to cut it off but we have gone already over 10 minutes, but you certainly will have an opportunity.

Mr. Nadler.

Mr. NADLER. Thank you.

First of all, I ask unanimous consent to insert my opening statement, which I wasn't here to deliver in the record.

Mr. CANADY. Without objection.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF HON. JERROLD NADLER, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. I want to commend you for scheduling this hearing today and for introducing with me the Religious Liberty Protection Act.

Although I have that uneasy feeling of *deja vu*, I believe that what we are doing today is necessary, though I find regrettable the fact that the Supreme Court has once again made legislation of this sort a necessity.

In its *Smith* decision, the Supreme Court threw away decades of sound First Amendment law by holding that government could interfere with an individual's religious practice, even imprison that individual for practicing this religion, and the Constitution would permit it, so long as the government didn't single out that person's religion.

So generally applicable laws, like zoning ordinances which exclude houses of worship, law which outlaw giving sacramental wine to children and other laws which have the effect of prohibiting the free exercise of religion, are ok. The government does not even have to show a compelling need for the law, nor does it have to show that there is another way to advance that public interest in a manner that is less restrictive on religion.

Congress responded with the Religious Freedom Restoration Act which the Court struck down in its *Boerne* decision, at least as applied to state laws, saying that Congress has exceeded its authority. I disagreed, but the Court does get the last word in these matters.

What we are doing with the Religious Liberty Protection Act is to follow the Court's instructions in its recent cases and provide the protection we believe our First Freedom merits. At least that is what we are trying to do. The purpose of this hearing is to continue the process of making the factual record the Court has said it needs to demonstrate the Constitutional power and the factual basis for this legislation. I also look forward to hearing the testimony of the fine constitutional scholars who have argued this question from all sides, to clarify the source of our powers, and to ensure that our final product will pass muster with the Court. We will do no one any good if we simply pass another bill which is ultimately struck down.

Religious liberty is threatened, not just because of bigotry, or hostility toward religion. It is in peril because sometimes the rules need to accommodate religion to protect it, and minority faiths, those lacking in political clout, cannot always depend upon the legislatures, whether it is a town council or the United States Congress, to grant them the leeway they need to observe their faith. We need federal civil

rights legislation to ensure that, whether or not a religious minority has the clout to make the political branches of government respond, they can still be assured their right to religious liberty. It is my hope that this legislation will accomplish that goal.

No American should be denied the right to religious liberty. With the passage of the Religious Liberty Protection Act, that right will once again be protected in a manner consistent with the Supreme Court's rulings.

Thank you, Mr. Chairman. With that, I yield back the balance of my time.

Mr. NADLER. Thank you. I think I am going to give Professor Hamilton the opportunity to comment. I was just going to ask her to comment on the—on Mr. Stern's interpretation of the Commerce Clause in this connection. Do you think it is too expansive?

Ms. HAMILTON. It is twofold. It is much too expansive under the current Supreme Court's doctrine and the trend of its doctrine.

The second problem is that he has transformed every aspect of the First Amendment into a subject of the Commerce Clause. The Commerce Clause is an enumerated power. The First Amendment is a limitation on Congress. You cannot say that all the subjects of the First Amendment are now enumerated powers. Congress was not originally intended to have any authority in this field. That it has any authority is only if it is acting appropriately with respect to an enumerated power on a particular topic in which it is solving a national problem. That is not the blueprint for this.

Mr. NADLER. Or under the Enforcement Clause of the Fourteenth Amendment.

Ms. HAMILTON. Under the Enforcement Clause, which does not apply to Federal activities. It only applies to State activities, and there, only—as *Boerne v. Flores* says, only if you are enforcing what would be unconstitutional activity.

Mr. SCHAERR. Could I respond to that, the question as to the scope of the commerce power?

The most recent and somewhat controversial decision in that area, as the panel knows, is the—*is the Lopez case*, which said that Congress may regulate under the commerce power not in just one circumstance but in three different kinds of circumstances.

First of all, the Court said Congress may regulate the use of the channels of interstate commerce. That is not what we have here. Second, they said Congress is empowered to regulate and protect the instrumentalities of interstate commerce. Again, that is not what we have here.

But the third category is the key one. They said, finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

So I think Mr. Stern's interpretation of the commerce power is exactly right. Even under the *Lopez* decision, which was viewed as somewhat of a restriction on the scope of Congress' commerce power, the Supreme Court has clearly indicated that this kind of legislation, just like traditional civil rights legislation, is still within Congress' power under the commerce—under the Commerce Clause.

Mr. NADLER. Thank you.

Let me ask you this, Professor Hamilton: In your testimony on page 3, you state that RLPA's intervention in local land use law would set the pace for the most expansive invasion of State and local government authority in history. That is a quote.

I have two questions. Doesn't this somewhat overstate the case? I mean, you have got statutes like the Clean Water Act, the Coastal Barriers Resources Act already intervening in what might be built where. And second, in *Boerne*, the Court made clear that where a factual record of free exercise violations exist, Courts may act using the—Congress, rather, may act using its section 5 Fourteenth Amendment power to craft a remedy.

And in your letter to me of November of last year, you say, quote, if after due consideration Congress were able to identify an arena in which religious conduct is subject to or is highly likely to be subject to unconstitutional burdens, Congress would have the power to enact laws for the purpose of enforcing the Fourteenth Amendment's due process clause.

So the question in the case of zoning is, where we have ample evidence of religion, of religion per se or particular religions, being singled out for discriminatory treatment under local zoning processes, is there any reason by reaching down to local zoning is an inappropriate use of our section 5 powers? And my follow-up question on that is if we have such evidence, do we have to have that evidence in individual cases, or is a nationwide pattern sufficient?

Ms. HAMILTON. It is my view that you need persuasive evidence of a nationwide pattern of discrimination, but let's be careful about what we mean by discrimination.

Discriminatory impact would not be sufficient. And as I understand most of the studies that I have seen on this issue, that is all that has been proven, that churches are disproportionately more likely to be affected. That does not prove discrimination. The free exercise clause, according to the Supreme Court, protects against especially discrimination which is targeting of a specific religion.

Mr. NADLER. Especially or only?

Ms. HAMILTON. Especially. The *Smith* decision is much more complex than it has been portrayed in hearings before this body. The *Smith* decision protects the free exercise of religion in a variety of contexts that have not been played out in the courts because RFRA was in the courts instead. Now that RFRA is no longer in the courts, we will see how the various exceptions to the generally applicable rule play out.

So the answer is, you will need fairly persuasive evidence that there is a national practice of discrimination which amounts to targeting of particular religions. I have not seen any scholarly studies that support that claim. I have heard particular anecdotal claims that it happens in particular communities, but I have to tell you, I have received hundreds of phone calls, since I started the RFRA litigation several years ago, from various zoning activities. I have yet to have one which involved real discrimination. Most of them involve neighborhoods which are trying to find ways to work out the conflict between a church that is too large and the neighborhood is trying to exist as a neighborhood.

Mr. CANADY. The gentleman's time has expired. The gentleman will have 5 additional minutes.

Mr. NADLER. Thank you.

Professor Laycock, we have been told that there is no precedent for the use of the least restrictive alternative standards. Didn't the

Supreme Court employ that standard in the 1981 case of *Thomas v. Review Board*, and in what context?

Mr. LAYCOCK. *Thomas v. Review Board* was an unemployment compensation case. Chief Justice Burger for, I think, seven Justices used the exact language of "least restrictive means" to summarize the Court's cases, and very similar language appears in the *Sherbert* case and the *Yoder* case, and those quotations are in a letter to Mr. Scott and the sponsors, and I will—with permission, I will have that letter entered into the record.

Mr. NADLER. Thank you. I have another question for you, and then for perhaps Professor Hamilton to comment after you, sir.

The bill has a blanket waiver of State sovereign immunity under the Eleventh Amendment. Can we do this after *Seminole*, and if so, how is what we are doing in RLPAs distinguishable from *Seminole* and its progeny? And here I am thinking of a number of appellate court decisions which have invalidated section 106 of the Bankruptcy Code, and those decisions are causing all sorts of problems around the country.

What is our constitutional basis, given the case law, for waiving the Eleventh Amendment here?

Mr. LAYCOCK. The case law is *Fitzpatrick v. Bitzer*, and it is reaffirmed in *Seminole Tribe*. There is a lot of litigation going around the country, and the question in every case is was this statute, which attempts to override the immunity of States, enacted to enforce the Fourteenth Amendment, or was it only enacted under an Article I power?

Everyone agrees that if it is enacted to enforce the Fourteenth Amendment, the override of immunity is valid. If it is a Commerce Clause statute, the override of immunity is not valid.

It is often unclear which power Congress is using because it didn't matter before *Seminole Tribe*. Now it matters, but it is clear what the rule is.

Mr. NADLER. Well, then I am confused. Given what the Supreme Court unfortunately said in *Boerne*, which is that our section 5 power is enforcement, not interpretation, how would—wouldn't the Court hold that given the fact that our sovereign immunity provision is not—is not based on the—premised on the Commerce or Spending Clause, but stands independently, wouldn't the Court almost inevitably hold that the sovereign immunity provision therefore falls squarely by itself on section 5 of the Fourteenth Amendment, which the Court in *Boerne* said can't be used for that purpose?

Mr. LAYCOCK. No. The sovereign immunity override applies only to claims under section 3. Section 3, we believe, is a section to enforce the Fourteenth Amendment. We believe the hearing record is strong enough to support that. If the Court disagrees with us, if it strikes down section 3, the immunity override will go with it. But the immunity override is fine if section 3 is constitutional, and I believe it is. So the question is about section 3.

Mr. NADLER. Okay. Could Professor Hamilton comment on the same thing? I would assume you agree with Professor Laycock.

Ms. HAMILTON. Not exactly. The answer, I think, is complicated because I think the Court is in the process of working out its Elev-

enth Amendment jurisprudence and is moving toward increasingly more conservative positions.

I think that if, in fact, that provision only applies to section 3, which I don't think is absolutely clear, but if that is true, then Professor Laycock's reasoning is probably correct.

But let me add one more thing, and that is, I will just point you to page 2 of my testimony explaining why the least restrictive means test was not the test before 1990. The Supreme Court says so in the *Boerne* decision at page 7121. So I don't think we need to talk about cases before the *Boerne* decision when the Court has already said something different.

Mr. STERN. The Supreme Court in *Boerne* also cited *Gobitis* without noting it had been overruled.

Mr. NADLER. Also cited what?

Mr. STERN. The Supreme Court, in *Employment Division v. Smith* also cited *Gobitis* without bothering to note that it had been explicitly overruled. I wouldn't take very seriously about what Justice Scalia said about what the law was or was not before he wrote his opinion in *Employment Division v. Smith*.

I would also, if I may, like to pick up on something that Professor Hamilton said is the standard for proving discrimination. She referred to scholarly studies of a nationwide pattern of an intentional effort to single out a single church. In the first place, there is nothing in any section 5 case that ever refers to scholarly opinions. And to the best of my knowledge, Congress has never used scholarly opinions as a basis for legislating before.

The 1982 Voting Rights Act was almost entirely anecdotal and one-sided, I might add, but it was entirely anecdotal.

Secondly, there is no requirement that a particular church be singled out. I just got finished telling a story about my town. I have been present when zoning officials have said, we don't want those people in because they are the people in the next town and we don't want them. And others have told those stories. You are going to hear more stories about that later today.

I don't know what more you need. To say as Professor Hamilton does, that there has not been any showing of it is to stick your head in the sand. Every time somebody shows you evidence of it, you say that is not enough, or I don't believe that story, or it is not proven. And Congress can't legislate that way.

Mr. EISGRUBER. Can I speak to that point, please?

Mr. CANADY. We are going to have a second—

Mr. NADLER. A second round?

Mr. CANADY [continuing]. Round, yes.

Mr. NADLER. Okay.

Mr. CANADY. So I will now recognize myself to conclude the first round.

Let me start off by asking about a related issue. As has been mentioned, efforts are under way in various States to enact State RFRAs.

Professor Hamilton and Professor Eisgruber, do you believe that the State RFRAs are constitutional?

Mr. EISGRUBER. No, I don't believe that they are constitutional. One of the objections that we set forth in our testimony is related

to Establishment Clause concerns and follows the concerns articulated expressly by Justice Stevens in the *City of Boerne* case.

I think it is perfectly reasonable and desirable for both Congress and State legislatures to protect against incidents of insensitivity to religious interests, as this body has done before and as State legislatures have done before. But unfortunately, the model of the compelling State interest test, which has been the heart of the problem in both *Smith* and *Boerne*, has been copied in these statutes, and I think it creates serious constitutional problems and serious policy problems.

Mr. CANADY. What is the serious constitutional problem with the State doing that?

Mr. EISGRUBER. The serious constitutional problem is along the lines I mentioned earlier with the greenbelt example. But the example that Justice Stevens gave in *City of Boerne* may be equally good. As he said, if there is a historic preservation ordinance, it would equally prevent the remodeling of a church or the remodeling of a private school or the remodeling of any other charitable enterprise that might be taking place within that historic preservation district. By exempting churches and only churches from the strictures of zoning laws, one doesn't create a remedy for discrimination. What one creates is a special privilege. And that is unconstitutional under the Establishment Clause.

Now, I should say here that I say with great confidence that I think the Commerce Clause and spending power arguments here would fail in the Court. The Establishment Clause issue is a bit harder. I agree with Professor Laycock that there are multiple precedents on this, *Corporation of Presiding Bishops v. Amos*, *Thornton v. Caldor* and *Texas Monthly v. Bullock*, and the trick is reconciling those three. I think the reconciliation of those three depends upon an argument about what makes sense and can't be somehow derived simply from what the Court has said thus far.

Mr. CANADY. Professor Hamilton.

Ms. HAMILTON. There are two questions in each of the States. One of them is whether or not there is a violation of the Federal Constitution. There is likely, in my view, an Establishment Clause problem, but I don't think that is a definite.

I think the second question is whether or not there is a violation of the State constitution. For example, many State constitutions have stronger Separation of Powers requirements than does the Federal Constitution.

Mr. NADLER. Separation of Powers or Establishment provisions?

Ms. HAMILTON. Separation of Powers under the State constitution, where there are many States that have provisions that require that the judiciary and the legislative branch do not overlap at all, unlike the Federal Government where more overlap is permitted. So the State constitutions themselves present particular problems.

What is interesting about what is happening in the States right now is that each of the States has turned into a laboratory for a mini-RFRA. The State proposals are now being subjected to exemptions, because discussion has started with the interests that are being affected. In Florida there was a debate about whether or not the prisons ought to be exempted. In California, it looks to me like

a fight to the death over whether or not the antidiscrimination laws will trump the mini-RFRA or the mini-RFRA will trump the antidiscrimination laws.

So what is happening in states is the interests that weren't tapped in the RFRA hearings are now being tapped.

Mr. CANADY. Okay. Let me give an example that has been posited by Professor Stephen Gey, that's G-E-Y. This is the example. It is the case of a female student whose religion does not permit her to bare her legs in public, but is compelled to attend gym class where, for aesthetic reasons, the students are required to wear shorts.

Now, as I understand it, there are some particular religious groups that do, in fact, have problems with allowing members of the group to wear shorts in gym class or in any other context.

Now, Professor Gey says that if an effort were made to accommodate that religious belief, to give the young lady a dispensation from having to wear shorts in gym class, that it would not be permissible. And he says, by ceding authority over the objecting student to the higher religious authority, the school board would subjugate democratic control of a particular policy area to a nondemocratic extrahuman force. That's the close of the quotation.

And I will give myself 5 more minutes.

Let me ask you this: Do you think there is a problem with the school authorities accommodating a student in this context on the basis of her religious beliefs? Professor Eisgruber first.

Mr. EISGRUBER. No, I don't believe it is an Establishment Clause problem. I believe it is affirmatively desirable that she be accommodated. Indeed, I think that it is quite possible, if we fill out the facts of the case, that this may be a justiciable issue under the constitutional law as it stands after *Smith*, and I would be comfortable arguing under the First Amendment that this student ought to be accommodated.

Let me mention to you a case from the Northern District of New Jersey, which I believe is currently on appeal to the Third Circuit, where the court vindicated a claim of this kind. There was a police officer in the Newark Police Department who was a practitioner of the Islamic faith and wanted to wear a beard. The Newark Police Department said, our officers have to be clean-shaven.

The officers went to court saying that their religious interests were being burdened, and the court very sensibly pointed out that other kinds of interests were accommodated within the Newark Police Department rules. So, for example, officers who developed a skin rash if they shaved were permitted to wear beards for that reason, and the court said, quite sensibly, that religious interests ought not to be treated worse.

I think the police officers there are in the same position as the student you described. Accommodating that kind of interest isn't by any means subordinating the law of the State to a higher law by some external authority. What it is doing is accommodating interests in the same way we do for persons of all variety, and we ought to do that.

Mr. CANADY. Professor Hamilton.

Ms. HAMILTON. No, that is not a problem. And I think Justice Scalia made it absolutely clear in *Smith* that it is not a problem. In general, he said, generally applicable—

Mr. CANADY. Let me ask you this: Do you think Justice Stevens would think that might be a problem?

Ms. HAMILTON. Justice Stevens—how would you ever predict what Justice Stevens would do? I am not sure.

Mr. STERN. Because he said so in *Goldman*.

Ms. HAMILTON. Well, I think that—

Mr. STERN. We don't have to predict it. He said so. The argument was presented in the context of military uniform regulation, and Justice Stevens said that the military regulation bearing the wearing of skullcaps had to be upheld because otherwise some people got to wear skullcaps, and others whose religious garb was more ostentatious or more visible, could not. And he said that the only way to keep the government neutral about religion was to let the government enforce its rules as they were written without any exception for religion.

Now, that means—and that means, unless you have a rule of law that is entirely episodic, that this girl in this school has to wear the uniform that everybody else insists on, and there is lower case law to that effect, before the free exercise clause got taken seriously. It was an Alabama case.

Ms. HAMILTON. Now wait a minute, wait a minute.

Mr. CANADY. But you are assuming that his future actions could be predicted by his past actions.

Ms. HAMILTON. Right.

Mr. CANADY. In certain other contexts, when it comes to Justice Stevens, that is not accurate.

Mr. STERN. I am sorry for taking Justice Stevens seriously.

Ms. HAMILTON. I think that is some danger.

Mr. EISGRUBER. I have to reserve time to respond, as a former law clerk to Justice Stevens.

Ms. HAMILTON. The *Smith* decision is much more recent in which Justice Stevens joined in the opinion that said that accommodation from laws of general application should be left to the democratic process and to local control. This kind of accommodation, I don't think, poses any problem.

There is a very good example in the State of California of how the process might work under the *Smith* world, if it ever is permitted to prevail. There was a widely publicized debate, about 3 to 4 years ago, on whether or not Sikh school children should be permitted to wear Kirpan (knives) in the public schools. The legislature widely debated it. It was discussed in the press. It was discussed among the people, and it was eventually voted down as being against the public interest. It is an example of the fact that these sorts of issues are capable of being intelligently discussed by people who are going to be affected by those particular kinds of rules.

Mr. EISGRUBER. May I say one thing about the Stevens' ruling?

Mr. CANADY. I am sorry. There is one other thing I want to ask, and we are going to have a second round so we will have an opportunity for you to say some more then.

Let me ask you about Title VI under the 1964 Civil Rights Act. Why is what this bill proposes to do substantially different than what Title VI does, focusing just on the spending authority that is—provisions that are contained in the bill?

Ms. HAMILTON. This bill institutes a standard that the Supreme Court has not used previously with respect to the Free Exercise Clause, in every arena where any Federal financial assistance is provided. That doesn't strike me as Title VI. Title VI is much more limited. This, once again, is the kind of broad brush approach that RFRA suffered from.

Mr. EISGRUBER. I think my position is a bit different from Professor Hamilton's position about this. I do think the compelling State interest test is one that the Court has used and continues to use with respect to some aspects of the Free Exercise Clause, in particular the *Lukumi Babalu Aye* case that the Court decided involving actual discrimination against religion.

I think the crucial distinction between Title VI and this exercise of the spending power is that Title VI is an antidiscrimination law, and because of the use of the compelling State interest test under these circumstances, this can't plausibly be regarded as an antidiscrimination law. That was the Court's message about congruence and proportion in *Boerne*, and that is what distinguishes RLPA from Title VI.

Mr. CANADY. But what does antidiscrimination have to do with the commerce—with the spending power?

Mr. EISGRUBER. It has something to do with the spending power because one reason that no question ever arises about the constitutionality of Title VI is that Congress has plenty of power to do this under various headings, including, I think, section 5 of the Fourteenth Amendment. Here the claim is—

Mr. CANADY. Well, all the Congress didn't think that.

Mr. BERG. If I may, that is not entirely true. There are discriminatory impact rules in Title VI that wouldn't be justified by the Fourteenth Amendment on their own, and those would fall if Title VI were interpreted the way Professor Eisgruber suggests.

Mr. EISGRUBER. As I said at the start of my remarks, I take a generous view of Congressional power and believe that the Court has done so in *Boerne*. And I think, as Justice Kennedy explicitly said, RFRA could not be understood as a discriminatory impact statute. I think the explanation for what is going on, if one is talking about laws that redress discriminatory impact, is that such laws may draw upon two sources; one, section 5 of the Fourteenth Amendment, and, second, the Commerce Clause cases where anti-discrimination has been understood as a reasonable way to open up markets.

The difference in this statute is that Congress is saying, with regard to the Spending Clause components, that we have no other source of authority besides the spending power, and we are going to use that power to bootstrap an effort to regulate with regard to religious conduct.

Mr. LAYCOCK. Even if that is a fair characterization of the statute, it is absolutely fine. All of this discussion has taken the focus in *Boerne*, that it has to be an antidiscrimination statute if it is enforcing the Fourteenth Amendment, and moved that focus, utterly

without basis, to Article I where Congress can use its powers for whatever policy reasons make sense in its judgment. The Court has said over and over that Congress doesn't have to convince us that an Article I statute; policy is wise. It has to convince us that there is an affect on commerce. It has to convince us that the condition is reasonably attached to the Federal funds. It doesn't have to be an antidiscrimination law. I think it is an antidiscrimination law in some contexts, in some of its applications, but it doesn't have to be.

Mr. CANADY. My time has expired.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Schaerr, you mentioned the *Lopez* decision.

Mr. SCHAERR. Yes.

Mr. SCOTT. Guns were clearly within interstate commerce, but this regulation of guns had nothing to do with interstate commerce.

Mr. SCHAERR. Well, it had no substantial affect on interstate commerce, that is, possession of guns on school property; that was what the Court concluded.

Mr. SCOTT. Now, how do we get—use the Commerce Clause to get to local land use regulation under that—under that theory?

Mr. SCHAERR. The bill doesn't try to rely on the Commerce Clause with regard to land use regulations. It relies entirely on section 5 of the Fourteenth Amendment.

Mr. STERN. I think you can rely on the Commerce Clause to deal with zoning issues. I am not sure you have to—it is clear that the bill relies primarily on section 5 for the zoning statutes. However, given the difficulty that the discretionary power of zoning has created for churches in locating in new areas and following their members, given, the impact on the construction trades and the other trades and simply the ability of people to move where they want, because if their church isn't there, they are not moving there, I think there is a fairly direct connection with the commerce power, just as there was with regard to the public accommodation statutes of the 1964 Civil Rights Act.

If blacks from the North have a job but they can't go to the South because they can't get a hotel room and they can't do the business, they are not going to be hired in the North. And that had a deleterious effect on commerce, and that is the basis on which the Supreme Court based Title II of the Public Accommodations Acts of and the 1964 Civil Rights Act.

Mr. SCOTT. And the Court in *Boerne* and other decisions went to great lengths to show that there was affirmative bigotry that motivated that behavior, and went to great lengths to say that the record was absent of such a record on religious bigotry.

Mr. STERN. Well, it is true that the last time around, relying on some earlier statements of the Supreme Court, we did not make the detailed record perhaps that we should have.

I have sat at zoning hearings where I represented a small storefront synagogue that wanted to move into a white town bordering on a largely black town. One of the commissioners said that if we allow this group in, we will be the next Paterson, which is the largely black town.

I said to him that I thought that was an outrageous statement, and a zoning decision should not be based on bigotry of that sort. He then took offense that I was calling him an anti-Semite. I said, excuse me. I didn't call you an anti-Semite; I called you a racist.

That goes on. There is a case in the Second Circuit in which somebody incorporated a town because they didn't want Orthodox Jews moving into the area. We have a similar dispute in Ohio. The committee heard testimony about California.

Mr. SCOTT. Is this bigotry aimed within different—at a specific religion?

Mr. STERN. No, it is aimed at whatever religion is coming into a community that is not popular and not wanted. I have been called by Jewish—

Mr. SCOTT. Wait a minute. But you are talking about minority religions, so you are treating one religion different from another religion?

Mr. STERN. No, I am talking about whatever religion—there is no majority religion in this country. There are communities where there is a majority religion. I get calls from Jewish communities in Westchester saying, in all horror, the Church of Latter Day Saints wants to come into our community. What can we do to keep them out?

The same communities have had litigation earlier when—

Mr. SCOTT. Well, again, my point is that that is discrimination of one religion against another; not a national trend, but within a locality discriminating one from another.

Mr. STERN. That is right. There is no national picked-on church.

Mr. SCOTT. Can't an antidiscrimination law deal with that—

Mr. STERN. Yes, because in each instance—

Mr. SCOTT [continuing]. Rather than a law that creates a right for religion generally?

Mr. STERN. Title VII of the 1964 Civil Rights Act bans national origin discrimination. There is no finding that any particular national origin was particularly worse off than others when Congress passed the law.

If you look at the law, you will find all sorts of people have brought national origins claims, depending where you are in the country and who your employer is, and I think the same is true here. You will find different religious groups are treated differently in different communities, and Congress can find that problem is serious enough to treat in an omnibus fashion.

Mr. LAYCOCK. I think Mr. Stern misunderstood the last question. In principle many of these cases can be dealt with in one-on-one antidiscrimination suits. The difficulty with that is that the standards in land use law are so vague, so discretionary, that it is almost impossible to prove in any one case that the ultimate reason for the decision was hostility to the group or its religion and not some vague land use consideration.

But this committee has before it both empirical studies and anecdotal evidence, and when you look at the whole pattern of cases, it is much easier to draw that inference. Then you have to draft a prophylactic statute to enable it to be dealt with one case at a time.

Mr. CANADY. The gentleman's time has expired. The gentleman will have 5 additional minutes.

Ms. HAMILTON. Representative Scott, it seems that when you ask about the Commerce and the Spending Clauses that you are accurately predicting the next federalism decision by the Supreme Court. A good example would be our chairman's example, the girl in the gym class in the public school in a small town in Alabama who doesn't want to reveal her legs. Now, that school is probably taking Federal funds of some sort. It is a public school. It would be covered by the plain language of the statute. Is there commerce power to regulate what the local school board does with respect to that particular student?

Mr. CANADY. Would you yield?

Mr. SCOTT. Go ahead.

Mr. CANADY. The issue is not commerce, but spending authority.

Ms. HAMILTON. The question is either one. Is there Commerce Clause power or, is there spending power there? Both are attempting to be—

Mr. SCOTT. But the fact that you have spending, the proscription has to relate to the spending, and in this case it would have nothing to do with spending.

Ms. HAMILTON. There is no nexus on spending. Now you are with commerce.

Mr. LAYCOCK. Of course there is a nexus to spending. If you drive her out of the school, she does not benefit from the Federal program to aid that school. That is the nexus here.

Mr. SCHAERR. And they would also be using Federal spending effectively to engage in conduct that is harmful to religion.

Mr. STERN. And that is exactly the basis the Equal Access Act—the Equal Access Act relies precisely on that power. Federal dollars flow to a school, not to the extracurricular club activities, but to the school, and the Supreme Court more or less unanimously upheld the constitutionality of that act.

Mr. SCHAERR. If you want Federal funding, you have to respect religious freedom.

Mr. BERG. I think there is a little bit of a tendency here to throw up as many objections as possible against the act, some of which are frivolous, in the hope that enough of those things will stick to strike it down. There are certainly some questions of the reach of the commerce power under the act. The act deals with those by saying that it is not going to apply where the Court would not view this as a regulation of commerce, but that doesn't speak to the other issues.

Could I say one thing about the relationship again between the antidiscrimination point and this situation. I think what Professor Eisgruber and Professor Hamilton are saying would doom the Civil Rights Act of 1964 because what they are saying is that there is really a big difference between antidiscrimination and the protection of religious freedom from generally applicable laws.

Well, if you look at the Civil Rights Act of 1964, it was about the difference between discrimination by the government and discrimination by private businesses. I can't think of a more fundamental division than between those two concepts. And the Court in the 1883 case that Congress had to deal with when they wrote the

Civil Rights Act said that there is a great difference between private discrimination and public discrimination.

You might have said in 1964 that this is a wholly different situation, and Congress, when attempting to legislate, would be struck down by the Court.

Mr. SCOTT. The Court went to great lengths to differentiate the racial discrimination laws with referendum. Why wouldn't they do that again?

Mr. BERG. They distinguished racial discrimination from effects of religious practice because under section 5 they were looking for discriminatory law.

Under the Commerce Clause they—Congress is not limited to legislating against discriminatory laws.

Mr. SCOTT. Let me try to get to another issue because it applied to the discussion about the gym clothes.

Is there a difference between the right to be accommodated and permissible accommodation; whether or not you have the right to give her an exception, or whether she has a right to be excepted?

Mr. EISGRUBER. I would draw the following distinction between the way the "right to accommodate" and "permissive accommodation" are sometimes used. That is even after the decision in *Smith*, Free Exercise doctrine requires government, regardless of whether or not legislation of this sort is passed, to make accommodation in some cases. I think that is the case with regard to the young woman in the hypothetical with her school clothes. I also think that there are distances of permissive accommodation in which legislatures look for an area in which problems are arising and write legislation which creates a need for accommodation or a right to accommodation enforceable in the courts which would not otherwise exist.

This has been—this is important, I think, actually to the case that was discussed before regarding Justice Stevens' views regarding yarmulkes in the military. Justice Stevens takes a very narrow view of what sorts of accommodations ought to be available as a right, and in the *Goldman* case he said he was very uncomfortable with the idea that judges would come in and decide, for example, which sorts of students should be exempted from which courses in schools or which sorts of military officers should be exempted from which uniform regulations.

But he has also clarified in *United States v. Lee* that his primary concern here is with equality, and I think he would uphold the law that Congress quite rightly passed in response to *Goldman v. Weinberger* which provides for an accommodation for individuals in those circumstances.

Mr. STERN. If your concern is equality, the worst way to deal with accommodation is case-by-case. Case-by-case means that those religious groups that are powerful enough and alert enough to get an accommodation get one, and those groups which are not well-organized or very unpopular will not get one.

You will not be able to get an accommodation of the *Santeria* in southern Florida, they are too unpopular. RLPAs would allow them the same right to have their claims tested as the most powerful group in south Florida. The case-to-case approach is the least consistent with equality of any of the approaches.

Mr. SCOTT. The issue of proportionality, what kinds of—if used in the Commerce Clause, which I think it has been described if we have gone too far, then it is not covered, so therefore you didn't go too far, what is covered and not covered in the context of proportionality to the response? The Supreme Court went to great lengths to say that RFRA was out of proportion to the problem. It covered too much. What is covered and not covered when you use the Commerce Clause?

Mr. BERG. Again, I think we have to start by saying that proportionality in *Boerne* is a section 5 concept. It has to be proportionate to the Court's conception of the constitutional right being enforced. The Court believes that it has primary authority under constitutional rights. It had never believed that the courts have authority over regulating commerce.

Congress doesn't have to be proportionate to the Court's conception of the problem when it is dealing with the Commerce Clause.

Mr. EISGRUBER. It did insist in *Lopez* that there be a nexus requirement that had to be met in cases where the commerce power was invoked.

Mr. BERG. There is a nexus requirement. It is not proportionality to a constitutional violation, it is substantial effect on commerce. That is the standard. And that standard obviously is to some extent case by case.

If the Commerce Clause is interpreted as generously here as it has been in the Federal criminal laws, for example, you cause a \$300 expenditure not to happen, and you have an impact on commerce because it might not otherwise have been spent.

If they interpreted it less narrowly, we may affect only or primarily the rights of religious institutions. When the church is prevented from operating in the jurisdiction by exclusionary lands use regulation, for example, the impact on commerce is clear. In the church employment cases, the connection to commerce is clear. Nearly all employment relationships are regulated by law under the Commerce Clause. So there are some clear applications.

There are number of debatable applications, and there probably will be litigation about those, and that is expected, but that is line-drawing litigation, it is about where the lines get drawn, not really about validity of the bill.

Mr. STERN. That is the plaintiff's burden in every case to demonstrate a nexus or substantial effect on interstate commerce.

Ms. HAMILTON. Which is to say that this bill requires a case-by-case determination of Congress' power in every case involving religious conduct.

Mr. SCOTT. Could I just make a comment? When we pass the law, we would like to have some idea what we are covering and what we are not covering, and this response is somewhat difficult.

Mr. BERG. I think the difficulty comes from the fear that Professor Hamilton—

Mr. SCOTT. If I may just finished. The chairman has extended my time twice. Thank you. I'm sorry.

Mr. CANADY. The gentleman's time has expired. The gentleman from New York, Mr. Nadler is recognized.

Mr. NADLER. I think I detected a slight area of distance between Professor Eisgruber and Professor Hamilton on the question of our young lady who doesn't wish to bare her legs in gym class.

Professor Eisgruber said based on religious discrimination, you probably have constitutional authority to deal with that; and Professor Hamilton said that is the kind of subject that is necessary for legislative adjudication, presuming that we don't have authority to deal with that.

Professor Hamilton, what disturbs me about the *Smith* decision and the *City of Boerne* decision, I want to quote Justice Jackson in the *West Virginia Board of Education v. Barnett*, one of the most famous quotes, and I am sure that you know it by heart before I read it.

Mr. STERN. Robert, not Jesse.

Mr. NADLER. I said "Justice."

Mr. STERN. It is your New York accent.

Mr. NADLER. "The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote. They depend on the outcome of no elections."

That is the crux of everything that we are discussing here, and what you are saying is that young lady's rights depend on the outcome of local elections.

Ms. HAMILTON. The way that the Court's doctrine has developed, there is not a requirement of mandatory accommodation from generally applicable laws unless you can prove discrimination or targeting. That is simply where the Court's jurisprudence is right now.

But I don't think that we should forget that religious belief and secular belief are absolutely protected. Government has no authority to dictate belief. What we are talking about here is only conduct.

Mr. NADLER. But what you are saying is that when someone has a religious belief, that girl presumably is going to be expelled from the school, and she doesn't want to be expelled from the school and deprived of an education and perhaps subject her parents to prosecution for violation of the State's mandatory attendance laws. She has to violate her religion.

Are you telling us we have no constitutional way of dealing with such a fundamental conflict to protect religious freedom in this country?

Ms. HAMILTON. I am telling you that there are generally applicable neutral laws that do not have to give way to religion in any particular circumstance. That is what the Supreme Court has said the Constitution requires.

Mr. NADLER. You are saying that the hundred-year-old decision in *Reynolds* that belief only is protected, we are back to that?

Ms. HAMILTON. No. *Reynolds* said that conduct can be regulated at will.

Smith said conduct can be regulated if you can prove the law is generally applicable, if you can prove it is neutral, if it is not subject to individualized discretionary decision-making, if it doesn't involve hybrid rights, et cetera. *Smith* is a very complex decision, and it does not deserve to be oversimplified and responded to on the basis of a misinterpretation.

Mr. STERN. We are back to *Reynolds* if you have a better lawyer is what Professor Hamilton means.

Mr. NADLER. Professor Laycock, as a follow-up, Justice Breyer said during the oral argument in *Boerne*, "Let me take what you are saying and put in it this linguistic framework. Congress passed this prophylactically to prevent the violation, and now fill in the blank, what violation?"

Solicitor General Dellinger responded, "Where different religious denominations are treated differently, there is no question before, during or after *Smith* that that violates the Constitution. It may be difficult to remedy in a case-by-case judicial approach where you are trying to prove it, but it clearly is a constitutional violation if an exemption is made for the Methodist Church and an exemption is not made for Santeria."

This relates directly to the legislative process. For example, the House recently approved amendments to the Bankruptcy Code which allowed for religious and other charitable giving, both prepetition and during individual plan of reorganization, the so-called tithing bill. The bill provides a 15 percent safe harbor for prepetition tithes in which the debtor need not demonstrate a prior pattern of giving. Why 15 percent when the Scripture says 10 percent? Well, because the beliefs and practices of the Mormon Church were adequately protected when the chairman of the Judiciary Subcommittee in the Senate, who comes from Utah, insisted on that. And there is nothing wrong with having a chairman being aware of a particular religion and ensuring its protection in statute. That is not the problem.

The problem is that not all denominations are similarly situated, and not all of them have the chairman of the Judiciary Committee being well aware and solicitous of their interests. They can't get a hearing for their concerns. They may not have a lobbyist in Washington to alert them that they need to speak out.

This sort of retail form of free exercise protection runs a real risk of omission, even with legislatures of the best of will. The real question is wasn't Dellinger right, and how do we assert that clear First Amendment violation under the *Smith* rules providing a basis for protection under our section 5 powers?

Mr. BERG. I think Dellinger was clearly right when one denomination gets an exemption or gets protected and a different faith or denomination doesn't, that is a *Smith* violation.

The problem is how do you prove it. One case at a time. Sometimes you can get the evidence, sometimes you can prove it. It is very difficult to do.

Mr. CANADY. The gentleman's time has expired. The gentleman will have 5 additional minutes.

Mr. NADLER. Thank you.

Mr. BERG. We have seen plenty of examples of that kind of thing. It is local. It does depend on the political influence of different faith

groups and different communities, although it is a bit of an exaggeration to say there is no national trend. There is in the record of an earlier hearing Gallup Poll data: 45 percent of the American people express hostility to minority religions and evangelicals, and 60 some percent or 80 some percent said that they wouldn't want to live next door to one.

There is—there is substantial evidence of very widespread hostility to people who take their religion more seriously than the norm. When rules are discretionary, when standards are vague as to in land use or certainly in the legislative process where you have discretion to pass a bill or not pass a bill, that kind of hostility matters.

Mr. NADLER. I agree with you. On the radio in New York there was a report. It seems that some schoolteacher in the Bronx 2 days ago or a day ago led the class in a prayer to Jesus Christ and explained to all of the third-grade children that they ought to believe in Jesus Christ, and she was then fired for this. She was then fired as an improper exercise. And this is creating some controversy, and one individual citizen was quoted—not quoted, it was recorded, I heard him saying, “This is terrible. She shouldn't be precluded from praying like that in school. It is terrible she was fired.”

And the interviewer said, “What if she prayed to Allah?”

He said, “Oh, then she should be fired,” because that is not the right God.

Professor Laycock, is it the case that you need a broad rule because of the difficulty of proof of discrimination, and that, in fact, you can justify that broad rule constitutionally on that?

Mr. LAYCOCK. To the extent you are exercising section 5 power, you can justify the broad rule constitutionally to the extent that you have evidence of discrimination or lack of general applicability.

To the extent that you are exercising Article I power, spending and commerce, all of these concerns about how discrimination is hard to find and hard to prove are policy reasons why Congress should want to do this, but they are simply not necessary to the question of constitutional power. Congress can do it because it thinks it is sound policy, whether or not it thinks that there are lots of violations out there.

One thing about your example from the Bronx, the person who made the mistake of going public and saying that praying to Jesus is different than praying to Alla—he can also whisper that to his friend on the school board, or a hundred people can whisper it to their friend on the school board, and we will never know about it, and it will never be in the hearing record, and you will never prove what the real motive was. You know that sort of thing goes on all of the time.

Mr. NADLER. Thank you.

Let me ask Professor Hamilton, I assume from the gist of your testimony that if we think that it is wrong for the State to use its power to put someone such as that schoolgirl and her parents in a position of violating their conscience or their religion or violating the law, of dropping out of school, being prosecuted for violation of the compulsory attendance rules, our only recourse is to pass a constitutional amendment, because the First Amendment does not pre-

vent this and because Congress has no power to prevent that kind of abuse.

Ms. HAMILTON. *Smith* says Congress can decide to accommodate, which is what they decided to do after the *Smith* decision. They decided to accommodate those who used peyote in Native American services. It is not that Congress has no options. It is that you've got a limit on what you can do, and the limit is the Establishment Clause. You can only go so far.

Mr. NADLER. Everything that I have heard you say today in your arguments and in your written material is that Congress doesn't have the power to pass any kind of broad general rule that would place a limit on local legislative exercises that put people in that impossible situation unless the purpose of that legislative exercise was precisely to put people in that decision.

If the purpose was something else, if the purpose was to say kids should have bare legs in gym class and not be inhibited in making the 4-minute mile by long pants, if that is the purpose, it happens to put people in a fundamental problem such as I described a minute ago, we have no power to protect people from that problem.

Ms. HAMILTON. If you are asking me does Congress have the authority to engage in broad general lawmaking in the First Amendment arena, my answer is no.

Mr. NADLER. My last question is: Assuming, God forbid, that your constitutional interpretation is again upheld by the Supreme Court, why shouldn't we pass a constitutional amendment to provide this kind of protection?

Ms. HAMILTON. I will tell you why. I was at the annual convention of the American Atheists this weekend. It is the first time they have ever invited a believer.

I heard many stories of people who are leading lives of quiet desperation because they live in neighborhoods where the church on the weekends is so busy they can't drive through their neighborhoods or where their children are ostracized in the schools.

I don't think that we have talked about the full universe of American citizens. We have talked about certain minority religions that allegedly are subject to majority control. We have not talked about all of the civil liberties that are of interest here, and I don't think that anyone in this room has sufficient information to justify RLPA's alteration of the relationship between church and state across the board.

Mr. NADLER. May I have 2 more minutes?

Mr. CANADY. The gentleman will have 2 more minutes.

Mr. NADLER. Are you saying that if you pass legislation that would stand up—let's assume that it would stand up to scrutiny. If you pass legislation that would protect people from an unintended conflict between their fundamental conscientious rights—and the Supreme Court, bear in mind, in the conscientious objector cases said that it doesn't have to be an established religion or any religion, it can be a fundamental conscientious belief that is equivalent to that person of a religion, it doesn't have to be a religion. But if we were to say that we are going to protect people from being put in that impossible position, that that somehow burdens atheists or other people? And if so, how does it burden them? How does it burden an atheist or anyone else to say, I cannot be forced

to choose between—if I were a woman—baring my legs in class or violating my religion or wearing a yarmulke in the Army or in prison and violating my religion; how does it burden anybody to enable me to live with my conscience within the law?

Ms. HAMILTON. Because you are choosing a judicial standard that draws the boundary of power between a democratically-enacted law and a religious believer. The question in a zoning case is whether or not the people who have spoken through their representatives and enacted zoning laws are going to trump, or whether the religious believer is going to trump. This is truly a zero-sum game.

If you adjust the balance of power so that the religion has more power to defy the historical preservation law, you are going to make unhappy those who wanted a historical preservation law in the first instance.

There is not a single generally applicable law that you can name with that does not have that same characteristic. And let me give you the City of Boerne, Texas. In Boerne, Texas, the people saw each other every day walking up and down the street, and they were in great discord over whether or not the church should have the addition or not. There was going to be a winner or loser, and it depended on where the line of power was drawn between the two parties. There is always a loser if someone is, in fact, a winner. This is about power.

Mr. LAYCOCK. There is sometimes a loser. In the gym shorts case there is no loser if you accommodate that person, and even when there is a loser, it is often that zero sum. If there is some statute in place that enables the religious side to force the city to sit down and talk with it, in many of these cases we find out that there is a solution which minimizes the cost to each side. But you can't start that conversation if you have no legal rights.

Mr. CANADY. The gentleman's time has expired.

Mr. NADLER. May I have enough time for Professor Eisgruber to respond?

Mr. CANADY. Yes. The gentleman may have 1 additional minute.

Mr. EISGRUBER. As Representative Nadler suggested, I find myself in considerable disagreement with Professor Hamilton. I do think there is power within State legislatures and Congress to make reasonable accommodations for religious belief.

In response to your question, Representative Nadler, about where the hypothetical student that Representative Kennedy described could turn in the absence of RLPA, I think there are two kinds of answers, perhaps three, to keep in mind.

One, I think there is a strong claim under the Free Exercise Clause of the Constitution because we are dealing not with a neutral and generally applicable law, but rather with a discretionary regulation made by schools.

Mr. NADLER. If that were passed by the city council, that would be different, in your opinion?

Mr. EISGRUBER. I think it would work differently if there was a specific law passed by the city council.

Secondly, I think we should remember that this is not simply a matter of Congress to the rescue or no help. That is, our State and local governments are often involved in all sorts of claims that are raised that are ugly, and sometimes they behave poorly, but some-

times they behave very well, and we should keep in mind in particular our State supreme courts which often do a very good job.

I don't know what Mr. Stern says when his friends in Scarsdale call him about excluding churches from their neighborhoods. When I was consulted by a community in New York which wanted to exclude a religious group, what I told them, as I read the Constitution, churches and schools are exempt from the kinds of regulations that you want to apply. I don't think there is any constitutional argument against that, and I think you have to let them in.

The third thing I would say is it is not a choice even in Congress between RLPA and nothing. What Congress did to accommodate the special needs of the disabled, for example, was to enact a reasonable accommodation standard in the Americans with Disabilities Act. I think that has been a useful assistance to the rights of the disabled. I am not quite sure why this issue and this issue alone gets a different test, one that we haven't applied to the disparate impact of discrimination in the area of racial discrimination.

Mr. STERN. I think if you look at the handicap legislation, and certainly this is true of religious accommodation, where reasonable accommodation is the standard, that standard proves to be no standard at all.

That is the standard currently for prisoner complaints across the board with constitutional claims, and it is absolutely a useless standard because it has no teeth at all. It is easily evaded. Even the rule about the girl and the gym clothes is reasonable in terms of accidents or minimizing insurance cost, and you can be sure that school officials will assert those things and meet a standard of reasonableness.

I don't understand, I must say, how Professor Eisgruber thinks that the New York State constitutional rule exempting or greatly minimizing the zoning authority of local authorities over churches is consistent with the argument in his memorandum about the nonestablishment of religion. I think that those are two entirely inconsistent doctrines.

Mr. CANADY. The gentleman's additional additional time has expired, and I will now recognize myself.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. CANADY. I want to go back to the point that Professor Hamilton was making about the whole business of drawing lines and having winners and losers and part of the free flow of debate in communities.

An example that I thought of earlier when Mr. Nadler was listing some of the examples, he listed congressional action, and one which did not happen to be on his list was the Fair Housing Act. Under the Fair Housing Act, the Congress has acted to help ensure that people with handicaps are not—have an opportunity to have housing opportunities and that people are not discriminated on the basis of their familial status. Some of us may have differences of opinion about the proper scope of that Federal action, how much latitude should be given to the local governments, but all of us agree that there is a proper role for the Federal Government there.

Just listening to this whole discussion today, it is hard for me to understand why the Federal Government can use its power under the Commerce Clause in that context to vindicate the values

that are vindicated by congressional action, and the Congress would be excluded from using its power under the Commerce Clause and the spending power to protect the values related to religious liberty.

I understand the road we have been down with respect to section 5. I thought that was a good choice that in the eyes of the Supreme Court we were mistaken, but to say that that would now exclude us from making a comprehensive serious attempt to address the problems that exist when people face having their consciences coerced, when they face the coercive power of government, and they face either having to sacrifice their religious beliefs or comply with government, and they are put in the position of making that choice, for us to say that we are now going to be able to enter that arena in the same way that we have entered the arena pursuant to the spending power and the civil rights context just does not make sense to me.

If we can do what we have done under Title VI, and Title VII for that matter, of the 1964 Civil Rights Act, I believe that we can act to protect religious freedom in a way that is closely modeled on that statutory basis.

And I would just like to open it up to Professor Laycock and Berg and Mr. Schaerr to make any comments in response to the claims that have been made about the inadequacy of congressional power under the Commerce Clause and the spending authority to accomplish what we are attempting to accomplish in this legislation.

Mr. SCHAERR. I agree with your comments that there has been so much discussion about so many different kinds of potential constitutional objections to this legislation that one could get the false impression, and I think it is a false impression, that there is a big dark constitutional cloud hanging over this bill, but I really do not think that is true. When you take each of the arguments and you look at them closely and compare them with the Supreme Court's case law on those issues, and when you compare them with what Congress has done in other contexts, especially in the discrimination context, the arguments, in my view, just evaporate.

I think this legislation is constitutional and would have a very good chance of being upheld. And it also seems to me that it would be a tragedy to have a situation in which, for example, the commerce power and the spending power are used to pursue other values, many of which are very important, but not also to use those powers to protect religious freedom, which I think all of us would agree is certainly among the most important values that there are in our society.

Mr. BERG. I would second all of those things and ask or sort of comment again that the raising of lots and lots of different objections can give the impression that there is just no way that the bill can be constitutional, but a good portion of the objections that we have heard today I just think have very little basis. And while there are a couple of constitutional issues with respect to this bill as to how far it can go under the commerce power particularly, I view those as entirely different from the sort of question about whether Congress has power to act in this area at all.

Just to say a word about the religious liberty issues, I think we—

Mr. CANADY. My time has expired. I will give myself 5 additional minutes.

Mr. BERG. It seems to me that it stands religious liberty on its head to say, as we think about these two clauses in the Constitution of Free Exercise and nonestablishment, that the establishment provision is going to prevent Congress from taking any kind of action with respect to ensuring religious liberty.

The Free Exercise side of the First Amendment speaks more directly, it seems to me, to the issue of leaving religious believers alone, far more directly than the Establishment Clause speaks to that issue. The Establishment Clause speaks to tax support for religion. It speaks to government-sponsored religion. It is out of its place dramatically, it seems to me, when it is used to address the issue of whether religious exercise can be left free from legal restriction.

Mr. CANADY. Professor Laycock?

Mr. LAYCOCK. I agree with all of that, and I would emphasize a couple of other things.

Much of these objections, particularly Professor Hamilton's, are based on a bet that the Supreme Court is changing the rules. She said that they are interpreting congressional powers more narrowly. What is going to be the next *Lopez* and so forth.

Maybe the Supreme Court will change the rules, although I think they would have to change them very dramatically to erode the spending power and the commerce power so far that this bill would run into significant constitutional difficulty.

But I don't think Congress should be paralyzed by fears of what the Court might do in the future without any basis in its precedents from the past. I think if you look at what the Court has decided for the past 60 years, this bill is clearly within congressional power. And I think the hypothetical from Professor Gey that the chairman mentioned, about the girl in gym shorts, is very revealing as to where much of the objection to this kind of legislation ultimately starts from. It is mostly an academic objection, and from the American Atheist Society, and then it gets picked up by interest groups who come into conflict with religious groups.

You quoted Gey as saying that the problem with letting the girl wear long sweats instead of gym shorts is that it would subjugate democratic policy to her God. That is what this is about.

The objection to exempting burdened religious practices is about the ultimate supremacy of majoritarian control and imposing majoritarian secular values on every member of a religious minority group who has an objection. Sometimes, unfortunately, the conflict is unavoidable, and we have to impose those values because of the impact that the person is having on other people. But the gym shorts example puts it clear. There is no impact on anybody except forcing that girl to drop out of school or violate her conscience, and the academic claim is that her religion has to be subjugated to the democratic process. I think that is exactly what the First Amendment was intended to prevent. The Supreme Court now disagrees; it said you have a right to believe a religion, but no right to practice it. To the extent that Congress has power under Article I, it ought to restore the right to practice religion to the American people.

Mr. CANADY. Thank you, Professor.

I want to thank all of the members of this panel for your very helpful testimony. I think we have had a good cross-section of opinion on these very important issues. Each of you have made a significant contribution to the considerations of the subcommittee, and we thank you for taking the time to be with us today.

We will now go to our second panel.

Mr. CANADY. I want to thank the members of the second panel for joining us today. Our first witness on the second and concluding panel of today will be Mr. John Mauck. Mr. Mauck is an attorney with the law firm of Mauck, Bellande & Cheely in Chicago, Illinois. And I apologize to your partners if I have mispronounced their names.

Finally, we will hear from Professor Cole Durham of Brigham Young University Law School. We appreciate your participation in the hearing today.

We would ask that you do your best to summarize your testimony in 5 minutes or less. Without objection your full written statement will be made part of the permanent hearing record. Observing the proceedings thus far this morning, you will note that we are not strictly enforcing the 5-minute rule.

Again, we thank you.

Mr. Mauck.

STATEMENT OF JOHN MAUCK, ATTORNEY, MAUCK, BELLANDE & CHEELY, CHICAGO, IL

Mr. MAUCK. Thank you, Mr. Chairman. My practice has been involved in land use, so I would like to confine my testimony to the land use aspects of the bill before you.

Churches come in all sizes and shapes. You may be aware that there are megachurches now along with house churches, groups of 5 and 10 and 15 people that meet in homes and storefronts. Churches come in many sizes and shapes. They come also in many religious denominations, but there is an overlapping ethnic and racial aspect, churches that group along ethnic lines, such as Korean, Hispanic, Afro-Americans, Albanian Orthodox, and as we have been talking about the power to regulate, I think we should realize that this is substantially and often a racial and ethnic issue as well as a religious issue.

I am involved particularly in zoning applications for churches and would like to tell the committee about a number of times that churches have been discriminated against in attempts to obtain zoning permits.

I represented one Hispanic church that attempted to get a permit in a suburb of Chicago. The mayor told the city manager, "We don't want Spics in this town." The only reason that I know that is that the city manager went to his priest and asked what to do, and the priest said, "you are going to have to risk your job. What you are being asked to do is evil." The city manager came and told me and he lost his job about a week later.

In the Marquette Park area of Chicago, which is a traditionally white area where Martin Luther King marched and was pelted a number of years ago, there is a dividing line called Western Avenue. It is a commercial street. To the east of Western Avenue is

almost entirely Afro-American, and to the west is almost entirely Caucasian. Faith Cathedral, an Afro-American church, purchased a funeral parlor about 100 feet west of Western Avenue. It was not on the commercial area, but it abutted the commercial area and residential area. They planned to use this funeral parlor as a place of worship. It had adequate parking. It had a chapel. It was set up for the type of assembly use that churches need.

It was also the biggest crowd that I have ever seen at a zoning hearing in the city of Chicago. There were probably some 30 white people there from the community objecting. And the zoning board turned down the application. The zoning board did not have to give a specific reason. They can say it is not in the general welfare, or they can say that you are taking property off the tax rolls. Most zoning statutes have large discretion to the city in determining whether to issue a permit. The zoning board would never say, we are turning you down because you are Afro-American, but I don't think that they had to in that case at least to convince me that racism motivated the turn down in some way.

In downtown Chicago there has not been a new church built in 20 to 25 years. There are large existing churches, but I have an Afro-American church client that tried to locate between the United Center, where the Bulls play, and the Loop, and where there is about an 8- to 10-block stretch that is developing. The reason they wanted to locate there was to provide a church for Afro-Americans, particularly young professionals. New churches have been shut out of the loop, as I said, except for the traditional churches that have been there for a long time. And the city did not want any churches in that area to gum up their planned commercial development.

The church then went to another area nearby, across from the Presbyterian Administration Building, and they were told by the city, "we might want to make this into a night club district, and your presence would interfere with our development."

Finally, the church moved down to the south side and found a funeral home. And the city said, fine, you can move there. It was an all Afro-American neighborhood, and I think the city was glad to be rid of a pesky challenge.

A small group of 20 Hispanic believers attempted to buy a building in the city of Chicago that was a formerly a florist shop, and the alderman didn't want them in the neighborhood, and so he changed that floral shop into a manufacturing zone. A 25-foot by 125-foot piece of land became a manufacturing zone.

A Vineyard Church attempted to buy a theater, one of these 1920 art deco theaters, and they were going to make that into their assembly hall and worship facility. The alderman changed that into an manufacturing zone.

A Currency Exchange on the south side of Chicago, a church attempted to buy that, and while their application for permit was pending, the alderman decided let's make that into a manufacturing zone.

These laws can be abused. Some of the cases were litigated, but I think you need to understand that in the area of land use, judicial remedies often are not available. The churches don't have the money, or the municipalities can wait them out because a church

has a choice of buying a building that it can't use or having to carry the expense and pay the mortgage every month, if it can get a mortgage, on a building that it can't use, or walking away. To continue and then sue the city and force them to allow you to use the building can take 3 or 4 years, and often it is not possible. So the cases reported in the legal system are just the tip of the iceberg. Discrimination is all over the place, and there is good reason to remedy that.

The Religious Liberty Protection Act proposes three solutions which I think are reasonable. One is that there be equal protection; wherever you allow a secular assembly, why not allow a religious assembly? Why discriminate on the basis of the content of the discussion that is going on? If there is allowed a meeting hall discussing great books, why not allow a religious assembly discussing the Bible?

The second problem is that many cities have ordinances that do not allow churches freely anywhere within the city. They must get a permit to get into the city. And this is not true, of course, of residential uses or commercial uses or many other types of uses. They all have choice where to locate. But in approximately half of all city ordinances that I have read, and this would be across the country because my practice ranges across the country, approximately half of the ordinances I see do not have any zone where a church can freely go. They must get a special use permit which requires a public hearing and public approval to permit those churches to go in, and there is a real Establishment of Religion problem here because municipalities decide what churches they want, what folks they want in their community.

And municipalities also need the help of a Federal law too so that they will be not be inundated with religious uses. Certain communities have had very easy access to churches and found that a lot of churches come to them because other communities put up high barriers. Those communities with low barriers are suddenly fearful that they are going to get too many churches, and so they put their barriers up higher. So these communities have to compete against each other and worry that if they don't have a higher barrier, they are going to be inundated with tax-exempt uses.

But the Federal Government is in a unique position to say, because of these fears in the community, we are going to have an across-the-board law that is the same for everyone, and then communities won't have to have fears about raising higher barriers to keep churches out.

Mr. CANADY. Thank you, Mr. Mauck.

[The information referred to follows:]

Religious Liberty Protection Act**Tales from the Front: Municipal Control of Religious Expression
Through Zoning Ordinances****Testimony of the Experience of Attorney John Manck**

I am an attorney who has been practicing law in Chicago for 25 years. My representation of churches began in 1978, primarily with regard to church zoning and real estate matters. Since 1978 I have represented approximately 150 churches in Chicago and around the country. In response to the growing difficulties faced by churches in securing properties, I founded Civil Liberties for Urban Believers (C.L.U.B.) in 1992. C.L.U.B. is an organization of churches dedicated to changing zoning laws, which prevent churches from securing adequate permanent locations for the exercise of their religious beliefs.

In addition to the outline which I submitted in connection with my testimony in support of the Religious Liberty Protection Act, I would also like to summarize the highlights of my experience in representing churches in their disputes with municipalities employing land use restrictions:

1. **Family Christian Center v. County of Winnebago (Rockford, Illinois)**

A church purchased a former school building for religious activities. One remark by a neighbor which was reported to us was "let's keep these [G. D.] Pentecostals out of here." Although the church met all zoning criteria, a judge inflamed with prejudice against churches based on negative publicity surrounding television preachers denied the church the right to use the school building. In rendering his decision, he stated "we don't want twelve story prayer towers in Rockford." Of course the church had not applied to build anything much less a 12 story tower. Apparently the judge was referring to the 12-story prayer tower at Oral Roberts University and had, outside of court, discovered the loose affiliation between the church and Oral Roberts University. Despite the church's clear entitlement to the building, it had to expend enormous amounts of money for attorney's fees and costs for a trial and appeal and sustained severe emotional distress before securing the facility.

2. Love Church v. City of Evanston (Evanston, Illinois)

A small Afro-American church of about 20 spent several years attempting to rent a facility for worship. The City of Evanston had no zones where churches were allowed. Landlords refused to take their property off the market on the chance that the church could eventually get a permit. Despite the substantial burden of having no regular meeting place to the congregation over many years, the Seventh Circuit dismissed the case for lack of standing and the U.S. Supreme Court denied certiorari.

3. Grace Community Church v. Town of Bethel

Bethel ("House of God"), Connecticut was chartered in 1750 so that the local residents could build a church. By 1990, churches were not a permitted use anywhere in the town. A church was denied the right to build on 7 acres of land it had owned for 10 years despite a Connecticut Constitutional right to build churches. The church was ultimately able to build after years of costly litigation.

4. Ira Iglesia de la Biblia Abierta v. City of Chicago

A Hispanic congregation of about 30 tried to buy a storefront floral shop to convert to a church. It applied for a permit to use the facility. While its permit was pending, the Alderman changed the zoning classification of the single storefront to "manufacturing" so that the church could not obtain a permit under any circumstances. There is probable racial and ethnic bias behind the city's action. A case challenging the action is pending in federal court.

5. C.L.U.B. v. City of Chicago

The aforementioned association of churches is currently challenging the constitutionality of the Chicago Zoning Ordinance in federal court.

6. Living Word Outreach v. City of Chicago Heights (Chicago Heights, Illinois)

The city denied a congregation of 70 the right to use a building for worship which had been a Masonic Temple for 40 years. The Masons had been 99% Caucasian and the church was 99% Afro-American. It appeared that the church was denied the right to use the building because it was in the predominantly white side of town. The Trial court ruled in favor of the church after costly legal maneuverings by the City which put the church in number of different courts. The case is now on appeal.

7. His Word Ministries v. City of Chicago (Chicago, Illinois)

This case is part of the C.L.U.B. action mentioned above. It involved essentially the same circumstances as the Ira Iglesia case. An Alderman reclassified a small bank facility to a manufacturing zone after a church had put a former branch bank facility under contract. However, it appears the motivation was religious rather than racial. The established church in the neighborhood did not want any competition and about 30 neighbors wrote the Alderman identical letters stating "we have enough churches."

8. Christian Covenant Outreach Church v. City of Chicago (Chicago, Illinois)

This case is also part of the C.L.U.B. action. A pastor voluntarily located his church in the most gang-infested part of Chicago and was successful in converting many hardened gang members to Christianity and a life of peace. The Chicago Sun Times even did a feature article commending his work in the community. The City successfully shut down the church by zoning lawsuits which the low income church of about 50 young people (mostly teens and 20's) was unable to afford to fight. Not long afterward on a Friday evening, a former gang member who would have otherwise been in the church singing in the choir during the Friday service was gunned down and killed at the very doorstep of the church permanently shut down by the City.

9. Christ Center v. City of Chicago (Chicago, Illinois)

An African-American church spent years attempting to locate on the Near West Side of Chicago was denied one permit and told it could not obtain another. It finally became apparent that an African-American church would not be welcome in a designated nightclub development which was intended to serve an upper middle class white clientele.

10. Christian Bible Center v. City of Chicago (Chicago, Illinois)

This church was denied zoning simply because some of the neighbors did not like them. When these same neighbors changed their minds two years later, the zoning was granted. In the meantime the church could not use its facility.

11. Mt. Zion Church v. City of Chicago (Chicago, Illinois)

This church spent years trying to find an adequate facility in the City of Chicago while being chased by city inspectors. After several years the church found a facility, but in the meantime sustained great emotional and financial distress.

12. City of Chicago v. Evangelical Church of God (Chicago, Illinois)

This church tried for a long period of time to secure a facility in a "proper" zone. When it became obvious that it could not find an adequate permanent facility in a proper zone, it was forced to purchase a facility in a zone where churches were not permitted. Although the City of Chicago is not enforcing its zoning ordinance against the church use at this time, it is pursuing a zoning lawsuit to shut down the church's Christian school.

13. Gethsemane Baptist v. City of Northlake (Northlake, Illinois)

Church bought former VFW meeting hall but the city refused to let it use their facility for religious purposes. The church could not afford to litigate.

14. Amazing Grace Church v. City of Chicago (Chicago, Illinois)

This African-American church was faced with zoning violation actions after a local Lithuanian community organization opposed its presence. Members of the organization shouted racial slurs and threw eggs at the cars of church members.

15. Faith Cathedral Church v. City of Chicago (Chicago, Illinois)

The same neighborhood group that opposed Saving Grace Church opposed Faith Cathedral church for the same reasons. Neighborhood opposition necessitated a difficult zoning permit dispute before the Chicago Zoning Board of Appeals. Despite the fact that the former funeral parlor which the church had purchased had a chapel and lots of parking the Zoning Board denied permission to use it for worship.

16. AOH House of Prayer (Chicago, Illinois)

After putting lots of money into improvement of a facility for church use, church was forced out of facility by a zoning enforcement action which it had insufficient funds to defend against.

17. Camper's Temple Sanctified C.O.G.I.C. v. City of Harvey (Harvey, Illinois)

After operating an adult day care ministry and church for some time, the church was sued for zoning violations. The City had no zones where churches were permitted. The church could not afford legal representation and the Pastor is currently trying to defend the church by herself.

18. Pine Stream Morning Star Retreat v. Ogle County (Ogle County, Illinois)

A Christian ministry led by Koreans sought to build a retreat facility on its land in a rural and relatively unpopulated area. Despite the fact that the facility would meet all of the county's requirements, the ministry was denied a permit when neighbors objected. The ministry also prosecuted and was rejected upon reapplication for a permit twice.

19. Vineyard Church of Chicago v. City of Chicago (Chicago, Illinois)

The circumstances of this case are the same as the Ira Iglesia and His Word cases above. The local alderman reclassified a theater which had been unused for ten years into a manufacturing zone. However, the church did not file a lawsuit.

20. Evanston Vineyard v. City of Evanston (Evanston, Illinois)

A church purchased an office building with an auditorium for church use. The zone allows cultural facilities defined as a " . . . theater, auditorium or other building . . . used primarily for musical dance, dramatic or other performances." Its special use permit application was denied despite the fact that all zoning criteria were satisfied.

21. Cornerstone Community Church v. City of Chicago Heights (Chicago Heights, Illinois)

A church sought to purchase an abandoned department store, which had been on the market for three years without a reasonable offer. The property was in a zone that allowed meeting halls without a permit. The church sought an injunction in federal court to require the city to allow church use of the property. The city argued that there was some chance that it would gain tax revenue if another department store moved into the property, however unlikely. The Court ruled in favor of the city.

22. Korean Central Covenant Church v. City of Northbrook (Northbrook, Illinois)

The church lost its request for a permit to hold services in an expanded facility. The facility was already legally used for church activities, and it met all zoning requirements except for the arbitrary approval of the City Planning Commission. There was evidence to suggest that neighbors simply wanted to keep Koreans out of the neighborhood. The City had no zone where churches were freely permitted.

In addition, I have knowledge that the City of Chicago has attempted to shut down the following churches in recent years for lack of a permit to worship: New Life & Love Full Gospel Church, Joyful Harvest Christian Ministries, Shining Light Apostolic Church of God, and Outreach Miracle Temple.

Thank you for the opportunity to testify regarding this matter. A list of legal citations can be provided upon request.

John W. Mauck

SUBSCRIBED AND SWORN TO
before me this 9th day of
July, 1998.

Carol A. Riley
NOTARY PUBLIC

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**COMPILATION OF ZONING PROVISIONS
AFFECTING CHURCHES IN 29 SUBURBS
OF NORTHERN COOK COUNTY
BY JOHN W. MAUCK OF 7-10-98
BASED UPON 1995 PUBLISHED STANDARDS**

Code Key

BH	=	Banquet Hall	L	=	Lodge
C	=	Club	LIB	=	Library
CC	=	Community Center	M	=	Museum
F	=	Funeral Parlor	MB	=	Municipal Building
FO	=	Fraternal Organization	MH	=	Meeting Hall
HC	=	Health Club, Gym, Amusement	T	=	Theater
RC	=	Recreation Center			

<u>Village</u>	<u>Any Zone Where Churches Allowed?</u>	<u>Uses Freely Allowed Where Churches Are Only Allowed By Special Permission Or Uses Allowed By Special Permission In Zones Where Churches Are Not Allowed Under Any Circumstances</u>
Arlington Heights	Yes, R only	F, CC, C, L, BH, T
Barrington	Yes, R only	MH, C, L, FO, L, M, T
Barrington Hills	Yes, R only	C
Bartlett	Yes, R only	F, BH, HC, RC, T
Buffalo Grove	No	MH, HC, C, L, FO, T, MB, RC
Des Plaines	Yes	F, T
Evanston	Yes	CC, C, RC, M, LIB
Glencoe	Yes, R only	MB, C, LIB
Glenview	Yes, R only	C, MH, HC, T, M, LIB, MB
Hanover Park	Hist. Dist. only	F, LIB, T
Hoffman Estates	No	MB, HC, T, C, MH
Inverness	Yes	C

Kenilworth	Yes, R only	MB
Morton Grove	No	C, L, LIB, HC
Mount Prospect	No	LIB, M, CC, MB, C, L, T, RC, HC
Niles	No	MHY, HC, RC, CC, F
Northbrook	No	C, L, HC, M, LIB, MB, T, F
Northfield	Yes, R only	C, HC
Palatine	Yes, R only	C, L, FO, CC, MH, T, HC
Prospect Heights	No	MH, C, CC, L, FO, HC, F, RC
Rolling Meadows	Yes	LIB, M, HC, MB, T, F
Roselle	No	MB, BH, F, RC, CC, MH, C, FO, HC, T, M, LIB
Schaumburg	No	T, CC, HC, RC, F, MB, MH, C, L, FO, LIB
Skokie	Yes, one acre minimum	RC, CC, LIB, C, L, FO, T, MH, F, MB
South Barrington	Yes, R only - 10 acre minimum	MB, C, L, T, F
Streamwood	Yes	M, C, L, FO, HC, LIB, MB
Wheeling	No	T, L, HC, FO, BH, MH, RC, F
Wilmette	No	RC
Winnetka	No	F, MB, HC

NChurch.Zon\Cook Cty Villages

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,
v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF CIVIL LIBERTIES FOR URBAN BELIEVERS

I, Theodore Wilkinson, being sworn upon my oath, state that I am the Chairman of the Board of Directors of Civil Liberties for Urban Believers ("CLUB") and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. CLUB is an unincorporated association of approximately 50 Chicago area churches ranging in size from 15 to 5,000 members.

2. The member churches of CLUB are churches which have been damaged or suffered under the zoning ordinances of the City of Chicago in one or more of the following ways:

- a. They have been denied a special use permit due to the opposition of the owners of neighboring property.
- b. They have been denied a special use permit due to the opposition of their alderman.
- c. They have been denied a special use permit due to the fact that the property they were seeking to purchase or lease was within 100 feet of a liquor store or bar.
- d. They have been unable to use property they have purchased because they were unable to obtain a special use permit.
- e. They have been unable to buy a building because no seller was willing to enter into a contract subject to the church obtaining a special use permit when that seller could freely sell to many other users who did not need a permit.
- f. They have been unable to lease a building because no landlord was willing to enter into a lease subject to the church obtaining a special use permit.

- g. They have had to pay more than a commercial or industrial purchaser would have had to pay for similar property because they had to make their purchase offer subject to obtaining a special use permit.
- h. They have lost membership and contributions due to their inability to find suitable property for which they could obtain a special use permit.
- i. They have had to purchase less suitable property for their purposes because they were unable to obtain a special use permit for property which was more suitable and which would otherwise have been available to them.
- j. They have entered into contracts to purchase buildings with the intent to obtain a special use permit, only to have the City Council rezone that particular building as a "manufacturing zone" so that the church could not apply for a special use permit.

3. Many members of CLUB desire to keep their identities secret because they know that, under the current zoning law, city officials and aldermen have discretion to retaliate against them should they need to expand or move to a new location.

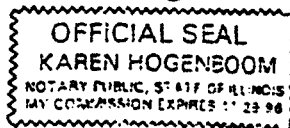
4. Approximately 25 members of CLUB have not personally experienced these hardships, but support other churches which have suffered under the Chicago Zoning Ordinance.

Dated: September 13, 1994

Peter Hendon Wilkinson

Signed and sworn to before me this 13th day of September, 1994.

Karen Hogenboom
Notary Public



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF CHRIST CENTER

I, Theodore Wilkinson, being sworn upon my oath, state that I am the Pastor of Christ Center and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. Christ Center is an Illinois Religious Corporation which began meeting as a church in 1987 and was incorporated in 1988.
2. Worship, teaching of the Bible, baptism, and communion are all integral to the exercise of the beliefs of Christ Center. All these activities require that the members of the church gather together regularly.
3. In 1990, we were meeting on Sunday mornings in the auditorium at Whitney Young High School, 211 S. Laflin, just west of downtown and near the Kennedy/Dan Ryan expressway. The congregation at that time was approximately 150 people. We carried all our sound equipment and supplies for communion to the school in cars and set up before the service. If the school had a function in the afternoon, it would cut our services short. If it needed the auditorium on Sunday morning, it would move us to a less suitable room without notice. We often had to worship among the scenery for a school play. The ushers had to clean the bathrooms before the service and bring toilet paper from their homes.
4. Because members travelled to the church from as far away as Wheaton and South Holland as well as from the west and south sides of Chicago, this created a serious inconvenience.
5. Furthermore, the energy of the congregation was spent on setting up worship and coping with unsuitable space rather than on worship itself. If members did not have to volunteer to set up chairs or bring toilet paper, they might have been able to volunteer to lead a Bible study or sing a hymn from the community.

6. Because there was no building associated exclusively with the church, the church had no visibility in the community. Therefore, the church was unable to draw in new people from the neighborhood who had seen the church and may have been curious about it. This was a particular problem because Christ Center believes that the one who physically dies without having a relationship with Christ is hopelessly and eternally lost. An important doctrine of the church is to convey the message of Christ's salvation from this fate to as many people as possible; this task is greatly hindered when a church is not visible to the unsaved.
7. One of the important beliefs of Christ Center is that baptism should be by immersion. There was no way to totally immerse candidates for baptism in water at the auditorium.
8. Several potential members of the church stated to me that they would not join a church which they perceived as impermanent and unstable because it did not have its own building.
9. If we wanted to have a church function during the week, we needed to rent another location. Many of these functions were held at the Duncan YMCA at Roosevelt and Morgan.
10. During part of the time we met at Whitney Young, we shared an office at a different location with another organization. We could not have committee meetings during this time because we did not have our own meeting space.
11. During 1990, we began looking for rental property for the church because of the inconvenience of meeting at the school. We wanted a building near downtown which would allow for numerical growth of the congregation, for increased visibility of the church in the neighborhood, and for easy access for our suburban attenders.
12. We were interested in several properties at or near developments at the Chicago Stadium, Rush Presbyterian St. Luke's Hospital, or the University of Illinois at Chicago.
13. Between 1990 and 1992, we seriously negotiated for leases on approximately five properties on the near west side.
14. By 1992, we began looking at property to purchase, still with the same goals of staying in the same neighborhood and increasing our membership, visibility, and ministry. During no time in our four year property search did we find a suitable property for lease or for sale which was located in a residential (R) zoning district.
15. In the summer of 1992, we signed a contract to purchase a commercial building located at 1139-43 W. Madison. As part of the contract, the seller agreed to finance the property, and it had on site parking which complied with the Chicago zoning

- ordinance. The property is zoned C2-3. But for the permit requirements of the Chicago Zoning Ordinance, the church was ready, willing, and able to purchase the property.
16. Several other charitable organizations are located nearby on Madison, including the Salvation Army, Olive Branch Mission, and the Chicago Lung Association.
 17. When we notified the owners of property within 250 feet of our intention to obtain a special use permit, the neighbors hired a former chairman of the zoning board to fight the approval of the permit. Their stated reason for opposing the special use was that they wanted a taxpaying commercial business in the neighborhood, not a church. We met with Alderman Theodore Mazola of the 1st Ward in an attempt to obtain his political support for a permit. However, he also opposed our application, stating that he would support our application anywhere in his ward except on Madison Street. Our application was denied on or about October 18, 1992 after a hearing on September 18, 1992.
 18. The Chicago Planning Department had designated the area as a special Madison-Racine redevelopment area and in that area community centers were a permitted use.
 19. After the application was denied, the congregation's contributions to the building fund and the general operating fund of the church decreased dramatically for approximately nine months.
 20. In the spring of 1993, we found another property in the same area, at 123 S. Morgan. This property was a former button factory in an M1-3 zone. Across the street in a similar building are the administrative offices of the Presbytery of Chicago.
 21. The owner of this property gave us a firm commitment to provide financing.
 22. Because of the expense of our previous unsuccessful application for special use, before we applied on the Morgan property we met with the Chicago Planning Department regarding our chances of obtaining a special use.
 23. After investigating the situation, the Chicago Planning Department informed us that they would oppose and effectively defeat any rezoning application because the neighborhood might someday become a "nightclub district" and the presence of the church would inhibit development in that direction as a general matter of land use and because of an Illinois law prohibiting the sale of alcohol within 100 feet of a church.
 24. We also met with Mayor Daley's special assistant for liaison with the religious community in an effort to gain political

support for our permit application, but he told us he was unable to change the decision of the Planning Department to oppose a church at that site.

25. As a result of these conversations with the city, we did not file an application for a special use and canceled our contract to purchase the property.
26. In the fall of 1993, we located property at 4445 S. King Drive. It was not in the location we had hoped for, but it has ample parking for 100-150 cars and can accommodate up to 400 people.
27. We were able to obtain a special use permit for this property and moved in October, 1993, three years after we were ready and able to buy a church building but for the City of Chicago's zoning laws.
28. As a result of moving to the south side, we lost approximately five member families and their financial support of the church because they were unwilling or unable to commute to our new location.
29. We expended over \$20,000 in attorneys fees, appraisal fees, zoning application charges, title charges and other expenses in attempts to acquire property and comply with the special use permit requirements.

Pastor Theodore W. Wilkinson

 Pastor Theodore Wilkinson

Subscribed and sworn to before me this 13th day of September, 1994.

Karen Hogenboom

 Notary Public

p:clubchce.aff



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF CHRISTIAN COVENANT OUTREACH CHURCH

I, Troy Garner, being sworn upon my oath, state that I am the Pastor of Christian Covenant Outreach Church and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. Christian Covenant Outreach Church is an Illinois Not-for-Profit Corporation organized on September 17, 1991. The church also began meeting in September of 1991.
2. Meeting together for worship, teaching and the sacraments of communion and baptism are integral to the exercise of the beliefs of Christian Covenant Outreach Church.
3. On November 1, 1992, the church began renting property at 5918 S. Ashland, Chicago, in a C1-2 zoning district. Churches are required to obtain a special use permit to meet for worship in this district. We were ignorant of this requirement.
4. Most of the church's members are within walking distance of the church. Many members are teenagers from the Englewood neighborhood; approximately 25 of the church's 90 members are former gang bangers and most of the others are teenagers at risk of being recruited by gangs. The church has sponsored many programs designed to keep teenagers off the streets or to protest the gang activity in our neighborhood. For example, we were written up in the Chicago Sun-Times on May 3, 1994 for a protest march we sponsored after a drive-by shooting in our neighborhood.
5. The owner of the building has told me that he would like to sell the building to the church, and would be willing to cosign for a loan.
6. However, because the church has no permit, we will continue to pay rent for the property in the fear that if we purchased the building the city would not let us use it.

7. City inspectors have come to the property on several occasions and threatened to take the church to court and shut it down if we do not obtain a special use permit.
8. The church's building needs remodeling in order to comply with the Chicago Building Code. We have been reluctant to pay for all but the most basic repairs necessary for the safety of the congregation, because we fear we could be shut down by the city at any time.
9. We are under contract to make a CD and a music video, but I have postponed recording sessions due to the poor condition of our sanctuary. Before we can make a video in the sanctuary, we will have to do major and expensive remodeling. The church does not want to invest the money in the building while we are still renting and may need to leave the building. The recording company is unwilling to make the CD without the video, so the whole project is on hold indefinitely.
10. Approximately fifteen members of the congregation have become discouraged and left the church because of their perception that the church is "afraid" to take a financial risk on the necessary building repairs and the beautification necessary for the music video. Unfortunately, the members who left have been some of our biggest donors, so their departure has hurt the programs of the church as well as the ability of the church to pay for remodeling its building.

Troy Garner

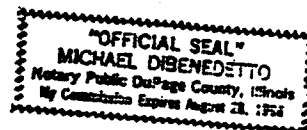
 Troy Garner

Subscribed and sworn to before me this 16 day of September, 1994.

Michael R. Benedetto

 Notary Public

p:clubccov.aff



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF HIS WORD MINISTRIES TO ALL NATIONS

I, Virginia Kantor, being sworn upon my oath, state that I am the Pastor of His Word Ministries to All Nations and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. His Word Ministries to All Nations is an Illinois Not-for-Profit Corporation organized for the purpose of creating a church in 1989.
2. Worship, teaching of the Bible, corporate prayer, baptism, and communion are all integral to the exercise of the beliefs of His Word Ministries to All Nations. All these activities require that the members of the church gather together regularly. Hebrews 10:25 says, "Let us not give up meeting together, as some are in the habit of doing, but let us encourage one another--and all the more as you see the Day approaching."
3. We met in the basement and sunroom of a house located at 6642 S. Richmond for two years, from 1990 to 1992. God had revealed to me that we were only to rent a house for two years, as Paul did in Acts 28:30-31: "For two whole years Paul stayed there in his own rented house and welcomed all who came to see him. Boldly and without hindrance he preached the kingdom of God and taught about the Lord Jesus Christ."
4. In the middle of 1992, it also became obvious that we could no longer meet at the Richmond house. More than sixty people were attending services in the basement. We had many new children attending, but the Sunday School was forced to meet in two small rooms. There was no office space for the church in the house.
5. Because we could not fit any more people into the house for

services, we could not fulfill the biblical command to "preach the Word; be prepared in season and out of season; correct, rebuke and encourage--with great patience and careful instruction." 2 Tim 4:2. And in Mark 16:15, Jesus commands us to: "Go into all the world and preach the good news to all creation." We feel that these commands are a crucial part of the work of any church, and it was extremely frustrating to be stifled in our efforts to bring new people to the church and to encourage and teach our current members.

6. Furthermore, a church which meets in the basement of a house has a disadvantage because most of the people we would invite to church do not have a lot of church background. They would be put off by the physical surroundings which the church met in, and be unable to focus on the presence of God.
7. Another important role of any church is to provide a place for its members to meet socially, where they can get to know one another and encourage one another in their faith. This was impossible in the Richmond house, due to lack of space, and without these social gatherings church attenders tend to turn to non-Christian friends and activities for their primary source of support.
8. In 1992, we found a building to purchase at 1616 W. Pershing in Chicago. It seemed perfect for our needs, and appeared to meet the special use requirements of the Chicago Zoning Ordinance. The property was zoned C1-2, a zoning category which requires city permission in order to meet for worship. We signed a contract, contingent on obtaining a special use permit, and put down over \$25,000.
9. We then met with Alderman Huels to discuss our plans for the building. He stated that he had no opinion either way on our plans, and would not support or contest our zoning application.
10. After we filed our application for special use, we met with several owners of nearby property at the alderman's office. The meeting was very positive, with many neighbors expressing support for our plans and ending with hugs all around.
11. When the hearing date arrived, the alderman sent a representative to have it continued for several months. Three times, the hearing was continued at the request of the alderman and we could not present our evidence. Each continuance resulted in months' delay.
12. After the third hearing where we were unable to be heard, in the fall of 1992, the alderman had our property rezoned as a manufacturing district. Because churches cannot be located in a manufacturing district under current zoning law, we were forced to withdraw our application for special use after paying our filing fees, attorney fees, and appraiser's fees.

13. The seller of the property informed us that we either had to withdraw our offer or proceed with the purchase without zoning approval. Because we could not afford to purchase a building we could not use, we withdrew our offer and lost the building.
14. From the time we made an offer on the building to the time we withdrew our offer, we spent approximately \$5,000 and wasted an entire year in seeking a special use permit.
15. At this point, about twenty members of the congregation became discouraged and left the church due to the crowded conditions at the Richmond house and the lack of prospects for a new building.

Virginia Kantor

Virginia Kantor

Subscribed and sworn to before me this 22 day of September, 1994.

Harvey Liss

Notary Public

p:clubhsw.aff



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF CHRISTIAN BIBLE CENTER

I, Jerone E. Lowrey, being sworn upon my oath, state that I am the Pastor of Christian Bible Center and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. Christian Bible Center is an Illinois not-for-profit corporation, incorporated in 1986.
2. Meeting together for worship, teaching, and the sacraments of communion and baptism are integral to the exercise of the beliefs of Christian Bible Center.
3. In 1986, the church began meeting in my home. We soon outgrew this space, however, so in the summer of 1988 we began looking for space to rent. We looked at possible spaces on a daily basis for three months, but were unable to find anything suitable which we could afford. We looked at public schools, for example, but could not afford the rent they were asking. We finally approached Mr. Gatling of Gatling's Funeral Home, 10133 S. Halsted, and he was willing to rent to us from 10 a.m. to 1:30 p.m. on Sundays, for \$300.00 a month.
4. Although the chapel of the funeral home is a good worship space, several attenders do not like going to a funeral home to attend services. During the time we have been there, children have had to stay in church with their parents, and the church had no office space. Mid-week Bible classes and prayer services have been held in homes of members on a rotating basis, which means that elaborate scheduling is necessary.
5. Often, the Sunday morning service was cut short in order to have everyone out of the building by 1:30 p.m.. Several times, the casket for an afternoon funeral or visitation has

been just outside the door of the chapel, ready to roll in as soon as we leave. If the service lasts until 1:30, the ushers cannot count the offering at the church, leading to accounting problems when that task got delayed.

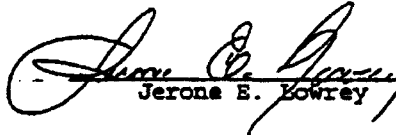
6. In 1990, we began looking for property to purchase. We found a building and adjacent vacant lot at the southeast corner of 83rd and Essex, but it was zoned B4-2 and Alderman Beavers told me that "he would not allow" a church in that location. Therefore, we did not make an offer on the property, although we were ready, willing and able to buy it but for the alderman's opposition to our application for a special use permit.
7. In March, 1991, Christian Bible Center purchased property at 513-23 E. 75th Street, Chicago. The congregation at that time consisted of approximately 35 adults, plus some children. The property was zoned B4-1. Immediately after the purchase, the church had to replace the roof to prevent structural damage to the building. Much additional renovation was necessary, but the Board of Directors decided to delay further expenditures on the property until a special use permit was obtained from the Zoning Board of Appeals.
8. Before the zoning hearing, church members and officers, including myself, met with the Park Manor Neighbors Association in an attempt to obtain political support for a permit to worship in our building. We also contacted Alderman Steele for the same reason, but he declined to assist us in our application.
9. Our special use permit hearing was on May 17, 1991. We hired an attorney to present our case and an architect and an appraiser testified on our behalf. The president of Park Manor Neighbors Association testified in opposition. The special use was denied.
10. In June 1991, the Board of Directors of the church voted to put the property on the market because it could not be used as a church due to the denial by the Zoning Board of Appeals. The church needed the money it had invested in the property in order to purchase a building it could use.
11. Almost all prospective purchasers of the building were churches; once they discovered that a special use application had already been denied for the property, they did not make an offer. The property remained on the market for ten months without receiving a single offer.
12. In February 1992, the Board of Directors voted to renovate the property for commercial use, in the hope that it would sell if it was fixed up and that the church could get its investment back in order to buy another building. The remaining balance in the church's building fund was used for these renovations,

which were completed in September, 1992.

13. By February of 1992, when the building fund was used to renovate the property on 75th Street, the church was cramped in the space it was renting. Our rental agreement only allowed for one service a week, so any other meetings or services of the church needed to be held in homes or in other rented space at additional expense and inconvenience. Approximately seven of the church's 35 members left during this time due to discouragement about the likelihood of the church ever having a building or because of the problems with our rented space.
14. In July, 1992 I contacted Annie Lynton, a member of the Board of Directors of Park Manor Neighbors Association. She informed me that the Association had reconsidered their opposition to our special use application.
15. In preparation for reapplying for special use, we held an open house for our neighbors in March, 1993. The president of the neighborhood association attended and expressed her support for our zoning appeal.
16. Also in March, 1993, after the open house, I received a copy of a letter to Alderman Steele from the president of the neighborhood association, stating that the neighborhood association has "decided to allow the Christian Bible Center to reapply for a 'Special Use Permit' again, with the support of the community this time." A copy of this letter is attached to this affidavit as Exhibit A.
17. We reapplied for a special use permit and on August 20, 1993, our special use was granted.
18. The delay in obtaining a special use permit caused a delay in obtaining a real estate tax exemption because we were not able to use the property for religious purposes until the zoning was finally approved and were therefore not entitled to a real estate tax exemption.
19. The church has spent over \$20,000 on legal fees, real estate taxes and interest, application fees for a second special use application, and other expenses which would not have been necessary if its application had been granted the first time it had applied.
20. A tremendous amount of time and energy has been expended by the church's Board of Directors on administrative work relating to these zoning problems.
21. The adversarial relationship with our neighbors that was created by the zoning process took many months and much effort and prayer to overcome. We desire to be an example of Christian love to our neighborhood, but until those

relationships were healed, we were hindered in that effort.

22. The emotional cost to the congregation has been extremely high. At one point during the process, in the summer of 1991, the Board seriously discussed dissolving the church, due to the untenable situation we were in and the opposition we faced. We have lost members, whose absence has been keenly felt in the programs of the church and in its budget. The current size of the congregation is approximately fifty adults, plus children.



Jerome E. Lowrey

Signed and sworn to before me this 14 day of September, 1994.



Notary Public



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF THE CHURCH ON "THE WAY" PRAISE CENTER

I, Charlene Crossley, being sworn upon my oath, state that I am the Pastor of the Church on "the Way" Praise Center and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. The Church on "the Way" Praise Center is an Illinois Not-for-Profit Corporation organized on January 12, 1983.
2. It is essential to the exercise of the beliefs of the members of the Church on "the Way" Praise Center that they meet together to hear the Word of God, to praise God's glory, and to minister to the needs of each other and the community.
3. The church began meeting on October 23, 1982 in the basement of my home. We began with seven people; by the time we moved elsewhere in December 1984, we were 25 people.
4. As soon as we began meeting, we began looking for a space to rent. Every suitable space we found for two years was either too expensive, too run down, or the landlord was not willing to rent to a church.
5. In December, 1984, we rented half of a storefront at 1704 W. 69th Street. The building was owned by a minister who had his church in the other half of the building. We met there for six and a half years, until the building burned in December of 1989.
6. Another pastor heard that the church was "homeless" and offered to share his space with us. However, our services needed to be arranged around his church's schedule, and we had no office space, no Sunday School facilities, and no fellowship hall. Our services often had to be moved to other locations on short notice if his church needed the building at our regular time for services.

7. For these reasons, we looked for property to buy or rent during the entire two years we met there. We were looking for a building which would allow us to grow, and which did not require too much remodeling or repair in order to be used as a church.
8. I reviewed the real estate ads in the newspaper regularly, and members of the church drove all over the area between 55th and 115th Streets on the north and south and King Drive and Kedzie on the east and west, looking for suitable property. At one point, five realtors were looking for property on our behalf.
9. The properties we found during this period were either too small for our needs, had been through a fire, were next to a tavern or liquor store, or cost over \$250,000. We understood that, as a practical matter, it was impossible to get a permit for a church near a liquor store and so did not pursue those properties.
10. When we found a former heating company building which was suitable for our needs at 8536 S. Racine. The building is located in a C1-1 zoning district, so a special use permit was necessary in order for us to use the building. However, we were desperate for a building and so we decided to go through the process to obtain a special use permit.
11. The church entered into a contract to purchase the building, contingent on obtaining a special use permit.
12. My first step was to meet with Alderman Murphy to enlist his support for our use of the building. He expressed his support and gave me a list of neighbors to notify that we were filing for a special use permit.
13. The church spent \$260 and many hours of labor to send certified letters to all the neighbors on the list, as required by the zoning ordinance. We also obtained a denial letter from the Department of Zoning.
14. However, when we went to the Zoning Board of Appeals to file our application, we were told that we had used a list of registered voters rather than a list of property owners for our notice, and therefore the whole process would have to be repeated, at an additional expense of over \$200.
15. We also discovered that there was a tavern within 100 feet of the church when the Department of Planning refused to support our application for that reason.
16. At this point, we hired an attorney with experience in zoning matters, in addition to the real estate attorney who was handling our purchase of the property. When we were finally able to refile our application, we also retained an appraiser

to testify at our zoning hearing.

- 17. Just before our hearing, our zoning attorney discovered that the tavern which was causing our zoning problems had renewed its liquor license in 1990, even though it was already within 100 feet of another church.
- 18. After we had our hearing before the Zoning Board of Appeals, we and the seller had to wait one month for a decision on our application.
- 19. Over all, our direct costs to obtain the zoning permit were between four and five thousand dollars.
- 19. The congregation was extremely frustrated with the time it took to obtain our special use permit so that we could have a permanent meeting place. We lost three or four members over this issue, along with their financial support of the church.
- 20. Many members of the church questioned my authority and my integrity because I was sure that God had provided this building for us. They believed that if God had provided the building, we would not be having the delays, expenses, and problems we were having. This led to discouragement among the church members.
- 21. When we obtained our approval letter, it was contingent on our paving the parking lot behind the building in a very specific way. We complied with these requirements at a cost to the church of approximately \$10,075; we now have the only paved parking lot in the 8500 block of South Racine, in spite of the fact that there is another church and many small businesses on the block.

Charlene Crossley

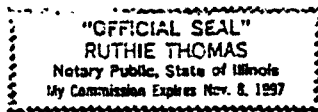
 Charlene Crossley

Subscribed and sworn to before me this 19th day of September, 1994.

Ruthie Thomas

 Notary Public

p:clubchwa.aff



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF MOUNT ZION CHURCH
(IGLESIA DE AVIVAMIENTO MONTE DE SION)

I, Jose Acevedo, being sworn upon my oath, state that I am the Pastor of Iglesia de Avivamiento Monte de Sion and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. Iglesia de Avivamiento Monte de Sion is an Illinois Not-for-profit corporation which began meeting as a church in 1983 and was incorporated in 1986. The church currently has approximately 110 members.
2. Worship, teaching of the Bible, baptism, and communion are all integral to the exercise of the beliefs of the church. All these activities require that the members of the church gather together regularly.
3. From February of 1988 to December of 1993, the church rented space at 4545 N. Kedzie, Chicago, which was zoned C2-2. We did not have a special use permit at this location. A city building inspector came out to the property in 1990 and told me that he would return in a year and did not want to see the church meeting there at that time.
4. In 1990, we also began to outgrow our rented space. People attending services had to stand, and we were only able to have two Sunday School classes. We had no space for a nursery, and we were unable to host services with other churches. Due to these factors and to our lack of a special use permit, we began looking for new rental space.
5. During our search we became more acutely aware of the special use permit requirements for churches, because many landlords were unwilling to rent to us due to the zoning complications of renting to a church.
6. In April of 1993, we located property at 3949 N. Pulaski which was suitable for our purposes, and entered into a lease

subject to our obtaining a special use permit. The property is zoned C1-2. We also were able to lease parking spaces in nearby lots for use on Sunday mornings, which is the only time the church needs a significant amount of parking. The number of parking spaces we leased was adequate under the Chicago zoning ordinance.

7. We obtained a denial letter from the Chicago Department of Zoning, ordered a zoning search, and sent notice to all neighboring property owners as required by the Chicago Zoning Ordinance. When we attempted to file our application for a special use with the Board of Appeals, they informed us that our parking did not meet the requirements of the ordinance because the parking was only available to the church on Sunday mornings. The Board of Appeals also informed us that we would need to apply separately for the church building and each parking lot, with total filing fees and zoning search fees of over \$1,000. We had already incurred over \$3,000 in legal fees and related expenses in our attempt to rent this property.
8. The Zoning Board of Appeals also advised us that it was unlikely that a permit would be granted because a liquor store was located within 100 feet of the space we wanted to rent.
9. We met with Alderman Wojcik to get his support for our permit application. He informed us that one neighborhood group was opposed to our use of 3949 N. Pulaski as a church and therefore he would not support our special use application.
10. Because of the problems with our zoning application, we decided to terminate our lease and look for other property rather than have the zoning board deny our permit. But for the requirements for a special use permit and the Illinois liquor law, we were ready, willing, and able to lease 3949 N. Pulaski for use as a church.
11. When we lost the property on Pulaski, the congregation became discouraged because it seemed unlikely that we would be able to find a bigger meeting place. Some members of the church became so upset with our situation that they left the church.
12. In late 1993, we located property at 2318 W. Foster, zoned B2-2. The landlord was willing to lease the property to us with a provision that we can terminate the lease if the City of Chicago attempts to shut down the church due to our failure to obtain a special use permit. We have been meeting at this location since the beginning of 1994.
13. Since we have moved to the property on Foster, the church has added approximately fifty new members. This property currently has adequate space for the church, but the uncertainty of our zoning situation and our current rate of growth are very stressful for the congregation and for me. If

we cannot meet at our current location for any reason, we will be without a place to meet. The last time we had to look for a new location, it took us three years, and the prospect of beginning another property search, given the zoning burden placed on churches, is extremely daunting.

Jose A. Acevedo
Pastor Jose Acevedo

Subscribed and sworn to before me this 22 day of September, 1994.

Karen Hogenboom
Notary Public

p:clubmtr1.aff



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF LIVING WORD MINISTRIES

I, Anthony Earl, being sworn upon my oath, state that I am the pastor of Living Word Ministries, and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

1. Living Word Ministries is an Illinois not-for-profit corporation incorporated in 1989. The church began meeting in 1989 at Clark Middle School, 5101 W. Harrison, Chicago.
2. Meeting together for worship, communion, teaching, and other observances is integral to the exercise of the beliefs of Living Word Ministries.
3. Currently, between 150-200 people attend services on Sunday mornings. We still rent space from Clark Middle School; our services are held in the auditorium, with Sunday School, the nursery, and youth ministries taking place in various classrooms.
4. Our congregation is almost entirely African-American. The area of Chicago where we meet is one of the poorest in the city. It is full of welfare recipients, gangs, drug dealers, and violence. A major purpose of our church and the hope of many members and attenders is to help the residents of our neighborhood, and others, through faith in Jesus and through teaching, training, and physical assistance, to live in the west side of Chicago without being a part of that destructive culture.
5. Meeting at the school has had many drawbacks. The equipment for each service needs to be set up and torn down, a process which takes eight to ten people an hour and a half every time. We have a nursery, sound equipment, a book table, a coffee hour, and a youth ministry which require someone in the congregation to store equipment in their home, transport the

equipment to the church, and then set it up.

6. As well as being inconvenient and time consuming for volunteer members, this process requires a lot of attention and organization by the staff. We need to use our limited energy and time to do the basic setup for the church, rather than in serving God in our neighborhood.
7. On Wednesday evenings, we have Bible School and a midweek service. In order to be out of the school on time, we need to start Bible School at 6:00 p.m.. Because we start so early, many students are unable to attend and receive the benefit of intensive Bible teaching. If we had our own building, we could be more flexible in our scheduling.
8. If we need to use the school for meetings or events which would last for less than four hours, we must pay \$300 for a four hour rental because four hours is the minimum rental for the space we use. We hold our church board meetings at a local hotel at a cost of \$280 per meeting.
9. Many church members have expressed frustration with the amount of time they are required to commit to the most basic tasks of setting up the church, and endure considerable inconvenience in order to store the church's equipment in their homes. Some have left because of this frustration or because they are used to worshipping in a building that "looks like a church." When people leave the church, it directly affects the church's income and indirectly affects the ability of the church to minister to its members and its neighborhood.
10. We are also outgrowing the school auditorium. If we remain there, we will have to begin holding two services, which is extra work for the staff and hinders the feeling of community in the church.
11. We want to relocate the church east of where we now meet, preferably near the University of Illinois, because God has called us to build a congregation from a variety of racial and economic backgrounds. If we are located too far west, we will not be able to attract white, hispanic or middle class members. We also want to fulfill God's vision for Israel in the inner city: "And they that shall be of thee shall build the old waste places: thou shalt raise up the foundations of many generations; and thou shalt be called, The repairer of the breach, The restorer of paths to dwell in." Isaiah 58:12
12. Because of the problems with our rented space and because of our goal to be a diverse congregation, we began looking for property to buy in 1992. In 1993, we located a building at 1218 W. Adams which would have been ideal for our needs. However, it was and is zoned M1-3, and we were informed by Pastor Theodore Wilkinson, who was interested in similar property, and by others that the city is not willing to rezone

property so that it can be used as a church. Therefore, we did not make an offer on the property. We were ready, willing and able to buy that property but for the zoning. Our ministry would have been greatly enhanced if we could have bought it.

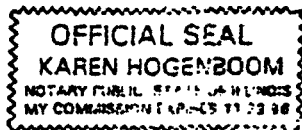
13. Currently, we are looking for a vacant lot so that we can build our own church building. For the last two years, I have kept a list of all the properties on the market on the west side. I have personally driven to most of them to see if they would be suitable for our needs, and have checked their zoning. As of the date of this affidavit, I have been unable to find one property between Lake Avenue on the north, Roosevelt on the south, the lakefront on the east and Homan Avenue on the west which is available and zoned for church use.


Anthony Earl

Subscribed and sworn to before me this 23 day of September, 1994.


Notary Public

p:clublvw.aff



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October 7, 1992

FILE COPY

Rev. Jim Queen
Chicago Metropolitan Baptist Association
329 Madison
Oak Park, Illinois 60302

Dear Jim:

This letter is a follow-up to your request for a letter concerning the requirement that any church desiring to locate in Chicago, in a business or commercial area, obtain a "special use" zoning permit and your request to be informed concerning the actions some of our clients will be taking. The process of obtaining such a permit places the following burdens on churches:

1. They must buy or lease the property (and make necessary improvements) taking the risk that the city will deny their permit and obtain a court order forcing them to vacate; or they must find an owner willing to sell or lease them property contingent upon special use approval. Finding such an owner puts a church at a distinct competitive disadvantage in the real estate marketplace because most competing purchasers or lessees need no such permit.
2. After having purchased a property or obtained a contract to purchase contingent upon "special permitting," the church must then file a request for special permission paying filing fees of about \$500, notify neighbors by certified mail, paying mailing and ownership list costs of \$300-\$400, and usually hire an attorney at a cost of \$2,000-\$5,000.
3. The hearing process often generates confrontations with angry neighbors, petitions and counter-petitions, and meetings with posturing aldermen.
4. A church can incur \$1,000 or more in costs for an appraiser, land planner and other experts.
5. The hearing process can take from two months to six months or longer, depending upon when the Board of Appeals meets and if continuances are

required.

6. The church usually experiences stress from financial strain and uncertainty. Members often misunderstand the law and may lessen giving, feeling their leaders have tried to do something "illegal" if the permit is denied.
7. If the permit is denied, the congregation often suffers great disappointment and must start over in its property search. The pastor's leadership ability may also be called into question.
8. The pastor, of course, is under considerable pressure not to preach on sin in city government since the Alderman and the administration can negatively impact the expansion plans of the congregation.
9. Finally, churches are severely discriminated against in this process. Following are non-religious assembly uses which are freely allowed (no permit required) in various commercial and business districts:
 - A. Theaters
 - B. Meeting Halls
 - C. Arenas seating up to 2,000
 - D. Funeral Parlors
 - E. Community Centers

As you can readily see, churches are a less intensive land use than many of the permitted uses. The only essential difference between churches and the permitted uses is the content of the meetings (prayer instead of cheering a sports team; preaching instead of eulogies; hymn singing instead of discussion of union matters). The Chicago Zoning Ordinance contemplates that churches should locate in the residential areas and does not require permits there. However, this "alternative" is unsatisfactory for several reasons:

1. The residential areas in Chicago are largely built up and already subdivided into small lots;
2. Groups meeting in a home usually do not have adequate parking to meet the zoning requirements once they grow beyond 25;
3. Even when land can be found, new construction of a church building and

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parking lot is far more expensive than purchase and rehab. of a former community center or funeral parlor.

4. The ordinance, passed in 1957, favors a "parish" system where people walk to a church in their neighborhood, and a hierarchial church (Catholic, Episcopal or Methodist) which can afford to build a large sanctuary with, perhaps, an adjacent school. While accommodation of a parish system is good, the ordinance does not contemplate or accommodate different religious patterns, such as the preference of individuals to attend a particular denomination which may have only three or four congregations in the city. Such congregations will want to meet closer to major streets or public transportation. Further, churches which want to evangelize often feel they can reach more people through locating visibility on commercial streets, rather than being tucked away in a residential area. Also congregations (and denominations) which are growing or hope to grow need the flexibility provided in business and commercial areas where land use patterns accommodate expanding, shrinking, and moving businesses. We all know the "church" is the people of God, but by forcing the church buildings into residential areas, the zoning ordinance forces the church into becoming the edifice (the people become the building rather than the building serving the people, Mark 2:27). Congregations often hold on to buildings because they have no flexibility to move/sell/downsize. I am sure you understand how such burdens sap the spiritual vitality from a congregation.

Jim, God's people are hurting and we need to come together as Christians to help end this discriminatory treatment against us and people of other religions. Our Afro-American and immigrant brothers are often hurt the most, because they usually lack the "clout" to obtain the permit and the dollars to fight.

In City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985), the U.S. Supreme Court held that an ordinance which required a special use permit for a "home for the feeble minded" (group care home), while freely allowing multiple dwellings, apartments, hotels, and nursing homes in the same zoning district, was in violation of the Equal Protection Clause because no rational basis existed for zoning such homes differently than the other residential uses permitted. We believe that the discrimination against our religious assemblies in favor of secular assemblies for social, business, recreational and educational uses is equally invalid.

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Several independent Afro-American churches have agreed to act as plaintiffs in a federal court challenge to the validity of the law. Other churches would be welcomed as plaintiffs. We need money, prayer and unified support. A political solution is unlikely because the Aldermen are highly resistant to voting to lessen their own powers (they have first taken our rights and then "buy" our votes by returning portions of such rights to us in their discretion).

Our budget is:

Legal Fees at District Court level	\$	25,000-50,000 ¹
Filing, court reporters, printing	\$	1,500
Public Relations	\$	3,000
Expert Witnesses	\$	<u>3,000</u>
Total Initial	\$	32,500-57,500

We plan to ask for damages and legal fees as well, but such recovery is a long way off and uncertain.

Probable Appeal:

Legal Fees	\$	25,000-35,000
Filing and printing	\$	2,000
Public Relations	\$	<u>2,000</u>
Total	\$	29,000-39,000

When we win this case, the savings to the Kingdom of God in Chicago alone will be very substantial. In what way can the CMBA help? A pro bono contribution of \$15,000 from the group would be, I believe, excellent stewardship of your assets. Almost any church seeking to locate or expand in Chicago faces this problem, but a favorable court decision will help in many suburbs also. In addition, we would ask the group to pray for us at each meeting during the pendency of the litigation and to pledge an equal amount to pay for an appeal if needed. If the city loses, they might appeal--if we lose at the district court level, an appeal should certainly be taken. We will place all funds in escrow and return them if the litigation does not proceed or will return a pro rata

¹ A major variable is the number of plaintiffs involved. By having more plaintiffs we believe our case will be stronger.

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amount if the case is aborted after it has commenced.

Please put this matter on a priority agenda for the Association, and let me know as soon as possible how you can participate. We would like to launch this action by November, Lord willing.

Yours in Christ,

**Mauck, Bellande, Baker
& O'Connell**


John W. Mauck

JWM:gb

cc. Woodroe Claiborne

Mr. CANADY. Professor Durham

**STATEMENT OF W. COLE DURHAM, JR., BRIGHAM YOUNG
UNIVERSITY LAW SCHOOL**

Mr. DURHAM. Thank you. It is a great honor for me to address this body today on legislation vital to protecting one of our pre-eminent liberties: religious freedom. I have spent much of the past decade working in support of this great principle both in my home State of Utah and at the Federal level, work which underscores my sense that we are dealing with one of the bedrock principles of any just society.

It is a true tragedy that some of the most fundamental problems arise in this area, and some people seem to think that they can't be dealt with at the Federal level. I believe that the proposed law is measured, that it does follow what has been done in other areas. For example, it involves valid assertions of the commerce and spending powers.

I also want to focus primarily on the land use issues. I think I must have misheard Marci Hamilton. I thought she said land use is the last bastion of liberty. I cannot believe that. I have to say that I must have misheard her.

Mr. CANADY. My ears heard the same thing with the same response on my part.

Mr. DURHAM. Maybe she misspoke, but certainly anyone who has been in any of these processes I know often have questions and problems with that.

One of my fundamental roles in this hearing is to draw together anecdotes—cases—on land use planning. There is a reason that we deal with anecdotes in this area, and that is that every piece of land is different; land is unique. And yet there are recurring kinds of problems.

A year or so ago when we were preparing the amicus briefs in the *Boerne* case, I along with some other colleagues pulled together all of the reported cases that we could find regarding land use and religious freedom. We tabulated them and simply looked at what happened. The result is not a scientific study in the strict sense. Frankly, I don't know how one would assemble a scientific universe of such cases. Instead, we simply tried to get all of the reported cases. When you look at them, you see an overwhelming pattern of discrimination.

This, of course, goes to the section 5 issue and section 5 support for the land use provisions of Religious Protection Act.

Let me just summarize very briefly what the overall results are. I am skipping over another study that was done by DePaul University that looks at the scope and the range of land uses that are done by churches throughout the country. This was a survey of about 300 major denominations and what their land use patterns are.

But focusing just on this collection of data about the actual cases, we compared the treatment received by smaller religious groups. This is a continuum, but we took those with 1.5 percent of the population or less and we compared those with the treatment that is received by larger religious groups. Minority religions that fall in

the category of having less than 1.5 percent of the population represent about 9 percent of the total population of the United States.

Mr. SCOTT. What percent?

Mr. DURHAM. About 9 percent. These small groups represent only 9 percent of the population, and yet they were involved in over 49 percent of the cases regarding the right to locate buildings at a particular site and over 33 percent of the cases seeking approval of accessory uses.

When we did the study, you couldn't exactly tell which kind of denomination was involved in each case. If the case name is "Roman Catholic diocese such and such," you know that it is Catholic, but some of the others are not so obvious. So there were a number of cases that are unclassified or are from unascertainable denominations. These unclassified cases are likely also to be in the category of small religious groups (with less than 1.5 percent of the population).

It turns out that the disproportionate burden becomes even more distressing when these cases are taken into account. If these are counted in, over 68 percent of the reported location cases, and over 50 percent of the accessory use cases involve smaller religious groups.

There may be some imperfections in the data, but there could be substantial error without disturbing the result. The point is this portrays a picture of significant recurring discrimination.

I think, as Mr. Mauck said, we are just seeing the tip of the iceberg. I can walk through a number of cases, as my testimony does, and you see churches being driven from pillar to post seeking place after place simply in order to find a place to worship, and this is, in my view, unconscionable.

Now, it is true that there are all sorts of planning reasons that one can give for such results. I want to say that most of the planning people in this country act in good faith and so forth, but I think that they end up suffering from what I call "secular blindness." They are often more concerned about some relatively minor concern about aesthetics and the like than they are with responding religious freedom. As important and valuable as these concerns are, they cannot outweigh the value of religion and religious freedom in our society. It is vital to adopt a law like the Religious Liberty Protection Act to deal with these things.

In conclusion, I would simply underscore what was said at another point in my written testimony with respect to the Commerce Clause issue. Commerce issues are particularly obvious in the land use area. Religious use of land has all kinds of impacts on commerce, and the impacts are clearly substantial. Religious uses are directly burdened by the land use decisions, and it is perfectly permissible for Congress to exercise its power to deregulate this area that is so vital to exercise one of the most fundamental freedoms in the world.

Thank you.

Mr. CANADY. Thank you, Professor.

[The prepared statement of Mr. Durham follows.] ~

PREPARED STATEMENT OF W. COLE DURHAM, JR., BRIGHAM YOUNG UNIVERSITY LAW SCHOOL

This statement is submitted by Professor Durham in his personal capacity, and is not made on behalf of any organizations or institutions with which he is affiliated.

It is a great honor for me to address this body today on legislation vital to protecting one of our preeminent liberties: religious freedom. I have spent much of the past decade working in support of this great principle: in my home state of Utah, at the federal level, and as a comparative law expert in many of the countries emerging from the yoke of communism. Experience in all these contexts has reaffirmed my conviction, in setting after setting, that religious freedom is one of the bedrock principles of any just human society. As Madison rightly argued over two centuries ago in his famous Memorial and Remonstrance, religious freedom "is in its nature an unalienable right" because it relates to duties that are "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."¹

While this hearing rightly focuses on issues of United States constitutional law, it is worth remembering that the principle of religious freedom is deeper and more absolute than any constitution. The Universal Declaration of Human Rights, whose fiftieth anniversary is celebrated this year, clearly recognized (as did our founding fathers) that religious freedom is not a right conferred on individuals by states; it is a right possessed by *everyone* simply by virtue of being human. Our Constitution is hallowed in no small part because it was one of the first great charters of human history to protect the deeper principle of religious freedom. Moreover, our constitutional history as a people remains impressive because of ongoing efforts to protect this cherished liberty. The legislation we are discussing today, if enacted, will be part of our generation's elaboration of the American heritage of religious freedom.

I. GENERAL CONSIDERATIONS CALLING FOR ADOPTION OF THE RELIGIOUS LIBERTY PROTECTION ACT

Congressional action is vital because religious freedom faces unique challenges at this juncture in our history. These challenges are not limited to the fact that the United States Supreme Court has radically and unnecessarily narrowed the scope of religious freedom protections as traditionally understood in this country.² They flow from the pervasiveness of the modern state, the increasing pluralization of culture, and powerful forces of secularization. Each of these three factors intensifies the need for added protection of religious freedom.

This is most obvious as one considers the massiveness of the modern state. The seemingly inexorable expansion of state activity into more and more sectors of life increases the number of areas in which state and religious activity can come into conflict, and where religious freedom protections are vital to protect individual and collective religious activity. This Hearing, previous hearings on the legislation in question, and all the hearings on the earlier Religious Liberty Protection Act, were replete with evidence of the many areas in which religious freedom is threatened if encroaching governmental action is not strictly scrutinized.

The increasing pluralism of contemporary society further compounds the potential friction points between religious activity and the state. Some, including Justice Scalia in the *Smith* decision, have cited this factor as an argument against accommodation of religious difference. But this runs counter to our historical experience. What the American experiment has shown, and shown stunningly (if not always perfectly), is that accommodation and toleration are much more effective in promoting social stability and flourishing than insistence on homogeneity and standardization. Increasing pluralism calls for more, not less religious freedom, because in addition to being right, respect for difference pays richer social dividends than wooden insistence on conformity.

Less obvious, perhaps, is the challenge posed by progressive secularization, which is particularly evident among our intellectual elites. Secularization is gradually dulling our sensitivities to the vital importance of religion and religious freedom to the strength of our republic. The importance of religion to society was obvious to the founders and to many of the greatest commentators on American life, such as Alexis de Tocqueville. But in secularized minds, the legitimate interests and claims of religion seem to fade in importance or to be marginalized when balanced against

¹James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, Marvin Meyers, ed. (rev. ed. 1981). The Memorial and Remonstrance is also reprinted as an appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947).

²*City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Employment Division v. Smith*, 494 U.S. 872 (1990).

the secular interests that are the focus of most governmental programs. Secular purposes look neutral, even when they have severe ramifications for religious life, whereas religious beliefs are suspect. What results is a kind of secular blindness, or at least myopia, that results in progressive underprotection of religious rights.

This trend is compounded by those thinkers about religious rights, including some at this hearing today, who advocate various versions of what might be called "secular reductionism." Some contend that religious rights can simply be reduced to other more secular rights, such as freedom of speech, or association, or the right to equal protection. Others view religious freedom through a paradigm of equality, in which the idea of religious freedom is reduced to a mere non-discrimination norm. Too often, even the residual equality norm to which religious freedom is reduced grows insensitive to the value of religious difference. It is axiomatic in dealing with equality norms that substantive equality cannot be achieved without taking relevant differences into account. But secularized equalitarians are all too prone to forget that religion and the right to religious freedom constitute relevant differences that need to be taken into account in order to provide genuine substantive equality. Whatever one ultimately thinks about the balance of liberty and equality, it is fair to say that the greatness of our tradition in religious liberty will be impoverished if we do not understand that at its core it is about the protection of religious differences, religious pluralism, and religious conscience, and that sometimes these values are so strong that they even override otherwise relevant equality claims.

The Religious Liberty Protection Act helps remedy the foregoing problems by insisting, at least in those areas where Congress has continuing power after *Boerne*, that governmental incursions on religiously motivated conduct shall be strictly scrutinized. This does not mean that all state action and state norms thus scrutinized will be invalidated. No one has ever claimed that the right to engage in religiously motivated conduct is absolute. But it does assure that government officials cannot ride roughshod over religious claims, that they will need to bear the burden of proving that state action they implement complies with constitutional requirements, and that they need to consider carefully whether they can structure their programs in ways that are less burdensome to religious believers and organizations. Only when they have strong justification will they be allowed to override religious concerns. Insisting on such justification does not constitute an unfair privileging of religion. To the contrary, it simply recognizes the distinctive protections afforded by the First Amendment. Religious differences need to be taken into account to avoid unfair *disadvantaging* of individuals and groups bound by conscientious obligations. Requiring special sensitivity affirms the distinct and sensitive role that religion plays in social life; state action that fails to respect its distinctive character is unjust.

II. THE NEED FOR SPECIAL PROTECTION OF RELIGIOUS FREEDOM IN THE FIELD OF LAND USE PLANNING

When I was invited to appear at this Hearing, I was asked to focus in particular on religious freedom issues that arise in the area of land use. In the balance of my remarks, I will turn to this area. In my view, the problems encountered by religious organizations in the area of land use are symptomatic of a larger set of problems that religious organizations face in the modern regulatory state. Thus, I hope my remarks in what follows will be understood both as documentation of concerns in the land use area in particular and at the same time as a case study providing evidence more generally of the need for the Religious Liberty Protection Act.

Conflicts between free exercise of religion and land use date back to the earliest days of the American colonial period. One of the most famous early cases of religious persecution in America involves the expulsion of Anne Hutchinson from Massachusetts Bay. While the case obviously antedates modern land use statutes, many of the elements are familiar. Apparently, Ms. Hutchinson attracted the disfavor of the establishment because she started holding regular sessions in her home to discuss (and criticize) sermons held in the dominant church. She started a women's club in her home to discuss the sermon and the Bible each week. The attendance at these meetings increased with the controversy over the banishment of Roger Williams. Women were attracted to Anne and wanted to hear her opinions. The first formal action taken against her was a resolution of the assembly in 1637, which, as reported by her principal antagonist, John Winthrop, read as follows:

That though women might meet (some few together) to pray and edify one another; yet such an assembly, (as was then the practice in Boston), where sixty or more did meet every week, and one woman (in a prophetic way, by resolv-

ing questions of doctrine, and expounding the scripture) took upon her the whole exercise, was agreed to be disorderly, and without rule.³

In a modern setting, planning authorities would have complained of inadequate parking, traffic problems, and other signs of "intensive" land use. A sanction as austere as formal banishment in seventeenth-century New England would have been an unlikely, but modern authorities might have proven just as adept at finding a neutral rubric (here, "disorderly conduct") to exclude an unpopular religious activity.

The field of land use is particularly vital for the simple reason that religious activity, particularly the communal life of a religious group, necessarily involves using land. To some extent, this simply states the obvious, but some detail about the nature of religious land use in the United States may be helpful. The 1994 Report on the Survey of Religious Organizations at the National Level (the "Survey"), conducted by the Northwestern University Survey Laboratory and the DePaul Law School's Center for Church/State Studies (with which I am involved), surveyed approximately 300 religious denominations in the United States, including virtually all major denominations.⁴ It found that nearly all religious organizations hold religious gatherings at least once a week. Not surprisingly, 96% of the respondents indicated that religious gatherings are held at a single permanent location. 89% of those utilizing such structures own them outright; 11% of respondents indicated that structures are leased.⁵ In addition, "approximately two-thirds . . . engage in social service or welfare activities; over 80% are involved in education;⁶ nearly 60% provide recreation or social activities;⁷ 85% are involved in communications;⁸ one-third have retreat centers; and 40% have cemeteries."⁹ These figures do not reflect the number of religious associations that operate hospitals or other health care facilities, nor do they reflect a variety of other programs carried out by religious social services agencies. 54% of the respondents indicate that their national bodies own real property that is not used for worship purposes, as do the local units of 54% of the respondents.¹⁰ Educational facilities and clergy housing are the most commonly held non-worship properties.¹¹ In addition, approximately one-fifth of the organizations surveyed indicate that they invest in real estate to raise funds.¹²

For the most part, the government officials dealing with land use issues in the nearly 70,000 local government entities of the United States are tolerant and respectful of religious rights. Nonetheless, particularly when community opposition is strong, or when the fashionable orthodoxies of the planning or historic preservation worlds are challenged, problematic instances occur.

It is difficult to measure with precision the extent to which intentional religious discrimination plays a role in the problematic cases. As noted in *In re American Friends of the Society of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979),

Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area. Under such circumstances it is necessary to most carefully scrutinize the reasons advanced for a denial to insure that they are real and not merely pretexts used to preclude the exercise of constitutionally protected privileges.

³ Quoted in CARL HOLLIDAY, *WOMAN'S LIFE IN COLONIAL DAYS* 40 (Boston: Cornhill Publishing Company, 1992).

⁴ My summary of the Survey draws on a summary prepared by Professor Angela Carmella in a chapter entitled "Land Use Regulation of Churches" that will appear in *The Structure of American Churches: An Inquiry into the Impact of Legal Structures on Religious Freedom*, which is to be published under the auspices of the DePaul Center for Church/State Studies. (I am an Associate Editor of this volume.)

⁵ Survey, MQ41.

⁶ 44% of the organizations surveyed indicated owning one or more educational facilities. Survey, MQ14.

⁷ Of these, 54% provide recreation centers, and 80% have campgrounds. Survey, MQ58 D and G.

⁸ 10% of these have a television station; 24% have a radio station.

⁹ *Id.*

¹⁰ Survey, MQ10, MQ42.

¹¹ Nearly one-third reported owning clergy housing or other real estate.

¹² Survey, MQ30.

Despite such instinctive efforts on the parts of governing bodies to avoid the appearance of intolerance, I have absolutely no doubt that prejudice is a substantial factor in a large number of cases, particularly where smaller or less popular groups are involved.

Strong evidence for this conclusion is provided by a study I prepared with colleagues from the B.Y.U. Law School and at the law firm of Mayer, Brown & Platt in January, 1997. A copy of the study is attached as an appendix to my statement. Essentially, the study reviewed all the reported cases we were able to identify involving free exercise challenges to land use regulation. If anything, it seems reasonable to assume that these cases significantly understate the number of situations in which religious groups *believe* that their religious rights are being violated. A variety of practical disincentives—ranging from the need to have good working relationships with local officials and neighbors, to religiously based impulses to go the second mile, to the sheer cost of litigation, to the availability of other sites and the unattractiveness of settling among manifestly prejudiced neighbors—all operate to deter religious groups from over-litigating their claims.

Cases were classified into two broad categories, essentially to see if there are significant differences between new construction situations ("location cases") and cases dealing with whether an accessory use (such as a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases"). The cases were also classified by denomination, to the extent that is possible based on case name or other information in the body of the decision. Information on size of denomination was based on data from a massive study that provides the best available estimates of church affiliation based on self-described affiliation.

With this data in hand, we proceeded to compare the treatment received by smaller religious groups (those with 1.5% of the population or less) with that received by larger groups.¹³ If land use laws were being applied in a neutral fashion, one would expect roughly equal treatment. But in fact, the situation is quite different. Minority religions representing less than 9% of the population were involved in over 49% of the cases regarding the right to locate religious buildings at a particular site, and in over 33% of the cases seeking approval of accessory uses. The disproportionate burden becomes even more distressing if one takes into account smaller non-denominational or other unclassified groups. If these are counted, over 68% of reported location cases, and over 50% of accessory use cases, involve smaller religious groups.

While a study of this type can at best give a rough picture of what is happening, the conclusion seems inescapable that illicit motivations affecting disputes in the land use area. Such illicit motivation may be present either in the form of prejudice against unpopular or less known groups, or in the form of undue favoring of more powerful groups, or most likely, both. There may of course be other factors that explain some of the disparity, but the differences are so staggering that it is virtually impossible to imagine that religious discrimination is not playing a significant role.

Significantly, the judicial success rate for small religious groups and larger groups is essentially the same. The smaller groups won approximately 66% of the cases in which they were involved, whereas larger religious groups won approximately 65% of the cases in which they figured. These figures suggest that judicial review has on balance tended to help smaller religious groups. At the same time, they indicate that judicial decisions tend to be more impartial across groups, and that there is no reason to think the high proportion of disputes involving smaller religious groups reflects higher levels of ungrounded claims.

The magnitude of the problem is reinforced when one considers that the reported cases are only the tip of the iceberg, since for the reasons discussed above, most religious groups bend over backwards to avoid conflicts with future neighbors and city officials they must deal with on a continuing basis. That is, religious groups are much more likely to give up on claims they may believe are valid in the interest of social peace than they are to litigate questionable claims aggressively. If anything, then, the study, with whatever unavoidable imperfections it may have, significantly understates the problems religious groups face.

Note that while the problems for smaller religious groups are particularly acute, the burdens faced by larger groups are not insignificant. A recent survey commissioned by the Presbyterian Church USA—a mainline denomination by anyone's definition—noted that 23% of its congregations had needed to obtain some sort of land use permit since January 1, 1992. Significant conflicts with city/county staff, neighbors, commission members, or others were encountered with respect to 10% of the

¹³ Technically, all religions in the United States are "minority religions" in the sense that their members constitute less than 50% of the population. It turns out that those with 1.5% of the population or more tend to include "mainline" groups, and that the less popular groups all fall below the 1.5% line.

land use approvals thus needed, although only 1% of the approvals needed have thus far been denied (with 4% remaining unresolved).¹⁴

The patterns of discrimination suggested by the foregoing statistics are all too familiar to those working in the religious land use area. In case after case, the plaintiff is a religious group that has obtained options on lot after lot, or has actually purchased a succession of lots, often after preliminary consultations with city officials, only to have a zoning request, a conditional use permit, a variance, or some other land use approval denied as opposition from local citizens climbs. Such denials are often issued even though similar religious uses from larger religious groups have been approved. This is exactly what happened when The Church of Jesus Christ of Latter-day Saints sought a zoning change for a temple site in Forest Hills Tennessee, as described in detail by Von Keetch in an earlier Congressional hearing held on March 26, 1998.¹⁵ Such denials are also a familiar litany in many cases involving Jehovah's Witnesses. And they are an even greater problem for newer or non-Christian religious groups.

The facts of discrimination were particularly blatant in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). A Muslim group that served primarily students at the University of Mississippi in Starkville sought necessary approvals for a place of worship near campus. Unfortunately, Starkville's zoning ordinance prohibited the use of buildings as churches in all the areas within the city limits that were near campus, and there was no place in the city in which worship facilities were permitted as of right. The Islamic Center considered three successive lots as possible worship sites, but each time was told by the City's building codes official that the sites could not be approved, either because of inadequate parking, heavy traffic on an adjacent street, or the risk of traffic congestion. The leaders then met with the building code official, and asked "exactly where we can locate," and were told that a fourth location would be excellent, if sufficient parking was provided. The representatives of the Center then bought the property, and provided 18 on-site parking spaces. The planning commission recommended approval. Ultimately, however, the use had to be approved by the Board of Aldermen, and despite recommendations of approval from staff, the Board denied the approval when a neighbor claimed that the use would cause "congestion, parking, and traffic problems." The Board thereupon denied the exception to the zoning ordinance that was sought. Subsequently some city officials inspected the building for conformity with fire and electrical requirements, and approved its conformity for worship. But several months later, in response to complaints about worship activities, the City ordered the Islamic Center to stop holding worship services at its building. What made this whole course of action particularly galling was that there was a residence next door that was used as a worship center for Pentecostal Christians. This group caused more noise, provided less parking and in general seemed less deserving of a zoning exception than Islamic Center. Five more churches were located within a quarter mile of the Center. The District Court, after holding that "congregational prayer for Muslims is desirable, but not mandatory," and that the "Starkville city ordinance does not preclude students from purchasing cars and driving to a worship site located [outside Starkville's city limits]," concluded that

[s]tanding alone, the denial of the . . . [Center's] zoning application is not enough upon which to base an inference of discrimination. . . . The actions of the Board were supported by valid traffic considerations, and there is no evidence to suggest that it improperly considered plaintiffs' religion in reaching its decision.

Therefore, it held, the zoning ordinance did not violate the Islamic student's rights to free exercise of religion or substantive due process.¹⁶

Fortunately, the Circuit Court reversed, applying a heightened scrutiny test to reject the District Court's wooden deference to blatantly discriminatory state action and its decision that Starkville's zoning ordinance did not burden the Islamic students' free exercise rights. The Fifth Circuit Court rightly compared the comments about how poor Islamic students could simply buy cars to drive to church across town or outside the city limits to "Anatole France's comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges. . . ." ¹⁷

The difficulty is that in far too many cases, as noted in the Schwab case quoted above, land use decisions are wrapped in neutral sounding language about parking,

¹⁴ Supplement to the Session Annual Statistical Report: End of Year 1997, Question 7-8.

¹⁵ See Statement of Von G. Keetch, pp. 11-17.

¹⁶ *Id.* at 298 (citing District Court opinion).

¹⁷ *Id.* at 298-99.

setbacks, traffic impacts, and the like, which may constitute substantial and tangible harm to surrounding property owners, but in too many cases merely serves as an empty verbal mask hiding illicit discriminatory conduct aimed at the exercise of religion. Thus, lack of parking facilities that results in constant overparking of a narrow street, disrupting traffic and blocking neighboring driveways may constitute a genuine problem, but it does not justify excluding a religious use from an area if adequate on-site parking is provided (as was the case in *Islamic Center*) or if the religious use is needed at the location in question precisely because of religious requirements that participants must walk to the service.¹⁸ References to increased traffic flows may constitute a genuine risk to safety, or they may simply reflect moderate increases as likely to result without the religious use. Rigid insistence on setback or bulk requirements may be unnecessary, or may reflect an aesthetic concern that should give way to weightier religious freedom concerns. Building code problems may constitute substantial health and safety risks, or they may relate to matters that are routinely waived in a community.

The point is that land use provisions, while often assumed to be part of general and neutral regulatory schemes, characteristically involve permit schemes analogous to those struck down in *Cantwell v. Connecticut*,¹⁹ which granted local officials essentially standardless discretion to determine whether religious practices may go forward. Land use decisions are often delivered in conclusory language that can mask behind-the-scenes prejudice. Constitutional rights to the free exercise of religion are of little practical value if they permit control of the meeting place of a church to pass from its members to government outsiders without any examination of the government's asserted need for such control. Yet unless the goals of land use authorities are tested against more searching scrutiny than that provided by standards of neutrality and general applicability, agency officials have no occasion and no motivation to consider and weigh their regulatory objectives against the substantial burdens these may impose on the free exercise of religion. As the Supreme Court noted in *Church of Lukumi Babalu Aye v. City of Hialeah*,²⁰ "The Free Exercise Clause protects against governmental hostility which is masked as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Significantly, the Supreme Court's decision in *Smith* jettisons strict scrutiny only as to neutral and generally applicable laws. As was clear even before *Smith* made the fact relevant, "[z]oning laws are peculiar in that they are not really laws of general applicability but are, rather, linked to individual properties."²¹ Some courts have built on this fact to hold that strict scrutiny continues to apply in the land use area as a reasonable construction of language in the *Smith* decision explicitly designed to avoid overturning *Sherbert* and its progeny. Thus, in *First Covenant Church v. Seattle*,²² the Washington Supreme Court found that a landmark designating ordinance was not general, because its criteria for application necessitated individual evaluations of each potential landmark property and was not neutral because of an exception for liturgy-based structural changes,²³ and hence that the challenged ordinance failed under strict scrutiny. The court in *First United Methodist Church of Seattle v. Seattle Landmarks Preservation Board*,²⁴ reached a similar conclusion, holding that while a particular church could be landmarked, it would violate the free exercise clause to allow restrictive features of the landmarking ordinance to be enforced so long as the building remained devoted to religious uses. While all courts have not reached the same conclusion,²⁵ Congress may legitimately exercise its power under Section 5 of the 14th Amendment to remedy violations and to assure protection of free exercise values that remain protected under the reasonable interpretation of *Smith* advanced by the Washington cases.

One of the major problems in the land use area is that the public officials charged with enforcing them are all too prone to undervalue the concrete needs of religious

¹⁸ *Orthodox Minyan of Elkins Park v. Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772, 773 (Pa. Cmwlth. 1989) ("It is ironic that the Board denied a special exception to convert a property to religious use on the grounds of increased traffic flow to a group whose religion prohibits them from driving automobiles during their day of worship").

¹⁹ 310 U.S. 296, 304-307 (1940).

²⁰ 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J. concurring)).

²¹ See Kenneth Pearlman, *Zoning and the Location of Religious Establishments*, 31 Cath. Law. 314, 335 (1988).

²² 120 Wash. 2d 203, 840 P.2d 174 (1992).

²³ 120 Wash. 2d at 214-15, 840 P.2d 174.

²⁴ 76 Wash. App. 572, 887 P.2d 473 (1995).

²⁵ See, e.g., *St. Bartholomew's Church v. New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (sustaining a landmarking statute as a neutral and general law).

activity as opposed to the other planning and preservation values. In part this is a reflection of what I called "secular blindness" or "secular myopia" above, and in part, it is a natural corollary of the commitment of such officials to planning and preservation values that motivated them to assume planning or preservation responsibilities in their communities in the first place. In the preservation context, the historical value of churches is sometimes given priority over the practical needs of living religion. In the planning context, idealized notions of the aesthetics and logic of urban layout are given greater credence than the need to allow land uses that can accommodate the needs of religious groups who desire to locate in a community and that will be as workable for the religious community as for residential neighborhoods and other more powerful blocs of the citizenry. The underlying values involved cannot be adequately balanced if any land use regulations the relevant authorities happen to prefer are determined to be "neutral and general" laws virtually immune to any religious freedom challenge.

If courts are not authorized to invoke the kind of heightened scrutiny called for by the Religious Liberty Protection Act, it seems highly plausible to expect that the plight of minority religious groups documented above will further deteriorate, because courts will not be able to be as effective in rectifying the problems encountered by smaller groups as they have been in the past. In the absence of such heightened scrutiny, courts will have a much more difficult time unmasking discriminatory conduct and a much stricter obligation to be deferential to land use authorities. Ironically, this could lead to a situation in the future in which the disparity between reported land use cases of larger and smaller groups is reduced, not because the smaller groups believe their rights are being vindicated, but because they perceive the prospects of vindicating those claims in court are hopeless, and therefore cease bringing cases in the future that they might have pursued in the past.

The Religious Liberty Protection Act is well designed to remedy the types of problems identified by the analysis of reported land use cases submitted herewith, and made more concrete by consideration of the various cases discussed above. By focusing on laws which "substantially burden religious exercise", the Act avoids the risk of imposing unreasonable constraints on governmental action that might result if every type of state action that incidentally burdens religion could be challenged under the Act. At the same time, because "religious exercise" is defined to mean "an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief," it follows *Smith* in insisting that state agencies should not get into the business of assessing what is central to a religion. The insistence that land use authorities use the "least restrictive means" available to promote their policies is only reasonable: continuing to insist on a more burdensome course of action when a reasonable alternative is available transforms what may initially have been inadvertent discrimination into knowing and thus intentional imposition of an injury to religious sensitivities. Finally, the insistence on "substantial and tangible harm" provides a meaningful standard (and one that is as precise as the subject matter allows) for assuring that only genuinely significant land use concerns will be able to override religious liberty claims. Significantly, this standard does recognize that there are circumstances where land use regulations will be sufficiently significant to override religious concerns. Where a community can demonstrate "substantial and tangible harm," a community may enforce land use regulations that will substantially burden religious exercise. However, in accordance with prior law, a community may not totally deprive a religious community of "a reasonable location in the jurisdiction," and it may not deprive religious assemblies of equal access to areas where non-religious assemblies are permitted.

The highly individualized processes of land use regulation readily lend themselves to discrimination that is difficult or impossible to prove in individual cases, but which is in fact pervasive, as the study submitted herewith demonstrates. RLPA will help remedy this problem in part by adjusting burdens of proof. Moreover, the heightened scrutiny of land use regulation called for in the Act will be an important tool in helping to root out such discrimination. Congress has power under Section 5 of the Fourteenth Amendment to support remedial legislation of this type. Significantly, Sections 3(b)(1)(B) and (C) are sustainable for independent reasons. Section 3(b)(1)(B) codifies the rule that it is unconstitutional wholly to exclude First Amendment activity from a jurisdiction.²⁶ If this principle were not sound, religious communities would be afforded less protection against land use authorities than adult theaters, bookstores, and other similar businesses. Section 3(b)(1)(C) codifies the rule that discrimination between different categories of speech, and particularly be-

²⁶ *Schad v. Bourough of Mt. Ephraim*, 452 U.S. 61 (1981).

tween differing viewpoints, and applies it to disallow land use regulations that might otherwise permit secular assemblies while excluding religious assemblies.

Of course, religious discrimination does not lurk behind every land use decision, but this is not the requirement. *Boerne* allows assertion of Congressional power in contexts where "there is reason to believe that many of the laws affected by the Congressional enactment have a significant likelihood of being unconstitutional."²⁷ Without remedial action, the pattern of discrimination evidenced by the study submitted herewith is all too likely to continue. Thus, Congress has power to enact the land use provisions of the Religious Liberty Protection Act.

III. COMMERCE POWER PROVIDES INDEPENDENT GROUNDS FOR ENACTING RLPA.

Before concluding, let me make a few final remarks regarding Commerce Power. At the outset, I wish to emphasize that in what follows I do not maintain that religious activity and commercial activity should be confused. Religious activity is not commerce, and even in the absence of First Amendment constraints, would not be regulable as commerce.

Having said this, however, no one can doubt that religious activity *substantially affects* interstate commerce. Much more extensive documentation of this fact has been provided in particular by the Statement of Marc Stern at this Hearing. My aim is merely to note a few examples that suggest the extraordinary range of effects that religious activity in the land use area has on commerce.

Land use regulations affect whether or not new religious buildings can be constructed. Religious institutions spend large amounts to build and maintain facilities for worship and for a variety of religiously motivated collateral activities, such as the provision of education, health care, recreational facilities and so forth.

Many religious organizations are interstate and indeed international organizations. The DePaul Survey cited above indicates that while approximately 60% of the denominational respondents indicate that final decisions as to location and property acquisition are made at the local level, nearly 20% indicated that such decisions are made by state, regional, or national bodies.²⁸ This means that for a substantial number of religious organizations, decisions regarding church building and expansion are made in one state and implemented in another. Funds typically flow in interstate commerce from one location to another in support of these objectives.

In some ecclesiastical polities, funds are collected and retained at the local level, but in others, they are gathered, transferred electronically to a central location, and then distributed back out nationally or internationally in accordance with the needs of various congregations. Charitable aid flowing through these channels depends to some extent on where congregations are ultimately located. Even where facilities are leased, the funds involved often flow in interstate commerce. Local as well as national organizations often own retreat facilities which may be located at a distance, even in a different state. Many religious organizations undertake humanitarian aid projects that involve sending goods (e.g., clothing) and services (e.g., medical aid) across state and international boundaries. Land use regulations impeding such uses obviously regulate activity that substantially affects interstate commerce.

City regulation of religious land use has the potential to divert the flow of commerce from one state to another. Certainly, it often impedes the flow, for substantial periods, while churches administered nationally look for alternative sites. The L.D.S. Church currently builds 300-400 churches annually. The cost of such buildings typically runs into the multimillion dollar range. Approximately half of these are built in various states of the United States, and the remainder are located internationally. This experience must be multiplied by that of hundreds of other denominations in the United States. Land-use regulations unquestionably delay or block such religious activity, with direct negative impacts on commerce that would otherwise occur.

Some religious facilities may attract believers to travel across state lines to regional retreat or worship facilities. Temples have this characteristic for believing Mormons; countless other churches have similar structures. Retreat, camp, or recreational facilities may lie across state lines. The location of a new church building in a municipality will typically result in a new flow of literature, media items, computers, and other such matters, as well as the installation of new interstate telephone lines and other means of communication. Often, supervisory personnel will need to travel to assure that new construction is handled properly and that existing

²⁷ 117 S. Ct. at 2170.

²⁸ DePaul Survey, MQ43.

facilities are properly maintained. These are precisely the types of activity that have justified Congressional regulation in the interest of civil rights in other contexts.²⁹

All too frequently, the current land use regime operates as a kind of non-tariff trade barrier against new and less popular religious groups, with ripple impacts on all the other types of commerce that the new religious activity would otherwise stimulate. Moreover, as noted above, current administration of land use rules creates in effect an unfairly burdensome excessive market for real estate options, as the sorry experience of numerous religious groups in proffering site after site to local planning authorities confirms. Congress can legitimately determine that it will regulate a field (or occupy a field with non-regulation) where it desires to assure that activities substantially affecting commerce (here: religious activities) should not be burdened, or should be burdened only where there are strong and non-discriminatory grounds for the burden.

Examples could be multiplied, but what has been said amply supports the truly massive impact religious activity in general, and more particularly, religious activity directly impacted by land use regulation, has on interstate commerce. Particularly when replicated across denominations and across the thousands of municipalities in the United States, the substantial effect on commerce is undeniable. Eliminating unjustified burdens on religious exercise will promote commerce, and justifies Congressional intervention to assure that religious activity and its substantial affects on commerce is not unfairly burdened by differential land use regimes around the country.

APPENDIX

Discrimination Against Minority Churches in Zoning Cases

In order to gain some perspective on the treatment of non-mainline groups in zoning cases, a broad sample of zoning decisions challenged on free exercise grounds has been analyzed. A total of 196 cases was ultimately included in the study. This set of cases should include a fairly comprehensive set of reported cases in this field. It includes all cases cited in annotations that have collected cases on this topic (including cases cited in pocket part updates),³⁰ all cases cited in the section of a leading treatise on zoning that addresses issues of religious land uses,³¹ and all cases identified through a Westlaw search classified under West's Constitutional Law Key Number 84.5(18), which collects religion cases involving zoning and land use. It is conceivable that some cases involving religion-based constitutional challenges to zoning decisions may not have been captured through these sources, but it is unlikely that there are many such cases.

The cases thus collected have been classified by the type of zoning case and by the denomination involved. Essentially, the zoning issues fall into two broad categories: cases that involve zoning on property to permit a church building to be erected on a particular site ("location cases"), and cases that determine whether an accessory use (such as a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases").

In most of the cases, the denomination involved is obvious either from the case name or from discussion of the case in the opinion. There are, however, a substantial number of cases in which either no denominational affiliation appears in the case, or the church involved is non-denominational. These cases are designated as "unclassified" in the tables below. While some of the unclassified religious associations may in fact have a denominational affiliation that simply is not evident from the cases, most of these cases appear to involve local, congregationally organized churches that are functionally similar to the organizations we have classified as minority churches.

Information on the size of various denominations was derived from tables provided in BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD; RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 15-17 (1993). The data is derived from the National Survey of Religious Identification conducted by the Graduate School

²⁹ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (allowing Congress to impose anti-segregation laws on restaurant whose food came 46% from out-of-state); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (allowing Congress to impose anti-segregation law on motel that had substantial out-of-state guests because racial discrimination in the aggregate discouraged many blacks from traveling).

³⁰ Jay M. Zitter, Annotation, *What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance*, 11 A.L.R.4th 1084 (1992); Jeffrey F. Ghent, Annotation, *Definition of Church or Religious Use Within Zoning Ordinances*, 62 A.L.R.3d 197 (1967); Annotation, *Zoning Regulations as Affecting Churches*, 74 A.L.R.2d 377 (1961).

³¹ A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ¶ 20 (4th ed. 1992).

of the City University of New York, which surveyed a representative sample of 113,000 people across the continental United States. This is the most comprehensive poll ever conducted on the issue of religious affiliation. *Id.* at 1-2. It provides the best available data of religious affiliation as assessed from the perspective of the believer.

The line between mainline denominations and smaller groups is difficult to draw, because one is dealing with a continuum. For purposes of this study, groups with more than 1.5% of the adult population were treated as mainline groups, whereas groups with smaller percentages were included in the minority category. The only exception in the tables that follow is Judaism, but if the statistics on Judaism were divided to reflect the major branches of that tradition, the various branches would come under the 1.5% threshold. Some smaller Protestant groups may be more analogous to mainline groups, so that the categorizations in a few cases could be questioned.

The population percentages in the tables that follow do not add up to 100% because the tables do not include data on non-religious groups and on the portion of the population (only 2.30%) that did not respond to the survey. Many smaller religions were not covered by the study because they have no reported cases, but such religions represent only 2.22% of the population.

In analyzing the data, a basic starting assumption is that any zoning dispute that progresses far enough into litigation to yield a reported decision reflects a situation in which religious groups *perceive* that their religious rights are being violated. For a variety of practical reasons, ranging from the need to have a good working relationship with local government officials to the sheer cost of litigation to the availability of alternative sites, churches probably bring fewer actions in this area than they think they may be entitled to bring. Table 1 summarizes the number of cases in the location and accessory use categories by denomination:

TABLE 1

Zoning Cases by Denomination					
Denomination	Self-Described % of Adult Population	# of Location Cases	%	# of Accessory Use Cases	%
Larger Denominations					
Catholics	26.20%	16	12.80%	13	20.00%
Major Protestants (>1.5% of Adult U.S. Population)					
Baptists	19.40%	7	5.60%	7	10.77%
Episcopal	1.70%	4	3.20%	2	3.08%
Lutheran	5.20%	6	4.80%	3	4.62%
Methodist	8.00%	3	2.40%	2	3.08%
Pentecostal	1.80%	1	0.80%	0	0.00%
Presbyterian	2.80%	2	1.60%	3	4.62%
Subtotal:	38.90%	23	18.40%	17	26.15%
Minority Denominations (<1.5% of U.S. Population)					
Assemblies of God	0.37%	0	0.00%	4	3.20%
Buddhist	0.40%	0	0.00%	1	1.54%
Christian Science	0.12%	1	0.80%	1	1.54%
Churches of Christ	1.00%	0	0.00%	1	1.54%
Church of God	0.30%	3	2.40%	1	1.54%
Church of Jesus Christ of LDS	1.40%	3	2.40%	1	1.54%
Eastern Orthodox	0.28%	1	0.80%	1	1.54%
Evangelical	0.14%	2	1.60%	0	0.00%
Hare Krishna	0.30%	1	0.80%	0	0.00%
Islam	0.50%	2	1.60%	0	0.00%
Jehovah's Witness	0.80%	19	15.20%	1	1.54%
Judaism	2.20%	25	20.00%	11	16.92%
Quakers	0.04%	1	0.80%	0	0.00%
Seventh Day Adventists	0.38%	1	0.80%	0	0.00%
Unification Church	0.30%	2	1.60%	1	1.54%
Unitarian	0.30%	1	0.80%	1	1.54%
Minority Cases	8.83%	62	49.60%	24	33.97%
Unclassified	14.78%	24	19.20%	11	16.92%
Minority + Unclassified	23.61%	86	68.80%	11	16.92%
Total Cases		125	100.00%	65	100.00%

The figures indicated in Table 1 already suggest that a substantial amount of the litigation in this area involves minority religious groups. This burden is more pronounced when compared to the percentage of groups from these denominations in the general population. Table 2 provides these comparisons.

TABLE 2

Percentages of Zoning Cases by Denominational Group and Percentage of United States Population			
Denomination	Self-Described % of Adult Population	Location Cases (%)	Accessory Use Cases (%)
Larger Denominations			
Catholics	26.20%	12.80%	20.00%
Major Protestants (>1.5% of Adult U.S. Population)			
Baptists	19.40%	5.60%	10.77%
Episcopal	1.70%	3.20%	3.08%
Lutheran	5.20%	4.80%	4.62%
Methodist	8.00%	2.40%	3.08%
Pentecostal	1.80%	0.80%	0.00%
Presbyterian	2.80%	1.60%	4.62%
Subtotal:	38.90%	18.40%	26.15%
Minority Denominations (<1.5% of U.S. Population)			
Assemblies of God	0.37%	0.00%	3.20%
Buddhist	0.40%	0.00%	1.54%
Christian Science	0.12%	0.80%	1.54%
Churches of Christ	1.00%	0.00%	1.54%
Church of God	0.30%	2.40%	1.54%
Church of Jesus Christ of LDS	1.40%	2.40%	1.54%
Eastern Orthodox	0.28%	0.80%	1.54%
Evangelical	0.14%	1.60%	0.00%
Hare Krishna	0.30%	0.80%	0.00%
Islam	0.50%	1.60%	0.00%
Jehovah's Witness	0.80%	15.20%	1.54%
Judaism	2.20%	20.00%	16.92%
Quakers	0.04%	0.80%	0.00%
Seventh Day Adventists	0.38%	0.80%	0.00%
Unification Church	0.30%	1.60%	1.54%
Unitarian	0.30%	0.80%	1.54%
Minority Cases	8.83%	49.60%	33.97%
Unclassified	14.78%	19.20%	16.92%
Minority + Unclassified	23.61%	68.80%	50.89%
Total Cases		100.00%	100.00%

The data in Table 2 are not wholly satisfactory, because the relative populations of various religious groups vary over the rather lengthy period from which the cases are drawn, whereas the population figures, to the extent they are available, are quite recent. Nonetheless, the figures suffice to give a rough sense for how the percentage of cases in which a given religious society is involved corresponds with that

society's percentage representation in the population as a whole. These figures strongly suggest that a high percentage of cases are being contested by religious groups comprising a very small percentage of the total population.

TABLE 3

Zoning Cases by Denomination						
Denomination	Claims Granted	% of Total Claims	% of Denom's Claims	Claims Denied	% of Total Claims	% of Denom's Claims
Larger Denominations						
Catholics	19	10.00%	65.52%	10	5.26%	34.48%
Major Protestants (>1.5% of Adult U.S. Population)						
Baptists	4	2.11%	28.57%	10	5.26%	71.43%
Episcopal	6	3.16%	100.00%	0	0.00%	0.00%
Lutheran	6	3.16%	66.67%	3	1.58%	33.33%
Methodist	4	2.11%	80.00%	1	0.53%	20.00%
Pentecostal	1	0.53%	100.00%	0	0.00%	0.00%
Presbyterian	5	2.63%	100.00%	0	0.00%	0.00%
Subtotal:	26	13.68%	65.00%	14	7.37%	35.00%
Minority Denominations (<1.5% of U.S. Population)						
Assemblies of God	0	0.00%	0.00%	4	2.11%	100.00%
Buddhist	1	0.53%	100.00%	0	0.00%	0.00%
Christian Science	1	0.53%	50.00%	1	0.53%	50.00%
Churches of Christ	1	0.53%	100.00%	0	0.00%	0.00%
Church of God	2	1.05%	50.00%	2	1.05%	50.00%
Church of Jesus Christ of LDS	2	1.05%	50.00%	2	1.05%	50.00%
Eastern Orthodox	0	0.00%	0.00%	2	1.05%	100.00%
Evangelical	1	0.53%	50.00%	1	0.53%	50.00%
Hare Krishna	0	0.00%	0.00%	1	0.53%	100.00%
Islam	2	1.05%	100.00%	0	0.00%	0.00%
Jehovah's Witness	11	5.79%	55.00%	9	4.74%	45.00%
Judaism	30	15.79%	83.33%	6	3.16%	16.67%
Quakers	1	0.53%	100.00%	0	0.00%	0.00%
Seventh Day Adventists	1	0.53%	100.00%	0	0.00%	0.00%
Unification Church	2	1.05%	66.67%	1	0.53%	33.33%
Unitarian	2	1.05%	100.00%	0	0.00%	0.00%
Minority Cases	57	30.00%	66.28%	29	33.72%	33.72%
Unclassified	17	8.95%	4.00%	18	9.47%	51.43%
Minority + Unclassified	74	38.95%	61.16%	47	24.74%	38.84%
Total Cases	119	62.63%	62.63%	71	37.37%	37.37%

According to Table 3, 63% of religious claims were granted, and 37% were denied. At the judicial level, minority groups appear to fare slightly better than mainline groups: they won 57 cases, or 66% of the cases in which they were involved; majority religions prevailed in 26 cases, or 65% of the cases in which they were involved. Among other things, these figures suggest that judicial review does help remedy the problems minority groups face, and tends to be impartial across groups. Since the data do not indicate that the higher percentage of cases in which minority religions are involved reflect higher levels of ungrounded claims, Table 2's data showing that minority groups face a substantially greater level of problems in the zoning area than mainline churches seems sound.

The percentage of cases in which various denominations' religious challenges to zoning decisions have been won and lost is summarized in Table 4. The figures show the number of claims won and lost both as percentages of the total number of cases and as percentages of the total number of claims in which each denomination (or group of denominations) is involved.

TABLE 4

Percentages of Zoning Cases Won and Lost by Denominational Groups and Percentages of United States Population			
Denomination	Self-Described % of Adult Population	Cases won as % of Total Cases	Cases Lost as % of Total Cases
Larger Denominations			
Catholics	26.20%	10.00%	5.26%
Major Protestants (>1.5% of Adult U.S. Population)			
Baptists	19.40%	2.11%	5.26%
Episcopal	1.70%	3.16%	0.00%
Lutheran	5.20%	3.16%	1.58%
Methodist	8.00%	2.11%	0.53%
Pentecostal	1.80%	0.53%	0.00%
Presbyterian	2.80%	2.63%	0.00%
Subtotal:	38.90%	13.68%	7.37%
Minority Denominations (<1.5% of U.S. Population)			
Assemblies of God	0.37%	0.00%	2.11%
Buddhist	0.40%	0.53%	0.00%
Christian Science	0.12%	0.53%	0.53%
Churches of Christ	1.00%	0.53%	0.00%
Church of God	0.30%	1.05%	1.05%
Church of LDS	1.40%	1.05%	1.05%
Eastern Orthodox	0.28%	0.00%	1.05%
Evangelical	0.14%	0.53%	0.53%
Hare Krishna	0.30%	0.00%	0.53%
Islam	0.50%	1.05%	0.00%
Jehovah's Witness	0.80%	5.79%	4.74%
Judaism	2.20%	15.79%	3.16%
Quakers	0.04%	0.53%	0.00%
Seventh Day Adventists	0.38%	0.53%	0.00%
Unification Church	0.30%	1.05%	0.53%
Unitarian	0.30%	1.05%	0.00%
Minority Cases	8.83%	30.00%	15.26%
Unclassified	14.78%	8.95%	9.47%
Minority + Unclassified		38.95%	24.74%
Total Cases		62.63%	37.37%

The foregoing data suggest that a variety of factors are operating in the zoning area in the United States that lead to de facto discrimination against smaller religious groups. This confirms that behind the surface of ostensibly neutral zoning laws, a variety of discriminatory and prejudicial factors may be operational that have the effect of violating the religious rights of minority groups.

To facilitate access to the date provided in this appendix, the cases reviewed are listed below, classified as they have been categorized in the study. Within each denominational category, the citations appear alphabetically by jurisdiction (with federal cases preceding state cases) in reverse chronological order. The parenthetical following the citations includes how the case was classified for purposes of the study. The letters in the parentheticals have the following meanings:

- G = The religious organization prevailed on the religious claim asserted.
- D = The religious claim asserted was denied.
- L = The case was a "location" case.
- A = The case was an "accessory use" case.

CATHOLIC:

- Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (D) (A)
- Ellsworth v. Gercke*, 156 P.2d 242 (Ariz. 1945) (G) (L)
- Ramona Convent of Holy Names v. City of Alhambra*, 26 Cal. Rptr. 2d 140 (Ct. App. 1993) (D) (A)
- Tustin Heights Ass'n v. Board of Supervisors of County of Orange*, 339 P.2d 914 (Cal. Dist. Ct. App. 1959) (D) (L)
- St. John's Roman Catholic Church Corp. v. Town of Darien*, 184 A.2d 42 (Conn. 1959) (D) (L)
- Daughters of St. Paul v. Zoning Board*, 549 A.2d 1076 (Conn. App. Ct. 1988) (G) (A)
- Hull v. Miami Shores Village*, 435 So.2d 868 (Fla. Dist. Ct. App. 1983) (D) (A)
- Diakonian Soc'y v. City of Chicago*, 380 N.E.2d 843 (Ill. App. Ct. 1978) (G) (L)
- Board of Zoning Appeals v. Wheaton*, 76 N.E.2d 597 (Ind. Ct. App. 1948) (G) (A)
- Society of Jesus of New England v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (G) (L)
- Sisters of Holy Cross of Mass. v. Town of Brookline*, 198 N.E.2d 624 (Mass. 1964) (G) (L)
- Mooney v. Village of Orchard Lake*, 53 N.W.2d 308 (Mich. 1952) (G) (L)
- City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880 (Minn. 1983) (G) (L)
- Association for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976) (G) (A)
- Black v. Town of Montclair*, 167 A.2d 388 (N.J. 1961) (G) (A)
- Andrews v. Board of Adjustment*, 143 A.2d 262 (N.J. Super. Ct. Law Div. 1958) (G) (A)
- Diocese of Rochester v. Planning Board*, 136 N.E.2d 827 (N.Y. 1956) (G) (L)
- Diocese of Buffalo v. Buckowski*, 446 N.Y.S.2d 1015 (Sup. Ct. 1982) (D) (L)
- Province of Meribah Soc'y of Mary, Inc. v. Village of Muttontown*, 538 N.Y.S.2d 850 (App. Div. 1989) (D) (A)
- American Friends of Soc'y of St. Pius, Inv. v. Schwab*, 417 N.Y.S.2d 991 (App. Div. 1979) (G) (L)
- People v. Kalayjiami*, 352 N.Y.S. 2d 115 (App. Div. 1973) (D) (L)
- Franciscan Missionaries of Mary v. Herdman*, 184 N.Y.S.2d 104 (App. Div. 1959) (G) (A)
- Hayes v. Fowler*, 473 S.E.2d 442 (N.C. Ct. App. 1996) (G) (A)
- Allen v. City of Burlington Board of Adjustment*, 397 S.E.2d 657 (N.C. Ct. App. 1990) (G) (L)
- Archdiocese v. Washington County*, 458 P.2d 682 (Or. 1969) (D) (L)
- O'Hara v. Board of Adjustment*, 131 A.2d 587 (Pa. 1957) (D) (L)
- Stark's Appeal*, 72 Pa D. & C. 1681 (Pa. 1950) (G) (A)
- In re Appeal of Hoffman*, 444 A.2d 764 (Pa. Commw. Ct. 1982) (G) (A)
- State ex rel. Roman Catholic Bishop v. Hill*, 90 P.2d 217 (Nev. 1939) (G) (L)

MAJOR PROTESTANT:

BAPTIST:

- Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988) (D) (L)
- Messiah Baptist Church v. County of Jefferson*, 697 F.Supp. 396 (D. Colo. 1987) (D) (L)
- Ex Parte Fairhope Bd. of Adjustments*, 567 So.2d 1353 (Ala. 1990) (D) (A)
- Corinth Baptist Church v. State Dept of Transp.*, 656 So.2d 868 (Ala. Civ. Ct. App. 1995) (D) (A)

- Cochise County v. Broken Arrow Baptist Church*, 778 P.2d 1302 (Ariz. Ct. App. 1989) (D) (L)
Abram v. City of Fayetteville, 661 S.W.2d 371 (ARK. 1983) (D) (A)
City of Chico v. First Ave. Baptist Church, 238 P.2d 587 (Cal. Dist. Ct. App. 1951) (D) (L)
East Side Baptist Church of Denver v. Klein, 487 P.2d 549 (Colo. 1971) (D) (A)
Parkview Baptist Church v. City of Pueblo, 336 P.2d 310 (Colo. 1959) (D) (A)
North Syracuse First Baptist Church v. Village of N. Syracuse, 524 N.Y.S.2d 894 (App. Div. 1988) (G) (A)
Yocum v. Power, 157 A.2d 368 (Pa. 1960) (G) (L)
Antrim Faith Baptist Church v. Commonwealth, 460 A.2d 1228 (PA. COMMW. CT. 1983) (D) (L)
City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982) (G) (A)
State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trustees, 108 N.W.2d 288 (Wis.) (G) (L)

EPISCOPAL:

- Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (G) (A)
O'Brien v. Chicago, 105 N.E.2d 917 (Ill. App. Ct. 1952) (G) (L)
State v. Cameron, 498 A.2d 1217 (N.J. 1985) (G) (L)
Greentree at Murray Hill Condominiums v. Good Shepherd Episcopalian Church, 550 N.Y.S.2d 981 (Sup. Ct. 1989) (G) (A)
Diocese of Central New York v. Schwarzer, 199 N.Y.S.2d 939 (Sup. Ct. 1960) (G) (L)
Heard v. City of Dallas, 456 S.W.2d 440 (Tex. Civ. app. Ct. 1970) (G) (L)

LUTHERAN:

- Miami Beach Lutheran Church of Epiphany v. City of Miami Beach*, 82 So.2d 880 (Fla. 1955) (D) (L)
Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722 (Ga. Ct. App. 1949) (G) (L)
Bethel Evangelical Lutheran Church v. Village of Morton, 559 N.E.2d 533 (Ill. App. Ct. 1990) (D) (A)
Our Savior's Evangelical Lutheran Church of Naperville v. City of Naperville, 542 N.E.2d 1158 (Ill. App. Ct. 1989) (G) (A)
Schueller v. Board of Adjustment, 95 N.W.2d 731 (Iowa 1959) (G) (L)
Zion Evangelical Lutheran Church v. City of Detroit Lakes, 21 N.W.2d 203 (Minn. 1945) (D) (L)
St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983) (G) (L)
Lutheran in America v. City of New York, 316 N.E.2d 305 (N.Y. 1974) (G) (A)
Synod of Ohio of United Lutheran Church v. Joseph, 39 N.E.2d 515 (Ohio 1942) (G) (L)

METHODIST:

- West Hartford Methodist Church v. Zoning Board of Appeals*, 121 A.2d 640 (Conn. 1956) (D) (A)
Keeling v. Board of Zoning Appeals, 69 N.E.2d 613 (Ind. Ct. App. 1946) (G) (L)
Linden Methodist Episcopal Church v. Linden, 173 A. 593 (N.J. 1934) (G) (L)
Cash v. Brookshire Methodist Church, 573 N.E.2d 692 (Ohio Ct. App. 1988) (G) (A)
First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996) (G) (L)

PENTECOSTAL:

- Pentecostal Holiness Church v. Dunn*, 27 So.2d 561 (Ala. 1946) (G) (L)

PRESBYTERIAN:

- Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F.Supp 538 (D.D.C. 1994) (G) (A)
Synod of Chesapeake, Inc. v. City of Newark, 254 A.2d 611 (Del. Ch. 1969) (G) (A)
City of Richmond Heights v. Richmond Heights Presbyterian Church 764 S.W.2d 647 (Mo. 1989) (G) (A)
First Westminster Presbyterian Church v. City Council, 393 N.Y.S.2d 180 (App. Div. 1977) (G) (L)
Westminster Presbyterian Church v. Edgecomb, 189 N.W. 671 (1922) (G) (L)

MINORITY DENOMINATIONS:

ASSEMBLIES OF GOD:

- First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994) (D) (A)
First Assembly of God v. City of Alexandria, 739 F.2d 942 (4th Cir. 1984) (D) (A)
First Assembly of God v. Collier County, 775 F.Supp. 383 (M.D. Fla. 1991) (D) (A)
Lakeshore Assembly of God Church v. Village Board of Village of Westfield, 508 N.Y.S.2d 819 (App. Div. 1986) (D) (A)

BUDDHIST:

- Moore v. Trippe*, 743 F.Supp 201 (S.D.N.Y. 1990) (G) (A)

CHRISTIAN SCIENCE:

- Bright Horizon House, Inc. v. Zoning Bd. of Appeals*, 469 N.Y.S.2d 851 (Sup. Ct. 1983) (D) (L)
Mahart v. First Church of Christ Scientist, 142 N.E.2d 678 (Ohio Ct. App. 1955) (G) (A)

CHURCH OF CHRIST:

- Church of Christ v. Metropolitan Bd. of Zoning Appeals*, 371 N.E.2d 1331 (Ind. Ct. App. 1978) (G) (A)

CHURCH OF GOD:

- Church of God v. City of Monroe*, 404 F. Supp. 175 (M.D. La. 1975) (G) (A)
Jernigan v. Smith, 126 S.E.2d 678 (Ga. 1962) (D) (L)
City of Sherman v. Simms, 183 S.W.2d 415 (Tex. 1944) (D) (L)
State ex rel. Howell v. Meador, 154 S.E. 876 (W. Va. 1930) (G) (L)

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS:

- The Church of Jesus Christ of Latter-day Saints v. Jefferson County*, 741 F. Supp 1522 (N.D. Ala 1990) (G) (L)
Corporation of the Presiding Bishop v. City of Porterville, 203 P.2d 823 (Cal. Dist. Ct. App. 1949) (D) (L)
Corporation of the Presiding Bishop v. Ashton, 448 P.2d 185 (Idaho 1968) (G) (A)
City of Las Cruces v. Huerta, 692 P.2d 1331 (N.M. Ct. App. 1984) (D) (L)

EASTERN ORTHODOX:

- Macedonian Orthodox Church v. Planning Bd.*, 636 A.2d 96 (N.J. Super. Ct. App. Div. 1994) (D) (L)
Appeal of Russian Orthodox Church of Holy Ghost, 152 A.2d 489 (Pa. 1959) (D) (A)

EVANGELICAL:

- State ex rel. Covenant Harbor Bible Camp v. Steinke*, 96 N.W.2d 356 (Wis. 1959) (G) (L)
Cornerstone Bible Church v. City of Hastings, 740 F. Supp 654 (D. Minn. 1990) (D) (L)

HARE KRISHNA:

- Marsland v. International Soc'y for Krishna Consciousness*, 657 P.2d 1035 (Haw. 1983) (D) (L)

ISLAM:

- Islamic Center v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988) (G) (L)
Islamic Soc'y v. Foley, 464 N.Y.S.2d 844 (App. Div. 1983) (G) (L)

JEHOVAH'S WITNESSES:

- Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (D) (L)
Galfas v. City of Atlanta, 193 F.2d 931 (5th Cir. 1952) (D) (L)
Jehovah's Witnesses Assembly Halls v. Jersey City, 597 F. Supp 972 (D.N.J. 1984) (G) (L)
Matthews v. Board of Supervisors, 21 Cal Rptr. 914 (Dist. Ct. App. 1962) (D) (L)

- Garden Grove Congregation of Jehovah's Witnesses v. Garden Grove*, 1 Cal. Rptr. 65 (Dist. Ct. App. 1959) (D) (L)
- Redwood City Co. of Jehovah's Witnesses v. City of Menlo Park*, 335 P.2d 195 (Cal. Dist. Ct. App. 1959) (G) (L)
- Minney v. City of Azusa*, 330 P.2d 255 (Cal. Dist. Ct. App. 1958) (D) (L)
- State ex rel. Tampa Co. of Jehovah's Witnesses v. City of Tampa*, 48 So. 2d 78 (Fla. 1950) (G) (L)
- Rogers v. Mayor of Atlanta*, 137 S.E.2d 668, 672 (Ga. Ct. App. 1964) (G) (L)
- Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals*, 182 N.E.2d 722 (Ill. 1962) (G) (L)
- Board of Zoning Appeals v. Decatur Co. Jehovah's Witnesses*, 117 N.E.2d 115 (Ind. 1954) (D) (A)
- Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svec*, 226 N.W.2d 306 (Minn. 1975) (G) (L)
- Allendale Congregation of Jehovah's Witnesses v. Grosman*, 152 A.2d 569 (N.J. 1959) (D) (L)
- Jehovah's Witnesses Assembly Hall of S. New Jersey v. Woolwich Township*, 532 A.2d 276 (N.J. Super. Ct. Law Div. 1987) (G) (L)
- State ex rel. Wiegel v. Randall*, 116 N.E.2d 300 (Ohio 1953) (G) (L)
- Libis v. Board of Zoning Appeals*, 292 N.E.2d 642 (Ohio Ct. App. 1972) (G) (L)
- Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 330 P.2d 5 (Or. 1958) (D) (L)
- Appeal of Trustees of the Congregation of Jehovah's Witnesses*, 130 A.2d 240 (Pa. Super. Ct. 1957) (D) (L)
- Congregation Comm. N. Fort Worth Congregation, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. Ct. 1956) (G) (L)
- State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 312 P.2d 195 (Wash. 1957) (G) (L)

JUDAISM:

- Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (D) (L)
- Village of Univ. Heights v. Cleveland Jewish Orphan's Home*, 20 F.2d 743 (6th Cir. 1927) (G) (L)
- Lucas Valley Homeowners Ass'n v. County of Marin*, 284 Cal. Rptr. 427 (Ct. App. 1991) (G) (L)
- Stoddard v. Edelman*, 84 Cal. Rptr. 443 (Ct. App. 1970) (G) (L)
- Beit Haverah v. Zoning Board of Appeals*, 418 A.2d 82 (Conn. 1979) (G) (A)
- Garbaty v. Norwalk Jewish Ctr., Inc.*, 171 A.2d 197 (Conn. 1961) (G) (L)
- Lubavitch Chabad House v. City of Evanston*, 445 N.E.2d 343 (Ill. App. Ct. 1982) (G) (L)
- Wolbach v. Zoning Bd. of Appeals*, 226 N.E.2d 679 (Ill. App. Ct. 1967) (G) (L)
- Schwartz v. Congregation Powolei Zeduck*, 131 N.E.2d 785 (Ill. App. Ct. 1956) (G) (L)
- Congregation David Ben Nuchim v. City of Oak Park*, 199 N.W.2d 557 (Mich. Ct. App. 1972) (G) (L)
- Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959) (G) (L)
- Kali Bari Temple v. Board of Adjustment*, 638 A.2d 839 (N.J. Super. Ct. App. Div. 1994) (G) (L)
- Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (G) (L)
- Farhi v. Commissioners of Borough of Deal*, 499 A.2d 559 (N.J. Super. Ct. Law Div. 1985) (G) (L)
- Sexton v. Bates*, 85 A.2d 833 (N.J. Super. Ct. Law Div. 1951), *aff'd sub nom.*, *Sexton v. Essex County Ritualarium*, 91 A.2d 162 (N.J. Super. Ct. App. Div. 1952) (D) (L)
- Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*, 342 N.E.2d 534 (N.Y. 1975) (G) (L)
- Westchester Reform Temple v. Brown*, 239 N.E.2d 891 (N.Y. 1968) (G) (A)
- Community Synagogue v. Bates*, 136 N.E.2d 488 (N.Y. 1956) (G) (L)
- Slevin v. Long Island Jewish Medical Ctr.*, 314 N.Y.S.2d 937 (Sup. Ct. 1971) (G) (A)
- Westbury Hebrew Congregation, Inc. v. Downer*, 59 Misc. 2d 387 (N.Y. Sup. Ct. 1969) (G) (A)
- Westchester Reform Temple v. Griffin*, 276 N.Y.W.2d 737 (Sup. Ct. 1966) (D) (A)
- Application of Garden City Jewish Center*, 155 N.Y.S.2d 523 (Sup. Ct. 1956) (G) (L)
- Harrison Oorthodox Minyan, Inc. v. Town Board*, 552 N.Y.S.2d 434 (App. Div. 1990) (G) (L)

Yeshiva and Mesivta Toras Chaim v. Rose, 523 N.Y.S.2d 907 (App. Div. 1989) (D) (L)
Siegert v. Luney, 491 N.Y.S.2d 15 (App. Div. 1985) (G) (A)
North Shore Hebrew Academy v. Wegman, 481 N.Y.S.2d 142 (App. Div. 1984) (G) (A)
Congregation Gates of Prayer v. Board of Appeals, 368 N.Y.S.2d 232 (App. Div. 1975) (D) (L)
Seaford Jewish Ctr., Inc. v. Board of Zoning Appeals, 368 N.Y.S.2d 40 (App. Div. 1975) (G) (L)
Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477 (App. Div. 1974) (D) (A)
Shaffer v. Temple Beth Emeth, 190 N.Y.S. 841 (App. Div. 1921) (G) (A)
Young Israel Org. v. Dworkin, 133 N.E.2d 174 (Ohio Ct. App. 1956) (G) (L)
Overbrook Farms Club v. Zoning Board, 40 A.2d 423 (Pa. 1945) (G) (A)
Appeal of Floersheim, 34 A.2d 62 (Pa. 1943) (G) (A)
Minyan v. Cheltenham Township, 552 A.2d 772 (Pa. Commw. Ct. 1989) (G) (L)
Berlant v. Zoning Hearing Board, 279 A.2d 400 (Pa. Commw. Ct. 1971) (G) (L)
State ex rel. B'Nai B'rith Foundation v. Walworth Co. Bd. of Adjustment, 208 N.W.2d 113 (Wis. 1973) (G) (L)

QUAKERS:

Milharcic v. Metropolitan Bd. of Zoning Appeals, 489 N.E.2d 634 (Ind. Ct. App. 1986) (G) (L)

SEVENTH DAY ADVENTISTS:

Application of Faith for Today, Inc., 204 N.Y.S.2d 751 (App. Div. 1960) (G) (L)

UNIFICATION CHURCH:

New Educ. Dev. Sys. Inc. v. Boitano, 573 F. Supp. 594 (N.D. Cal. 1983) (G) (L)
Holy Spirit Ass'n v. Town of New Castle, 480 F. Supp. 1212 (S.D.N.Y. 1979) (D) (L)
Holy Spirit Ass'n for Unification of World Christianity v. Brush, 469 N.Y.S.2d (App. Div. 1983) (G) (A)

UNITARIAN:

North Shore Unitarian Soc'y v. Village of Plandome, 109 N.Y.S.2d 803 (Sup. Ct. 1951) (G) (L)
Unitarian Universalist Church v. Shorten, 314 N.Y.S.2d 66 (Sup. Ct. 1970) (G) (A)

UNCLASSIFIED:

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (G) (L)
Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221 (9th cir. 1990) (D) (L)
Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (D) (A)
Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991 (D. Colo. 1994) (Alpine Christian Fellowship) (G) (A)
Nichols v. Planning & Zoning Comm'n, 667 F. Supp. 72 (D. Conn. 1987) (G) (L)
Love Church v. City of Evanston, 671 F. Supp. 508 (N.D. Ill. 1987) (D) (L)
Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982) (D) (A)
City of Colorado Springs v. Blanche, 761 P.2d 212 (Colo. 1988) (D) (L)
Grace Community Church v. Town of Bethel, 622 A.2d 591 (Conn. App. Ct. 1993) (G) (L)
Grace Community Church v. Planning Comm'n, 615 A.2d 1092 (Conn. Super. Ct. 1992) (G) (L)
Town v. Reno, 377 So. 2d 648 (Fla. 1979) (Ethiopian Zion Coptic Church) (D) (L)
Pylant v. Orange County, 328 So. 2d 199 (Fla. 1976) (First Apostolic) (D) (L)
State v. Maxwell, 617 P.2d 816 (Haw. 1980) (Hula Hau) (D) (A)
Hope Deliverance Ctr., Inc. v. Zoning Bd. of Appeals, 452 N.E.2d 630 (Ill. App. Ct. 1983) (Non-denominational) (G) (L)
South Side Move of God Church v. Zoning Bd. of Appeals, 365 N.E.2d 118 (Ill. App. Ct. 1977) (D) (A)
Twin-City Bible Church v. Zoning Board of Appeals, 365 N.E.2d 1381 (Ill. App. Ct. 1977) (G) (A)
Coston Chapel A.M.E. Church v. Chaddick, 292 N.E.2d 215 (Ill. App. Ct. 1972) (D) (L)

- Family Christian Fellowship v. County of Winnebago*, 503 N.E.2d 367 (Ill. App. Ct. 1986) (G) (L)
- Board of Zoning Appeals v. New Testament Bible Church*, 411 N.E.2d 681 (Ind. Ct. App. 1980) (G) (A)
- Portage Township v. Full Salvation Union*, 29 N.W.2d 297 (Mich. 1947) (D) (A)
- Yanow v. Seven Oaks Park*, A. 2d 482 (N.J. 1963) (Eastern Christian Institute) (D) (L)
- Covenant Community Church, Inc. v. Gates Zoning Bd. of Appeals*, 444 N.Y.S.2d 415 (Sup. Ct 1981) (G) (L)
- Duallo Realty Corp. v. Silver*, 224 N.Y.S. 2d 55 (Sup. Ct. 1965) (Temple Emanuel) (G) (A)
- Holy Sepulchre Cemetary v. City of Greece*, 191 Misc. 241 (N.Y. Sup. Ct. 1947) (D) (L)
- Neddermeyer v. Town of Ontario Planning Bd.*, 548 N.Y.S. 2d 951 (App. Div. 1989) (The Healing Church) (G) (L)
- Unification of World Christianity v. Rosenfeld*, 458 N.Y.S. 2d 920 (App. Div. 1983) (Holy Spirit Ass'n) (D) (L)
- Independent Church Realization of Word of God, Inc. v. Board of Zoning Appeals*, 437 N.Y.S. 2d 443 (App. Div. 1981) (D) (L)
- State ex rel. Anshe Chesed Congregation v. Bruggemeir*, 115 N.E. 2d 65 (Ohio Ct. App. 1953) (Anshe Chesed Congregation) (G) (L)
- Damascus Community Church v. Clackamus County*, 610 P. 2d 273 (Or. Ct. App. 1980) (D) (A)
- Christian Retreat Ctr. v. Board of County Comm'rs*, 560 P. 2d 1100 (Or. Ct. App. 1977) (D) (A)
- Church of Savior v. Zoning Hearing Bd.*, 568 A.2d 1336 (Pa. Commw. Ct. 1989) (G) (L)
- Conversion Center, Inc. v. Zoning Board of Adjustment*, 278 A.2d 369 (Pa. Commw. Ct. 1971) (G) (L)
- City of Rapid City v. Kahler*, 334 N.W.2d 510 (S.D. 1983) (Conerston Rescue Mission) (G) (L)
- Fountain Gate Ministries, Inc. v. City of Plano*, 654 S.W.2d 841 (Tex. Ct. App. 1983) (D) (A)
- First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (G) (L)

Mr. CANADY. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. MAUCK, when discussing discrimination against religions, why can't the civil rights statutes be amended to just add or enforce religious bigotry without a new area of the law?

Mr. MAUCK. All of the ordinances that I have ever seen treat churches as a separate land use category. The ordinances themselves are seeing land uses in a religious way, and they need to be addressed. Racial discrimination is hard to prove.

Mr. SCOTT. You indicated that if you have a general application and you have a secular gathering, why not churches?

Mr. MAUCK. Yes, Mr. Scott. The question generally gets asked, suppose you cannot have the gatherings, why should churches be special, particularly in light of the Justice Stevens' representation that this would be an establishment and should get thrown out summarily?

Churches are entitled to at least two protections. They are entitled to be equally protected under the 14th Amendment, and they are entitled to the protection of the Free Exercise Clause of the First Amendment. So even if everybody was equally discriminated against, which I don't think could happen, for a city to say, we won't have any meeting halls or community centers at all, a community still must provide a zone where people may purchase a building to worship without having to get special permission. And that is not an establishment. The proposed law functions really to prevent an establishment. For an existing community to say that we are not going to allow any new churches unless we say so be-

cause we already have established churches would violate the Establishment Clause. What we are talking about is new churches that want to come in or expand, so we are balancing those two constitutional rights Free Exercise and No Establishment.

Mr. SCOTT. This does not create a special privilege for churches that other people cannot enjoy? The statute provided the church with a legal weapon that no atheist or agnostic can obtain. The government preference for religion as opposed to irreligion is forbidden by the First Amendment. That is from Justice Stevens' concurring opinion. Is it your view that he can't get five votes to sustain that position?

Mr. MAUCK. I wouldn't think so, but the—I would hate to guess. But religious land use rights are also protected under the Free Speech right, and the Court has recognized that land uses in the area of Free Speech, particularly adult uses, must be allowed in every community.

We now have laws all over this country that say no church can come into our community unless we give you a permit. Those laws would be absolutely unconstitutional if they had to do with adult uses.

So pornographers now have more rights to come into our communities, because the Supreme Court has said you must have a zone where you can locate, than churches, and all we are asking is let's rectify the situation and give churches the same access that adult movie theaters have.

Mr. SCOTT. Adult movie theaters are not governed by the time, place and manner restrictions? I mean, because it is an adult bookstore, it has rights that other similar gatherings wouldn't have?

Mr. MAUCK. Because they are protected under the Free Speech Clause, the Supreme Court has said in land use regulation, you must allow an area where they can locate. That area is not defined. It has got to be a reasonable area. In some cases it has been found to be 5 percent of the community allows it. Am I answering your question?

Mr. SCOTT. Well, I think you are answering it. I am not sure I agree with it.

Mr. MAUCK. That is what the Court has said. But—

Mr. SCOTT. Well, if they prohibit all gatherings, you are suggesting that there is a free speech exemption from a general application? I mean, if they say you can have stores but you can't have stores that say this content, then I can see how that could get thrown out.

Mr. MAUCK. Yes, but—

Mr. SCOTT. I don't see how if—if you have no stores, period, I don't see how an adult bookstore would have super rights to come in and sell adult books.

Mr. MAUCK. I believe the case is *Schad v. Borough of Mount Ephraim*.

Mr. SCOTT. Could you repeat that again?

Mr. MAUCK. *Schad v. Borough of Mount Ephraim*. It is a 1981 case—452 U.S. 61—has said you must have a zone where you allow adult uses. And they didn't—in that case, there was a small commercial area in the city. It wasn't a fact situation where there were no commercial areas at all.

Mr. SCOTT. Could I have one additional minute, Mr. Chairman?

Mr. CANADY. The gentleman can have two additional minutes.

Mr. SCOTT. Thank you.

Professor Durham, why aren't the civil rights laws sufficient to accomplish what we are trying to accomplish?

Mr. DURHAM. Well, I think one of the fundamental things, just viewed globally, is that we are dealing here with the relative priority of equality and liberty. And in general, while it is true that in our tradition we protect equality, it is vital to understand that tradition, there are cases where religious freedom, along with other sorts of freedom, takes priority.

Part of the greatness of our tradition in religious liberty will be impoverished if we do not understand that at its core, it is about the protection of religious differences, religious pluralism and religious conscience. It is the pressure to try and transform—

Mr. SCOTT. But you are—you are talking about minority religions. If you can build a church in an area, you ought not to be able to discriminate against a particular religion.

Mr. DURHAM. Right.

Mr. SCOTT. The civil rights laws, I think, are clearly competent to deal with that.

The question is, if you don't allow any gatherings, no buildings, historic district, it is across the board, should those who are building a building for religious purposes be given additional rights, notwithstanding the Establishment Clause, that other people do not enjoy?

Mr. DURHAM. I would say yes.

Mr. SCOTT. Didn't *Boerne* rule the other way? I mean, how could we do it if you are looking at a Supreme Court decision? I mean, I voted for the bill so obviously I agree with you.

Mr. DURHAM. I think ultimately that one has to understand that the Establishment Clause and the Free Exercise Clause work together, and it is a perversion of First Amendment jurisprudence to think that the Establishment Clause in these contexts has so much force that it overrides free exercise.

Mr. SCOTT. How do you—how do you fit that view into the *Boerne* decision, which, you know, I mean, you can agree or disagree with it, but it is there?

Mr. DURHAM. I have to say that the *Boerne* decision is problematic, but distinguishable. I am not sure it is the *Boerne* decision so much as the *Smith* decision in the first place that is the problem. But in the meantime, going back to your question about why the discrimination statutes are not enough. The problem is they don't adequately take into account the range of religious freedom that is legitimate to take into account in this country.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CANADY. Mr. Nadler.

Mr. NADLER. Thank you.

Mr. Durham or Professor Durham? Professor Durham, you said that minority religions representing less than 9 percent of the population involved over 49 percent of the cases regarding the right to locate religious buildings at a particular site.

Mr. DURHAM. Right.

Mr. NADLER. This is prima facie evidence that, in fact, there is discrimination going on, although perhaps not provable, correct; that is why you cite the figure?

Mr. DURHAM. Right. The problem is that this is just the tip of the iceberg. What we don't see here are all the cases that never reach court.

Mr. NADLER. Yes, but you are saying—but the basic proposition—

Mr. DURHAM. Right.

Mr. NADLER [continuing]. That this illustrates—I assume that what you are saying is that the basic proposition that this illustrates is that under the guise of neutral zoning laws, in fact, there is a lot of religious discrimination against minority religions going on?

Mr. DURHAM. Right.

Mr. NADLER. Okay. Now, the gentleman from Virginia asked why can't the antidiscrimination civil rights laws handle this. Am I correct in asserting or assuming that under the civil rights laws or the existing discrimination laws, in order to deal with this, you would have to prove discrimination in a particular case?

Mr. DURHAM. I have to admit I am not an expert on the civil rights laws.

Mr. NADLER. You would have to prove intentional discrimination, and I think you would have to prove it in a particular case, to show that here there is discrimination, that the reason this church is not getting its zoning is because they don't like this church or they don't want this church but some other church might have gotten it.

Whereas the point of this law, or this proposed law, this bill, is that recognizing the kind of evidence of these statistics, we are going to say we know discrimination is going on and we are trying to use the general power of Congress to stop it without having to prove the specifics. I assume you would assume—you would agree that that is a real difference between this and the—

Mr. DURHAM. Sure.

Mr. NADLER. Do you have a study—can you get us the studies that show this? Not this moment, but do you have the studies?

Mr. DURHAM. You mean the studies attached to the report that I am—

Mr. NADLER. They are in the appendix here?

Mr. DURHAM. Yes.

Mr. NADLER. Then they are in the record.

Thank you very much.

Let me just say that in response to some of what has been said in the—I should mention also, before I go into what I was going to say, that in *Boerne* only Mr. Justice Stevens raised the Establishment Clause issue. Three justices argued that *Smith* should be reconsidered. The majority said nothing about the Establishment Clause issue, and I don't think *Boerne* can be read to say that the Establishment Clause issue in this case is in conflict—or in this situation is in conflict with the Free Exercise Clause.

Do you agree with that?

Mr. DURHAM. Yes. When we were preparing—well, when Mr. Laycock was preparing for argument, there was a sense that the

establishment claim was not a really serious issue, that it would not really attract any significant following for the Court, and in fact, a lot of weight was not put on that argument.

The establishment issue did end up being mentioned by Justice Stevens, but, again, the main opinion poses no establishment bar to giving priority to religious liberty, as I said before.

Mr. NADLER. Thank you. Let me comment on that, if I may, and on some of what Professor Hamilton—or the import of Professor Hamilton's comments and some others before, especially when—I was struck by Professor Hamilton's comment that it is a question of power and that it is a zero sum game. If you permit the church to add a wing, then they may be advantaged, but the people who don't like the church to add a wing because it is against, I don't know, zoning density or whatever, it is against their interests, and that it is a zero sum game, and it is always a religious interest versus some other interest, and we shouldn't be favoring the religious interest. And I think that is a fair summary of what was said and what was implied by some others.

I just want to say that I think there is a fundamental difference. And I don't know if it is a constitutional difference, but it is a fundamental value difference, and I believe it is the heart of the purpose of the Bill of Rights and certainly the First Amendment, and that is freedom of conscience.

There is a difference between someone's—there is a—this country, except when absolutely unavoidable, should not permit government, whether State, local or Federal, to put someone in a position of violating his conscience, especially his religious conscience, or obeying the law. And the girl in the gym class is one example. The person—I can think of other examples.

If some local school district decided to hold classes on Saturday and Orthodox Jews couldn't go to school on Saturday, you can imagine a million different example.

Mr. CANADY. The gentleman will have three additional minutes.

Mr. NADLER. Thank you. We should not, and I think it is a core value that people's freedom of religious conscience should, to the extent possible—and that is why I think the strict scrutiny test is a good test—to the extent possible, without invading other people's liberties, should be respected; that people should not be put in the position of violating their conscience. And there is a difference between someone's desire to have less traffic in a neighborhood, which is a legitimate desire, and someone's absolutely existential problem of violating either the law or their religious conscience, and that in a society that values religious freedom has to have a higher value. And that is, I think, what we are trying to do here.

Mr. DURHAM. Well, that is certainly, I think, what I was trying to articulate by referring to the priority of liberty.

I think that the land use cases are simply one set of cases that is a broader problem, and I think what Mr. Laycock said earlier, that what you really have to recognize here is in a lot of cases, by getting people to come to the table and talk, they will find better solutions than would come about otherwise. But if the secular bureaucrat is told that what he is doing is a neutral general law, and that in any litigation or challenge he automatically wins, there is

very little impetus to start that dialogue and to find a way out of the zero sum game.

Mr. NADLER. I would agree with you as a practical matter, though I would go further and say that the question is not or should not be whether that bureaucrat—I don't like to use the word "secular" as opposed to "religious"—the fact is the government official adjudicating some law or enforcing some law being insensitive to a religious or conscientious need, that religious free exercise right, number one, it could be accommodated hopefully by talking, but second of all, it should not be subject to the whim of a bureaucrat or to a majority vote unless it threatens the liberty of somebody else. That is the basic core principle.

Mr. DURHAM. I think that is why Barnett was right and Scalia should have read it instead of Gobitis.

Mr. NADLER. I yield back the balance of my time.

Mr. CANADY. Thank you. I now recognize myself.

I think it is important that the subcommittee look at the specific language of the provision that is in the bill we have under consideration. If we look—if we look at that specific language, one of the things—

Mr. SCOTT. Mr. Chairman, do you have another copy of the bill? The copy I have was the draft, the 14th draft.

Mr. CANADY. We can even provide you with a copy of it.

Mr. SCOTT. It has been changed a little bit since then. Thank you.

Mr. CANADY. This on pages 3 and 4. But one feature of the bill is that it takes into account the impact of decisions on the location of a church or other religious facility on neighboring properties or on the public health or safety. So, again, I emphasize here that this is not some absolute right for churches to come in or other religious institutions to come in and have their facilities put wherever they want them put. That clearly would not be the impact of this.

The language most certainly requires a consideration of the impact that the location of the facilities would have on surrounding uses. And that is important. That is important for us to note here, and I believe as a matter of policy that is the way it should be.

And none of us who are advocating this bill are suggesting that just because someone claims—makes a claim under the Free Exercise Clause, that that should trump all other considerations.

Now, having said that, let me turn to Mr. Mauck and ask you this: Under the law as it is now, what kind of track record do you see in religious organizations? We have some statistics on this, but I am interested—and we have gotten that quantified here. But I would like to just get your anecdotal impression about how easy it is for minority religions to prevail when they are subjected to exclusion in the land use process.

Mr. MAUCK. I think there are two practical problems. A real serious one is getting State court judges to understand the constitutional issues. In my experience, they want to. They don't have enough litigation before them involving constitutional issues, and when they get a constitutional issue they don't quite know what to do with it. And then if I start talking with them about Church of the Lukumi Babalu, and they look at it and they see this is about Santeria sacrifices, they think it has nothing to do with a land use

case. And the same with peyote-smoking drug counselors as in the *Smith* case, they are not seen as relevant to a zoning case.

And I think what this committee can do and what Congress can do is take what is being said by the Supreme Court and put it into a law that is easy to read and easy to enforce and for judges to look at and attorneys to look at and say, here is something that is real practical.

I don't see the land use sections of this law as being an end run around *Boerne*. I see it as taking the other Supreme Court precedents and setting them out in more clear generalities to help at the local level the attorney who is representing the minority church, who doesn't have the constitutional issues all the time, or the judge. So that is part one of my answer.

The second problem, and I think it could be addressed with a little clarification in the law, is that some courts, including some Federal appellate courts, do not see land use as part of religious exercise. They see that as simply a secular activity that everybody engages in and should not be part of religious exercise. But the Supreme Court, and Justice Scalia, has said part of free exercise is assembling together, but that is just dicta at this point. But I think that would clearly be upheld, and it ought to be—I think it ought to be added. And then with those two—well, with that change, and also may I suggest another change?

Mr. CANADY. Sure.

Mr. MAUCK. In section 1(B)—B(1)(b) under land use regulation—

Mr. CANADY. I will give myself three additional minutes. What page are you on?

Mr. MAUCK. Page 4, line 6.

It talks about denying the—or denies religious assemblies a reasonable location in the jurisdiction.

I think the intent there is to have an area where religious groups can freely locate without discretionary governmental approval, and that could be better said by adding, "location in the jurisdiction where it can freely locate without discretionary governmental approval," because some municipalities think that everything they do is reasonable and all of their special use standards are reasonable.

The problem is that the local ordinances are so discretionary that they allow, in many cases, unconstitutional factors, such as prejudice, to invade the process.

Mr. CANADY. So if I understand what you are saying, you would—that would end up requiring that there be a church zone or a religious facilities zone?

Mr. MAUCK. No. What I am saying, most communities have a residential zone with subcategories, a commercial or business and a manufacturing or an industrial. Within those zones they have a multitude of freely permitted uses. A commercial use may have funeral parlors and theaters and restaurants, and if they allow churches in that area, fine. In other—in other communities, churches are allowed freely in the residential area, and they have to get a permit in the commercial area. That is fine as long as there is at least one substantial zone where—

Mr. CANADY. As of right they would be—

Mr. MAUCK. Where they can go as of right, without having to get a special use permit.

Mr. NADLER. Would the chairman yield a moment?

Mr. CANADY. I would be happy to yield.

Mr. NADLER. Thank you.

I have one question, Mr. Mauck. You know, what would you do about the situation, what you were just saying, that it is okay as long as there would be some specific location in the town for churches? Orthodox Jews have to walk to synagogue, and that is why in communities you may have small storefront synagogues or even assemblies in people's homes because people have to walk. So the fact that downtown a mile or two away or three, there is a place, a church or synagogue, that wouldn't help this. So how would what you are suggesting relate to this problem?

Mr. MAUCK. Paragraph B wouldn't help in that situation. Either paragraph C, which gives religious assemblies equal standing, or paragraph A.

Mr. CANADY. It seems to me that probably the solution to that problem would be found in paragraph A or subparagraph A, rather than the other provisions.

Mr. MAUCK. And that is a real problem, by the way. There was a synagogue that met in a home in Miami, and they were—they have been shut out several times trying to just be allowed to worship, 15 or 20 people worship in a home.

Mr. NADLER. You think this language would take care of that problem in A or B?

Mr. MAUCK. I think A would, and B or C might, depending upon the particular local ordinance.

Mr. NADLER. Thank you. I just want to make sure the record is clear on that point, that one of the purposes or intended effects of subparagraph A is for exactly that purpose.

Mr. CANADY. Well, I appreciate the gentleman mentioning that. As the gentleman may recall at a press conference where we spoke about this bill on the day of its introduction, that is a particular example that I used of one of the most egregious abuses of religious liberty, and it is important that we do what we can here to correct that specific problem.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. CANADY. Mr. Scott, Mr. Nadler, if you have additional questions.

Mr. NADLER. I don't.

Mr. SCOTT. Mr. Chairman, I would ask—

Mr. CANADY. Mr. Scott is recognized.

Mr. SCOTT. Thank you. I would just ask that we ask the Department of Justice to express their opinion as to the constitutionality of the bill. They will be the ones that will have to defend it if and when it goes to the Supreme Court, and we would like them to have an opportunity to be heard.

Mr. CANADY. I think that that is a good idea.

Mr. SCOTT. I yield back.

Mr. CANADY. With that, this hearing will come to a conclusion.

I want to thank the members of our second panel. Your testimony has been very helpful in focusing on the specific issue where the bill acts pursuant to Congress' authority under section 5.

Mr. SCOTT. Could I ask another question?

Mr. CANADY. The gentleman from Virginia is recognized.

Mr. SCOTT. There is one kind of technical question on the land use. Page 4, line 17, it says, section 2 does not apply. Section 2 includes the Commerce Clause and the Spending Clause. So is it the reading of the witnesses that we are relegated to section 5 enforcement?

Mr. MAUCK. I think the Land Use sections of the Religious Liberty Protection Act is a valid exercise of Congress' power under at least two constitutional provisions. First, the Enforcement Clause of the 14th Amendment gives the Congress power to enact laws where, according to the *Flores* case. Congress has evidence of systematic violation of constitutional rights. I have given you evidence of widespread religious, ethnic, racial and socio-economic discrimination in the sphere of zoning and will supplement the record in that regard. The second basis for Congressional enactment authority is the Commerce Clause. The Commerce Clause does not authorize religious regulation but does authorize Congress to restrain local governments in their over regulation of uses affecting commerce. Other witnesses have shown the massive effect of church construction, church relocation and other religious land use on commerce. If Congress discerns that local land use regulations are negatively affecting commerce by, for example, the race to erect ever higher barriers to land use between municipalities or states then they can and should retrain those abuses as an exercise in prudent Federalism. Municipalities cannot end the higher barriers "arms race" themselves and states, to a large extent, are also powerless. Congress is uniquely positioned to "demilitarize" the zoning codes under the Commerce Clause.

Well, I don't think it should be, if that is what it is saying, that this is not a commerce issue, because it does—at least as I see it, in every zoning hearing, every zoning board says this is a commerce issue. That is how the local communities see it: We want more business and less church.

Mr. CANADY. With the indulgence of the members of the subcommittee, I think it would be appropriate and helpful to have Professor Laycock, if he would be willing to address that specific point, because in the statement he has provided the committee, he has addressed that.

Mr. LAYCOCK. Thank you, Mr. Chairman. It is in the statement. My understanding of the intention of that provision is to say that the compelling interest test in section 2 does not apply to land use, so that the land use authorities do not face a double hurdle of first they have to show that they have complied with A, B and C, and then in addition they have to show that they meet the compelling interest test. The substantive standard is one or the other.

But I think the committee should make clear that that provision does not say anything about what sources of constitutional authority Congress is relying on to enact the land use provisions. Those provisions are primarily intended as acts to enforce the Fourteenth Amendment, but in many of their applications, they will also be cases affecting commerce, and Congress can rely on the Commerce Clause—certainly in construction cases and probably in lots of other cases. And there may even be occasional cases where there

is some sort of Federal aid and there is a Spending Clause application.

Mr. SCOTT. Let me ask it another way. Line 18, which is in section 2, are you really aiming at just such sections 2 (B), (C), (D) and (E), and not section 2(A)?

Mr. LAYCOCK. My copy of the bill doesn't have numbered lines. I had to get it off the Internet.

Mr. SCOTT. Section 2 says, general rule, and 2(A)(1) says, Federal assistance.

Mr. CANADY. If I could just interject here. I think that there would be a conflict because the standard set forth in section 2 is a different standard than that set forth in section 4, the section on land use that we are focusing on; section 3(B).

Mr. LAYCOCK. I think we have to think—

Mr. CANADY. It is a more particularized standard that relates to land use than the general standard articulated in the earlier section.

Mr. LAYCOCK. That is right. We clearly don't want the compelling interest test to apply. This language has been tinkered with since the last time I saw it, and we may have to think through it very carefully and make sure we have got it right. And, Mr. Scott, it may only be some subsections that do not apply.

Mr. SCOTT. Is it your intention that the relevance of the Commerce Clause and Federal assistance would apply to section 3?

Mr. LAYCOCK. Yes. That was clearly the intention of the coalition when they began talking to the Members about the bill.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CANADY. Again, I want to thank you for participating in our hearing today. Your testimony is very valuable to the considerations of the subcommittee. The subcommittee stands adjourned.

[Whereupon, at 1:10 p.m., the subcommittee was adjourned.]

RELIGIOUS LIBERTY PROTECTION ACT OF 1998

TUESDAY, JULY 14, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in Room 2237, Rayburn House Office Building, Hon. Charles Canady [chairman of the subcommittee] presiding.

Present: Representatives Charles Canady, Robert C. Scott and Jerrold Nadler.

Also Present: Representative Henry J. Hyde.

Staff Present: Cathleen Cleaver, Counsel; Susana Gutierrez, Clerk; and Brian Woolfolk, Minority Counsel.

Mr. CANADY. The subcommittee will be in order. This is the fifth hearing the Subcommittee on the Constitution has conducted over the last year concerning the protection of religious liberty in the wake of the *Boerne v. Flores* decision of the Supreme Court.

We convene today for the second hearing focusing specifically on H.R. 4019, the Religious Liberty Protection Act of 1998, legislation which Mr. Nadler and I introduced on June the 9th. It is my hope that with today's hearing, the subcommittee will have completed the hearing phase of our work on this issue and that we will be in a position to move forward with consideration of H.R. 4019 after the members have had an opportunity to reflect on the testimony offered by the distinguished witnesses who are with us here today.

I do want to thank members of both panels for taking the time to be with us. Some are back with us after previously testifying. We appreciate your participation in this ongoing process.

I now recognize Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I am delighted that we are having the hearing to review the legislation. Frankly, I thought the major purpose of the hearing was to hear from the Justice Department. I thought you were instructed to invite the Justice Department.

Could you tell me what happened, and I will yield.

Mr. CANADY. Yes, I will be happy to respond.

We have invited the Department of Justice. They felt that they were unable to be prepared to appear. I think they were given adequate notice. I was disappointed that they were unwilling or unable to be with us here today, because that was something that we had hoped to accomplish here.

Let me say that I am ready, willing, and able to hear from the Justice Department whenever they feel that they are in a position to make a presentation. It is disappointing that it is taking them so long, because this is an issue that has been around for some period of time. The bill has been filed for some weeks now. They have known about this. They were aware of this bill even before it was filed, so I am somewhat mystified. I don't want to attack them in this context, but I am disappointed.

As I had offered previously, I will offer again, once they do have their act together on this, I would be happy to host a briefing for members of the subcommittee or the full committee, as the case may be, to hear from the Department.

I think that I can state what I understand the Department's position is. They don't see any substantial problems with the bill. I think they may have some different views about the way various things should be phrased in terms of the legislative language. But it is my understanding, and I am not in a position really to represent them, but it is my understanding that they are generally supportive of the approach in the legislation.

Mr. SCOTT. Well, thank you, Mr. Chairman. I am delighted to know that they were invited, because there are significant concerns with the constitutionality of the bill. We would not want to pass another bill that gets rejected by the Supreme Court.

I look forward to the testimony of the witnesses. I yield.

Mr. CANADY. Well, if the gentleman would yield. I have just seen that there is a letter which we have just received from the acting Assistant Attorney General, indicating that the administration supports the goals of this important legislation designed to protect the religious liberties of all Americans. It goes on to say, as you know, the Department is continuing to review and analyze the array of important constitutional considerations raised by H.R. 4019 to help ensure that the legislation conforms with the Supreme Court precedent as well as the important legal and policy issues raised by the legislation.

They go on to say that they believe that they can best assist the committee by continuing that process. I would suggest that they can best assist the committee by completing that process and giving us the benefit of their considered judgment.

Mr. SCOTT. Well, thank you, Mr. Chairman. I think we tend not to agree on many things, but I think we agree on this one, that we would like to hear from the Justice Department. I think we all agree with the goals of the legislation; but if there are constitutional imperfections, we want them cured before the bill proceeds.

With that, I will yield back.

Mr. CANADY. Thank you. Are there members wishing to make an opening statement?

Okay. We will now move to the first of two panels. So if the members of the first panel would come forward to take your seats. We will have five witnesses on this first panel and five witnesses on the second panel.

On our first panel today, our first witness will be Pat Nolan, who is President of the Justice Fellowship. Following him will be William Dodson, who is the Director of Government Relations of the Southern Baptist Convention. Our third witness this morning will

be Michael Farris, who is the President of the Home School Legal Defense Association. Our fourth witness will be Colby May, Senior Counsel, Office of Governmental Affairs with the American Center For Law and Justice. The final witness on our first panel will be Steven McFarland, Director of the Center for Law and Religious Freedom.

As most of you know, you have been around the committee, and you have either testified or have observed the proceedings here, we would ask that you would do your best to summarize your testimony in no more than 5 minutes. I don't expect that anyone is going to insist on strict enforcement of the 5-minute rule here today, but if you could, we would appreciate your coming as close to the 5 minutes as you can.

I would point out that we have another hearing of the subcommittee scheduled this afternoon for consideration of the bill introduced by the chairman of the full committee, so we will have to make certain that we are done in time to convene that hearing. So your consideration would be appreciated.

Of course, your full written statements will, without objection, be made a part of the permanent record of the hearing.

Mr. CANADY. With that, I will now recognize Mr. Nolan.

STATEMENT OF PATRICK NOLAN, PRESIDENT, JUSTICE FELLOWSHIP

Mr. NOLAN. Good morning, Mr. Chairman and members. And thank you for this opportunity to address this panel on a most important topic, religious liberty.

I am the President of the Justice Fellowship, and we are the public policy arm of Prison Fellowship Ministries, Chuck Colson's ministry. Justice Fellowship works to reform our criminal justice system based on biblical principles of restorative justice. We seek to restore peace to our communities by healing the wounds of victims and renewing the hearts of offenders.

I bring a unique background to Justice Fellowship. Prior to being its President, I served for 15 years in the California State Assembly for them as Republican leader. I also was a Federal inmate for 25 months, 25 months in prison, 4 months in a halfway house. This was hard on my wife and young children. The one solace I had was my faith. And I saw firsthand the routine inference with my ability to practice my faith in prison.

But I am not here to simply bring a prison ministry's perspective to this important issue. I am here to show how this issue is important to all Americans, liberals as well as my fellow conservatives.

We were disappointed with the *Boerne* decision and the impact it has had on religious liberty around the country. Following the *Boerne* decision, religious freedom came under swift attack. Christian day care centers in Philadelphia were served with notice to comply with local ordinances prohibiting discrimination on the basis of faith.

California death row inmates were prevented from bringing bibles to Bible studies. Bible studies in South Carolina were broken up by local authorities claiming they violated local zoning ordinances. And Texas school children were disciplined for wearing ro-

saries, by school officials who claimed that they were evidence of gang attire.

How can these government officials interfere in religious practices like these? The answer is the *Boerne* decision struck down the long-standing compelling interest test. By knocking that out, the Court emasculated the Free Exercise clause and reduced religious liberty to a second-class right. The Supreme Court gave the green light to government agencies to interfere with religious practices. They have done so with gusto.

But the *Boerne* decision did far more than diminish our religious liberty. It gravely impaired our right to representative government. The courts made a power grab in the *Boerne* decision, not only ruling that RFRA was unconstitutional, but asserting that the Court and only the Court could interpret the Constitution. Congress, the Court said, could not expand on our constitutional rights.

That position would have horrified the Founding Fathers who deliberately left this issue ambiguous, giving all three branches some role in constitutional interpretation. Thomas Jefferson rightly feared a judicial oligarchy, which is precisely what that decision, left unanswered, would lead to. Professor Russell Hittinger called the *Boerne* decision a silent coup d'etat.

This unprecedented power grab must be challenged immediately or it will stand as precedent. If RLPA does not pass, the courts will be able to arbitrarily dismiss any legislation that Congress passes in accordance with the people's moral traditions. The courts already muzzled the public in *Romer v. Evans* when they struck down Colorado's Proposition 2. They then muzzled State legislatures and the governors by saying they had no role in the abortion question in *Planned Parenthood v. Casey*, overturning Pennsylvania's parental consent law. If Congress fails to challenge the *Boerne* decision by passing RLPA, the court's coup will be complete. They will have silenced all avenues of dissent from their imperial rule.

As we all know, the Bill of Rights is a floor for our rights and not a ceiling. RLPA protects religious freedom by using two sources of congressional authority explicitly granted to Congress in the Constitution, the Commerce Clause and Spending clause.

While not providing protection for all religious activities, RLPA would provide protection for the vast majority of them. Because not all religious freedoms will be protected in RLPA, that doesn't mean that we shouldn't gain the protection that the law would afford us.

Prison Fellowship Ministries must regain the ability to minister to prisoners using the tools available, just as civil rights forces use these same tools, including the Commerce Clause, to obtain voting rights. Yes, the Constitution already protects religious freedom just as the Constitution granted voting rights, but occasionally Congress must use its explicit powers to reassert these rights.

The few groups who oppose RLPA do not deny the need for a bill to reinstate the protection of RFRA and challenge the Court. They only object to RLPA because it is based on Congress' authority under the Commerce Clause. They claim it would expand the Federal Government's intrusion into our lives.

On the contrary, RLPA uses the Commerce Clause to stay the hand of government. The courts have already allowed government agencies to interfere with religious practices. RLPA would inter-

vene to stop that inference. The Commerce Clause is the basis for all manner of Federal action. Whether one supports or opposes those uses of the Commerce Clause, why on earth with anyone oppose using that to protect our religious liberty?

Because Congress uses its Commerce Clause to reinforce the First Amendment doesn't mean that the people who are protected by it become businesses. That assertion is preposterous. It simply means that Congress has used the Commerce Clause for its authority to restrain civic officials from restricting free exercise.

If a religious practice involves commercial activities, then RLPA would protect it and put the First Amendment preeminent over the secular interest. A showing of compelling State interests would then be necessary before the government could interfere with those practices.

The opponents say they would prefer to use other means, but none of their alternatives are being actively pursued. So by opposing RLPA, they would leave us with no statutory protection for our religious liberty and leave the Court's power grab unanswered. That would be calamitous.

Do we really want to allow our differences over which clause in the Constitution we should use to prevent Congress from acting to protect religious liberty or to reassert our right to self-determination? There is no question where most conservatives come down on this issue.

That is why Dr. Jim Dobson, Gary Bauer, Don Hodel, Chuck Colson, myself, and many others are working feverishly to pass RLPA. Our groups, which reach millions of Americans, are mobilizing our supporters to urge you to approve RLPA swiftly. There is no issue before Congress which is more important to our groups. Under the protection of RLPA, Prison Fellowship and other ministries will have new opportunities to minister to thousands of men and women, giving true rehabilitation through the power of the cross.

Although we are not of the world, we are still in the world and must use whatever incremental approach is necessary to repair the damage done by the Court to religious freedom, just as civil rights had to be established one step at a time.

We owe a great debt to you, Mr. Canady, and to the cosponsors of this legislation who have taken the lead in restoring our religious liberty. If Congress does not pass RLPA this session, we will be left with no statutory protection for our first freedom, religious liberty, and grave damage will be done to our ability to legislate in accordance with our moral traditions.

Thank for you allowing me this opportunity to speak in defense of religious liberty.

Mr. CANADY. Thank you, Mr. Nolan.

[The prepared statement of Mr. Nolan follows:]

PREPARED STATEMENT OF PATRICK NOLAN, PRESIDENT, JUSTICE FELLOWSHIP

Thank you for this opportunity to testify before this Committee on this very important subject of Religious Freedom.

I am the president of Justice Fellowship, the public policy arm of Chuck Colson's Prison Fellowship Ministries. Justice Fellowship works to reform the criminal justice system based on the principles of restorative justice found in the Bible. We seek

to restore peace to our communities by healing the wounds of victims and renewing the hearts of offenders.

I bring a unique background to Justice Fellowship. Prior to being the president of Justice Fellowship, I served for 15 years in the California State Assembly, four of those as the Assembly Republican Leader. I also was a federal inmate for 25 months in prison and four more months in a halfway house. This was hard on my wife and our three young children. The one solace I had as I served my time was my faith. I know first hand the barriers to religious practices that exist inside our prisons.

But I am not here to simply bring a prison ministry perspective to this very important issue. I am here to show how this issue is important to all Americans, liberals as well as my fellow conservatives. We were disappointed with the *Boerne* decision and its effect on religious liberty in this country. After the *Boerne* decision, religious freedom came under a swift attack: Christian day-care centers in Philadelphia were served with notice to comply with local ordinances prohibiting hiring on the basis of religion, California death row inmates were prevented from taking their Bibles to Bible study, Bible studies in South Carolina were broken up by officials claiming the meetings violated a zoning ordinance, and Texas school children were disciplined for wearing rosaries which were claimed to be gang symbols.

How can government officials interfere in religious practices like these? The answer is that in the *Boerne* decision the court eliminated the long-established standard for protecting religious practices, the "compelling interest" test. By knocking that out, the court emasculated the Free Exercise clause, and reduced religious liberty to a second-class right. The Supreme Court gave the green light to government agencies to interfere with religious practices. And they have done so with gusto.

But the *Boerne* decision did far more than just diminish our religious liberty. It gravely impaired our right to representative government. The courts made a power grab in the *Boerne* decision, not only ruling that RFRA was unconstitutional but in asserting that the court, and the court alone may interpret the meaning of the Constitution. Congress, the court said, could not expand constitutional fights! That position would have horrified the founding fathers who deliberately left this issue ambiguous, giving all three branches some role in constitutional interpretation. Thomas Jefferson rightly feared a judicial oligarchy, which is precisely what this decision will lead to. Professor Russell Hittinger called the *Boerne* decision "a silent coup d'etat."

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As we all know, the Bill of Rights is a floor for our rights and not a ceiling. RLPA protects religious liberty by using two sources of congressional authority explicitly granted to Congress in the Constitution: the commerce clause and the spending clause. While not providing protection for all religious activities, RLPA would provide protection for the vast majority of them.

Because not all religious freedoms will be protected under RLPA, that does not mean we should not seek to gain the protection this law will afford. Prison Fellowship Ministries must regain the ability to minister to prisoners using the tools available just as the civil rights forces used these same tools (including the commerce clause) to obtain voting rights. Yes, the Constitution already protects religious freedom, just as the Constitution granted voting rights, but occasionally Congress must use its explicit powers to reassert these rights.

The few groups who oppose RLPA do not deny the need for a bill to reinstate the protection of RFRA and challenge the court. They only object to RLPA because it is based on Congress' authority under the Commerce Clause. They claim it would expand the federal government's intrusion into our lives. To the contrary, RLPA uses the Commerce Clause to stay the hand of government. The courts have already allowed government agencies to interfere in religious practices. RLPA would intervene to stop that.

The Commerce Clause is the basis for a manner of federal action. Whether one supports or opposes those uses of the Commerce Clause, why on earth would anyone oppose using it to protect religious liberty?

Yes, the authority of the congress is under the Commerce Clause, but because Congress uses that authority to reinforce the First Amendment doesn't mean that

people who are protected by it become businesses. That is preposterous. It simply means that Congress has used the Commerce Clause for its authority to restrain civic officials from restricting free exercise. If a religious practice involves commercial activities, then RLPA will protect them, and put the First Amendment pre-eminent over the secular interest. A showing of a compelling state interest would be necessary before the government could interfere with those practices.

The opponents say they would prefer to use other means, but none of their alternatives are being actively pursued. So, by opposing RLPA, they would leave us with no statutory protection for our religious liberty, and leave the court's power grab unanswered. That would be calamitous. Do we really want to allow our differences over which clause in the Constitution we should use to prevent Congress from acting to protect religious liberty and reassert our right to self-determination? There is no question where most conservatives come down.

This is why Jim Dobson, Gary Bauer, Don Hodel, Chuck Colson, and myself, among others, are working feverishly to pass RLPA. Our groups, which reach millions of Americans, are mobilizing our supporters to urge congress to approve of RLPA swiftly. There is no issue before Congress which is more important to our groups.

Under the protection of RLPA, Prison Fellowship and other ministries will have new opportunities to minister to thousands of men and women, giving true rehabilitation through the power of the Cross. Although we are not of the world, we are still in the world and must use whatever incremental approaches necessary to repair the damage done to religious freedom, just as civil rights had to be established one step at a time.

We owe a great debt to Congressman Charles Canady and the co-sponsors who have taken the lead in restoring religious liberty. If Congress does not pass RLPA this session, we will be left with no statutory protection for our first freedom, religious liberty; and, grave damage will have been done to our ability to legislate in accordance with our moral traditions.

Thank you allowing me this opportunity to speak in defense of religious liberty.

Mr. CANADY. Mr. Dodson.

**STATEMENT OF WILLIAM DODSON, DIRECTOR, GOVERNMENT
RELATIONS, SOUTHERN BAPTIST CONVENTION**

Mr. DODSON. Thank you, Mr. Canady. It is indeed an honor to be here before this committee, for which I have a very high regard. I am the Director of Public Policy and Legal Counsel for the Ethics and Religious Liberty Commission of the Southern Baptist Convention. I hope that we speak for the sentiments of most of our 16 million members; however, I will not stand here or sit here and say we speak for every single member, because I am sure that there are members who disagree, not the least of which might be the individual to my right for whom I have high regard.

Certainly it is not my intent to be here and try to gang up on those who disagree with us on this particular issue. What I am here about is that I believe that religious liberty is a value of much greater weight than some of the concerns which have been expressed against it.

In short, I think that we are in a situation where Congress simply must respond to the Court's decision in *Boerne*. The Religious Liberty Protection Act, in my opinion, is a good-faith and magnanimous effort at legislation which conforms to the ruling in *Boerne*. The Religious Liberty Protection Act is an attempt to give religious liberty the greatest protection possible, given the framework within which the Supreme Court has to make that happen.

I know that there are other alternatives, but we feel that in light of the possible alternatives, this is the best practical alternative at this approach.

I don't think that there is momentum in Congress to simply re-pass RFRA, nor do I think there is momentum at this time for a

constitutional amendment, to mention two of the options; and I am sure there are others.

For some, this is controversial. The RLPA is more controversial than RFRA because of its use of the Commerce and Spending Clauses to extend greater protection to religious liberty. While I am certain that there are many in our convention who would be sympathetic to these concerns, I do believe that the concern for religious liberty overrides any of those concerns with regard to this particular legislation, and a greater weight must be given to the precious value of religious liberty than the value of strictly adhering to a political theory to which we feel no one is morally bound.

I think that the vast majority of Americans are correct in their intuitive sense that religious liberty has lost significant ground in recent years and that the courts in general and the Supreme Court in particular no longer share most Americans' conviction that religious liberty should be cherished and protected to the greatest practical extent.

One very eloquent exception to this is Justice O'Connor, who said in a dissent that the First Amendment's Free Exercise Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference even when such conduct conflicts with a neutral, generally applicable law.

Before *Smith*, our Free Exercise cases were generally in keeping with this idea. Where a law substantially burdened religiously motivated conduct, we required government to justify that law with a compelling State interest and to use means narrowly tailored to achieve that interest.

The Court's rejection of this principle in *Smith* has harmed religious liberty. Justice O'Connor concludes that the historical evidence cast doubt on the Court's current interpretation of the Free Exercise Clause. The record, instead, reveals that its drafters and ratifiers likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.

It is difficult to improve on such straightforward prose. Let me just simply add by way of closing, that I believe that if churches or individual Christians or any person of faith came to me in the future and said, okay, under the Religious Liberty Protection Act, we are in a better position to make our argument before the Court that our interest that we are trying to protect has greater protection under this act than it would have without such an act. And my answer would be, unequivocally, yes, this act helps you, and you would be in a worse position if you did not have this act.

Does it cover every situation that RFRA covered? No, it does not. But it offers the greatest protection affordable under the guidelines that the Court has given us, and we strongly support this legislation and encourage you in your efforts to secure its passage.

Mr. CANADY. Thank you, Mr. Dodson.

Mr. Farris.

**STATEMENT OF MICHAEL P. FARRIS, PRESIDENT, HOME
SCHOOL LEGAL DEFENSE ASSOCIATION**

Mr. FARRIS: Thank you, Mr. Chairman, Mr. Scott and Chairman Hyde. I appreciate the opportunity to be here.

On behalf of the Home School Legal Defense Association, I would like to inform the committee that the defeat of this bill is our number one legislative priority in this Congress because we believe that the supposed gradual step is a discriminatory step; that the step that we are making, supposedly to help religious freedom, is a step forward for the wealthy and the powerful while leaving out the poor, the not powerful, the small, the individual, and the families—like the nearly 60,000 home schooling families of our organization—that depend heavily on Free Exercise protection. We are left out, while the big guys are protected ostensibly by this legislation.

There is no question that there is a serious problem. For the 22 years I have been an attorney, most of that time has been spent as a Free Exercise litigator. I could have written and fully agree with every word that Pat Nolan said during the first half of his presentation in his critique of *Smith* and *Boerne*. And, indeed, I was the initial chairman and ultimately the cochairman of the committee that wrote the Religious Freedom Restoration Act and, obviously, I strongly supported the passage of that legislation.

But there are three reasons why we oppose RLPA. First, it discriminates among religious practices. Given the current Commerce Clause jurisprudence, only the big, the wealthy, and the powerful can claim Free Exercise protection under this act.

Individuals and small ministries like the church of which I am the interim pastor—by the way, I am a Baptist, but not a Southern Baptist—we would be left out. So I just submit to you that if we are going to protect only one group, the big and the wealthy and the powerful are the wrong group to start with. We should be protecting the small and the weak.

The second reason we oppose this bill is, it denigrates the faith of many who need to claim its protection. I believe that religion is not commerce. Jesus threw the money changers and the merchants out of the temple. And many churches that if RLPA is enacted I would have belonged to have an absolute bar of selling any goods whatsoever on church property. As a lawyer, I have to tell them, "You are silly for having that bar. The more goods you sell, and the more interstate in character they are, the more likely you will have a claim under this Act."

To require us to prove that our exercise of faith is connected to a commercial transaction, and not just any commercial transaction, but a commercial transaction that is big enough to be called one that affects interstate commerce, is an affront to those of us who believe what Jesus said—where he said, "You cannot serve both God and money." Unless you serve both God and money, you have no protection under this act.

The third reason we do not support this act is, it is an exercise in futility. I believe that, under the Commerce Clause jurisprudence of this Court and the *Boerne* decision, there is a 95 percent-plus likelihood that the Supreme Court will declare this bill unconstitutional on its face as violating the Separation of Powers. If not Separation of Powers, their Commerce Clause jurisprudence will

restrict it to being a virtually ineffective tool in protecting our religious liberty. Read the *Lopez* decision. I am sure there were guns and bullets purchased in interstate commerce in that case, and it simply didn't make a difference.

So we are spinning our wheels. We are wasting time. We are not going to accomplish anything. This bill will be overturned as unconstitutional in a heartbeat. A lower Federal court will declare it unconstitutional. It will not be enforced until the Supreme Court rules, and I predict that they will rule against it.

One of the witnesses in the Senate—in fact, my cochairman in drafting RFRA—testified: “Here, look at all these catalogs for church stained-glass windows. They're out of State. And if you buy your stained-glass windows out of State, you'll be protected.” Well, not if the issue is a city gay rights ordinance and you are trying to hire certain staff, and you don't want homosexuals on your church staff because you have a doctrinal conviction against having homosexuals on your church staff. There has to be a nexus, an interstate commerce connection between the religious activity in question and the government activity in question.

So the fact that you purchase your stained-glass windows or your communion wine or your Sunday school material from another State is not going to be the issue. It is going to be very narrowly focused, and I think it is an affront to us. We basically have to prove that the movie *Elmer Gantry* was right, that we really are a bunch of commercial hucksters, and that religion really is about money.

In fact, George Will wrote a nationally-syndicated column in the *Washington Post* the Sunday after the *Smith* decision was rendered in which he said, “The primary purpose of the founding of this Republic was to establish the primacy of capitalism over religion.” I think that that is atrocious history, but that is exactly what this bill does. It says, unless we bow our knee to the real god of this nation, money, then we will have no religious protection.

There are a substantial number of conservative leaders and organizations, including former Attorney General Ed Meese, Charles Rice of Notre Dame Law School, Phyllis Schlafly, Beverly LaHaye, Don Wildmon, Paul Weyrich, Lou Sheldon, Tom Jipping, Jordan Lawrence (who has testified before this committee as a religious liberty litigator), and a number of others oppose this bill because of its misuse of the Constitution and the betrayal of the principles of faith.

Mr. CANADY. Thank you, Mr. Farris.

[The prepared statement of Mr. Farris follows:]

PREPARED STATEMENT OF MICHAEL P. FARRIS, PRESIDENT, HOME SCHOOL LEGAL DEFENSE ASSOCIATION

My name is Michael P. Farris and I am the Founder and President of the Home School Legal Defense Association (“HSLDA”). For 15 years, HSLDA has been committed to protecting the rights of parents to choose and control the education of their children, to defending religious liberty, and to advocating the principles of federalism, limited government and individual rights. I am here today to speak in opposition to the proposed Religious Liberty Protection Act (“RLPA”).

There are many points on which I, and those who agree with HSLDA's opposition to RLPA, are in full agreement with the bill's supporters. We agree that there is in this country a great constitutional problem concerning legal protection for the free exercise of religion. This committee has already heard testimony regarding the

Supreme Court's disastrous 1990 decision of *Employment Division v. Smith*, which eviscerated the Free Exercise Clause of the First Amendment; the response of Congress in the 1993 Religious Freedom Restoration Act ("RFRA"); and the Court's 1997 *Boerne v. Flores* decision holding RFRA unconstitutional. I served as co-chair of the initial drafting committee for RFRA. This committee later grew into the Coalition for the Free Exercise of Religion, many of whose members now support RLPA. I understand the gravity of the problem that the Supreme Court has created with respect to religious freedom, and I am committed to working toward real, lasting solutions to that problem.

The RLPA, however, is not such a solution. I do not believe that Congress can employ an expansive theory of the commerce clause to protect religious freedom without violating crucial constitutional principles and without denigrating the role and meaning of religious faith in our society.

RLPA DISCRIMINATES AMONG RELIGIOUS PRACTICES

Unlike RFRA, RLPA is not a blanket protection for religious freedom. It does not give every American's religious practices the security of the compelling interest/least restrictive means standard. Instead, by its very terms the bill only protects religious conduct when that conduct occurs in a federally-funded program or affects commerce with foreign nations, among the several States, or with the Indian tribes. This is inherently discriminatory. Religious groups and organizations that are large, powerful and involved in economic activities such as publishing houses and products distribution will have little problem establishing that their ministries have an effect on interstate commerce. Not so the "little guy." Individual religious believers, families—including the almost 60,000 home schooling families who make up HSLDA's constituency—and small churches and ministries will be left defenseless. A home school run out of religious conviction will be unable to claim the protections of RLPA because the family will be unable to establish that their faith has any material effect on interstate commerce.

In fact, this discrimination in favor of affluent and powerful religious groups, against the small and economically weak, runs in total opposition to the purposes of religious liberty protection under our Constitution. The wealthy and powerful are able to seek political solutions to any legal infringement of their sincere religious practices. It is the small and powerless who must be able to turn to the courts for the protection of their fundamental, inalienable rights. Yet these are the very people who would be excluded from protection under RLPA.

RLPA DENIGRATES RELIGION

Quite simply, religion is not commerce. If RLPA is enacted, Christians and other people of faith will not be able to seek legal protection for our worship simply because it is commanded by God. Instead, we will be required to prove in court that our religion is interstate commercial activity. This reduction of worship to "big business" is highly offensive to many people of faith. The Bible instructs that we cannot serve both God and money. Even if RLPA were successful in winning some cases where religious freedom is at stake, the price is too high. Believers cannot submit to Caesar what is rightly God's, and we cannot allow our religious liberty to be determined by whether we can establish that our worship is commerce.

There is a law of general applicability in every State banning the use of alcohol by minors. Under *Smith* and *Boerne*, applying this law to Holy Communion would not violate the Free Exercise Clause. Suppose a sheriff decides actually to enforce this law during a worship service, and the church defends on the basis of RLPA. "Don't worry about the religious stuff," the church's lawyer would say. "Under RLPA, the most important thing is to prove that the bread and wine were purchased through channels of interstate commerce. Otherwise, we lose."

RLPA ATTACKS PRINCIPLES OF FEDERALISM AND LIMITED GOVERNMENT

Our nation was founded on the principle of federalism and the belief that our national government is one of limited, defined powers. Unlike the States, which have plenary police powers to legislate for the public good, Congress has authority to act only where the Constitution grants express or implied power. All other powers are reserved to the States or the people by the Tenth Amendment.

Beginning in the New Deal era of the 1930s, this principle of limited national government has been seriously undermined by an expansive reading of the congressional power under Article I, Section 8 to "regulate commerce . . . among the several States." Originally intended as a national power over rivers, roads and canals which do not fall exclusively under the jurisdiction of any one State, the commerce power has been transformed by the legal fiction that virtually any area of human

activity must have some indirect effect on something that once was or someday might be transported in the channels of interstate commerce. Indeed, for many years it was a truism in our nation's law schools that the Commerce Clause gives Congress virtually unlimited power to legislate on any subject. Limited government became a distant historical relic.

In 1995, the Supreme Court signaled a possible openness to reexamining the principles of federalism and limited government when it decided *United States v. Lopez*, ruling that an individual's possession of a handgun in a local public school has no clear connection to interstate commerce so as to support congressional action. The *Lopez* decision has prompted significant speculation by commentators, both those who support it and those who oppose it, that the Court may be moving towards a new era of federalism in which Congress will once again be limited to acting in the areas of its explicit and clearly implied powers.

RLPA runs in direct opposition to this encouraging development. By enacting the RLPA, and thereby claiming a Commerce Clause power over activity as intrinsically non-commercial as religious worship and practice, Congress would be signaling to the Court that it disapproves of the *Lopez* decision and seeks plenary regulatory authority over virtually all human activity. If RLPA is enacted, the commitment of this Congress to the principle of limited government would be reduced to mere lip service and empty symbolism.

CONSERVATIVE OPPOSITION

For Christians and conservatives who believe in both religious freedom and federalism, this is a very difficult bill because it puts these two values in direct opposition. The more that RLPA protects religious freedom, the more it expands federal regulatory authority over all of life. If, on the other hand, the courts uphold the principle of limited federal government, this bill will accomplish little or nothing in protecting religious believers. This is why so many Christian and conservative leaders and organizations that believe in limited federal power are united in our opposition to this bill. The position that I am advocating today is held by Concerned Women for America, the American Family Association, Eagle Forum, the Traditional Values Coalition, the American Association of Christian Schools, Paul Weyrich and the Free Congress Foundation, and former Attorney General Edwin Meese, among many others. These individuals and organizations represent and are listened to by millions of mainstream Americans.

ALTERNATIVES

Legal scholars have proposed a number of different possible congressional responses to the Supreme Court's *Boerne* decision, and I am confident that a remedy can be found that does not contain the problems inherent in RLPA. The alternatives range from a direct reenactment of RFRA to a provision restricting the jurisdiction of the federal courts over RFRA cases to a Constitutional amendment restoring the Free Exercise Clause to its pre-*Employment Division v. Smith* contours. Each of these has substantial merit and can be examined in due course if RLPA does not derail the debate. The RLPA is, at best, a waste of the time and resources that could be used in developing a non-discriminatory response to the problem of religious liberty that can generate widespread public support.

It is interesting to note that some of RLPA's supporters have argued that this bill will "challenge" the Supreme Court's *Smith* and *Boerne* decisions. There are many possible ways to challenge the Court, including a constitutional amendment, the selection of new Justices, stripping of appellate jurisdiction, impeachment and a "court packing" plan like that almost pursued by President Roosevelt in the 1930s. RLPA would present no such challenge. The very act of passing RLPA, giving up both the Free Exercise Clause and the Fourteenth Amendment as legitimate sources of protection for religious freedom and relying instead on an inappropriate source like the Commerce Clause, will signal to the Supreme Court that Congress has acquiesced in the atrocious *Boerne* decision and accepted the notion that it has no direct power to protect the inalienable right to religious liberty. After RLPA is held unconstitutional by the Supreme Court, as seems quite likely, what federal power will be cited in the next proposed bill?

CONCLUSION

After the Supreme Court took away serious constitutional protection for religious exercise in 1990, it took three years for a sufficient consensus to develop to pass RFRA. In the interim, liberty suffered but the Republic was able to survive. Now, after RFRA has been held unconstitutional, the situation is once again bad, but not quite as bad. RFRA may still be good law with respect to the federal government

(lower courts and commentators are divided on this question), and a number of states have enacted or are considering state-level RFRA's or constitutional amendments.

This is the time to seek a response to the Supreme Court that can generate widespread public and congressional support. It is not the time to jump precipitously into a measure that has divided the religious freedom community because of its use of expansive federal commerce authority, because it discriminates among believers based on their economic power, and because it casts our most deeply held religious beliefs into the role of crass commercial activity. I urge this committee to reject the RLPA.

Thank you for your time and consideration of this important matter.

Mr. CANADY. Mr. May.

**STATEMENT OF COLBY M. MAY, SENIOR COUNSEL, OFFICE OF
GOVERNMENTAL AFFAIRS, AMERICAN CENTER FOR LAW
AND JUSTICE**

Mr. MAY. Mr. Chairman, members of the subcommittee, thank you for extending to me the invitation of this body to participate in this important hearing today on the Religious Liberty Protection Act, legislation intended to protect religious liberty and to require that government at all levels demonstrate a compelling reason before it takes an action which substantially burdens the Free Exercise of religion.

The problem Congress is addressing was created by the Supreme Court when it issued its *Smith* decision in 1990. Instead of adhering to the plain language of the Free Exercise Clause that Congress shall make no law prohibiting the Free Exercise of religion, the Supreme Court in *Smith* instead ruled that government at all levels can indeed make laws prohibiting the Free Exercise of Religion as long as the law has some rational basis and is generally applicable.

Congress was so alarmed by the *Smith* ruling that in 1993 it tried to reinstate some semblance of the original constitutional protection for religion by enacting the Religious Freedom Restoration Act. However, in 1997, the Court in its *Boerne* decision declared that to be unconstitutional, concluding that neither the Due Process nor the Equal Protection portions of the 14th Amendment enabled Congress to address the evisceration of the rights of free exercise resulting from the *Smith* decision.

In other words, the courts have corralled Congress and held that it has no authority to provide any greater freedom by statute than what the Court was giving under its new interpretation of the Free Exercise Clause in *Smith*.

The record first for RFRA and now for RLPA make one thing perfectly clear: There is a serious problem. Government in the absence of having to show a compelling interest and least restrictive means of fulfilling that interest has virtual license to abridge the Free Exercise rights of the people.

Having first created the problem and then rejecting Congress' efforts to address the problem, the Court has changed "We, the people" to "We, the justices." This should not, however, be the last word.

As President Lincoln warned in his first inaugural address, "The candid citizen must confess that if the policy of government upon vital questions affecting the whole people is to be irrevocably fixed by decision of the Supreme Court, . . . the people will have ceased

to be their own rulers, having to that extent . . . Resigned their government into the hands of that eminent tribunal.”

The RLPA is a measured and appropriate response to that eminent tribunal’s claim in *Boerne* that it alone has the authority to irrevocably fix, by its decision, the vital question of the standard the government must scale before it burdens the Free Exercise of Religion.

On the claim that using the Commerce Clause to advance and protect religious free exercise essentially cheapens religious expression because, only that religious expression which affects commerce is protected by RLPA is really no objection at all.

Using the Commerce Clause to advance religious liberty does not subordinate things religious to things commercial. Rather, the Commerce Clause is simply being harnessed to advance religious expression as far as it may go. One may wish that the court had not issued the *Smith* and *Boerne* decisions, which greatly intruded into the protection of Free Exercise so clearly stated in the Constitution, but it has.

Using the Commerce Clause here as far as it may go, simply stays the hand of government from intruding unhindered, as it may now, and takes an important step in helping to restore the preeminent first right, the right of free exercise of religion.

The original RFRA coalition, some members of which now object to RLPA, believing it constitutionally infirm because it uses the enabling power of the Commerce Clause, earnestly believed that RFRA was constitutional and that Congress had plenary power to enact the law under the 14th Amendment. The Supreme Court disagreed.

Clearly, reasonable and sincere people may disagree on whether courts will uphold use of the Commerce Clause as harnessed in RLPA. Such differences almost always exist. That is simply the way it is. But Congress must nevertheless act in the face of the Supreme Court’s assertion that Congress is powerless to advance religious liberties in any manner inconsistent with the *Smith* decision.

RLPA is that action, and the American Center for Law and Justice supports its enactment. We have, over the last 9 years, had more than nine cases argued in front of the Supreme Court, important cases on free exercise, on religious liberty, on virtually every aspect of the First Amendment.

We believe that the rights that are assessed and otherwise being advanced through RLPA are indeed the preeminent rights. We, as Americans, must be able to have confidence that our government will not intrude in matters religious. To the extent we use the enabling clauses of the commerce power or the spending power to do that, I think Congress is otherwise to be applauded.

Thank you for this opportunity to be with you today.

Mr. CANADY. Thank you, Mr. May.

Mr. McFarland.

STATEMENT OF STEVEN T. McFARLAND, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM

Mr. McFARLAND. Good morning. Thank you, Mr. Canady—Chairman Canady, Chairman Hyde, Mr. Scott, Mr. Nadler for the opportunity to address this committee on this important subject.

The Christian Legal Society urges this Congress in this session to wield every constitutional means for the protection of our first freedom. And I ask that my written remarks be submitted after this hearing and be included in the record.

Let me respond to my friend, Mr. Farris—some of his comments regarding some conservative concerns. First of all, this bill is not just for the big, the powerful, and the wealthy. It is not just about religious publishers. It will not leave individual believers and small churches defenseless.

It will be available to any “economic activity that might through repetition elsewhere substantially affect any sort of interstate commerce,” obviously the rule in the *Lopez* decision. The issue will not be the size of a church’s budget or of the book store’s inventory. The question will be whether there is an adverse impact on religious exercise at one church which, when repeated on a larger scale, on a statewide scale perhaps, will substantially affect interstate commerce; and the answer in many cases will be yes.

To the argument that religious believers would be reducing their worship to big business: religious believers will be able to seek legal protection without having to either claim that their worship is big or that it is business.

Mr. Farris would lead one to think that the RLPA’s definition of the exercise of religion is that it must be commercial activity. On the contrary, religious exercise, as defined in this bill is “an act or refusal to act that is substantially motivated by a religious belief.” The scope of religious practices is not defined in terms of dollars in this bill.

While the bill recognizes a very broad scope of potentially protected religious activity, RLPA also recognizes that Congress is constitutionally limited in its power. That does not denigrate religion. It recognizes that fortunately we live in a country where the Congress and the Federal Government are not omnipotent. Among those of us who treasure civil liberties, that would seem to be good news.

As to the argument that the RLPA would somehow signal to the Supreme Court a disapproval of a more conservative approach toward the Commerce Clause, I think that claim is in error as well. By passing RLPA, the Congress would be neither approving nor disapproving of *Lopez*. It would simply be abiding by it. It would simply be appropriating, using all of its Commerce Clause power to the furthest extent the clause permits in the service of religious liberty.

RLPA does not codify *Lopez*. If the Supreme Court, in further cases, as Mr. Farris predicts, contracts the scope of the Commerce Clause, then the RLPA’s scope of protection in that section will contract with it, because its definition closely tracks the constitutional language. If religious exercise is “in or affects interstate commerce,” then—to whatever extent the Court recognizes, then that activity is covered. So RLPA will not expand congressional regulatory authority.

This fact is further guaranteed by not one, but two other explicit disclaimers in RLPA. Section 5(b) says that nothing in this act shall create any basis for regulation of religious exercise or for claims against religious organizations. As if that weren’t enough,

section 5(e) says that just because religious exercise is protected under RLPA does not mean that the religious practice is now subject to any Federal regulations based on the Commerce Clause.

As to the argument that RLPA will protect only a few religious practices or a few religious believers, that is not correct. It will protect many believers, individuals as well as large institutions, without expanding Federal power. The Spending Clause power, which Mr. Farris overlooked mentioning—needless to say, congressional dollars are spent all over the country, not the least of which is public schools. So public schools could not refuse to permit a student to make up work after missing class or an exam because of a religious holiday. A public school would have to excuse a student from attending a sexually explicit assembly on safe sex if the student objected on religious grounds.

A public university could not forbid students from living off campus in a religious community or require them to live in coed dorms contrary to their religious convictions. Public medical schools receiving Federal aid could not deny admission to an applicant because she stated her religious objections to performing abortions. The list goes on.

Secondly, RLPA's section 3(b), which also was not discussed by Mr. Farris, would protect every church and synagogue and house of worship in the country in the area of land use; the record from the five hearings before this subcommittee are replete in describing this as a nationwide problem.

Third, the act's Commerce Clause section would trigger and extend coverage to, as I mentioned earlier, religious schools that, for example, are denied accreditation because they refuse on religious grounds to teach some State-mandated curriculum on, for example, sex education.

Churches (big and small) charities and religious book stores, who wish to hire employees of the same faith, would have potential coverage under the Commerce Clause. Prison inmates and ministries that minister to inmates would be able to have some kind of an argument when wardens in State prison systems bar religious literature from going to people like Pat Nolan.

Finally, RLPA would clarify—and this also was not discussed by Mr. Farris—that every Federal employee, every Federal policy, all 2 million civilian employees of the Federal Government and a million men and women in uniform and their dependents, are all still protected by the 1993 RFRA.

For all of these reasons, members of the committee, we strongly support the immediate passage of this bill and thank the committee for its leadership in this regard. Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Mr. McFarland follows:]

PREPARED STATEMENT OF STEVEN T. MCFARLAND, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM

The Christian Legal Society (CLS)¹ recognizes the dire need for federal legislation to restore the highest legal protection for religious freedom and urges you and the subcommittee to wield every constitutional means available to the Congress to

¹ *Disclosure:* The Christian Legal Society has not received any federal grant, contract or sub-contract in the current or preceding two fiscal years. CLS represents only itself at this hearing.

achieve this end. CLS believes that H.R. 4019, the Religious Liberty Protection Act (RLPA), is the best vehicle for such protection at this time.

For the following reasons, our friend, Michael Farris, is mistaken in his arguments against H.R. 4019 ("RLPA").

1. RLPA Would Protect Individual Believers And Religious Institutions, Small Churches As Well As Large.

The portion of RLPA based on the Commerce Clause would protect small churches and ministries, as well as large ones, because both frequently depend on purchasing and distributing goods and services across state lines. The size of the church budget or of the bookstore's inventory will not be determinative. The question will be whether the adverse impact on religious exercise at one church—when repeated on a statewide scale—will substantially affect interstate commerce. In many cases, the answer will be "yes."

If a small Baptist church (or a huge one) were forbidden by state law from requiring that its choir director be a practicing Christian, chances are good that both churches would dispense with the position. No matter how big or small the church, both buy their hymnals from Indiana, their choir robes from Missouri, and their sheet music from Tennessee. Therefore, the state law burdening their religious exercise in employment will, through repetition in numerous places of worship, substantially affect interstate commerce, thus triggering RLPA.

If a state prison system forbids the possession of Bibles and religious literature by inmates, that statewide policy affecting thousands of prisoners would trigger RLPA; literally millions of dollars worth of religious literature crosses state lines in the U.S.

2. Using The Commerce Power Of The Congress To Protect Religious Exercise Will Not Expand Federal Power.

RLPA would not expand Congress's power beyond its present boundaries. Its entire purpose is to constrain state governmental power with the strictest test known to the law.

RLPA neither approves nor disapproves of the Supreme Court's decision in *Lopez* but simply abides by it. RLPA would appropriate the Congress' power under the Commerce Clause to the extent the Clause permits—no more, no less. By closely tracking the wording of the Clause, RLPA's Commerce Clause section will expand or contract as broadly or narrowly as the Supreme Court interprets the Clause in the future.

The fact that RLPA would not expand federal power is further guaranteed by two explicit disclaimers. Section 5(b) states that "(n)othing in the Act shall create any basis for regulation of religious exercise or for claims against a religious organization . . ." And section 5(e) underscores that "(p)roof that a religious exercise affects commerce for the purposes of the Act does not give rise to any inference or presumption that the religious exercise is subject to any other law regulating commerce."

Rather than expanding federal power under the Commerce Clause, RLPA would use that Clause to restrain the federal and state governments from burdening religious Americans: from church schools to religious bookstores; from small businesses to prison inmates; from churches to day care centers to private landlords.

3. By Using Its Commerce Clause Power, Congress Would Protect, Not Denigrate, Religion.

The presupposition for the bill is not that religion is just another commercial transaction. Rather its presupposition is that state and local regulation often places a heavy burden on religious practice, and Congress should use its powers to protect our precious religious freedom from such abuse.

Some religious practices *do* affect interstate commerce—that is a fact, not an insult—and so the Congress can, and should, protect it.

Our desire that the Congress use every arrow in its constitutional quiver presupposes not "an insult" but the highest reverence for religion, for its autonomy and for its free exercise.

Congress' powers are limited under the Constitution and this is quite proper. What would be improper, in our view, would be to use these enumerated powers to legislate on all manner of issues, save protection of our religious liberty. As church-state scholar Professor Michael McConnell recently responded to Mr. Farris' criticism: "RLPA does not purport to change the reach of federal government power, but simply to enshrine religious freedom protection within that domain."

4. RLP A Would Protect Much Religious Exercise

Current court interpretation limits the scope of Congress' legislative power over state or local activity to: conditioning the ways federal money is used by states, regulating interstate commerce, or remedying proven state infringements on due process, equal protection or the privileges and immunities of citizenship. The Religious Liberty Protection Act properly uses all three of these shields to protect religious liberty uniformly for all Americans.

The outcome in the following scenarios will turn on their own facts. But RLP A would unquestionably make it more difficult for the government to defeat the following claims.

4.1 Protection Based On The Spending Clause Against Interference By State And Local Government.

If a state's welfare-to-work program requires that a welfare recipient attend training classes and schedules them exclusively on Sunday mornings, RLP A would enable those welfare job trainees to be able to get the training as well as attend church (by requiring that the state provide training on non-Sabbath days).

A public school could not refuse to permit a student to make up work after missing class or an exam for a religious holiday or worship service.

A public school would have to excuse a student from attending a sexually explicit assembly on "safe sex" if the student objected on religious grounds.

A public university could not forbid students from living off campus in a religious community or require them to live in co-ed dorms contrary to their religious convictions.

A public medical school receiving federal aid could not deny admission to an applicant because she stated her religious objection to performing abortions.

If RLP A were enacted, all of the beneficiaries of federal programs would have their religious exercise protected from most government interference. Beneficiaries would include: students attending public universities and receiving federal financial aid; Americans living in federal housing projects and subsidized housing; public elementary schoolchildren from low-income families participating in Title I supplemental education programs; children, parents and employees at Head Start and other government-run child care centers receiving child care block grants; those who live in government housing for the elderly or handicapped; students at public institutions in the healthcare professions receiving federal education and training assistance; and many others.

4.2 Protection From Interference By Federal Government.

In addition to protecting the beneficiaries of all these state and local programs that are federally subsidized, RLP A would clarify that the Religious Freedom Restoration Act of 1993 applies to federal law, policies, property and employees. This would mean the highest level of legal protection for the religious expression of:

two million federal civilian employees of the Executive Branch (from postal workers to U.S. Attorneys);

a million men and women in uniform, including their dependents, around the world;

those with public access to federal buildings, parks and monuments;

employees of, job trainees and patients in veterans programs;

the thousands of diplomatic personnel of the State Department worldwide; and

every person whose religious exercise is substantially burdened by any federal statute, regulation, Executive Order or policy.

4.3 Protection Under The Commerce Clause

In passing RLP A, Congress also would be using its explicit constitutional power to regulate commerce between the States and would make it more difficult for the government to defeat religious liberty claims. Countless federal laws have exercised this power, including the proposed federal ban on partial birth abortion. It would be tragic if the Congress failed to use this power to help shield our First Freedom uniformly for all persons, regardless of the state in which they live.

Religious exercise is defined in RLP A not in terms of dollars or size of budget, but as "act or refusal to act that is substantially motivated by a religious belief. . ." [sec. 8(1)]. Thus, RLP A defines a very broad scope of potentially protected religious activity.

While RLP A would have a broad scope of beneficiaries, it also respects the constitutional limits of congressional power. The Act's protection under the Commerce Clause would be triggered if a person's religious exercise were "in or affecting commerce . . . among the several States. . ." The Supreme Court has most recently

said that a law based on the Commerce Clause “requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” *U.S. v. Lopez* (1995). In determining this, the Court asked whether the regulated activity was “in any sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez* affirmed the common sense proposition that power under the Commerce Clause must be based on a commercial transaction, but it cast no doubt on the Court’s longstanding view that Congress may regulate many small transactions that affect commerce in the aggregate.

If landlords are required, contrary to their religious convictions, to rent their real estate to unmarried couples engaging in what the property owners sincerely believe is sinful behavior, Congress may reasonably conclude that many landlords of conscience will take their units off the market, convert them to nonresidential uses, etc. Through repetition, these economic decisions can substantially affect the volume of commerce, the supply of housing and therefore the price of housing, and the interstate movement of potential tenants.

If a group supporting abortion rights sues a printer under a state civil rights law for refusing to print their pro-abortion leaflets because of the printer’s religious objection to abortion, the printer could invoke RLPA for protection. Forcing such businesses to close if they refuse to violate their conscience would surely affect commerce.

If a government denies accreditation to church schools because they refuse on religious grounds to teach state-mandated curriculum, including evolution and sex education, the schools will qualify for RLPA’s shield, based on the Commerce Clause.

A municipal ordinance forbidding employers from discriminating against job applicants because of religion could force churches, religious charities, and religious bookstores to move out of town, close their doors, or downsize their staff to eliminate the job opening. This is “economic activity that might [indeed would] through repetition elsewhere, substantially affect” interstate commerce and travel. Indeed, the whole body of federal labor regulation and private-sector employment discrimination law is based on the Commerce Clause; it is inconceivable that employment cases are outside the Congress’ power to regulate commerce.

Similarly, if a state agency prohibits religious schools and day care centers from requiring that their employees be of the same faith, the churches, Jewish day schools, and denominational headquarters will close many of them. This will directly affect interstate trade (from diapers to toys to antiseptic cleansers to Graham crackers), so RLPA will be available as a defense for those religious schools and childcare centers.

RLPA will not protect every religious individual and group from every burden that government might impose on their religious exercise. The Constitution wisely withheld general police power from the federal government. But states are economically diversified and highly interdependent, so that many activities of believers, if altered by government-imposed burdens, will substantially affect commerce and travel between the States.

4.4 Protection Under the Fourteenth Amendment For Church Land Use

For decades the Congress has passed civil rights laws protecting the right to vote, to be free of racial discrimination in employment and housing, etc.—legislation that went beyond the minimum required by the Constitution but was deemed appropriate for the enforcement of the Fourteenth Amendment’s guaranties of due process and equal protection of the laws. The Religious Freedom Restoration Act of 1993 followed in this well-worn legislative path.

In 1997, the Supreme Court ruled that the Congress exceeded its remedial power under the Fourteenth Amendment, that it had not proven to the Court’s satisfaction that RFRA was a sufficiently tailored remedy for government interference with religious exercise that permeated every level of government and every kind of law. In *City of Boerne v. Flores*, the high Court told the Congress that its remedial legislation must aim at a smaller target, a problem that congressional committees have scrutinized and found to be a serious, nationwide obstacle to the exercise of a fundamental constitutional right.

Local land use regulation that discriminates against churches is that kind of a national problem. In the multiple hearings in 1997 and 1998 before this subcommittee, witness after witness testified to this growing, pervasive problem. Many cities disfavor churches and religious property uses because they cannot collect property tax from them, and minority faiths are not always welcomed by mainstream majorities.

Consequently, many cities will permit churches to locate only in areas that are inappropriate (industrial zones, red light districts), already fully developed, and/or prohibitively expensive. Some jurisdictions make no provision for churches at all.

So RLPA specifically targets discriminatory land use regulation, based on the Congress' remedial power under section 5 of the Fourteenth Amendment.

As presently worded, section 3(b) on land use is both stricter and more lenient than RLPA's general standard for all other covered burdens on religious exercise. Section 3(b) requires the local zoning board to prove that burdening the church's access to or use of land "is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety." While "substantial and tangible harm" may be less difficult for the government to prove than a "compelling government interest," the harm that justifies the law is much more limited—it must substantially and tangibly harm neighboring properties or public health. In addition, subsections (1)(B) and (C) are outright prohibitions against two of the most common forms of zoning discrimination; they apply no matter how compelling the government's alleged interests might appear.

Literally every church, temple and mosque, as well as every religious school and parachurch ministry, would be protected under section 3(b) of RLPA.

4.5 Protection Under the Fourteenth Amendment Generally

RLPA also simplifies the litigation of all free exercise claims by shifting the burden of persuasion to government once the claimant shows a *prima facie* case. Because the Supreme Court's free exercise test has many exceptions of uncertain scope, shifting the burden of persuasion has many potential applications. Some examples:

A local school board imposes policies that make it difficult or impossible for parents to home school their children. Religiously motivated home schoolers make a hybrid rights claim, invoking both the Free Exercise Clause and the right of parents to control the education of their children. Once the parents show a *prima facie* case, the school board would bear the burden of persuasion on its purpose for imposing the burdensome regulations, on the applicability of the hybrid rights doctrine, and on the existence of a compelling state interest.

Many laws that burden religion have exceptions for favored secular activities. Land use laws, employment laws, bankruptcy laws, and most forms of regulation have exceptions. Any such law can be challenged under the Free Exercise Clause as not being generally applicable. These cases often turn on the difficult issue of whether the burdened religious practice falls in the same regulatory category as the exempted secular activity. Under section 3(a) of RLPA, government would bear the burden of persuasion on this issue. This is another way to win in cases also covered by the spending and commerce clause sections, and it is a way to get a more complete remedy in cases against statewide agencies that are protected by special immunity rules.

For example, a New York City school district allows community groups to rent school facilities on weekends, except for worship or religious instruction. A church that was denied access to facilities for Sunday worship services could invoke RLPA to clarify that the school district bears the burden of persuasion in justifying this favoritism for secular over religious activity. See, e.g., *Bronx Household of Faith v. Community Sch. Dist.* (2d Cir. 1997), cert. denied (1998).

A prison warden permits a generic Christian worship service, or a Catholic service and a generic Protestant service, but refuses to permit a separate evangelical service. He has made some comments suggesting hostility to evangelical Christians. The burden of persuading the court that he acted for a nondiscriminatory motive would shift to the prison authorities.

5. A Federal Statute Is Presently The Most Viable And Responsible Means Of Protecting Religious Liberty.

Mr. Farris offers several alternatives to RLPA, all of which he admits are politically nonviable.

Re-enacting the Religious Freedom Restoration Act of 1993 in defiance of the Supreme Court's decision striking RFRA as to the states (*City of Boerne v. Flores*, 1997) is not a possibility in this Congress, nor is the President likely to sign a bill that has been previously declared unconstitutional.

Stripping the Supreme Court (or all federal courts) of jurisdiction in religious freedom cases would leave believers to the mercies of state legislative majorities and of state judges. This would foolishly deprive religious claimants of what is frequently their most important venue for vindicating their fundamental rights. Our First Amendment was intended to remove such rights from the fickle "tyranny of the majority."

Impeaching the Justices on the Supreme Court who voted to strike RFRA in *Boerne* is not a responsible step. Mr. Farris offers it only as a means of "getting

the attention of" (i.e., intimidating) the Court. His suggestion that Congress threaten a "court-packing" scheme has the same purpose and is equally doomed.

Amending the federal Constitution may be necessary, especially if RLPA were to be enacted and then struck by the Supreme Court. But the serious step and lengthy process of amendment should only be undertaken as a last resort. The case for an amendment cannot be made as long as a federal statute like RLPA is still constitutionally and politically viable.

Conclusion

Like Mr. Farris, the Christian Legal Society wants religious freedom protected at the highest level. To this end, we urge you and the subcommittee to pass RLPA, and to include within it every means the Constitution affords to the Congress. Our First Freedom deserves nothing less. Through RLPA, the Congress can restore meaningful legal protection to our First Freedom using all the tools explicitly granted to it by the Constitution. While not reaching every area of government interference with religious exercise, these powers together can shield much of the sacred, and do so uniformly for all Americans of faith.

Mr. CANADY. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. And I want to thank the witnesses for their testimony. I think one of the questions that we kind of went through is the effect of the Commerce Clause and who is covered and who isn't.

Mr. Farris, do you want to respond to the comment that small churches would, in fact, be covered?

Mr. FARRIS. Mr. Scott, I appreciate the opportunity to respond. I believe that the test will be—both for the Spending Clause and the Commerce Clause—that there must be a nexus between the activity that is being challenged and the government program that is being challenged and interstate commerce.

So small ministries and individuals, I believe, will be left out of the majority of the cases. The question to ask the people who support this, all of whom admit that this is not a broad protection of religious liberty for all Americans, as the Justice Department said is the goal, is, who is left out? That is the question that they have to answer. Who is left out?

And I would submit that my friend, Mr. McFarland, is wrong when he says that the attendance makeup, a case that he projected in the public schools because that activity is not federally funded—the mere receipt of Federal funds for the school in general or for the education for special needs children, for example, should not make a difference in that makeup case or in the sex film case. If the sex education films were federally funded, then you should have an argument; but if they were purchased by local funds and State funds, you should have no argument.

So we are leaving gaping holes in religious freedom here. RLPA supporters admit that they are leaving gaping holes. And having litigated these kind of cases myself for 22 years, particularly with home schooling, I can tell you I can't close the holes for the home schooling families under this bill. I can't use this bill to protect the religious freedom of home schoolers. And having litigated a number of cases for parents and teachers and others in public schools, I don't think you can close it in the public school cases either, because there should be a direct nexus between the Federal funding or the interstate commerce and the activity in question. It is almost never there.

And so the small, the weak, and the individuals are left out. The big, the mighty, the rich, and the wealthy are going to have the

easier time, not only in terms of the ultimate decision, but in terms of litigating the case. You add to the cost of litigating these cases substantially because every time you are going to have to hire economic experts to come in and say, "Well the purchase of these home schooling books that are religious in character, if we repeat this a number of times, it is going to substantially affect interstate commerce."

Well, you have raised—

Mr. SCOTT. Let me kind of ask another pointed question along those lines. If you were running a restaurant that used in-state homegrown food, but it is a restaurant, and just served people within the State, could you discriminate on the basis of race?

Mr. FARRIS. Under the current decisions, I think you could see that outcome. That is because we use the weak link of the Commerce Clause as the basis of civil rights laws, as opposed to using the 14th Amendment's power, which I think is the far greater power to protect the liberties and equal protection of all Americans. So to the extent that commerce—

Mr. SCOTT. Wasn't there a guy with an axe or something in Georgia that tried to do that?

Mr. FARRIS. Right. I mean, the question is, where is the law now? *Katzenbach v. McClung*, the Ollie's barbecue case that came in the mid-1960's, upheld the plenary authority of Congress to outlaw race discrimination on the basis of interstate commerce. I don't think that case would necessarily come out the same way today.

I think that using the Commerce Clause is a weak link to achieve a good result. I think that we should use the 13th Amendment and the 14th Amendment as authority for passing laws against race discrimination, not the Commerce Clause. It is not wrong because it is a commercial transaction; it is wrong because it is race discrimination. And our Constitution explicitly speaks against race discrimination and explicitly gives Congress authority to enact laws that protect us against race discrimination. That is the reason that Congress has the authority to do that, not because it is a commercial transaction. I see a broader authority for Congress if we rely on the explicit grant that relates to race discrimination.

Mr. SCOTT. Let me ask all of the panelists to comment on the effect that this bill would have in the context of being the last bill passed on someone's ability to get around racial discrimination laws based on religious conviction.

Mr. MCFARLAND. Mr. Scott, it is very clear, if there is anything clear in civil rights law, it is that there is a strong and compelling government interest in eradicating racial discrimination. So I can't imagine any case in which it would be—the government would be unable to justify the application of civil rights laws in that context because of a religious objection. It would—this is strictly, as you know, reasserting a standard of review, a standard of review under which eradication of racial discrimination has always been successful.

Mr. SCOTT. So the safety and health exceptions which are explicitly listed did not need to satisfy the compelling State interest, but you think the racial discrimination would satisfy the compelling State interest?

Mr. MCFARLAND. The Congressman is looking at the land use section in 3(b) and that health and safety—

Mr. CANADY. The gentleman's time has expired. The gentleman will have 3 additional minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. MCFARLAND. That applies to zoning decisions, and frankly is a standard which has been amended recently, not certainly by this subcommittee, but in discussions with the Justice Department. There are a number of us who would amend that section and suggest an amendment in that regard. But that is obviously not before this committee.

But my point is, the general standard of compelling government interest is—has no difficulty being met in the area of racial discrimination. And the standard that you are looking at is strictly for land use decisions.

Mr. FARRIS. Mr. Scott, if I can volunteer and perhaps shut the door on that, I agree with Mr. McFarland on race discrimination.

Mr. SCOTT. As you answered the question, you made the comment about sexual orientation discrimination?

Mr. FARRIS. Yes.

Mr. SCOTT. If we were to pass legislation to expand antidiscrimination to include sexual orientation, where would that come down?

Mr. FARRIS. With respect to race discrimination, the Supreme Court has determined that there is a compelling governmental interest, that is the highest level of government interest. So if race discrimination laws pass the highest test, the question is whether gay rights laws would also be held to be a compelling governmental interest. The fact that Congress passes such a law is evidence of the strong governmental interest. But whether the Supreme Court labels that compelling or not is undetermined.

Mr. SCOTT. Mr. Nolan.

Mr. NOLAN. Mr. Scott, in answer to your earlier question about whether it would protect the small churches, most of the testimony has been from a litigation perspective, but the history with RFRA and with RLPA will be the same: It is most effective as a tool of negotiations. It gives us a seat at the table to try to see, if there is a way to advance the government interest in the least restrictive way. It sets up a discussion. And it is a powerful tool, no matter what the size of the institution.

Our ministry ministers to the "least of these." I don't think there is any class of our citizens that is more vulnerable and more unpopular than prisoners. Yet, RFRA gave us a tool to try to get access to prisoners to advance the gospel to them.

Now, frankly, RFRA, which Mr. Farris supported, was an imperfect tool; it didn't cover everything. I have a letter here from a prisoner while RFRA was in affect. It says, "Already in our jail, the officers are limiting what we can have in terms of any religious materials and services. One inmate got some study materials sent to him, but the mailroom said that they were more appropriate for a chaplain, so he should give them to the chaplain instead. The items were never received by the chaplain.

The weekly services are now monthly. And the officers often "don't get" requests from inmates who wish to attend. This makes the groups "smaller and easier to watch" according to one

officer. Bibles must be requested in writing from the chaplain, but those requests, too, are often left lost in the mails. And little, if any, study material is ever available here. Bible studies mailed in are oftentimes returned to sender marked "No longer here," when we are.

My own experience was the same. Three times, the legislative chaplain, Richard Cherry, tried to send a Bible in to me. Three times it was sent back to him saying, "It does not comply with Federal regulations," even though it complied with every jot and tittle. RFRA did not give me protection there. It only gave us a lever to try to get compliance. And that is, I think, the most important tool that RLPA will give you. It gives the poor and the vulnerable at least an argument to say, "yes," you have a compelling interest to maintain order in a prison; but isn't there a way to satisfy that need in a less restrictive way?

Mr. CANADY. The gentleman's time has expired.

Mr. Hyde.

Chairman HYDE. I have no questions.

Mr. CANADY. Mr. Nadler.

Mr. NADLER. Yes. Let me ask Mr. Farris some questions. I am a little confused.

Let me, by the way, say, did George Will really say the reason for the establishment of this country was to establish the primacy of capitalism over religion?

Mr. FARRIS. He certainly did. And he's no conservative when he says that.

Mr. NADLER. You just confirmed my lack of regard for his general opinions then.

Of course, I think it was Oliver Wendell Holmes that said the Constitution did not establish Herbert Spencer's social contract nor George Will's capitalism nor Adam Smith's *The Wealth of Nations*. In any event, I am a little confused by your argument, sir.

Mr. FARRIS. Okay.

Mr. NADLER. Assuming the factual basis for which the other gentlemen here dissent from, isn't your argument really saying that RLPA is not perfect? It doesn't defend—it doesn't protect all religious liberty? It protects some, but not all, and therefore we shouldn't do any?

In other words, let's assume that the Commerce Clause's reach is as limited as you think it is. What you seem to be saying is, we can't do the job that we could do in RFRA, which you supported. The Commerce Clause—the constitutional basis is more narrow. The Supreme Court has forced us to that expedient. And therefore let's not do it at all.

I mean, the way I always look at a legislative thing, if I have a goal, which is to protect freedom in this case, and I can protect 50 percent of freedom—I would rather protect 100, but if I can protect 50 percent, it is a lot better than protecting zero.

Mr. FARRIS. Well, I understand that argument, Mr. Nadler, and it is one that concerns me. First, though, I don't believe that this bill will be held to be constitutional. Chuck Colson, who supports this legislation, has written to me and said he believes the bill may be stricken on its face as unconstitutional.

Mr. NADLER. That is a different question.

Mr. FARRIS. But the answer is, if it is unconstitutional under the Separation of Powers, we are wasting time with that legislative approach when we should be doing something else. If we are going to protect religious liberty, let's get the job done rather than spin our wheels.

Mr. NADDLER. How would you do it?

Mr. FARRIS. But to answer your question directly, the question is, who are we leaving out; and what will be possible for them after this bill is passed? I would submit to you that all these ministries that have pumped out all of this direct mail to their members and their supporters saying "We are going to solve all these problems in America by passing this bill," when it doesn't go as broadly as they hope, we are going to leave a demoralized group, and it is going to be the small and the weak and the powerless.

Mr. NADLER. Mr. Farris, I have heard that argument. My question again is assuming—I haven't heard a way in which we could protect everybody. Should we draft it differently? What ways do we have, given the *Boerne* decision of the Supreme Court? I think the Supreme Court was wrong and *Smith* was wrong and *Boerne*. A lot of good it does that I think so. Given the Supreme Court's edict, what can we do that is better than this?

Mr. FARRIS. Well, if I can just complete the thought, then I will answer that question directly.

The thought is this, that if we leave the weak out today, the weak will never have the political strength to come back and ask this Congress to find another way to protect them. We have got to pass a provision—

Mr. NADLER. But that assumes there is another way. If you have one, let me know.

Mr. FARRIS. To me, there is no easy solution to this. But I think that you could pass—repass RFRA and strip the Supreme Court of appellate jurisdiction over it. You have that power. This House just passed a bill stripping the Federal courts of jurisdiction over a certain class of inmate lawsuits brought under cruel and the unusual punishments; 350 votes approximately passed that Tom DeLay-sponsored measure. So that is one alternative.

I am not opposed—and I am sure I have no support on this panel or the next one—I am not opposed to the idea of impeaching the Supreme Court, because they are not tied to a criminal standard like the President. They are tied to a standard of good behavior.

I think when you misuse the First Amendment, that is not behaving very well. I think you send a shot across the street that says, "You guys had better interpret the First Amendment a little more generously or we are going to do something about it." I don't mind FDR's court-packing scheme. I think the fact of the matter is that the Supreme Court has told you, you have no legislative authority in this to redefine the Constitution.

What you are doing here today is trying to redefine the Constitution anyway. And you are stuck with what the Court said. You either confront it directly or you can play games. I think this is playing games.

Mr. NADLER. Thank you.

Let me ask Mr. McFarland a somewhat different question.

Can I have another 2 minutes?

Mr. CANADY. The gentleman's time has expired. The gentleman will have 3 additional minutes.

Mr. NADLER. Well, thank you.

I would simply observe that—from Mr. Farris' answer, that this seems a more practical attempt than some of the other suggestions.

Mr. McFarland, I have introduced, along with Chairman Goodling, legislation to protect the rights of religious individuals against employment discrimination by strengthening the requirement in Title VII by legislating for the overturning three specific Supreme Court decisions, which were statutory construction decisions, to provide a reasonable accommodation of their religious practices in the workplace. How would this legislation interrelate with other antidiscrimination legislation where either an institution or an individual claimed a right under the Religious Liberty Protection Act, should it pass, to discriminate? And how would this affect the application of those laws to both suspect and unsuspect classes of people?

Mr. MCFARLAND. The Workplace Religious Freedom Act, which you cosponsored, and we are grateful that you have——

Mr. NADLER. I wrote.

Mr. MCFARLAND. You wrote. The Christian Legal Society is very supportive of and thanks you for doing that.

As we have been talking about this morning, there are limited spheres of influence that each of these bills can cover. The Religious Liberty Protection Act is the subject of our testimony this morning and would cover that which Federal funds affect and that which is in interstate commerce. Also, it would affect land use regulation that affects religious activity.

That does not encompass private activity, including discrimination by private employers against employees with religious convictions. And your bill would add an additional complementary sphere of influence that would restore statutorily Congress' original intent in the 1964 Civil Rights Act that employers, public and private, be required to make reasonable efforts to accommodate the religious practices of their employees unless they can prove that doing so would create an undue hardship.

So I believe your bill, Mr. Nadler, would be very complementary with RLPA and it is one of the highest legislative priorities for the Christian Legal Society.

Mr. NADLER. Thank you.

Mr. CANADY. Now I recognize myself for 5 minutes.

Let me explore something with you, Mr. Farris. I understand from your testimony which you provided here, as well as your written testimony, that you are concerned about the overreaching of Federal power beginning with the New Deal. You think that was kind of a watershed event in our history where the Supreme Court moved the wrong way in interpreting the Constitution.

Now, one of the major legacies of the New Deal was Social Security. Do you believe that the Social Security system constitutes an example of the overreaching of Federal power and is an improper use of Federal power?

Mr. FARRIS. I will touch that third rail. The answer is yes.

Mr. CANADY. Okay.

Mr. FARRIS. And by the way, the author, the chief legal architect of the Social Security law, says it is the worst thing he ever did in his career.

Mr. CANADY. So you believe that Social Security is not within the proper scope of congressional power, to be clear?

Mr. FARRIS. Sure.

Mr. CANADY. Okay. Let me continue on this issue about federalism. You assert that the bill puts the values of religious freedom and federalism in direct opposition. Now, I understand the point you are making there, but isn't it true that the Religious Freedom Restoration Act of which you were a vigorous, a very able proponent, was itself designed to restrict the power of the State, that is, to require that State power yield in at least some circumstances to the free exercise of religion? So isn't your concern more with how the Federal Government restricts the power of the States than with whether it restricts the power of the States?

Mr. FARRIS. The belief that I have is not that the power of the States should be able to run free. I believe in the Constitution. And I believe that the Constitution gives this body enumerated powers, explicit enumerated powers. There is an explicit, enumerated power in section 5 of the 14th Amendment to enforce the 14th Amendment. And I agree with the jurisprudence that says that the word "liberty" in the 14th Amendment's first section has some content, that we are not just talking about process, but there is content to liberty that is protected as well.

So I believe that this body has the authority to protect the content of liberty, and the free exercise of religion certainly fits in with the content of the fundamental liberties of this Nation that is within the 14th Amendment. I do not believe—as James Madison did not believe—that the Commerce Clause gives plenary authority.

James Madison, when he was President of the United States, vetoed the bill that authorized the building of roads, bridges, and canals because there was no congressional authority to do so. He said, "If you do that, if you allow the building of bridges, roads, and canals, then the congressional power will run amok and there is no area of life that we will be able to stop from congressional power." His prediction was absolutely correct.

Mr. CANADY. So, on that, you would also be opposed to any public works of that sort authorized by the Congress?

Mr. FARRIS. Mr. Canady, I believe in the original intent of the Constitution. If you want to paint me as a constitutional extremist, you have done an adequate job of pointing out that I don't believe as Social Security as a commerce power. I think that is properly a State function, not a Federal function. I think that road building is properly a State function, not a Federal function. But you don't have to go all the way to Mike Farris' view of the Commerce Clause to recognize that this bill is a problem. Just take what the Supreme Court has said in *Lopez*.

Mr. CANADY. Let me——

Mr. FARRIS. And that's a more——

Mr. CANADY. Let me reclaim my time here. I am just trying to figure out exactly what your views are on this, and you are entitled to express them. That is why we are having the hearing.

But let me ask you, continuing on something you said, if I understood you correctly, you believe that the Civil Rights Act of 1964 is, in light of the *Lopez* decision, on shaky ground. Is that correct?

Mr. FARRIS. To the extent that it relies exclusively on the Commerce Clause as its authority, I think that is correct. I prefer Justice Douglas's concurrence in the *Katzenbach v. McClung* case which relies on the 13th and 14th Amendments as the authority for Congress. I think that the law is completely constitutional.

Mr. Canady, if you are going to ask me questions that are designed to embarrass me, I am entitled to respond.

Mr. CANADY. Please do.

Mr. FARRIS. The answer is, I believe that the antidiscrimination laws of the 1964 Civil Rights Act are constitutional. I believe they are best defended and best understood as constitutional when they are premised on the 14th Amendment and the 13th Amendment, not on the shaky grounds of the Commerce Clause.

Mr. CANADY. I guess the problem I have with that is squaring that with the *Boerne* decision. If you feel they are on shaky ground under the Commerce Clause, what ground would they stand on under the *Boerne* decision? I don't know. I don't think it is on shaky ground. I would disagree with you on that.

Mr. FARRIS. The Supreme Court in *Boerne* said that if Congress is passing laws designed to enforce the same standard that they have announced, then fine, you have got all the power to enforce their standard. But if you are trying to enforce a different standard of constitutional rights, then you don't have that authority.

They would say that the Civil Rights Act is trying to enforce the same standard that the Supreme Court has enacted, so you are on strong ground there. That is why *Boerne* will give you no problem. It is *Lopez* that gives you a potential problem for the Civil Rights Act in its reliance on the Commerce Clause. If Congress is passing this law which is adopting a different standard of constitutional rights, then that is where the *Boerne* decision gives you problems.

Mr. CANADY. Let me give myself 3 additional minutes.

I was struck in your testimony by your statement that believers cannot submit to Caesar what is rightly God's. I think most believers would certainly adhere to that. One of the things that that brought to my mind is the controversy over the incorporation of churches which raged earlier in the history of our country.

People who were antiestablishmentarianist were opposed to incorporation of churches because they felt that was kind of giving something to the churches they shouldn't get; at least some people felt that way. Others in churches felt that receiving a charter of incorporation from the State somehow compromised the religious status of the churches.

I really see that debate as kind of a parallel to the argument you are making about the use of the commerce power in this context. What are your views on that? Do you think it is a submission to Caesar when a church receives a charter of incorporation from the State?

Mr. FARRIS. Mr. Canady, I live in the Commonwealth of Virginia. The Commonwealth of Virginia, in its Constitution, prohibits churches from being incorporated. The State of West Virginia also, in its Constitution, prohibits the incorporation of churches. James

Madison, when he was President of the United States, vetoed another bill that allowed the Episcopal church in Alexandria, when Alexandria was a part of the District of Columbia, to incorporate, because he understood it to violate the Establishment Clause of the United States Constitution.

My views are that for the government to give sanction to religious activity, to create the juridical person of a corporation, is unnecessary and can lead to danger. The church of which I am elder board chairman and interim pastor is not incorporated because, (A), it is unnecessary and, (B), I think it does lead to potential extra regulation of the church. Whether churches do it or not I don't think is—

Mr. CANADY. Do you believe that that would in essence be submitting to Caesar what is rightly God's, if the church accepts a charter of incorporation from the State?

Mr. FARRIS. That is how I interpret scripture, but that is different from interpreting the Constitution. You asked me for a scriptural interpretation at that point, and my answer is yes, as a matter of scriptural interpretation.

Mr. CANADY. I understand that you are giving a scriptural interpretation about God and man, but I don't think there is much about that in the Constitution.

Mr. FARRIS. Of God and Caesar.

I agree with that. I am making an appeal that as a practical matter, there are a number of people like myself who would have a problem of conscience in coming into court and arguing that what we are really doing is a commercial transaction. Look at how we affect commerce here in our claim.

I think I am the only person on this panel who has spent substantial time in the courtroom, actually putting witnesses through the paces of testifying in a free exercise case. Others have written amicus briefs and so on, and appellate briefs, but I am a litigator. I go in the courtroom and have done so for 22 years. I have worked with the witness, I have worked with the pastor, I have asked them the questions that established the predicate for the case. I think I have some understanding of the kind of predicate that you are going to have to lay to get a factual basis for claiming protection under the RLPA. You are going to have to go into all the commercial things. You will commit legal malpractice if you don't try to prove how commercial this really is. I think it is an affront to my faith. I will have clients that will refuse to do it.

It puts you in a potential quandary if you take the scripture as I do. Not everybody takes the scripture as I do, and that is fine, but there will be a substantial number of people who do, and we leave those people out. The question for all the people that supported this is, "Who is left out and why?" That is the question you all need to answer.

Mr. CANADY. Thank you for your testimony. Mr. Hyde is recognized.

Chairman HYDE. I just want to make a comment. I just want Mr. Farris to know that he is not without his admirers and supporters on this side of the bar here, because I think you have a strong view of the Constitution under the original intent. The problem is not that you are not accurate legally and historically, but the courts

have so adulterated the language and the plain meaning of the Constitution that we are confronted with practical problems that I think were best expressed in *Casey v. Planned Parenthood* where the Court said, "Look, we're stuck with *Roe v. Wade*. It may be questionable but we're living with it, people have relied on it, and so we have to proceed as though it were legitimate."

I think the question of Social Security, the question of the Civil Rights Act, I think constitutionally you are probably quite right. But again, we are an amalgam of the Constitution and somebody's views of pragmatism. But I want you to know you are not viewed as off the wall at all by this Member. I am not sure—I don't take the rigorous position you do, but I think it is refreshing to hear somebody go back to the real document, the Constitution, and what our Founding Fathers meant.

We shouldn't be here discussing this bill, because the Constitution is quite unequivocal: Congress shall make no law respecting an establishment of religion or inhibiting the free exercise thereof. That is pretty clear. But the courts have mucked it up, and I think the phrase Mr. May used said we the people; it is we the Justices who are running this country.

The real answer is to strip the Court of this issue rather than horse around with a clever, inventive idea of using the Commerce Clause. As a practical matter, that won't fly. We have tried it before on other issues. It was good enough for the Norris-LaGuardia Act, and it is something that I think is the real answer, but it is not what—

Mr. NADLER. Will the Chairman yield?

Chairman HYDE. Certainly.

Mr. NADLER. Thank you. I am just struck by the history here. I about a year ago, read a biography of Abraham Lincoln. I always wondered why he became a Whig instead of a Jacksonian Democrat, given his populist sympathies. What I found in that book was the answer to the question.

The answer was that in Sangamon County in Illinois where he was first getting involved as a young man in politics, they needed a canal. The Democrats, following Mr. Madison's interpretation, the Jacksonian Democrats thought it was beyond the powers of the Federal Government to have internal improvements, as they called it in those days, what we would today call public works.

But Abraham Lincoln, admiring Henry Clay, who was in effect one of the founders of the Whig Party, the antecedents of the Republican Party, Henry Clay had his American System, the central premise of which was that the Jacksonian Democrats, Mr. Madison and Mr. Jackson, were wrong in their interpretation of the Constitution and that the Constitution had plenary power—not plenary power—enabled the Federal Government to do internal improvements, and that the Federal Government should indeed fund roads and canals, and that was the original reason Abraham Lincoln became a Whig.

It is fascinating to me to hear a constitutional discussion today replaying the debate between the Whigs and the Democrats in the 1830's, a debate which turned Abraham Lincoln, the founder of the Republican Party or one of the founders, into a Whig. I just wanted to make that historical observation.

Chairman HYDE. You have made my day.

Mr. FARRIS. Mr. Hyde, I would just like to thank you for your comments.

Mr. CANADY. Mr. Scott is recognized for additional questions.

Mr. SCOTT. Thank you. I wanted to ask the witnesses if they could help us a little bit. In the *Boerne* decision, the Court pointed out that there was an insufficient record to justify the legislation. Could you tell us what practices would be permissible under RLPA, that would be included or not included on RLPA, that would have been under RFRA, are not included, not protected now, some specific cases that this would actually affect?

Mr. MCFARLAND. I can take a stab at that. There are four areas that RLPA, as I understand it, would address, four spheres of protection. One would be, number one, clarifying that as to the Federal Government the '93 RFRA still applies. As you know, RFRA, to answer this part of your question, RFRA applied to every State and local law and action that substantially burdened religious exercise. If that was the plumline of the way it was from '93 to '97, then in contrast we cannot at the present time, given the jurisprudence, enact that broad a remedy. We can address land use problems which as, Mr. Scott, you know from being in all these hearings, there is a substantial amount of testimony both—and there will be more in the second panel on that issue. That is based on section 5 of the 14th Amendment.

So you have the reaffirmation of the Federal RFRA, you have the land use areas; any action that has an impact on religious activity through land use decisions would potentially be covered. Then you have the Commerce Clause, obviously, which has been the subject of discussion as to how narrow or broadly “in or affecting interstate commerce” extends. And, fourthly, you would have cases involving spending, and I listed a number of those in answer to Mr. Farris’s rebuttal about the abstinence or the sex education hypothetical.

The latter wouldn’t require an economic expert. You would simply have to ask the school superintendent, the “condom demonstration assembly which was mandatory attendance for my client, where did you get the money for that?” Answer: “Well, that comes from a block grant from the Federal Government.” “Thank you very much;” you have just made your predicate, no economics professors necessary.

We didn’t discuss specific cases under the Commerce Clause. I would suggest, for example, if a government denied accreditation to church schools because they refused on religious grounds to teach a particular State-mandated curriculum, for example, on sex education, the schools would potentially qualify for protection there, again, if there is the adequate nexus between the curriculum and the impact on interstate activity. If a group—for example, an actual case in Vermont—supporting abortion rights sued a printer under a State civil rights act for refusing to print their pro-abortion leaflets because of the printer’s religious objections to abortion, the printer would be able to potentially invoke RLPA for protection. Forcing such businesses to close if they refused to violate their conscience would surely affect interstate commerce in many cases.

You heard from landlords who are required, contrary to their religious convictions, to rent their real estate to unmarried couples

that are engaging in what they believe to be sinful behavior. Congress may reasonably conclude that some landlords of conscience will take their units off the market or convert them to nonresidential uses, again which would impact interstate travel, interstate commerce.

These are some examples under that one of four spheres of protection that specifically would enjoy a heightened standard of scrutiny under this bill.

Mr. SCOTT. Mr. Nolan, does your support for the bill require the Supreme Court to disagree with itself in the *Boerne* decision, to overturn part of its hostility to RFRA?

Mr. NOLAN. No, sir. I think that Congress can address the problem in a different way, as it has in the past where the Supreme Court has struck down previous acts. For instance, the original child labor laws were attempted in three different ways, I think. Finally, the fourth time it was phrased in such a way that it passed muster with the Court and the National Fair Labor Standards Act became law. We don't think the Court has to overturn *Boerne*. We think it should, but we don't think it has to do that. We think it is wise that the sponsors of the bill have chosen the Commerce Clause, clearly enumerated in the Constitution as one of Congress' powers, and the Spending Clause, to base its authority on.

In answer to your last question, I have a couple of instances right before me where I think RLPA would be a substantial help. In Pennsylvania, as I mentioned, the day care centers were served with notice that they had to comply with city ordinances against discrimination in hiring on the basis of religion. Of course these are church-based day care centers, with religion the main curriculum to these children. They certainly couldn't have an atheist teaching there.

Anyway, the senior assistant counsel to the Commonwealth of Pennsylvania cited the *Boerne* case, and this came down within a month of the *Boerne* decision, cited the *Boerne* case in his order to them, saying they had to comply with the nondiscrimination ordinance. The Aleph Institute, a Jewish group that provides services to Orthodox Jews inside prisons in preparation for the High Holy Days, was preparing to send in goods for the ceremonial meals. They were denied by many prison chaplains on the basis that Janet Reno had put out a policy saying they couldn't accept any gifts and interpreting this as a gift.

Mr. CANADY. The gentleman's time has expired. The gentleman will have one additional minute.

Mr. SCOTT. If you could finish up briefly.

Mr. NOLAN. Because RFRA was still applied at the Federal level, we along with the Aleph Institute were able to get the Bureau of Prisons to accept these goods. Without RFRA or without RLPA making the States do it, we would be powerless. They would just say no, it does not serve a penological interest, and say no.

Lastly, as we have tried to get into Maryland prisons, the State of Maryland said that Prison Fellowship is not a religion and therefore not entitled to access to come in and preach the gospel. Now they still limit us to only Protestants. If someone lists a faith, Lutheran, Baptist, Catholic, they are not allowed to attend our Prison Fellowship seminars; only if they check the generic box, "Protes-

tant," are they allowed to attend. Someone that doesn't claim a faith isn't allowed. That prevents us from evangelizing in prisons. RLPA would give us a seat at the table to say, is that reasonable? Is there another way to serve the penological interest while still giving access to religion?

Mr. CANADY. Thank you. Mr. Hyde. Mr. Nadler.

I will recognize myself for hopefully not even 5 minutes. I do want to focus on the alternatives that have been suggested. I think that most of us who have been involved in this recognize that we wish that the Religious Freedom Restoration Act had been upheld. This legislation that we have before us is not our first choice, but we really have come to this because we believe it is the most likely means of providing an extra measure of protection for religious liberty in our country. We are supporting it for that reason.

Some alternatives have been suggested in kind of outline. One is the direct reenactment of RFRA. These are alternatives that Mr. Farris mentioned in his testimony: One, the direct reenactment of the Religious Freedom Restoration Act; two, a constitutional amendment; three, a provision restricting the jurisdiction of the Federal courts over RFRA.

On the direct reenactment of RFRA, it is my candid judgment that that would be an exercise in futility. We would have no success at the lower court level. It would be immediately invalidated by the lower courts. It would just work its way up to the top and be struck down in record time by the Supreme Court. I think that most people would share that evaluation of what would be likely to occur.

Constitutional amendment, it is also my view on that that we simply don't have the votes. We have had some experience with constitutional amendments in this subcommittee; quite frankly, a little more experience than I would like to have. I can tell you that I don't think that it would succeed. I will tell you that if I thought it could succeed, I would be working on that, but I really think that that would be an exercise in futility.

The third alternative that you mention in your written testimony, Mr. Farris, was this provision restricting the jurisdiction of the Federal courts over RFRA. I am just puzzled by that, that court-stripping provision, because RFRA is something that people need to go to court to use, and if you strip the courts of jurisdiction over it, I just don't know where that gets you. I am having a conceptual problem understanding how that court-stripping suggestion helps an individual whose religious liberty has been infringed by an act of a State or local government to get some redress. Would you want to respond to that?

Mr. FARRIS. Sure. I agree with you that the constitutional amendment is the best alternative and if the entire RFRA coalition would support it—RFRA passed unanimously in the House and 98-2 in the Senate—if the entire RFRA coalition would support it, it would be through this Chamber in record time, and I think it would be ratified at the State level in record time.

I have never heard an explanation of why it is not politically possible, except that most of the groups on the left don't want it, without any explanation that I have heard of except a fear of an Istook amendment being attached to it. I think that is an irrational, un-

reasonable fear, and I think we should get on with the business of doing what is right.

But the other alternatives that I have suggested have basically been to answer what Justice Fellowship has been saying, that even though they recognize that this bill will be declared unconstitutional by the Supreme Court, we have got to do battle with the Supreme Court. I don't suggest that it is going to establish religious liberty for anybody, but if Congress is going to preserve its prerogatives to be able to protect the rights of the people, I agree that it is a good idea to engage the Supreme Court. If you are going to engage them, I suggest, let's engage them.

So I am not suggesting that that alternative protects anyone's religious liberty, but I don't think this bill protects anyone's religious liberty.

Mr. CANADY. Talk about engaging the Supreme Court. You mention impeaching the Supreme Court as one solution. Mr. Farris, I am not trying to paint you as an extremist, I want you to understand that, but that is something you said. I want to understand if you really believe that it would be productive for us to undertake to impeach Justice Scalia, Justice Rehnquist and Justice Thomas because of their decision in these cases.

Mr. SCOTT. Not because of their decision in this case, but maybe for some other reasons.

Mr. FARRIS. And I will go with Mr. Scott on that, some other cases as well. With respect to my suggestion, do I think that an impeachment would pass, no, I don't think that you would get the votes to do it. Do I think you would get the Supreme Court's attention? Yes. Nothing changed in the New Deal scenario except the people across the street woke up and somebody changed their mind. I am hoping that somebody across the street will wake up and change their mind and start reading the Constitution correctly.

It is just based on pragmatic politics, Mr. Chairman, that I make those suggestions. I think that the Supreme Court is a political branch of government, not a legal branch of government. They are engaging in wild judicial activism, making up the law, not interpreting the law, not applying the law; and since they are politicians, I say we treat them like politicians and we do things that are designed to bring political pressure on them. That is the only reason. It is the equivalent of turning on the phone calls to a Congressman. That is all I am suggesting.

Do I think that impeachment would be successful? No. Do I think it would have much effect? No. Do I think it would get the court's attention? Yes, maybe. Maybe we could get some votes changed over there, and maybe we could get the First Amendment interpreted correctly as it should be.

Mr. CANADY. Thank you. My time has expired. Mr. Hyde, do you have anything else?

Chairman HYDE. I am ready for the next panel, Mr. Chairman.

Mr. CANADY. We will move to the next panel. I do want to thank all the members of this panel for taking time to be with us. We appreciate your perspectives on this. I appreciate the sincerity with which all of you hold to your convictions on these important issues. Thank you very much.

Mr. NADLER. Mr. Chairman?

Mr. CANADY. Mr. Nadler.

Mr. NADLER. May I ask unanimous consent to read part of my opening statement, which a late plane prevented me from reading at the time, and I would ask that the rest of it be included in the record.

Mr. CANADY. Yes, without objection, you will be recognized now for the purpose of reading part of your opening statement, as the members of the second panel prepare to come forward.

Mr. NADLER. Thank you. Mr. Chairman, I would like to make one observation which I think goes to the heart of this issue before us today. The true disaster of the *Smith* decision was to invite legislatures to hold rollcall votes on the fundamental rights of individual Americans. Religion should not always trump the law where it is burdened by a law of general applicability, but neither should it always give way to the whim of every bureaucrat. How we strike that balance as a society is never easy, but the difficulty of the task is no excuse for shirking our responsibility to respond to *Smith* effectively and appropriately.

Both with RFRA and now with RLPA, the Congress is attempting to employ a standard familiar to legal scholars, and more importantly to take the case-by-case balancing of these rights out of the political process where religious minorities and other disfavored groups will receive disparate treatment. As legislators we understand all too well that this is often the case, if not out of malice or popular political sentiment, then simply due to ignorance or the absence of a group's voice in the legislative process.

The evil of favoring one religion over another, whether in the granting of exemptions to laws of general applicability or through some other means, is still clearly in violation of the Free Exercise Clause as enunciated in *Smith*. Even Justice Scalia recognized that. We as legislators perhaps understand the political and legislative process better than the Justices, and understand that carving out such exemptions on an ad hoc basis will inevitably disfavor the voiceless and the unpopular, hence the need for a more general rule.

We have already begun taking rollcall votes on the Floor of the House on whether certain religious practices will be protected, in order to protect the rights of religious tithers in bankruptcy proceedings, for example. Although we did our best, we really had no way of being sure there was not some religious minority omitted due to a lack of information. Absent the general rule of the sort proposed in RLPA, I fear that this will be the only alternative.

I would, therefore, close with the words of Mr. Justice Jackson, who observed 55 years ago: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

Unfortunately, right now our first freedom may indeed be submitted to a vote, and the question before us today is whether, based upon the guidance we have received from the Supreme

Court, and any hints they may have given us as to what rule they may think up next, we can protect our first freedom from this precarious position. That is what we are attempting to do.

I thank you, Mr. Chairman, and I look forward—I look backward to the witnesses we heard and I look forward to the witnesses we are yet to hear.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF HON. JERROLD NADLER, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. Today we continue our review of the Religious Liberty Protection Act. I appreciate your having scheduled this hearing so that we can take additional testimony on some of the very difficult technical issues attending this legislation.

I have to say that when we passed the Religious Freedom Restoration Act in 1992, the law on Congressional power to protect the fundamental rights of individual Americans against substantial burdens imposed by governmental actions appeared clear. Despite its thin protestations to the contrary, the Supreme Court has plainly abandoned earlier and well established rules of constitutional construction which invested in the Congress the power to enforce by appropriate legislation those rights.

That's the law, and we must abide by it, even if the Supreme Court's notion of congressional authority is occasionally a moving target. We have an obligation to do everything we can to ensure that this critically necessary legislation will pass constitutional muster. In that regard, although the Justice Department was unable to testify today, I still look forward to their comments on this legislation.

We have also heard concerns about the impact this legislation may have on other laws designed to protect individuals rights, laws designed to protect society from criminals, preserve historic landmarks, the environment, and the ability to maintain order in prisons. We need to have a clear understanding of how this proposed legislation will be understood and interpreted. I hope that our witnesses today can help the Subcommittee focus on the standard we are restoring and how it was understood and applied by the courts both under the Free Exercise Clause and under RFRA.

Finally, I would like to make one observation which I think goes to the heart of this issue.

The true disaster of the *Smith* decision was to invite legislatures to hold roll call votes on the fundamental rights of individual Americans. Religion should not always trump the law where it is burdened by a law of general applicability, but neither should it always give way to the whim of every bureaucrat. How we strike that balance as a society is never easy, but the difficulty of the task is not excuse for shirking our responsibility to respond to *Smith* effectively and appropriately.

Both with RFRA, and now with RLPA, the Congress is attempting to employ a standard familiar to legal scholars, and more importantly to take the case by case balancing of these rights out of the political process where religious minorities and other disfavored groups will receive disparate treatment. As legislators, we understand all too well that this is often the case, if not out of malice, or popular political sentiment, then simply due to ignorance, or the absence of a group's voice in the legislative process.

The evil of favoring one religion over another, whether in the granting of exemptions to laws of general applicability, or through some other means, is still clearly a violation of the Free Exercise Clause as enunciated in *Smith*. Even Justice Scalia recognized that. We, as legislators, perhaps understand the political and legislative process better than the Justices, and understand that carving out such exemptions on an *ad hoc* basis will inevitably disfavor the voiceless and the unpopular—hence the need for a more general rule. We have already begun taking roll call votes on the floor of the House on whether certain religious practices will be protected—in order to protect the rights of religious tithers in bankruptcy. Although we did our best, we really had no way of being sure there was not some religious minority omitted due to a lack of information. Absent a general rule of the sort proposed in RLPA, I fear that this will be the only alternative.

I would, therefore, close with the words of Mr. Justice Jackson who observed, 55 years ago,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by

the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Unfortunately, right now, our first freed may be submitted to a vote, and the question before us today is whether, based upon the guidance we have received from the Supreme Court, and any hints they might have given us as to what rule they may think up next, we can protect our first freedom from this precarious position.

Thank you, Mr. Chairman, I look forward to today's witnesses.

Mr. CANADY. Thank you, Mr. Nadler.

We now will move to our second panel. The second panel, like the first, is composed of five witnesses. The first witness on our second panel will be Bruce D. Shoulson, an attorney whose practice includes land use and health care matters. Our second witness will be the Reverend Elenora Giddings Ivory, Director of the Washington office of the Presbyterian Church. Following her will be Steve Green, the Legal Director of Americans United for Separation of Church and State. Next will be Jamin Raskin, a professor at American University's Washington College of Law. And our final witness of this panel and our final witness of the day, and hopefully our final witness of a long series of hearings on this subject, will be Douglas Laycock, Associate Dean for Research at the University of Texas Law School.

Again, I want to thank all of you for being with us. We would ask that you do your best to summarize your testimony in no more than 5 minutes, although, as you have observed, we have not been strictly enforcing the 5-minute rule. Without objection, your full written statements will of course be made a part of the permanent record of this hearing.

We will now turn to Mr. Shoulson.

**STATEMENT OF BRUCE D. SHOULSON, ATTORNEY AT LAW,
LOWENSTEIN SANDLER, P.C.**

Mr. SHOULSON. Thank you, Mr. Chairman, distinguished members of the committee, my name is Bruce Shoulson. I have practiced law in northern New Jersey for more than 30 years. My practice has included a substantial amount of work in the land use area, including presentations of applications for variances and other types of approvals to local zoning and planning boards and representation of clients on appeals from board actions to both the State and the Federal courts.

In particular, I have presented some three dozen or more applications on behalf of religious institutions, particularly Orthodox Jewish congregations. The impact of zoning regulation is of particular concern to Orthodox Jews desirous of establishing new congregations. Orthodox Jews are prohibited from driving on the Sabbath and on specified holidays. Thus, it is necessary for Orthodox Jews to live within walking distance of their synagogues.

In many New Jersey communities, the applicable land use ordinances mandate, for houses of worship, minimum lot sizes as well as minimum front, side and rear yard setbacks, together with limitations on building coverage and requirements for off-street parking. In communities which are already built up, when taken together, these requirements may often make it impossible for Orthodox Jews to move into a community.

For example, if the local ordinance requires a minimum lot size of one acre for a house of worship and the residential areas are fully developed and built up, a small congregation which wishes to convert an existing residence to a house of worship may have to purchase two, three or even four or five homes to meet the minimum requirement, depending on the standard lot size in the area and whether contiguous properties are available for purchase at any reasonable price. Full compliance with the ordinance requirements will mean razing the unneeded homes and blacktopping much of the lot to provide the mandated parking, which will only be rarely used since driving is prohibited on the times of greatest use, that is, the Sabbath and holidays.

While one acre may seem substantial, there are municipalities which require as many as three acres, and there may be even more than three acres in some other towns. In the event the congregation converts the residence and succeeds in attracting new worshipers and requires additional space, it would likely not be able to improve its space situation materially because of the restricted building envelope resulting from the setback and coverage requirements of the parking standards.

The irony of this situation is that in these same built-up communities there are existing houses of worship of various denominations within the same residential zones which were constructed before the adoption of the current standards, and which do not even come close to complying with the ordinance requirements. As an example, one municipal ordinance in New Jersey now requires that the exterior design of houses of worship conform to the general character of the area. In residential zones this means the surrounding residential properties. Besides being vague, the standard places an unreasonable burden on new houses of worship which is not shared by preexisting structures, and undoubtedly serves to limit their size and utility.

It is also not uncommon to find ordinances which establish standards for houses of worship which differ from those applicable to other places of assembly. For example, in two New Jersey communities with which I am familiar, houses of worship are conditional uses and not permitted as of right in any zone. They have minimum lot size and setback requirements which are not imposed on other places of assembly.

The result of these zoning patterns is to foreclose or limit new religious groups from moving into a municipality. Established houses of worship are protected and new houses of worship and their worshipers are effectively kept out. This has undoubtedly been the case in certain North Jersey communities where the difficulty in obtaining approvals for new synagogues and the resulting overcrowding of existing synagogues has discouraged people desirous of moving from New York City to a more suburban environment.

Of course there is a solution to the problem, and it is one which I have pursued more than 30 times, that is, seeking variances from the ordinance requirements. I must report to this committee that these types of proceedings are difficult and often stressful for the entire community involved.

In preparing for this presentation, I happened to read the prior testimony of Chicago attorney John Mauck. I was struck by his description of the hearing in Chicago attended by 30 objectors, which he described as, "the biggest crowd I have ever seen at a zoning hearing in the City of Chicago." Well, in many of my applications in small towns with populations of under 40,000 persons, it has been routine to have 75 to 100 in attendance, and in some cases several hundred, necessitating moving the hearing to a local school auditorium.

If, as the late Speaker Tip O'Neill stated, all politics is local, then the political realities of zoning matters are quintessentially local. The zoning board members who pass on variance applications are local residents, and they have been appointed by local council persons who are always looking to the next election.

The standards in our State for granting variances in these cases are far from precise. In the end, the applicant must show that the benefits of granting the variance outweigh the detriments. This is certainly a most subjective standard. On appeal to the New Jersey courts, there is no *de novo* hearing. Rather, the review is on the basis of the record made before the zoning board, and the board's actions must be upheld if there is substantial credible evidence in the record to support the board, even if the reviewing court would have independently come to a different conclusion based on the total record.

What then are the influences that may lead board members to exercise the broad discretion given to them and deny an application? General antireligious feelings? Anti-Semitism? The desire to exclude people who may be different from the community? The desire to maintain the status quo? The desire to be reappointed to the board? I leave it to the members of the committee to identify additional possibilities, but I close with three examples from my personal experience which I believe illustrate what we are often dealing with.

One, during a hearing on an application for an Orthodox Jewish institution, an objector stood and turned to the people in the audience wearing skull caps and said, "Hitler should have killed more of you."

Two, one community, in an effort to head off a zoning battle over the conversion to an ultra-Orthodox synagogue and relating Yeshiva program of buildings which had previously been used by a house of worship, instituted eminent domain proceedings with respect to the subject property on the suddenly conveniently discovered grounds that that specific property was needed for a new municipal complex. Ten years after the Orthodox group sold rather than engage in protracted litigation over the condemnation, there was still no new municipal complex located on the site.

Three, a governing body in a small New Jersey town, considering an approval which would have had the potential of leading to the growth of its Orthodox Jewish population, made it known that it was interested in testimony as to the effect on other communities of substantial Orthodox Jewish populations.

While admittedly these cases are extreme, and in most cases the motivations are much more difficult to identify, the implications of these examples, which I believe are not unique, are obvious, and

the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious.

Mr. CANADY. Thank you, Mr. Shoulson. Reverend Ivory.

STATEMENT OF REVEREND ELENORA GIDDINGS IVORY, DIRECTOR, WASHINGTON OFFICE, PRESBYTERIAN CHURCH (USA)

Ms. IVORY. Thank you, Mr. Chairperson. I am Elenora Giddings Ivory. I serve as the Director of the Washington office of the Presbyterian Church, U.S.A. Our church has approximately 11,500 members. I am here today to share with you our support for H.R. 4019, the Religious Liberty Protection Act of 1998.

We thought it would be valuable for you to hear the results of data we collected in the annual session reports regarding land use difficulties and congregations. We asked congregations to tell us things like how many new members in the past year and how many baptisms and how many deaths.

In question number six of this particular survey we asked, "Since January 1, 1992, has your congregation needed any form or permit from a government authority that regulates the use of land?" The response rate to this particular survey was 90 percent.

Rather than just sharing dispassionate statistical information of a survey, I will share stories. We wanted to know where there had been either latent or overt hostility to religious folks.

The first story I will share with you is Stuart Circle Parish in Richmond, Virginia. Stuart Circle Parish is a group of six churches of different denominations that have come together to provide a meal ministry. Grace Covenant Presbyterian Church is among those six. It also offers worship, hospitality, pastoral care, in addition to a healthful meal to the urban poor in Richmond. The ministry was motivated in direct response to the Biblical New Testament mandate of Matthew 25, where Jesus admonishes to feed the hungry and to clothe the naked.

This ministry operated for almost 15 years in one of the parishes. When it grew, as the numbers of the poor grew, it was decided to move the program to another of the member churches. The parish ran up against a city zoning administrator who interpreted the program to be in violation of the city's zoning ordinance which limits feeding and housing programs for homeless provided by churches to no more than 30 homeless individuals for up to 7 days between the months of April and October.

Since the hungry do not automatically stop getting hungry between November and March, the parish did not want to limit its Biblical calling of the meal ministry to the hungry. The zoning guidelines would force the parish to move the program around to all of its member churches, and it would still not be offering meals on anywhere near the number of days that were necessary.

This ordinance is not a neutral and generally applicable law. It was aimed at religious organizations engaged in this clearly religious activity. The parish had to go to civil court to protect its First Amendment rights. The Religious Freedom Restoration Act was in effect in 1996. Otherwise, the feeding program would have been shut down.

This program was the fulfillment of a central tenet in the parish's religious beliefs and practices. Many congregations choose to stay in the cities in order to fulfill this central theological mandate of service. They do not want to abandon the poor, nor do they want the political establishment to force them to abandon the poor.

The second story I will share with you is Palo Cristi Presbyterian Church, Paradise Valley, Arizona. It has 193 members. This church is located in the middle of the desert, but the church wanted to construct a beach volleyball court. They wanted to do this on one side of the church's property for the use of the church's youth. The church needed a volleyball net, sand, and railroad ties to surround the court and to keep the sand in place. The proposed site was near the adjoining property of a residence.

In Paradise Valley, churches must obtain a special use permit in order to use the church grounds for means beyond that which would ordinarily be expected of a church. Palo Cristi obtained a special use permit. The resident objected. In an attempt to appease its neighbor, the church promised not to light the volleyball court and to have no games to occur after nightfall. These concessions were not sufficient. The resident owner of the adjoining property voiced his objection. In Paradise Valley, residential desire, regardless of how minimal, takes precedence over the church's desired use of its land. Palo Cristi's application for a special use permit was denied.

In conclusion, I would like to say that the legal costs of these challenges to congregations and ministries robs a congregation of resources that might otherwise have been used for the benefit of the church or a community program. The \$170,000 spent by First Presbyterian Church in Berkeley, for instance, where they had to challenge a particular landmarking designation and special permits, that money could have been used for tuition, room and board and student fees for 26 African-American students to go to Presbyterian Johnson C. Smith University in Charlotte, North Carolina.

The Presbyterian Church, U.S.A., is a well-established denomination with over 200 years in this country. We just had our 209th General Assembly in Charlotte, North Carolina. That is why it surprises many people that even the Presbyterian Church would experience such difficulties. It is even more surprising, given that we are perhaps overrepresented in local governments like zoning boards and city councils in comparison to our percentages in the general population. In addition, about 10 percent of the U.S. Congress is Presbyterian. I have often said that the "P" in Presbyterian must sometimes stand for politics.

That being the case, the fact is that we are in so many places where decisions are being made still having trouble advancing our ministries. Even as the established church that we are seen as, we have encountered regulations that would deny the fulfillment of our ministries. This gives further credence to the complexity of these concerns and demonstrates why we need the passage of H.R. 4019. We can only surmise what must be happening to smaller denominations and minority faiths.

In 1995 the Presbyterian Panel Survey, another information gathering instrument of the Presbyterian Church, U.S.A., found

that many Presbyterians are politically involved. The survey found that over 70 percent of Presbyterian members either strongly agree or agree that it is important for Presbyterians to exercise their Christian witness in the public arena. The survey found that 64 percent of the church's members actively participate in election campaigns and 69 percent write letters to elected officials. This is a direct outgrowth of our understanding of the gospel message, to be involved with the community through our churches, through our businesses and through our political process, in order to do what needs to be done during times of societal decisionmaking and need.

I want to thank you all for this opportunity to share these concerns. We would be happy to provide additional information as needed. Thank you.

[The prepared statement of Rev. Ivory follows:]

PREPARED STATEMENT OF REVEREND ELENORA GIDDINGS IVORY, DIRECTOR,
WASHINGTON OFFICE, PRESBYTERIAN CHURCH (USA)

I am Rev. Elenora Giddings Ivory. I serve as the Director of the Washington Office of the Presbyterian Church (USA). Our Church has approximately 11,500 congregations all across the United States and Puerto Rico. I am here today to share with you our support for H.R. 4019, the "Religious Liberty Protection Act of 1998".

We thought it would be valuable for you to hear the results of the data we collected in the annual session reports regarding land use difficulties and PC(USA) congregations. This data was collected during our regular annual statistical gathering process where we ask the sessions of congregations to tell us things like how many new members in the past year; how many baptisms and how many deaths.

Question number 6, of the most recent survey asked, "Since January 1, 1992, has your congregation needed any form or permit from a government authority that regulates the use of land? These authorities include zoning boards, planning commissions, landmark commissions, and (sometimes) city/county councils?" Our Presbyterian Church (USA) forms are suppose to be filled out by all 11,500 of our congregations. The response rate for this last session survey was almost 90% of our churches.

Rather than just sharing what is sometimes dispassionate statistical information of a survey, I thought I would share stories involving land use troubles experienced by congregations who responded to the survey. We wanted to know where there has been either latent or overt hostility to religious folks. Four of the stories came directly from responding congregations.

1. STUART CIRCLE PARISH-RICHMOND, VA

The Stuart Circle Parish is a group of six churches of different denominations that have come together to provide a meal ministry. It also offers worship, hospitality, pastoral care, in addition to a healthful meal to the urban poor in Richmond. This ministry was motivated in direct response to the Biblical New Testament mandate of Matthew 25 where Jesus admonitions to feed the hungry and clothe the naked. Jesus said, "I was hungry and you gave me something to eat. . . .")

This ministry operated for almost 15 years in one of the parishes. When it grew, as the numbers of the poor grew, it was decided to move the program to another of the member churches. It was at that time the Parish ran up against a City Zoning Administrator who interpreted the program to be in violation of the City's zoning ordinance which limits feeding and housing programs for homeless provided by churches to no more than 30 homeless individuals for up to seven days between the months of April and October. Since the hungry do not automatically stop being hungry between November and March, the Parish did not want to be limited in its Biblical Calling of ministry to the hungry.

The zoning guidelines would force the Parish to move the program around to all its member churches and it would still be not be able to offer meals on anywhere near the number of days necessary. Moving the feeding program around would also keep the hungry guessing as to were to go for food on at any given time.

This ordinance was aimed at religious organizations engaged in this clearly religious activity. The City's justification was limited to responding to complaints about the behavior of attenders (unruly behavior, public urination, and noise in the area),

although the City was unable to establish where or when these acts had taken place.

The Parish had to go to civil court to protect its first Amendment rights. Had it not been for the Religious Freedom Restoration Act which was in effect in 1996 when this case arose, the feeding program would have been shut down. This program was the fulfilment of a central tenet in the Parish's religious belief and practice. So many of our congregations that choose to stay in the cities do so in order to fulfil this central theological mandate of service. They do not want to abandon the poor nor do they want the political establishment to force them to abandon the poor.

Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, No. CIV. A.3:96CV930

2. PALO CRISTI PRESBYTERIAN CHURCH; PARADISE VALLEY, ARIZONA; 193 MEMBERS.

Palo Christi was described as a church literally located in the middle of the desert. The church wanted to construct a "beach volleyball court" on one side of the church's property for the use of the church's youth groups. The only materials the church needed to construct the court were a volleyball net, sand, and railroad ties to surround the court and keep the sand in place. The proposed site of the court was near the church's property line with the adjoining property being the backyard of a residence.

In Paradise Valley, churches must obtain a "special use permit" in order to use the church grounds for means beyond that which would ordinarily be expected of a church. Consequently, Palo Christi had to obtain a special use permit in order to erect its volleyball court. However, the resident whose backyard adjoined the church's property at the point closest to the proposed site of the volleyball court objected to the construction of the court. The resident was concerned that the noise coming from the volleyball court would keep him awake at night. In an attempt to appease its neighbor, the church promised to not light the volleyball court and also promised that no games would occur after nightfall. However, these concessions were not sufficient for the neighbor as he stated that he was often on call at night and thus slept during the day.

When Palo Christi applied for the special use permit, the resident owner of the adjoining property voiced his objection. In Paradise Valley, residential desire, regardless of how minimal, takes precedent over the church's desired use of land even when the church is willing to make concessions. Thus, based on the objections of this one neighbor, Palo Christi's application for a special use permit was denied. At the present, the church still is without a volleyball court and one less ministry to the youth of that congregation and the surrounding community.

3. CHESTER PRESBYTERIAN CHURCH; CHESTER, VIRGINIA; 728 MEMBERS.

Chester Presbyterian owns a vacant, adjoining lot which faces on a street shared by fourteen residences. The vacant lot is under a covenant agreement stating that the lot cannot be used for anything other than a house without the approval of fifty percent of the other homeowners on the street. The purpose of the covenant agreement was to prevent a business from locating in an otherwise residential area.

Several years ago, Chester Presbyterian needed to expand its parking lot and wanted to use the vacant lot as a part of its expansion. The church sought the approval of the homeowners to pave the lot, but less than fifty percent of the homeowners gave their approval. Despite the church's attempts to negotiate with the homeowners, the homeowners refused to relent. Chester Presbyterian did expand its parking lot to the extent that it could without infringing upon the vacant lot.

Chester Presbyterian is presently extending its Fellowship Hall. The parking situation is as bad as it has ever been. Once again, the church contacted the homeowners about the possibility of expanding its parking lot into the vacant lot, but the majority of the homeowners again refused to give their approval. Chester Presbyterian went to court over the use of the lot and also pursued remedies with the city. However, all of the church's attempts were for naught. Presently, the lot still sits vacant, and the church's parking problems remain.

4. BAY PRESBYTERIAN CHURCH; BAY VILLAGE, OHIO; 2195 MEMBERS.

Bay Presbyterian Church is a very large church both in terms of its membership and its church grounds. The church continues to grow and has occasionally acquired surrounding lands when necessary for the planning of future growth. Recently, Bay Presbyterian completed a 40,000 square foot, four million dollar expansion. Although several homeowners in the surrounding community protested such an expansion, the city grudgingly allowed the expansion to occur.

A few years ago, the city debated whether or not to propose an amendment to the city's Constitution that would require a church, in addition to nursing homes and libraries, to have any proposed expansion approved by a city-wide referendum. The cost of the referendum would be borne by the group wishing to expand and would undoubtedly cost the group thousands of dollars before expansion could begin—assuming expansion was even approved. Although this debated amendment would have impacted all churches, nursing homes, and libraries, the amendment was primarily considered a way to alleviate the city's growing concern about the size and growth of Bay Presbyterian. While the amendment was never enacted or voted upon, the city is once again considering such an amendment in light of Bay Presbyterian's latest expansion and the church's growing need for another expansion project. Thus, Bay Presbyterian is deeply concerned about the impact such an amendment could have on its ability to minister to its members.

5. FIRST PRESBYTERIAN CHURCH; BERKELEY, CALIFORNIA; 1455 MEMBERS.

First Presbyterian Church is a relatively large church whose problem pertains to a church-owned building located on its grounds. The building was originally built in approximately 1923 to serve as a school. Over the years, the 9,400 square foot building served various purposes before ultimately being transformed into twelve individual apartments. In 1983, First Presbyterian elected to purchase the building since the church property surrounded the building on all sides. First Presbyterian continued to use the building as rental housing by making the apartments available to low-income families. However, due to the building's advanced age, its condition soon degenerated to the point that it was no longer suitable for occupation nor desirable for any other use. Consequently, First Presbyterian desired to have the building demolished.

The City of Berkeley was upset over the church's desire to have the building demolished because the city did not want to lose any rental housing. Although Berkeley pursued some possible avenues by which it could prevent the church from eliminating the apartments, the city could not find any possibilities that would work. Thus, First Presbyterian ended its use of the building as apartments and prepared to demolish it. However, while the City of Berkeley was unable to find a means by which to prevent the church from eliminating the apartments, it was able to prevent the church from having the building demolished by having the building landmarked based upon its construction circa 1923.

Since the building has been landmarked, First Presbyterian is unable to demolish it even though the building is an "eyesore" in the middle of the church's property. As the building has continued to age, it is now completely unfit for any purpose. It has all windows and doors boarded shut. It would cost approximately one million dollars to return it to a useable condition and considerably more to return it to a desirable condition.

The City of Berkeley has a 1994 law which states that the city cannot landmark a church building without the church's consent. The building on First Presbyterian's grounds was officially landmarked after 1994. The City has declared that its actual landmarking was effective before 1994 and that the 1994 law, requiring the church's consent to be landmarked, cannot be applied retroactively. Thus, First Presbyterian is still unable to have the building demolished despite the current law which would support its position.

First Presbyterian ultimately sued the City of Berkeley over this dilemma in California Superior Court and was victorious. However, the City appealed to the Appellate Court which overruled the trial court and found in favor of the City. Although First Presbyterian felt confident that they had strong grounds for appeal to the California Supreme Court, the ongoing expense of the legal battle was more than the church could bear. Therefore, the church did not appeal. After approximately three years of battle, First Presbyterian estimates its direct costs at approximately \$170,000 with total costs somewhere between \$750,000 and \$1,000,000.

Presently, First Presbyterian is still battling with the City of Berkeley, and the unused building remains standing on the church grounds.

IN CONCLUSION

The legal cost of these challenges to congregations and ministries, robs a congregation of resources they might otherwise have used for the benefit of church or community programs. The \$170,000 spent by First Presbyterian Church in Berkeley, could have covered the tuition, room, board and student fees for 26 African American students at Johnson C. Smith University, in Charlotte, N.C.. The \$170,000 could have paid for six or seven mission co-workers to go overseas were

teaching or medical personnel are badly needed. It really hurts me to learn that mission money is going for legal fees and court battles.

The Presbyterian Church (USA) is a well established denomination with over 200 years in this country. We just had our 209th General Assembly meeting in Charlotte, North Carolina. That is why it surprises many people that even PC(USA) congregations would experience such difficulties. It is even more surprising given that we are perhaps "over represented" in local governments (like zoning boards and city councils) in comparison to our percentage in the general population. In addition, about 10 percent of the U.S. Congress is Presbyterian. I have often said the "P" in Presbyterian must stand for politics. That being the case, the fact that we are in so many places where decisions are made—we are still having trouble advancing our ministries. Even as an established Church, we have encountered regulations that would deny the fulfillment of our ministries. This gives further credence to the complexity of these concerns and demonstrates why we need passage of HR 4019. We can only surmise what must be happening to smaller denominational churches and minority faiths.

In a 1995 Presbyterian Panel Survey, another information gathering instrument of the Presbyterian Church (USA), we found that many Presbyterians are politically involved. The survey found that over 70 percent of Presbyterian members either strongly agree or agree that "it is important for Presbyterians to exercise their Christian witness in the public arena." The survey found that 64 percent of church members actively participate in election campaigns and 69 percent write letters to elected officials. This is a direct out growth of our understanding of the Gospel message, to be involved with community through our churches; through our businesses and through the political process in order to do what needs to be done during times of societal decision making and need.

I want to thank you for this opportunity to share these concerns. We would be happy to provide additional information if needed.

Mr. CANADY. Thank you, Reverend Ivory.

Mr. Green.

STATEMENT OF STEVEN K. GREEN, LEGAL DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Mr. GREEN. Mr. Chairman and honorable members of the committee, I am Steven K. Green. I am the legal director of Americans United for Separation of Church and State.

Americans United was founded in 1947 by religious leaders and educators with the goal of preserving religious liberty and separation of church and State, and we have been involved in many of the significant church-State cases before the U.S. Supreme Court. We supported the Religious Freedom Restoration Act, and following the Court's decision in the *City of Boerne*, we have been working with the Coalition for the Free Exercise of Religion in drafting new proposed language which is being considered by this committee.

Today I want to comment on RLPA's proposed legal standard found in section 2(b) the "compelling interest" or "strict scrutiny" test. I would like to stress why the compelling interest standard is so critical to RLPA and why it should be kept in its present form when the bill passes out of committee.

The primary reason that RLPA is supported by the broadest range of ideological groups imaginable, and the reason it presents a viable solution for protecting the religious rights of all Americans, is that it relies on the compelling interest standard and nothing more. Much of my testimony will address the concerns that the compelling interest standard is skewed toward either religious claimants or the government; in particular, that RLPA will exempt some religious people from complying with important State laws. To be sure, the compelling interest standard is an exacting one for the government. Still, the standard is fair. In my remaining time

I will briefly discuss why RLPA also does not violate the Establishment Clause.

Members of the Free Exercise Coalition frequently disagree on the substance of many issues that implicate free exercise concerns: the funding of religious education; student religious expression at public school events; and the application of nondiscrimination laws in employment and housing to religious claimants and institutions. Because members of the Coalition, like Members of Congress, hold divergent views on the merits of such claims, RLPA cannot seek to address or ordain those outcomes.

The beauty of the compelling interest standard is that it does not preordain any particular outcome but merely sets up a balancing test of competing interests. The compelling interest standard was selected, first and foremost, because it was a standard the United States Supreme Court had adhered to for almost 30 years. But the compelling interest standard in its unadulterated form was also chosen because it is ideologically neutral in its application.

Let me put to rest any concern that the compelling interest test advantages or disadvantages any group or ideological perspective. The standard is fair, but rigorous, not only for the government but also for religious claimants. It allows neither religious interests to always prevail, nor those of the government, even when those interests may be compelling.

Because RLPA, like RFRA, does not define the various elements of the standard but relies on judicial interpretations, it is helpful to look at how the courts have defined some of those terms.

With substantial burden, the responsibility for demonstrating a substantial burden on religion exists with the claimant. To claim merely that government action is inconsistent with one's religious beliefs, without more, is insufficient for a showing of a substantial burden.

The case law of the Supreme Court prior to *Employment Division v. Smith* and that of lower courts since RFRA clearly indicates that not all burdens on religion are unconstitutional. Merely incidental effects of government programs which may make it more difficult to practice certain religions but have no tendency to coerce individuals into acting contrary to their religious beliefs are insufficient to meet the burden standard. The burden must be one that is constitutionally significant, meaning that religiously motivated conduct is significantly or meaningfully curtailed.

Applying that standard, the high Court has held the assessment and collection of sales taxes from a religious organization does not constitute a substantial burden on religion. Similarly, a religious organization's compliance with minimum wage requirements in its commercial operations failed to constitute a substantial burden.

Even under RFRA, courts have found no constitutionally significant burden on religion where some churches were denied zoning variances to develop particular parcels, where parents were denied State-subsidized services for their children in religious schools, or for abortion protesters to comply with the Clinic Access Act. And in the now familiar California landlord-tenant case, the California Supreme Court held that a landlord's religion was not burdened by conforming her commercial activities to the State antidiscrimina-

tion law. Because the substantial burden test was applied in each case, RLPA would not change the outcome in any of those cases.

Now, this is not to suggest that the substantial burden standard is so high that legitimate claims go unrequited. Certainly, reasonable minds can and do differ on whether the standard has been applied correctly in any particular case. The point here is that the substantial burden requirement serves as an important triggering device to ensure that the government is not unnecessarily required to bring forward a compelling justification for its otherwise lawful actions when the interference with religion may only be minimal.

Turning to the compelling interest side, as with substantial burden, RLPA does not define a compelling interest, and this is the wisest course. Any attempt to define a compelling interest would invite intensive lobbying and wrangling by groups to have their interests specially protected.

However, one point needs emphasizing. Even though RLPA claims involve what we would consider to be a fundamental right, there is no requirement that the government come forward with an interest of constitutional magnitude before it can override a religiously based claim. In other words, a RLPA claim will not automatically trump important local interests merely because it is based on Federal law or has the aura of a constitutional right. Even a cursory review of Supreme Court holdings indicate that many nonconstitutional interests will likely prevail over a RLPA claim.

The question on many minds is whether the enforcement of anti-discrimination laws constitutes a compelling interest. Courts have held that the government has a compelling interest in eradicating all forms of discrimination. I believe that in most conflicts involving individual religious claimants, the antidiscrimination laws will probably prevail. The government has an interest in prohibiting discrimination in housing and employment generally regardless of the particular form it takes.

The compelling interest test rests on the overall purposes behind the enactment of the law and in ensuring its enforceability. The parsing of a discrimination law to identify a hierarchy of rights threatens the law's integrity and subverts its goals. In other words, the compelling interest is in the eradication of discrimination generally, not in how it manifests itself.

An additional element in the discrimination laws is the detrimental impact that discrimination may have on third persons. Most free exercise claims considered by the courts have involved laws that burden religious rituals or organizations where there was a clear line between the activity and the society at large. No one else was burdened if Captain Goldman wore his yarmulke while in uniform.

Such cannot be said when a religious claim is used as a defense for alleged discrimination. In a related context, the Supreme Court has considered the impact a religious accommodation would have on third parties when weighing the government's interest. Although the Court's statements on accommodation of religion have not always been clear, it has consistently held that religious exemptions cannot impose substantial burdens on third persons not sharing in the accommodation.

No doubt some people may disagree with this analysis. The point of my testimony is not that antidiscrimination laws will prevail in every case, but to set the record straight that such laws serve as important expressions of legislative authority and that by adopting the compelling interest standard in RLPA, Congress is acknowledging that courts will consider and weigh important interests behind these laws. But because each religious claimant's situation is unique, it is appropriately left to the courts in weighing the competing interests.

I see my time us up. I will reserve my remarks on the Establishment Clause to my written comments. Thank you.

[The prepared statement of Mr. Green follows:]

PREPARED STATEMENT OF STEVEN K. GREEN, LEGAL DIRECTOR, AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

Mr. Chairman and honorable members of the Committee, I am Steven K. Green, Legal Director for Americans United for Separation of Church and State (Americans United). Americans United was founded in 1947 by religious leaders and educators with the goal of preserving religious liberty and separation of church and state, and has been involved in many of the significant church-state cases decided by the U.S. Supreme Court. We were disappointed by the Court's 1990 decision in *Employment Division v. Smith* and joined with a coalition of religious and civil rights organizations to bring about the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (RFRA). We then helped defend the constitutionality of RFRA in the courts. Since the Court's decision in *City of Boerne v. Flores*, we have worked with the Coalition for the Free Exercise of Religion in drafting new remediating language that serves as the basis for the Religious Liberty Protection Act (RLPA), now being considered by this Committee.

Today, I want to comment on RLPA's proposed legal standard found in section 2(b): the "compelling interest" or "strict scrutiny" test. That standard is, of course, at the heart of RLPA and the very purpose for its being. Compelling interest was the standard the Court adhered to prior to *Employment Division v. Smith* and the same standard Congress incorporated into RFRA. I want to stress why the compelling interest standard is so critical to RLPA and why it should be kept in its present form when the bill passes out of committee. The primary reason that RLPA is supported by the broadest range of ideological groups imaginable and the reason it presents a viable solution for protecting the religious rights of *all* Americans is that it relies on the compelling interest standard, and nothing more. Much of my testimony will address concerns that the compelling interest standard is skewed towards either religious claimants or the government. To be sure, the compelling interest standard is an exacting one for the government; still, the standard is fair. In the time remaining, I will also briefly discuss why RLPA does not violate the Establishment Clause.

THE COMPELLING INTEREST STANDARD

The adage that politics makes strange bedfellows could easily be applied to the Free Exercise Coalition. A model for bipartisanship, the Coalition is comprised of groups from across the religious and ideological spectrum, from Americans United and ACLU to Concerned Women for America, from the Unitarian Universalists to the National Association of Evangelicals, and includes Muslims, Sikhs, Latter-day Saints, and the entire Jewish community. What has brought this wide array of groups together is their commitment to religious liberty; what has kept them working together is the understanding that RLPA will merely apply the legal standard that existed prior to 1990 and not seek to predetermine particular controversies.

Members of the Coalition frequently disagree on the substance of many issues that implicate free exercise concerns—the funding of religious education, student religious expression at public school events, and the application of nondiscrimination laws in employment and housing to religious claimants and institutions. Because members of the Coalition, like Members of Congress, hold divergent views on the merits of such claims, RLPA cannot seek to address or ordain their outcomes. The beauty of the compelling interest standard is that it does not preordain any particular outcome but merely sets up a balancing of competing interests. The compelling interest standard was selected, first and foremost, because it was the standard the

Supreme Court had adhered to for almost 30 years.¹ But the compelling interest standard, in its unadulterated form, was also chosen because it is ideologically neutral in its application.

Let me put to rest any concern that the compelling interest test advantages or disadvantages any group or ideological perspective. The standard is fair, but rigorous, not only for the government, but also for religious claimants.² The standard neither allows religious interests always to prevail, nor those of the government, even when its interests are compelling.³ The standard weighs and then balances competing interests, first considering the burden on the claimant's religion and then evaluating the importance of the government's activity and the available alternatives for achieving its goals.

Because RLPA, like RFRA, does not define the various elements of the standard but relies on judicial interpretations of those terms, it is helpful to look at how courts have defined such terms.

1. *Substantial Burden*—The responsibility for demonstrating a that *substantial* burden on religion exists rest with the claimant. To claim merely that a government action is inconsistent with one's religious beliefs, without more, is insufficient for showing a substantial burden.

The case law of the Supreme Court prior to *Employment Division v. Smith* and that of lower courts since RFRA clearly indicates that "[n]ot all burdens on religion are unconstitutional."⁴ Merely "incidental effects of government programs which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" are insufficient to meet the burden standard.⁵ The burden must be one that is "constitutionally significant,"⁶ meaning that religiously motivated conduct is "significantly or meaningfully curtailed."⁷ As the Court stated in *Thomas v. Review Board*:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting *substantial pressure* on an adherent to *modify his behavior and violate his beliefs*, a burden upon religion exists.⁸

Applying this standard, the high court has held that the assessment and collection of sales taxes from a religious organization does not constitute a substantial burden on religion.⁹ Similarly, a religious organization's compliance with minimum wage requirements in its commercial operations failed to constitute a substantial burden.¹⁰ Even under RFRA, courts have found no constitutionally significant burden on religion where churches were denied zoning variances to develop particular parcels, where parents were denied state subsidized services for their children in religious schools, and for abortion protesters to comply with the Clinic Access Act.¹¹ And in the now-familiar California landlord-tenant case, the California Supreme Court held that the landlord's religion was not burdened by conforming her commercial activities to the state's antidiscrimination law.¹² Because the substantial burden test was applied in each instance, RLPA would not change the outcome in any of those cases.

This is not to suggest that the substantial burden standard is so high that many legitimate claims go unrequited. Certainly, reasonable minds can and do differ over whether the standard has been applied correctly in a particular case. The point is that the substantial burden requirement serves as an important triggering mechanism to ensure that the government is not unnecessarily required "to bring forward

¹ *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989).

² See Ira Lupu, "The Failure of RFRA," 20 UALR L. Rev. 1, 19–22 (1998).

³ See *Jesus Center v. Farmington Hills Zoning Board of Appeals*, 544 N.W.2d 698 (Mich. App. 1996) (finding that an action of the zoning board furthered a compelling interest but was not the least restrictive means available to achieve that goal).

⁴ *Bowen v. Roy*, 476 U.S. 693, 702 (1986); *United States v. Lee*, 455 U.S. 252, 257 (1982).

⁵ *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439 (1988).

⁶ *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 377 (1990).

⁷ *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995).

⁸ 450 U.S. 707, 717–18 (1981) (emphasis supplied).

⁹ *Jimmy Swaggart Ministries*, 493 U.S. at 392.

¹⁰ *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 304–05 (1985). See also *Lyng*, 485 U.S. at 447–453; *Bowen v. Roy*, 476 U.S. 693, 706 (1986).

¹¹ *Daytona Rescue Mission v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fl. 1995); *Goodall v. Stafford County School Board*, 60 F.3d 168 (4th Cir. 1995), cert. denied, 116 S. Ct. 706 (1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).

¹² *Smith v. Fair Employment and Housing Comm.*, 913 P.2d 909 (Cal. 1996).

a compelling justification for its otherwise lawful actions" when the interference with religion has been only incidental.¹³

In order to ensure faithfulness to the Court's *Sherbert* standard,¹⁴ RLPA importantly clarifies that the burdened religious activity need not be compulsory or central to one's religious belief system. See Section 6(1). This lessens the risk that courts will be evaluating the relative merits of differing religious claims and determining whether a particular practice is "mandated," "essential" or "fundamental."¹⁵ Admittedly, some courts during the RFRA era used a centrality requirement to hold that the burden on religion was not substantial,¹⁶ and this clarification would possibly affect some of those holdings. But this clarification alone should not tip the scales one way or the other as RLPA still requires that the conduct be "substantially motivated" by religious belief. Moreover, the legal standard still requires that the government action be seen as placing "substantial pressure on [the claimant] to modify his behavior and to violate his beliefs," clearly indicating something more than an incidental incursion upon one's faith.¹⁷

2. *Compelling Interest*—As with "substantial burden," RLPA does not define a "compelling" government interest, again relying on judicial interpretations. This is the wisest course. In that the standard is not unique to religion claims but is applied in other fundamental rights, any specific definition of compelling interest would add confusion and uncertainty to litigation. Moreover, an attempt to define "compelling interest" would invite intensive lobbying and wrangling by groups to have their interests specially protected.

A compelling interest is, of course, an interest of "the highest order."¹⁸ No one benefits when courts dilute the standard by embracing garden variety interests as being of overriding importance.

However, one point needs emphasizing. Even though RLPA claims involve what we would consider to be a fundamental right, there is no requirement that the government come forward with an interest of constitutional magnitude before it can override the religiously based claim. In other words, a RLPA claim will not automatically prevail over important local interests merely because it is a federal law or has the aura of a constitutional right. Even a cursory review of the Supreme Court's holdings indicates that many non-constitutional interests will likely prevail over a RLPA claim. The Court has held the government has a compelling interest in the allocation and collection of taxes,¹⁹ in maintaining the integrity of its social security system,²⁰ in eradicating racial discrimination in education,²¹ in the operation of military conscription laws,²² in maintaining a uniform day of rest,²³ in enforcing child labor laws,²⁴ and in protecting public health and safety.²⁵ Lower courts applying RFRA have found that compelling interests exist in protecting threatened and endangered species,²⁶ in complying with child support,²⁷ in land use regulations²⁸, in complying with subpoenas,²⁹ in protecting the right to collective bargain-

¹³ *Lyng*, 485 U.S. at 450–51.

¹⁴ *Sherbert v. Verner*, 374 U.S. 398, 403–404 (1963); *Thomas*, 450 U.S. at 715–16.

¹⁵ "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. . . . Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Employment Division v. Smith*, 494 U.S. at 886 (citations omitted); accord, *Mack v. O'Leary*, 80 F.3d 1175, 1178–79 (7th Cir. 1996).

¹⁶ *Goodall v. Stafford County*, 60 F.3d 168 (4th Cir. 1995), cert. denied, 116 S. Ct. 706 (1996); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994).

¹⁷ *Thomas*, 450 U.S. at 718.

¹⁸ *Thomas*, 450 U.S. at 718.

¹⁹ *Hernandez*, 490 U.S. at 699–700.

²⁰ *Lee*, 455 U.S. at 258–59.

²¹ *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

²² *Gilette v. United States*, 401 U.S. 437, 462 (1971).

²³ *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961).

²⁴ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

²⁵ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

²⁶ *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997); *United States v. Gonzales*, 957 F. Supp. 1225 (D.N.M. 1997).

²⁷ *Hunt v. Hunt*, 648 A.2d 843, 851 (Vt. 1994).

²⁸ *Daytona Rescue Mission v. City of Daytona*, 885 F. Supp. 1554 (M.D. Fl. 1995).

²⁹ *Commonwealth v. Stewart*, 690 A.2d 195, 202 (Pa. 1997).

ing,³⁰ and in protecting public health by providing unobstructed access to reproductive health facilities.³¹

This list is not comprehensive; nor is it intended to belittle the importance of any of those religious claims. Rather, its purpose is to highlight the variety of government interests that, depending on the particular context, may be considered compelling. Again, each of us may disagree with some of those decisions just as we may be able to identify other government interests we believe are compelling. The point is that while RLPA creates a federal statutory right, that right will not automatically prevail over all state and local interests.

The question on many minds is whether enforcement of antidiscrimination laws constitutes a compelling interest. Courts have held that the government has a compelling interest in eradicating discrimination in all forms.³² I believe that in most conflicts involving individual religious claimants the antidiscrimination laws will prevail. The government has an interest in prohibiting discrimination in housing and employment generally, regardless of the particular form it takes. The compelling interest rests in the overall purposes behind the enactment of the law and in ensuring its enforceability. The parsing of a discrimination law to identify a hierarchy of rights threatens the law's integrity and subverts its goals.³³ In other words, the compelling interest is in the eradication of discrimination generally, not in how it manifests itself.

An additional element that speaks to the compelling nature of antidiscrimination laws is the detrimental impact that discrimination has on third persons. Most free exercise claims considered by courts have involved laws burdening religious rituals or organizations where there was a clear line between the activity and the society at large. No one else was burdened if Captain Goldman wore his yarmulke while in uniform.³⁴ Such cannot be said when a religious claim is used as a defense for alleged discrimination. In other contexts, the Supreme Court has considered the impact an accommodation of a religious claim would have on third parties in weighing the government's interest.³⁵ Although the Court's statements on accommodation of religion have not always been clear, it has consistently held that religious exemptions cannot impose substantial burdens on third persons not sharing in the accommodation.³⁶ As Judge Learned Hand once wrote: "The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities."³⁷

No doubt some people would disagree with this analysis. The courts that have addressed this issue have split over which interest prevails, although not on compelling interest grounds as some might assume.³⁸ The point of my testimony is not that antidiscrimination laws will prevail in every case, but to set the record straight that such laws serve as important expressions of legislative authority, and that by adopting the compelling interest standard in RLPA, Congress is acknowledging that

³⁰ *South Jersey Catholic School v. St. Teresa*, 675 A.2d 1155, 1170-71 (N.J. Super. A.D. 1996), aff'd 696 A.2d 709 (1997).

³¹ *American Life League v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995).

³² *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 323 (5th Cir. 1977) (en banc) (Goldberg, J., specially concurring), cert. denied, 434 U.S. 1063 (1978). See *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993) (racial discrimination); *Bob Jones University*, 461 U.S. at 603-04 (same); *EEOC v. Pacific Press Pub.*, 676 F.2d 1272, 1280 (9th Cir. 1982) (gender discrimination); *Gallo v. Salesian Society*, 676 A.2d 580, 593 (N.J. Super. A.D. 1996) (age and gender discrimination); *Swanner v. Anchorage Equal Rights Comm.*, 874 P.2d 274, 283 (Alaska 1994) (marital status discrimination); *Jasniewski v. Rushing*, 678 N.E.2d 743, 751 (Ill. App. 1997), vacated, 685 N.E.2d 622 (Ill. 1997) (same).

³³ *Jasniewski*, 678 A.2d at 751. See also *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997) (finding a compelling interest in preserving the integrity of a city's antidiscrimination policies).

³⁴ See *Goldman v. Weinberger*, 475 U.S. 503 (1986).

³⁵ *Estate of Thorton v. Caldor*, 472 U.S. 703, 709-10 (1985) (noting that a statute would impose "significant burdens on other employees required to work in place of Sabbath observers."); *Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to [a religious] employer operates to impose the employer's religious faith on the employees."). See also *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (noting that the exemption created no harm to children).

³⁶ *Ibid.*; *Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

³⁷ *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953), quoted in *Thorton*, 472 U.S. at 710.

³⁸ Compare *Smith*, 913 P.2d at 927-929 (no substantial burden); *Swanner*, 874 P.2d at 283 (compelling interest); *Jasniewski*, 678 N.E.2d at 751 (compelling interest); with *Attorney General v. Desilets*, 636 N.E.2d 233, 241 (Mass. 1994) (remanding for finding of compelling interest); *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (finding that statute does not extend to unmarried, cohabitating couples; dividing on issue of compelling interest). Only in *Thomas v. Anchorage Equal Rights Commission*, No. A95-0274-CV (Jan. 27, 1997), appeal pending, did the court directly find that the government lacked a compelling interest in preventing marital status discrimination in housing.

courts will consider and weigh the important interests behind these laws. Because each religious claimant's situation is unique, it is appropriately left to the courts to weigh the competing interests.

ESTABLISHMENT CLAUSE

No doubt, as with RFRA, claims will be made that RLPA violates the Establishment Clause of the Constitution by providing preferential treatment to religion or through public funding of religious activity. With all due respect to Justice Stevens, with whom I rarely disagree on Establishment Clause issues, I do not believe this to be true. Although either of these activities would violate the Constitution, RLPA does not specially favor religion or require the government to fund religious programs or activities.

First, as addressed above, RLPA applies when there is a substantial burden on religious exercise. The purpose of RLPA is to remove those unintended burdens that result from the application of neutral laws—burdens that are often unique to particular religions—and to put the religious claimant back into a position he would have otherwise been. In practice, RLPA should not advantage religion or provide preferential treatment but alleviate those burdens that are special to religion. For example, a rule against wearing hats in school has a disproportionate impact on Orthodox Jews; providing Jewish boys an exemption from the rule does not advantage them but merely removes a special burden not experienced by non-Jews.

However, in order to guard against claims that RLPA provides special treatment for religion and thus violates the Establishment Clause, it is important for Congress to indicate that the terms "religious exercise" and "belief" are to be interpreted broadly to encompass all belief systems that are comparable to traditional understandings of religion—to include those belief systems that occupy a place in a person's life that is parallel to religion. The Supreme Court intimated in the draft cases that the Free Exercise Clause would require as much.³⁹ In that RLPA is a non-constitutional accommodation, the Establishment Clause would demand the same. We must remember that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection."⁴⁰

Second, nothing in RLPA is intended to create a right of religious organizations to receive public funds or to change the Establishment Clause prohibition on funding religious activity.⁴¹ The bill guards against such interpretations in three ways. First, section 5(c) states that the Act does not create a right of any religious organization to receive public funding or for any person to receive government funding for any religious activity. Second, funding religious activity in violation of the Establishment Clause would obviously serve as a compelling interest under section 2(b).⁴² And finally, section 8 of the bill expressly declares that nothing in the Act affects the Establishment Clause. Taken together, these provisions act as an important safeguard on RLPA's constitutionality.

I thank the Committee for its attention and welcome any questions.

Mr. CANADY. Thank you, Mr. Green. Professor Raskin.

STATEMENT OF JAMIN RASKIN, PROFESSOR, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. RASKIN. Thank you, Mr. Chairman and members of the committee, for inviting me to testify. I very much favor the purposes of this bill. I think that *Oregon v. Smith* is a terrible decision that created an asymmetry in approach to free speech and religious free exercise, and so I am hoping that you can come out of this with a seaworthy bill that will pass constitutional scrutiny. So I hope that my comments are taken in a spirit of constructive criticism.

I just recently finished reading Taylor Branch's second installment in his biography of Martin Luther King called "Pillar of Fire," which covers 1963 to 1965 and the events leading up to the passage of the Civil Rights Act of '64 and the Voting Rights Act of 1965. It is filled with accounts of police chiefs turning German

³⁹ *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

⁴⁰ *Thomas*, 450 U.S. at 714.

⁴¹ See *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 842 (1995).

⁴² See *Widmar v. Vincent*, 450 U.S. 263, 271 (1981).

shepherds and water hoses on children, sheriff's deputies joining KKK night riders in blowing up churches and houses, people sitting at lunch counters getting beaten over the head with billy clubs or beer bottles, and massive official interference with people's civil rights.

This history I think influenced the Court's decision striking down RFRA in *City of Boerne*. The Court held that you don't enforce religious free exercise by changing its meaning, and even though Congress does have the power to pass sweeping prophylactic legislation to enforce civil rights under section 5 of the 14th Amendment, it must first make detailed legislative findings and lay a factual predicate to justify the massive intrusion on federalism that is in fact accomplished by something like the Voting Rights Act or the Civil Rights Act or RFRA.

Congress didn't do that in RFRA the first time. It could conceivably do it now. One way to read *City of Boerne* is that it is an invitation to Congress to go back and to detail the ways in which there is massive interference with the civil rights of people trying to exercise their religious freedom.

But I think that we know, at least in the 20th century, we don't have a history of deliberate interference with religious freedom in the same way that Congress faced the deliberate interference with Civil Rights in the 1960's.

What RFRA deals with, what RLPA deals with are incidents of incidental or accidental infringement on religious exercise. If it is deliberate, if it is purposeful, that is taken care of by the *City of Hialeah* case. There is nothing wrong with doing that. In fact, I think we should do it. States do it all the time. States are allowed to go beyond the Federal constitutional minimums and to grant a greater quantum of liberty, religious liberty, to their citizens than is accorded to the citizenry through the First Amendment.

But this time I think that Congress has got to be much more careful about laying the predicate findings and respecting the independent constitutional norms and constraints that operate in the specific source of jurisdictional authority that you are invoking.

Now there are two hooks for this legislation: the Spending Clause and the Commerce Clause. These are imperfect instruments, as you know, for accomplishing what we want to accomplish. And you haven't chosen this work for yourselves. You started with the 14th Amendment, and now you are turning to the Commerce Clause and the Spending Clause to do it. And I think that there are some problems there.

Let's start with the spending power. The spending power is not unlimited, the Court emphasized in *South Dakota v. Dole*. And Congress cannot randomly attach godfather offers to any of its money. The Court outlined several general restrictions that apply, the key one being that "conditions on Federal grants may be illegitimate if they are unrelated to the Federal interest in particular national projects or programs."

I emphasize the word "particular" here, because it presents a real problem for this bill which applies not to particular public programs receiving Federal funds which may have some demonstrated history of entrenching on the rights of religion but all public programs generally.

This is precisely the kind of sweeping, broad-brush approach that I think the Court condemned in the *Boerne* case. It would be defensible, for example, to restore the compelling interest test for infringements of religious liberty in Federal unemployment compensation programs where there is a long history of problems going back at least to *Sherbert v. Verner*.

But are there similar problems in the field of administering highway funds or Pell grants or Medicaid or juvenile justice programs? I don't know the answer to that. But I think that you need to assemble some hard findings to show a general cross-programmatic problem with government stepping on religious freedom to establish the necessary means and fit to justify the very broad application of this statute.

Furthermore, in *Dole*, it was clear that the provision imposed by Congress, which conditioned the States receipt of Federal highway funds on adoption of a minimum drinking age of 21 was, quote, "directly related to one of the main purposes" for which highway funds are expended, namely, safe interstate travel, a goal that had been frustrated by different drinking ages in the various States.

We cannot say whether the spending restriction offered here is "directly related to one of the main purposes," for which the various programmatic funds are expended, because we are talking about every single Federal Government funding program in the country, which obviously implicates a huge variety of unrelated goals.

It might be tempting to say, and I have thought about it, that fastidious respect for religious exercise is an implicit structural goal of all Federal legislation. But without an articulation of why a categorical across-the-board rule is necessary, based on actual problems, I am afraid that Congress is setting itself up for another judicial rebuke on the grounds that this condition is not directly related to any specific legislative goals like safe interstate travel or promoting universal access to higher education or what have you.

I am not saying that the showing is impossible, only that it hasn't happened yet. And I detect a mood on the Court hostile to far-reaching symbolic spending restrictions that have only a random relationship to the underlying program to which they are attached.

Can we go down the list of spending programs and show how religious liberty is practically or at least theoretically imperiled in each one? Recall that it is not enough to say that there may be religiously based discrimination going on, since the Civil Rights Act of 1964 already forbids religious discrimination. There has to be a showing of actual discouragement of or interference with religious exercise in a way that is short of religious discrimination or a Free Exercise violation.

The same general problem applies to RLPA's attempt to impose RFRA's standard on the States through the Commerce Clause which provides that Congress has power "to regulate commerce among the States," among several States.

In *Lopez*, the Court closed the door on efforts by Congress to transform the Commerce Clause into a general Federal police power over the states. The Court invalidated the Gun-free School Zones Act of 1990, ruling that the possession of a gun in a local

school is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Nor was there indication that the defendant had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

The Court concluded the law neither regulates the commercial activity nor contains a requirement that the possession of a gun in the school zone be connected in any way to interstate commerce.

Now it is clear that religion in itself is not an economic activity within the meaning of that Commerce Clause, and I can't imagine that we would want it to be defined as one. RLPA tries to avoid the problem that the Gun-free School Zones Act encountered by explicitly stating in section 2 that "A government shall not substantially burden a person's religious exercise in or affecting commerce with foreign nations among the several States or with the Indian tribes."

This phraseology seeks to obviate the constitutional problem by building the *Lopez* standard into the very definition of the statutory violation. Yet, given the strangeness of talking about religious exercise in or affecting commerce, the law remains ambiguous. At this level of generality, the text can mean two different things. It might mean that any plaintiff under RLPA would have to show how the government's alleged burden on his own type of religious exercise has a concrete and substantial effect on interstate commerce, or it might mean that since religious exercise as a whole in America has a general substantial effect on interstate commerce, any RLPA plaintiff can allege that any incidental government burden on his religious exercise is, by definition, actionable. I think that this latter interpretation has huge problems.

What the *Lopez* Court found was that Congress could not simply invoke the massive nexus between public education and commerce to rationalize its law. The substantial effect test requires a proof that the specific activity being regulated substantially affects interstate commerce; thus, the government had to show in *Lopez* not the obvious truth that public education affects interstate commerce, but that the possession of guns within a certain distance of a public school affects interstate commerce. No such finding was ever made.

So I think it is mistaken to conclude, as I think my friend Professor Laycock did, that it is enough to show that churches in the aggregate affect commerce. It is not the churches that would be regulated by Congress here nor is it even the aggregated specific religious practices; it is, rather, the governments, that are incidentally imposing on religious exercise through their normal course of business, which are being regulated.

Thus, in order for RLPA to withstand *Lopez* scrutiny, I think it has to be shown either that incidental governmental imposition on religious exercise substantially affects interstate commerce across the board or that the statute itself requires proof in each case that an incidental governmental imposition on religious exercise substantially affects interstate commerce.

So I think you can take care of this problem simply by explicitly identifying that a plaintiff, under RLPA, needs to prove that the

incidental burden on his or her religious exercise, in fact, affects, substantially affects interstate commerce.

But, otherwise, I believe that this bill cuts against the whole spirit and substance of *Lopez*, whatever the merits of that case are. And I am afraid that, as presently written, this bill might be an invitation to the Court to strike down yet another act trying to vigorously defend religious free exercise on both Commerce Clause grounds and also Spending Clause grounds.

Mr. CANADY. Thank you, Professor Raskin.

[The prepared statement of Mr. Raskin follows:]

PREPARED STATEMENT OF JAMIN RASKIN, PROFESSOR, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

In passing the Religious Freedom Restoration Act of 1993 (RFRA)¹, Congress tried to create a national statutory right of religious liberty with more bountiful protection than exists under current First Amendment jurisprudence. In *City of Boerne v. Flores*,² the Supreme Court struck down Congress' handiwork, restoring the legal hegemony of its controversial 1990 holding in *Employment Division of Human Resources v. Smith*.³

In *City of Boerne*, Justice Kennedy found for the Court that, with RFRA, Congress had exceeded its enforcement powers under Section 5 of the Fourteenth Amendment when it enacted RFRA. The Court emphasized that Congress' powers to defend Free Exercise in the states under Section 5 are "remedial" rather than "substantive,"⁴ and that Congress "does not enforce a constitutional right by changing what the right is."⁵ While the majority was willing to cede wide latitude to Congress to pass "measures that remedy or prevent unconstitutional actions," it held in no uncertain terms that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁶

The Religious Liberty Protection Act of 1998 is an effort to recover some of the ground lost when the Court discarded RFRA. Thus, Congress is trying to invoke other powers to advance what is properly understood as a civil liberties agenda for religious Americans.

Yet, precisely because this is a civil liberties effort, the Spending Clause and Commerce Clause are imperfect—although not impossible—jurisdictional instruments to be used for this purpose. There is something of trying to fit square pegs into round holes about this work, although I understand that it is not a labor that you ever wished upon yourself. Someone might ask why you don't simply take up the Supreme Court's invitation to build an appropriate legislative history demonstrating the kind of massive deliberate rights violations that the Court seemed to demand in *City of Boerne*. We know that the answer to this is that a record of religious oppression cannot be shown on the magnitude of our sordid history with slavery, Jim Crow, white primaries, poll taxes, and so on. This is not to say that the religious

¹Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §2000bb to bb-4 (1993)).

²521 U.S. ____, 117 S. Ct. 2157 (1997).

³494 U.S. 872. In *Smith*, the Court discarded the strict scrutiny standard for testing challenges to government action that incidentally but substantially burdens religious free exercise. This libertarian standard had been enunciated by Justice Brennan in *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Smith* Court, per Justice Scalia, held that burdens on religious free exercise, however substantial, do not violate the First Amendment so long as they are the "incidental effect of a generally applicable" law. 494 U.S. at 878. Religious advocates and civil libertarians have considered this decision a major assault on the right to practice religion, and the decision has come under withering assault by observers. See, e.g., Mark G. Yudof, *Religious Liberty in the Balance*, 47 SMU L. Rev. 353, 356 (1994) (stating that "[t]he *Smith* formulation leaves non-mainstream or atypical religions in the most vulnerable position"); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court Centrism*, 1993 BYU L. Rev. 259, 260 (1993) (calling the decision "substantively wrong and institutionally irresponsible"); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 102 (1990) (describing decision as "inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses and inconsistent with precedent"); Michael W. McConnell, 57 U. Chi. L. Rev. 1109, 1120 (1990) (condemning the Court's deliberate indifference to the history of the Free Exercise Clause and stating that *Smith's* "use of precedent is troubling, bordering on the shocking.")

⁴117 S. Ct. 2158-59.

⁵*Id.* at 2159.

⁶*Id.*

exercise of citizens is always treated justly, but what we are talking about is restoring by statute the "compelling interest" test for *incidental* infringements of religious liberty that was jettisoned by the Court in *Oregon v. Smith*. This effort is about providing more religious liberty to Americans than the Supreme Court's current interpretation of the Constitution does.

I want to emphasize that there is nothing wrong with this effort so long as other constitutional lines, like the Establishment Clause and Equal Protection, are not crossed in the process. After all, state legislatures and state supreme courts often provide Americans with *more freedom* than the Supreme Court does with its increasingly pinched interpretation of constitutional rights and liberties. And if the states can do it, why can't you?

But when you invoke other lawful powers to accomplish these civil liberties purposes, it is important for the sake of both institutional legitimacy and withstanding judicial review later that you scrupulously respect the independent norms and constraints that accompany exercise of such powers. It is critical that Congress not make the same kind of mistake it made with RFRA when, according to the Court, it used its remedial powers under Section 5 of the 14th Amendment to expand impermissibly substantive constitutional rights. The Court there objected not only to Congress' objectives and to the poor fit between the ends sought and the means chosen, but also to the sweeping and categorical nature of RFRA's coverage, pointing out that it "intrude[s] at every level of government, displacing laws and prohibiting official actions of almost every description" by "every agency and official of the Federal, State and local governments."⁷

How well do the Spending Clause and Commerce Clause work as new pegs for the RFRA principle? They are a very blunt instrument, but with further narrowing and sharpening, I conclude that you could fashion a piece of legislation that is much more refined and exacting and passes constitutional scrutiny.

The spending power is "not unlimited," the Court emphasized in *South Dakota v. Dole*, and Congress may not randomly attach godfather offers to its largesse.⁸ The Court outlined several general restrictions on attaching strings to money: spending limitations must advance "the general welfare," must be unambiguously stated, must be related to the federal interest in particular programs, and may not transgress other constitutional boundaries.⁹

Does this proposed statute advance the general welfare? The Court has been generally deferential to the Congress on this issue since "the concept of welfare" itself is "shaped by Congress," *Helvering v. Davis*, 301 U.S. 619 (1937), but we can expect a claim that the statute is designed to advance the interests of one segment of the population—the class of religious citizens—rather than the whole of it. I would therefore suggest some statement in the preamble or at least in the committee report that this bill is an effort to advance the common good and liberty of *all* citizens in federally financed programs.

The more serious problem is the Court's suggestion in *South Dakota v. Dole* that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"¹⁰ I emphasize the word "particular" here, because it may present a sticky problem for this bill, which applies not to particular public programs receiving Federal funds which may have some demonstrated history of trenching on the rights of religion, but *all of them*. This is precisely the kind of sweeping, broad-brush legislation that the Court condemned in *City of Boerne*.

Thus, it would be one thing to restore the compelling interest test for infringements of religious liberty in federal unemployment compensation programs, where there is a long history of problems going back at least to *Sherbert v. Verner*, and *City of Boerne* has thrown things into doubt. But are there similar problems in the field of administering highway funds? Pell grants? Medicaid? Juvenile justice programs? I honestly do not know, but I think that you need to assemble some hard findings to show a general *cross-programmatic* problem with government stepping on religious freedom to establish the necessary means-ends fit to justify the very broad application of this statute.

Furthermore, in *Dole*, it was clear that the provision imposed by Congress, which conditioned the states' receipt of federal highway funds on adoption of a minimum drinking age of 21, was "directly related to one of the main purposes for which high-

⁷ *Id.*

⁸ See *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

⁹ *Id.* at 208.

¹⁰ See *id.* (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion) (emphasis added).

way funds are expended—safe interstate travel,” a goal that “had been frustrated by varying drinking ages among the states.”¹¹

We cannot say whether the spending restriction offered here is “directly related to one of the main purposes” for which the various programmatic funds are expended, because we are talking about every single federal government funding program, which obviously implicates a huge multiplicity of goals. It might be tempting to say that fastidious respect for religious exercise is an implicit structural goal of all federal legislation, but without an articulation of why a categorical, across-the-board rule is necessary based on real problems out there, I am afraid that you are setting yourselves up for another judicial rebuke on the grounds that this condition is not “directly related” to any specific legislative goals, like safe interstate travel or promoting access to higher education or securing the health of our seniors, and so on. I am not saying that the showing of a rational connection is impossible, only that it has not happened yet, and I detect a mood on the Court hostile to far-reaching symbolic spending restrictions that have only a random relationship to the underlying program. Can we go down the list of spending programs and show how religious liberty is practically or at least theoretically imperiled in each one? Recall that it is not enough to say that there may be religiously-based *discrimination* going on, since the Civil Rights Act of 1964 already forbids religious discrimination. No, there must be a showing of actual discouragement of, or interference with, religious exercise.

In *Dole*, the Court refused the invitation of the National Conference of State Legislatures to precisely “define the outer bounds of the ‘germaneness’ or ‘relatedness’ limitation on the imposition of conditions under the spending power,” *id.* at 209, n.3, but this law might furnish the perfect opportunity for the Court to set up new federalism-enforcing limits on Congress’ powers to micromanage the states through restrictions attached to spending bills. Is that a result Congress is willing to live with here?

Without explicit findings that governments receiving federal assistance are trampling religious freedom, without showing how the goals of all federal programs assimilate a goal of accommodating free religious exercise beyond the existing imperatives of anti-discrimination law, the original *City of Boerne* majority may be galvanized to invalidate the legislation as irrational and excessive under the Spending Power and clip Congress’ wings once again. Thus, I would do a systematic canvass of all the programs affected and show how there are if not real, then at least hypothetical, dangers that Congress is responding to.

The same general problem applies to the RLPA’s attempt to impose a RFRA-like standard on the states through the Commerce Clause, which provides that Congress has power “To regulate Commerce . . . among the several States.” In *United States v. Lopez*,¹² the Court firmly closed the door on efforts by Congress to transform the Commerce Clause into a general federal police power over the states and localities. The *Lopez* Court invalidated the Gun-Free School Zones Act of 1990, ruling that the “possession of a gun in a local school is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” Nor was there any “indication that [the student defendant] had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.”¹³ The Court concluded that the law “neither regulates a commercial activity nor contains a requirement that the possession [of a gun in a school zone] be connected in any way to interstate commerce.”¹⁴

Now it is clear that religion in itself is not an “economic activity” within the meaning of the Commerce Clause. I cannot imagine the supporters of RLPA wanting religion to be considered a commercial activity, if for no other reason than commercial activity is usually taxed by federal, state and local government. But the RLPA tries to avoid the problem that the Gun-Free School Zones Act encountered by explicitly stating, in Section 2, that “a government shall not substantially burden a person’s religious exercise . . . in or affecting commerce with foreign nations, among the several states, or with the Indian tribes.”

This curious phraseology seeks to obviate the constitutional problem by building the *Lopez* standard into the very definition of the statutory violation. Yet, given the strangeness of talking about “religious exercise in or affecting commerce,” the law remains ambiguous and uncertain. At this level of generality, the text could mean two different things. It might mean that any plaintiff under the RLPA would have to show how the government’s alleged burden on *his own* type of religious exercise

¹¹ *Id.* at 208–09.

¹² 514 U.S. 549 (1995).

¹³ *Id.* at 567.

¹⁴ *Id.* at 551.

has a concrete and substantial effect on interstate commerce, or it might mean that, since religious exercise as a whole in America has a general "substantial effect" on interstate commerce, an RLPA plaintiff can allege that any incidental government burden on his own religious exercise is, by definition, actionable.

Professor Laycock sometimes seems to have something like the latter alternative in mind. In his June 16, 1998, testimony before the House Subcommittee on the Constitution, Professor Laycock refers to the *Lopez* Court's "aggregation rule," which provides that "in considering whether an activity substantially affects commerce, Congress may aggregate large numbers of similar transactions." He argues that the RLPA proceeds on a presumptive aggregation theory:

A small church with a RLPA claim need not show that it affects commerce all by itself, it is enough to show that churches in the aggregate affect commerce. An individual need not show that his religious practice affects commerce all by itself; it is enough to show that the practice affects commerce in the aggregate, or perhaps that a broad set of related or analogous practices affects commerce in the aggregate.

But there are huge problems with this analysis. What the *Lopez* Court found was that Congress could not simply invoke the massive and undeniable nexus between public education and commerce to rationalize its law against gun possession within the vicinity of public schools. The "substantial effects" test rather requires a proof that the *specific activity being regulated* "substantially affects" interstate commerce. Thus, the Government had to show in *Lopez* not the obvious point that *public education* substantially affects interstate commerce but that *the possession of guns within a certain distance of a public school* "substantially affects" interstate commerce. No such legislative finding was ever made, as the Court emphasized, nor was there a specific jurisdictional nexus element requiring the government to prove that a particular defendant got a gun crossing state lines.

Thus, Professor Laycock may be mistaken to conclude, in the RLPA context, that "it is enough to show that churches in the aggregate affect commerce." It is not the churches that would be regulated by Congress here nor is it even the aggregated specific religious practices. It is, rather, the governments that are incidentally imposing on religious exercise through their normal course of business which are being regulated. Thus, in order for RLPA to withstand *Lopez* scrutiny, it must be shown either that incidental governmental imposition on religious exercise substantially affects interstate commerce across the board or that the statute itself requires proof in each case that an incidental governmental imposition on religious exercise substantially affects interstate commerce.

The former showing has not been made yet, and it is doubtful that it could be. It would be difficult to identify a large category of cases where otherwise neutral rules are incidentally and substantially burdening religious exercise while not violating Free Exercise or existing civil rights law. Undoubtedly some of these cases may exist, and we would probably think that the person whose religious exercise is being burdened could be exempted from the law without creating Establishment Clause problems. After all, we so have a Constitution that affirmatively endorses religious exercise.

But this argues for a statutory jurisdictional requirement of a particular showing by an RLPA plaintiff that the kind of incidental governmental burden being placed on his or her own religious exercise, when aggregated with others like it, is "substantially affecting" interstate commerce. If we clarify in the law that each RLPA plaintiff must make this showing, then I think that the law could pass constitutional muster.

Otherwise, the bill cuts against the whole spirit and substance of *Lopez*. Recall that the Government there argued that possession of a gun in a school zone might result in violent crime and that violent crime would affect the national economy in several ways. *Id.* at 563. First, large economic costs of violence are spread through the population through insurance and, second, gun violence reduces the "willingness of individuals to travel" across state lines to unsafe areas. *Id.* at 564. Third, the Government argued that guns in school areas threatened the educational process, which in turn reduces national economic productivity. *Id.*

The Court held that these arguments proved far, far too much. Under the "costs of crime" and "national productivity" theories, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens," including family law and public school curricula. Under these theories, the majority found, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign." *Id.*

The Court admitted that the "determination" it was calling for of "whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty," *id.* at 566. But it said that this uncertainty was inevitable and the determination needed to be made in order to uphold federalism. In our case, even if we wanted it to be, religion is not going to be defined as commercial; religion is probably the constitutional opposite of commerce.

Thus, the only way to harmonize the statute with *Lopez* is to write in a specific federal jurisdictional nexus element that requires individual plaintiffs to allege that the kind of governmental infringement on religious liberty they are experiencing "substantially affects" interstate commerce. This is going to be a slender category of cases, making the statute a less sweeping but more constitutionally defensible one, as opposed to a categorical and symbolically grand statement that is almost certainly doomed to be rejected. Without such a requirement, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power," destroying the "distinction between what is truly national and what is truly local."¹⁵ It may be that those of us who champion religious freedom against state power, and I am one of those, want to throw caution to the winds and simply pass a piece of legislation that will allow us to go down in a blaze of glory. But RFRA already served that cathartic purpose, and I think it would be much better to come up with a bill that is more narrowly focused on real-world problems and likely to survive judicial scrutiny.

Mr. CANADY. Professor Laycock.

**STATEMENT OF DOUGLAS LAYCOCK, PROFESSOR, ASSOCIATE
DEAN FOR RESEARCH, UNIVERSITY OF TEXAS LAW SCHOOL**

Mr. LAYCOCK. Thank you, Mr. Chairman. I was asked in preparation for this hearing to summarize the record on land use. I have done that in some detail in my written statement. I want to speak about that very briefly and then respond to some of the things Professor Raskin said.

The question with respect to land use is whether Congress believes that there is a substantial likelihood of constitutional violations under the Supreme Court's standards in many church land use cases. So fact-finding here is very important. The question is not whether the witnesses believe that there are many violations and not whether the Supreme Court believes that there are many violations. The question is whether Congress believes that there is a substantial likelihood of many violations and whether Congress' reasons for believing that are rational. So I think it is very important that the committee make careful findings.

There is lots of information in this record. There is more that has come in. I particularly call your attention to the supplemental statements that John Mauck of Chicago submitted in the wake of the June 16th hearing. The record has always been quite strong that there is discrimination against small churches. Big denominations are treated better than small denominations and non-denominational churches, and there has been both statistical and anecdotal evidence of that. But now John Mauck has submitted statistical evidence that churches in general are treated worse than secular meeting places. He submitted 29 zoning codes from suburban Chicago. Twenty-two of these clearly, and some of the others less clearly, give much better treatment to theaters, meeting halls, lodge halls, clubs, restaurants, funeral homes, and other places where people gather in large numbers, and less favorable treatment to churches.

¹⁵ *Lopez*, 514 U.S. at 567.

I think Congress can draw those inferences—that there is discrimination against churches and among churches. I think the record is very strong. But it is important that the inferences actually be drawn, and that Congress make a record of what facts it has found.

We see discrimination in the places that leave a published record—in the reported cases and on the face of the zoning codes. I think it is a reasonable inference for Congress to draw that if we see discrimination there, and if we have the same vague standards in the unreported cases, which are much more numerous, or if the same forces are at work, the discrimination will be equally rampant in those unreported cases.

Now, with respect to the Commerce Clause, I think the supporters of this bill have always intended something very close—not identical because there are really two issues run together here—but something very close to the understanding of this bill that Professor Raskin just said would be permissible. In talking about two issues at the same time, I may have created some of the misunderstanding here in my testimony on June 16th.

I think everyone's understanding has been that the connection to commerce is open to litigation in each case. The aggregation rule must apply to the activity that is being regulated. So if the religious activity requires or produces a commercial transaction, and if burdening that religious activity will prevent that commercial transaction or make that category of religious transactions substantially more expensive, so that fewer of those transactions will occur, then we have a connection to commerce.

If the religious activity does not require a connection to commerce, then we can't regulate it, and we can't protect it under the Commerce Clause provisions of this bill. I think that has been everybody's understanding. So when I said on June 16 that the question is not whether this particular church affects commerce, the question is whether all churches together affect commerce, that is true; but I wasn't as precise as I should have been.

The question is whether this type of activity, when aggregated among all churches, affects commerce. So to take the easy cases first, I think church construction cases plainly affect commerce. The question is not whether my little church in my block affects commerce but whether, if the burdensome regulation on church construction is widespread, does church construction generally affect commerce.

In the employment cases, I think employment is plainly an activity in commerce. The Federal Government regulates employment in all sorts of ways. The question is not whether one particular employee affects Commerce but whether church employment, or religious employment generally, affects commerce.

On the other hand, it is plain that there will be ritual activities that simply cannot be protected. There has been testimony before this committee about cases of deliberate violations of the secrecy of the confessional. As outrageous as those cases are, I think it would be a quite unusual confessional case that has any connection to commerce. Going to confession doesn't require you to buy anything. It doesn't require you to spend any money. We can't get that case

under the Commerce Clause. That is unfortunate, but we can't get it.

I have listed some other examples of things that I think will clearly be in, will probably be in, or will probably be out, in my written testimony. So I am not sure that Professor Raskin and I disagree all that much about the Commerce Clause.

Mike Farris on the earlier panel said that Congress can't help with the home school cases. Well, yes and no. I think there are burdensome intrusions on education inside the home school that we probably cannot reach under the Commerce Clause provision. On the other hand, a regulation that prevents the home school from happening, that says we just won't recognize you as a school, you have to send your kids to public school, I think the bill applies to that one, because the interstate market in textbooks and curriculum materials for home schools is a very large market. I think that is subject to the Commerce Clause provision.

Now there is one point with respect to commerce that I think Professor Raskin and I disagree about, and I think it is important. He says it is not a bill about regulating religion; it is a bill about regulating government, it is a bill about regulating the burdens that government imposes on religion. That I think is not right.

As I testified before, this is not a bill to regulate the States; this is a bill to deregulate religion. Congress' focus is on the private activity, on the religious exercise. We are deregulating religious behavior. And if the religious behavior that is being deregulated affects commerce, it is within the reach of the bill.

When you considered the Airline Deregulation Act, and expressly pre-empted State law, you didn't ask whether State governments affected commerce; you asked whether the airline industry affected commerce. It is the same thing here. This is a bill that deregulates religion.

With respect to the Spending Clause, I think Professor Raskin and I disagree somewhat more. Most of his analysis starts with the word "particular," which appears in passing in the *Dole* opinion, and in a context that makes sense. The *Dole* opinion was about a particular spending restriction on a particular spending program. But that is not how lots of other spending provisions work.

Title VI on race is not a Spending Clause requirement attached to a particular program. It applies to every spending program the Federal Government operates. Similarly, every Federal spending program is subject to the Rehabilitation Act.

Congress did not have to make findings with respect to Title VI or with respect to the Rehabilitation Act that, in every single Federal spending program, there is a substantial problem with race discrimination or disability discrimination. Congress' interest there is the same as Congress' interest here, which is that no intended beneficiary be excluded from the benefits of the Federal program because of his race, because of his disability, or because of his religious practice; and that Federal money not be spent to discriminate on the basis of race or disability or to substantially burden religious practice. That is a legitimate interest, and it is an equally legitimate interest in every spending program.

Now I think it is almost certainly the case that there will be spending programs where we never have a RLPA case. I don't

know if there are any religious burden or discrimination in road building. Maybe there is occasionally. And if there is occasionally, there will be an occasional case. But the intrusion or the regulatory burden here will be directly proportionate to a number of cases that there actually are.

I also would like to clarify one other thing about the Spending Clause provisions that came up in the last hearing. There has to be a connection between the person whose religion is burdened and the Federal spending. But it doesn't have to be that the burden on religion is funded by the Federal Government. That is certainly not how Title VI or Title IX works. The easiest illustrations of that are the sexual harassment cases.

The Federal Government does not fund statutory rape of school girls by their teachers. But statutory rape of school girls by their teachers is a violation of the sex discrimination law attached to Federal aid to education; and the Supreme Court doesn't have the slightest doubt about that. The only question is whether the school is responsible for it when school officials didn't know about it. Sexual harassment is covered, even though the Federal Government doesn't fund it, because Federal money aids the school. Burdens on religion in a federally aided educational program will be covered the same way.

Finally, one other point that came up in the last hearing. George Will is not the only person familiar to this committee who has written that the point of the Constitution was to subordinate religion to commercialism. Chris Eisgruber has also made that argument at some length, and that may be of some interest to members of the committee.

Mr. CANADY. Thank you, Professor Laycock.

[The prepared statement of Mr. Laycock follows:]

PREPARED STATEMENT OF DOUGLAS LAYCOCK, PROFESSOR, ASSOCIATE DEAN FOR RESEARCH, UNIVERSITY OF TEXAS LAW SCHOOL

Thank you for the opportunity to testify once again in support of H.R. 4019, the Religious Liberty Protection Act of 1998. I teach Constitutional Law at The University of Texas, but as always, I testify in my personal capacity as a scholar, and not on behalf of the university.

I have been asked to respond to questions that have arisen since the hearing on June 9, and to summarize the record on church land use regulation.

I. CHURCH LAND USE REGULATION

A. Section 5 of the Fourteenth Amendment

This Committee has heard much testimony about church land use regulation, and it will hear more today. Some of this testimony is statistical—surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal. Some of it is sworn statements by individuals or representatives of organizations with wide experience in this field who say that the anecdotes are representative—that similar problems recur frequently. This evidence is cumulative and mutually reinforcing; it is greater than the sum of its parts.

Cole Durham on June 9, and Von Keetch on March 26, described the Brigham Young study that several other witnesses have mentioned. The Brigham Young study shows that small religious groups, including Jews, small Christian denominations, and nondenominational churches, are vastly over represented in reported church zoning cases. These small faiths are forced to litigate far more often; they have less ability to resolve their land use problems politically. The land use authorities are less sympathetic to their needs and react less favorably to their claims. Yet once they get to court, these small faiths win their cases at about the same rate as larger churches. It is not that small churches bring weak cases, but that small churches are more likely to be unlawfully denied land use permits. The equal win

rates also tends to confirm what would be a reasonable inference in any event—that over a large number of cases, other factors balance out.

The over representation of small faiths is greater in location cases, where the issue is whether there can be a church on a particular site, than in accessory use cases, where the issue is whether one of the church's activities is permitted in an existing church. In my experience, the explanation for this difference is that land use authorities often have a narrow idea of what a church is and does. Churches that confine their activities to the zoning board's understanding of a basic worship service are treated differently from churches that do anything more than that. This discrimination based on the scope of the religious mission brings more mainstream churches into court in accessory use cases, but even there, the small faiths are significantly over represented.

I would add that there is no majority religion in the United States, and that adherents of different faiths are distributed quite unevenly across the nation. Every faith is a small faith somewhere. Faiths that are small nationally are just small in more places. Even faiths that are tiny minorities in most places may be large and influential in a few places.

Rev. Elenora Ivory will testify today to a Presbyterian study. I have testified about this study in the Senate. It shows that sixty to eighty Presbyterian churches per year experience significant conflict with land use authorities, or significant cost increases in their projects, because of the demands of land use authorities. Compare this number to the two reported cases involving Presbyterian churches in the Brigham Young study, and you get some sense of how much of the problem is unreported.

The Presbyterians are a well-respected, mainstream faith by any definition. Yet they have significant trouble in 15% or more of their applications. Combining the Brigham Young and Presbyterian studies, it is reasonable to infer that smaller and less familiar faiths have trouble in far more than 15% of their cases. The same attitudes, rules, and procedures are at work in the reported and unreported cases, so it is reasonable to infer that there is similar discrimination against small faiths in both contexts.

There is also evidence of discrimination in the zoning codes themselves. Zoning attorney John Mauck, in a written statement supplementing his testimony at the June 9 hearing, describes a survey of twenty-nine zoning codes from the northern suburbs of Chicago. In twelve of these codes, there was no place where a church could locate as of right without a special use permit. In ten more, churches could locate as of right only in residential neighborhoods. But in most residential neighborhoods, a right to locate is illusory for all but the tiniest congregations. Unless your congregation can meet in a single house, the only way to build a church in a residential area is to buy several adjacent lots and tear down the houses. But several adjacent lots never come on the market at the same time, and if they did, any church pursuing this strategy would likely provoke an angry reaction from the neighborhood. It is only in commercial zones that significant tracts of land are bought and sold with any frequency. So in effect, twenty-two of these twenty-nine suburbs exclude churches except on special use permit, which means that zoning authorities hold a power to say yes or no that is almost wholly discretionary. In the free speech context, we would call this standardless licensing, and it would be unconstitutional. It should be equally unconstitutional as applied to churches.

In fact the situation is worse than exclusion except on special use permit, because some of these codes do not permit churches even on special use permit in all or most of the city.

Mr. Mauck's testimony also shows that places of secular assembly are often not subject to the same rules. The details vary, but uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded. Every suburb on his list permitted at least one of these uses, and some as many as twelve of these uses, on terms more favorable than those that applied to churches. Many business uses are also generally permitted as of right without special use permits.

Last week, Mr. Mauck told me another fact, not included in his written statement, that tends to show discrimination between religious and secular uses. He regularly attends the meetings of the Board of Zoning Appeals in Chicago. The cases at each session are listed on a docket sheet, which he reviews. He estimates that at least 30% of the cases involve churches, although churches are nowhere near 30% of the land uses in the city, or even of the nonresidential land uses in the city. In Mr. Mauck's expert opinion, churches are so over represented because they are more

likely than secular uses to be subject to the requirement of a special use permit, and because authorities are less likely to grant the permit when it is required.

Numerous witnesses testified that land use regulation is administered in individualized processes. John Mauck testified to this; I testified to it; Marc Stern testified to it. John Mauck, Von Keetch, and Rabbi Chaim Rubin all described examples of individualized permit processes. The Presbyterians found that in half their cases, there was no clear rule, and I believe that if we had a more detailed report, we would find that the larger and more important the land use decision, the less likely there is to be a clear rule. Even when there is a clear rule, the rule can be changed. Steven McFarland and John Mauck testified to cases in which churches sought to locate on a site where churches were permitted as of right, and in which the land was then rezoned to exclude churches.

These witnesses also testified that these individualized decisions are made under standards that are often vague, discretionary, or subjective. John Mauck and Von Keetch testified to permits denied for reasons such as "the general welfare," the "character of the area," "aesthetics," and "traffic." "Traffic" sounds more objective than the other three, but every use of land adds traffic, so the real question is how much traffic is too much. That question is as subjective as "aesthetics" or "the general welfare."

Mr. Mauck also testified to two other common reasons for excluding churches, reasons which in combination are universally applicable. Churches can be excluded from residential zones on the ground that they are commercial and generate traffic. They can be excluded from commercial zones on the ground that they have little activity during the week and do not generate traffic. If these reasons are legally sufficient, then any church can be excluded from any zone, and the decision whether to invoke these reasons is wholly discretionary.

Even discretionary reasons may support a legitimate judgment in cases at the extremes, but typical proposed projects do not pose cases at the extremes. Every land use imposes some cost on its neighbors, so there is always *some* reason to say no. But of course, authorities do not always say no; most urban land is eventually developed. So there is a very wide range of proposed projects that impose some costs but not more than the city is willing to accept if it welcomes the use. And in this very broad range, subjective judgments about questions of degree can be consciously or unconsciously distorted by other factors, including how the neighbors or the authorities feel about the proposed use and the proposed occupant. If the neighbors or the authorities are not comfortable with a church, or with a particular church, these attitudes inevitably affect such discretionary judgment as the general welfare, the character of the neighborhood, aesthetics, and traffic. Each of these labels can readily be used to disguise a decision made for quite different reasons. And each is almost impossible to prove or disprove.

In my letter of July 18, 1997, supplementing my testimony at a hearing last year that also occurred on July 14, I testified to Gallup poll data showing that 45% of Americans admit to "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% admit to mostly or very unfavorable opinions of "members of religious cults or sects." Thirty percent of Americans said they would not like to have "religious fundamentalists" as neighbors, and 62% said they would not like to have "members of minority religious sects or cults" as neighbors. A desire not to have members of a minority sect as neighbors is closely related to a desire not to have the minority sect's church as a neighbor.

I have spent more than twenty years working on these issues, and I have met with people with a vast range of perspectives on religion and religious liberty. I believe that a range of negative attitudes underlies these Gallup data. Some Americans are hostile to all religion. They believe it is irrational, superstitious, and harmful. This is the view of a small minority, but this view is over represented in elite positions. What is much more widespread is suspicion of, or hostility to, religious intensity. People who are moderately religious themselves are hostile to those who are more intensely religious. In my judgment, this is why Gallup reports such widespread negative attitude toward "fundamentalists," "cults," and "minority sects." And as I testified in my letter of July 18, churches and believers often encounter such attitudes among persons in elite positions, and it is reasonable to infer that these views are well represented among government officials with discretionary powers.

As I said at the beginning of this statement, these data are mutually reinforcing. Religious biases are widespread in the population. Individualized decision making and discretionary standards provide ample opportunity for any biases to operate. Legislation is necessarily political and discretionary, so any biases that may exist can also operate when the city enacts its zoning code.

We see evidence of discrimination in the places that leave a published record. On the face of the zoning codes, churches are often treated worse than secular meeting places. In the reported cases, small and unfamiliar churches are forced to litigate far more often than large, mainstream churches. Congress can infer that these differences are not random. These patterns appear because views about churches distort discretionary decisions under vague and subjective standards. Consciously or unconsciously, land use authorities discriminate against religion and among religions.

Finally, we see that there are many times more unreported church land use conflicts than reported cases. We have no systematic way to study this vast number of unreported conflicts. But the same individualized processes and discretionary standards apply. The same biases are present in the population. If these factors lead to discrimination against churches and among churches in the visible parts of the process—in the zoning codes and the reported cases—Congress can infer that they also lead to discrimination against churches and among churches in the invisible part of the process, in the vast number of unreported, discretionary decisions on individual permit applications.

The evidence based on anecdote and experience supports this inference. John Mauck described twenty-two cases of apparent discrimination in his written statement. He spends nearly all his professional time handling such cases in the Chicago area, and he gets calls about such cases from all over the country. He described several cases where churches were refused permission to meet in building had been used for secular assemblies—a Masonic temple, a VFW hall, a funeral home, a theater, an auditorium in an office building. He described cases in which cities preferred nightclubs to churches, and preferred to let an abandoned department store sit empty rather than let it be used by a church.

Marc Stern testified that he has handled or advised on many cases of land use discrimination, and he described several examples. He described a case in Hempstead, New York, in which a synagogue was excluded because it would bring traffic on Friday nights, but an astute judge noted that it would bring no more traffic than the large parties that were already common in Hempstead on Friday nights. Unfortunately, few judges are so astute. He described an Ohio case where Jewish leaders wholly satisfied the land use officials, but their project was disapproved in a referendum in which biased views were openly expressed. On March 26, he described a case in Clifton, New Jersey, where officials said they preferred an art group to a church; on June 9, he testified that these same officials later permitted a white church where they had denied two black churches.

Rabbi Rubin described how the City of Los Angeles refused to let fifty elderly Jews meet for prayer in the Hancock Park neighborhood, because Hancock Park had no place of worship and the City did not want to create a precedent for one. Yet they permitted other places of assembly in Hancock Park, including schools, recreational uses, embassy parties, and a law school within walking distance of Rabbi Rubin's shul! This is a clear case of discrimination between religious and secular uses. Eighty-four thousand cars passed the building every day, and hundreds of law students came and went to both the day school and the night school. But we are supposed to believe that fifty Jews arriving on foot once a week would irrevocably change the neighborhood.

California has responded with legislation to solve a similar land use problem, the exclusion of childcare from residential neighborhoods. Cal. Health & Safety Code § 1597.40 (1990 & Supp. 1998). The legislature found that childcare in a home is an accessory use that does not change the character of the neighborhood. This statute was recently upheld against constitutional attack. *Barrett v. Dawson*, 71 Cal. Rptr. 3d 899 (Cal. App. 1998). So Californians now have a statutory right to assemble children for offer group childcare in their homes, despite zoning or restrictive covenants to the contrary, but no right to assemble for prayer in their homes.

Rabbi Rubin also testified that Agudath Israel, a national organization of Orthodox Jews, tells him these conflicts over Jews meeting for prayer are common. Bruce Shoulson will testify today to similar cases. Marc Stern testified that land use authorities often refuse permits for Orthodox synagogues because they do not have enough parking spaces—even though the Orthodox walk to synagogue because as a matter of religious obligation, they cannot use motor vehicles on the Sabbath. When a religious minority is repeatedly denied permits on grounds that are wholly irrational, it is reasonable to infer that the stated ground is not the real reason, or not the whole of it.

Steven McFarland and John Mauck testified to rezoning to exclude churches that managed to acquire property where churches were a permitted use. Steven McFarland also testified to the case of The Refuge Pinellas in St. Petersburg, Florida, where a church has been reclassified as a social service agency, and then excluded

on that basis. This case illustrates discrimination based on the scope of the religious mission; it may also involve discrimination against small faiths. A dissenting land use official said that numerous churches in St. Petersburg were social service agencies under the city's definition, but the less conventional, nondenominational example has been singled out for prosecution. Elenora Ivory will testify today to several other cases of zoning laws being invoked to confine a church's mission.

Von Keetch testified to the case of Forest Hills, Tennessee, which permitted the Baptists, Presbyterians, Methodists, and the Church of Christ to build churches, and then declared that no other denominations could enter the city—not even at a major intersection in a building formerly used as a church. A judge found the city's reasons unconvincing, but looking at the single case in isolation, she could not infer discrimination, and she would not find that the city's rules were not generally applicable.

I testified to a *Wall Street Journal* story about suburbs with fierce resistance to churches, deliberately using land use regulation to wholly exclude churches or sharply limit their number. John Mauck testified to statements such as "Let's keep these God damned Pentecostals out of this neighborhood." Steven McFarland testified to a zoning official calling a church a "stinkweed." Marc Stern testified to similar experiences.

Sometimes permits for churches are denied in whole or in part for reasons of racial discrimination. John Mauck testified to several cases of racially motivated opposition to black churches, and to a case in which the mayor told his city manager that "We don't want Spics in this town." The city manager was fired after he disclosed this statement. Marc Stern testified to a case in which black churches were denied permits, and in which a citizen opposed the permit on the ground that the city would soon look like Patterson, a predominantly African-American city nearby. He further testified that a white church was later permitted where the black church had been refused.

Multiple witnesses testified that this discrimination is very difficult to prove in any individual case. John Mauck, Marc Stern, Von Keetch, Gene Schaerr, and I all testified to this. Subjective criteria mean that any decision can be supported by a reason that sounds neutral and legitimate. Even if somebody blurts out an unambiguously bigoted motive, courts are reluctant to attribute the collective decision to that motive. Marc Stern described a case holding that remarks from the crowd are not attributable to the decision maker, and another case in which the court refused discovery on issues of motive.

Section 3(a) is intended to help with such cases. Evidence of bad motive among constituents of the land use authority is prima facie evidence of the motive for the ensuing decision. The burden of persuasion to show a legitimate nondiscriminatory motive should therefore shift to the land use authorities.

Marc Stern, Steven McFarland, and John Mauck testified that it is difficult and expensive even to litigate these issues. The church must acquire and hold an interest in the land in order to have standing to seek zoning approval, which may be wholly discretionary. I would add that this problem is especially acute for churches, which tend to have tight operating budgets and limited capital.

I have described the evidence and how it fits together. Congress must decide what it believes based on this evidence. Congress is the relevant fact finder—not the witnesses, and not the courts. The courts see one case at a time. Congress can cumulate evidence from around the country, and it can draw reasonable inferences from patterns in that evidence. It is up to Congress in the first instance to decide what inferences to draw from the raw facts, and the Committee should state in its report what inferences it has drawn.

I believe that Congress can find at least the following:

- a. That land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules. Presbyterian Study; Mauck; Laycock; Schaerr; McFarland; Rubin.
- b. That the standards in individualized land use decisions are often vague, discretionary, and subjective. Mauck; Keetch; Laycock.
- c. That rules restricting particular uses to particular zones may be used to entirely exclude religious organizations, or to confine them to areas where little or no land is actually available. Mauck; Keetch.
- d. That these individualized processes and vague standards provide ample opportunity for any religious bias or hostility to disguise itself in the land use process, facilitating discrimination against religion or among religions. Laycock; direct inference from underlying facts.

e. That faiths and denominations with few adherents are discriminated against in the land use process, as shown by their gross over-representation in reported church land use cases. Brigham Young Study.

f. That small and large faiths win their claims at the same rates once they get to court, so that the over representation of small faiths in the reported cases indicates government's discriminatory regulation of these faiths rather than their own propensity to litigate. Brigham Young Study.

g. That serious conflicts between religious organizations and land use authority are many times more common than reported litigation. Presbyterian Study.

h. That the same attitudes and opportunity for discrimination are present in unreported land use conflicts and in reported cases, and it is therefore reasonable to infer that the discrimination documented in the reported cases is equally widespread in the far more numerous unreported conflicts. Direct inference from underlying facts.

i. That these inferences from reported data are reinforced by anecdotal evidence of discrimination, and that these anecdotes come from all across the country. Stern; Mauck; McFarland; Keetch; Rubin.

j. That these anecdotes show not just that religious institutions are often burdened, but that more popular churches, better connected churches, and older churches are often treated better than less popular, less connected, and newer churches. Brigham Young Study; Stern; Mauck; McFarland; Keetch; Rubin.

k. That there is no majority religion in the United States, and that adherents of different faiths are distributed quite unevenly across the nation, so that every faith is a small faith somewhere in the country. Laycock; common knowledge.

l. That in some cases, religious discrimination is joined with and reinforced by racial and ethnic discrimination. Mauck; Stern; reasonable inference from underlying facts plus general knowledge about racism.

m. That in a significant number of communities, it is difficult or impossible to build, buy, or rent space for a new church, whether large or small. Mauck; Laycock; Keetch; *Wall Street Journal*.

n. That the problem is most severe with respect to small faiths, but it is not confined to them, and large, mainstream churches also sometimes encounter land use decisions that appear to have been influenced by hostility to the presence of a church. Presbyterian Study; Laycock; Chopko.

o. That in many cities and towns in America, it is illegal to start a church anywhere in the community without a special use permit or similar discretionary permission from a land use authority. Mauck.

p. That churches are many times more likely to be landmarked than any other kind of property. Laycock (7/14/97), citing New York study.

q. That some communities have land use rules that on their face discriminate against churches. Presbyterian Study; Mauck.

r. That churches are often refused permission to meet in buildings designed for meetings, and in which secular meetings have been permitted. Mauck.

s. That 45% of Americans have "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% have mostly or very unfavorable opinions of "members of religious cults or sects." Gallup Poll.

t. That 30% of Americans would not like to have "religious fundamentalists" as neighbors, and 62% would not like to have "members of minority religious sects or cults" as neighbors. Gallup Poll.

u. That these data on views about "fundamentalists," "cults," and "sects" indicate widespread hostility to persons whose religious beliefs are unusual or significantly more intense than the norm. Laycock; reasonable inference from underlying facts.

v. That citizens sometimes voice explicit hostility to religion in general or the particular religion, and offer this hostility as reason to refuse needed land use permits. Mauck; Stern; McFarland; *Wall Street Journal*.

w. That governmental officials, including land use officials, respond to religious hostility among their constituents as they respond to any view among their constituents, and that some land use officials probably hold such views themselves. Inference about political behavior, within the expertise of Congress.

x. That this hostility can readily influence land use decisions about religious organizations, because of the individualized processes and vague standards. Mauck; Stern; Keetch; Laycock; direct inference from underlying facts.

y. That even in the absence of discrimination, land use regulation has a disproportionate impact on religious organizations, because they are not-for-profit organizations, often operating on limited operational budgets and with little or no capital, and buildings designed for religious use are often difficult or impossible to convert to other uses. Laycock; reasonable inference from common knowledge and from facts found by this Committee in its report on the Religious Liberty and Charitable Donation Protection Act of 1998.

z. That independent of any inference about motives or the nature of the process, the raw numbers show that land use regulation has disparate impact on churches and especially on small faiths and nondenominational churches. Brigham Young Study; Mauck.

aa. That zoning litigation is very expensive, not only because of the cost of litigation, but also because it is often necessary to pay for the land and hold the land throughout the litigation, without knowing whether it will ever be possible to use the land. Mauck; Stern.

bb. That it is difficult to prove discrimination in any one land use proceeding, because the applicable standards are vague, the focus is on the single parcel of land, land use agencies discourage or refuse to hear evidence about other comparable parcels, and the national pattern of discrimination is not readily apparent until large numbers of cases are examined. Mauck; Stern; Keetch; Schaerr; Laycock.

If Congress makes these findings, or several of them, it will have found a pattern of discrimination sufficient to support remedial legislation to enforce the Fourteenth Amendment. It is not necessary to find that every church land use regulation is unconstitutional; no one claims that. It is not necessary for Congress to try all the cases and determine that any particular percentage of church land use regulations is in fact unconstitutional. Rather, *Boerne* says the standard is "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997). Surely the findings outlined above show "reason to believe" that "many" applications of land use regulations to religious organizations "have a significant likelihood" of being unconstitutional.

At another point in the opinion, *Boerne* says that "If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive." *Boerne*, 117 S.Ct. at 2171. The Brigham Young study alone shows disparate impact against small faiths, and John Mauck's data from Chicago and its suburbs show disparate impact against churches in general. The Brigham Young study shows disparate impact in a context where the inference of improper motive is strongest—not in a single statute that might have been enacted for good reasons despite its disparate impact, but in a series of individualized decisions over a large number of cases where other legitimate reasons might be expected to balance out.

These witnesses have not claimed, and it is not necessary for Congress to find, that land use authorities in all these cases deliberately seek to exclude places of worship and consciously do so because of religion. Sometimes that happens, and sometimes there is evidence of it. But that is not the only kind of case, and Congress does not have to find the relative frequency of that kind of case.

I believe that in many of these cases, the effects of bias may be quite unconscious. In individually assessing proposed land uses under vague and subjective standards, it is inevitable that attitudes toward the proposed use will affect judgment. Authorities may assess traffic or aesthetics or character of the neighborhood one way for a public meeting hall and the other way for a church, one way for Episcopalians and a different way for Jehovah's Witnesses. And the authorities may honestly think they are just deciding individual cases on the merits. But if the decisions are individualized and the pattern of results is discriminatory, Congress can find unequal treatment, and thus discrimination, without making any finding about motive.

As I testified in greater detail a year ago, the constitutional standard is whether the law is neutral and generally applicable. Individualized rules are not generally applicable, and rules that result in unequal treatment are neither neutral nor generally applicable. The law does not require religious bigotry or conscious anti-religious motive. The clearest evidence of this point is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the motive part of the opinion drew only two votes. The holding was not based on motive; the holding was that secular conduct received more favorable regulatory treatment than similar religious conduct, and that the laws were therefore not neutral and not generally applicable.

If the Committee finds that the land use process is not neutral and generally applicable, the land use provisions of RLPAs will be a remedy that is proportionate and

congruent to the problem. RLPA provides reasonably objective rules and a discrete range of verifiable reasons for refusing religious land use needs. It puts the burden of persuasion on land use authorities instead of on the religious organizations. These provisions accommodate legitimate reasons for land use regulation while making it much harder to refuse permits for vague reasons that disguise hostility to religion in general or to minority religions or to a particular disliked religion, or which depend on discretionary judgments that may be readily influenced by a general reluctance to permit churches or certain kinds of churches.

RLPA would protect all religions, although the evidence shows that the problem is most severe with respect to newer and smaller religions. This does not make RLPA a disproportionate response, for at least two reasons. First, Congress could not pass a law protecting some religions and not others. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (striking down a law that distinguished religions on the basis of the source of their contributions). The only way for Congress to protect the smallest religions is to protect all religions.

Second, the standard pattern of discrimination laws is to protect against discrimination in a whole category, even though it is rarely the case that every subgroup within a category is discriminated against, and never the case that every subgroup is discriminated against equally. The most severe problem of racial discrimination was against African-Americans. Congress heard much less evidence of discrimination against Asians, and little or no evidence of discrimination against whites. Congress heard much more evidence of discrimination against women than of discrimination against men. There are scores of national origins about which Congress heard no evidence of discrimination. Yet Congress protected all races, both sexes, and all national origins.

The land use provisions of RLPA are drafted on the same principle. If Congress were simply to enact a general provision prohibiting discrimination, it obviously would protect all religions and not just those that have suffered the most discrimination. But a general prohibition on discrimination would be as difficult to enforce as the existing general prohibition in the Free Exercise Clause. RLPA proposes more specific prophylactic rules to make the constitutional rule against discrimination enforceable, but the principal is the same: these rules should protect all religions, and not just those that have suffered the most.

B. The Commerce Clause.

To the extent that Congress can protect church land use under the Commerce Clause, it is not necessary to find discrimination or lack of generally applicable rules. It is necessary only to find an aggregate effect on commerce. The record summarized above is overwhelming that churches are burdened by land use regulation. These burdens necessarily reduce the volume of building and related economic activity by churches, and thus reduce the volume of commerce, whether or not these burdens are discriminatory or imposed under laws that are not neutral and generally applicable.

And certainly many church land use decisions are within reach of the commerce power. Construction of a church is a major economic undertaking. Certainly the construction industry affects interstate commerce, and it is subject to federal regulation in areas such as labor and safety. Construction materials are bought and sold in interstate commerce; construction contractors operate in multiple states; and construction workers often travel across state lines to where the work is.

If the church is denied the right to locate on a new site, the resulting commerce will not happen. If it is generally difficult to get permits for new church construction, there will be fewer new churches, with longer delays before they are built; both the volume and pace of commerce will be reduced.

Remodeling, refurbishing, or rehabilitating a structure for church use affects commerce in the same way as building a new church. These are simply alternate forms of construction, probably smaller in amount on average, but not smaller in every case. The cost of rehabilitating a large structure can easily exceed the cost of building a smaller one.

Rental of a building for church use may be a harder case. There is a risk that courts will hold that rental markets are local and do not necessarily affect interstate commerce. I think such a holding would be in error. There is an interstate market for investment property; investors may own properties in multiple states. Certainly the financing of these properties occurs in interstate commerce, often through federally chartered and federally insured financial institutions, and mortgages are regularly bought and sold in interstate commerce. And all of these transactions are conducted with a view to the income to be earned by renting the property. I find it impossible to say that rental markets do not affect interstate commerce.

But as I said, there is a risk that courts will disagree. The smaller the church and the smaller the property, the greater the risk that a court will say the proposed rental has no effect on interstate commerce. But as we have seen, the smaller the church, the greater the risk of discrimination in the land use process. Findings that land use regulation is not based on generally applicable rules, and that there is substantial discrimination against churches and among churches, will sustain the land use provisions of the bill under section 5 of the Fourteenth Amendment in those cases where there is a litigation risk under the Commerce Clause.

Another set of cases with litigation risk are the cases of small groups meeting in homes for prayer. Some of these cases may be portrayed as involving no construction, no purchase or sale, and no rental. It may appear that the house is already owned as a residence, and that the owner merely invites a minyan of his friends to join him in prayer. This may be how the city characterizes the event when it argues the Commerce Clause issue; of course it will characterize the event very differently in the zoning board, where it may claim that the change in use will have cascading commercial consequences. But regardless of such inconsistencies, courts may hold that the mere use of the property for religious purposes does not affect commerce.

Again, I think that such a holding would be a serious error. Bruce Shoulson will testify that Orthodox Jews simply cannot live in communities that exclude religious meetings from residential neighborhoods. Zoning rules that prohibit such meetings prevent the interstate movement and relocation of citizens, which is clearly a commerce clause concern. I think that Congress can protect religious meetings in residential neighborhoods under the commerce clause. But again, Congress can also find that there is discrimination in many of these cases, and protect religious meetings in residential neighborhoods under its power to enforce the Fourteenth Amendment.

The important point is that by using both the power to regulate commerce and the power to enforce the Fourteenth Amendment, Congress can reach all or nearly all of the church land use cases. The two powers depend on different theories; they require different showings; and one may reach where the other does not.

II. THE COMMERCE CLAUSE SECTIONS OF THE BILL.

I have also been asked to give some examples of things that probably would, and probably would not, be subject to the commerce clause section of the bill.

As I already said, I think that most church land use cases, and certainly church construction cases, will be covered by the commerce clause section of the bill.

Employment is an activity in commerce, subject to broad federal regulation. So, for example, a wrongful discharge suit by a minister should be covered by the commerce clause section of the bill.

Some religious exercise cannot be performed or completed without a prior or subsequent commercial transaction. Personal property used in religious exercise must be purchased, and the purchase is likely to be in the channels of interstate commerce. Regulations that substantially burdened or prevented the use of ritual foods or other ritual items, vestments or other clothing worn for religious purposes, candles, prayerbooks, or any other property used for religious purposes, should be covered by the commerce clause section of the bill. An outright prohibition on using such items obviously prevents the commercial transaction of buying the items; a substantial burden on the use of such items will reduce the volume of burdened religious exercise and reduce economic demand for the items.

A ban on the importation of sacramental wine into a state is excluded from commerce clause protection by the Twenty-First Amendment, but burdensome regulations that permit the wine to be imported and then restrict its use are not excluded. So an attempt to prevent children from receiving First Communion is probably within the commerce clause section of the bill.

Regulations that prevent religious persons from engaging in economic activity should be within the commerce clause section of the bill. For example, if a person cannot carry a driver's license with a photograph, because he believes that the photograph is a forbidden graven image, that person would be effectively excluded from commerce, and the volume of commerce would be reduced accordingly. A person excluded from an occupation by some licensing requirement that violated his religious faith should also be able to bring a claim under the commerce clause section of the bill. Whether any of these claims would be successful of course depends on the respective efforts to show substantial burden and compelling interest.

In general, if it can be said that because of the substantial burden on religious exercise, some economic or commercial transaction will not happen, or that some set of economic or commercial transactions is substantially burdened so that fewer of

the transactions will be completed, the burdensome regulation should be subject to the commerce clause section of the bill.

On the other hand, ritual acts and obligations that do not require or result in commercial or economic transactions will generally fall outside the commerce clause section of the bill. I am reluctant to say categorically that no one can ever prove a commerce clause connection under circumstances I may not be thinking of today. But I can give you some examples where it seems to me unlikely that the commerce clause connection could be shown, at least in the usual case.

It is hard to see how a penitent going to confession affects interstate commerce, because there is no economic exchange and no antecedent or subsequent commercial transaction. Thus, an attempt to violate the secrecy of the confessional would not normally be subject to the commerce clause section of the bill, unless the state's intended use of the confidential communication provided the necessary link to interstate commerce.

The autopsy cases may fall outside the commerce clause section of the bill. It seems obvious that the decedent is no longer engaged in commerce. I do not know enough about the process, and the chemicals and supplies that must be purchased to complete an autopsy, to know whether the medical examiner's activity affects commerce. Unless that can be shown, these cases probably fall outside the commerce clause section of the bill.

Sometimes the effect on commerce may depend on the seriousness of the burden. For example, prayer is not a commercial activity, and a rule that prohibits prayer is probably not within the commerce clause section of the bill. But if the rule excludes an individual from an occupation, as perhaps in the case of an observant Muslim obliged to pray at five specified times each day, that application of the rule might well be within the commerce clause section of the bill.

III. CONCLUSION.

I remain available to answer any other questions that the Committee or its members may have. This is an important bill. In a society that is religiously diverse and pervasively regulated, religious liberty cannot be left to a mere prohibition on laws that are not neutral and generally applicable. Pervasive regulation is too easily used, both intentionally and unintentionally, to burden and suppress religious practices, and especially those that are in any way unfamiliar or unpopular. Congress cannot reach the whole problem with this bill, but it can reach much of the problem, and I urge it to do so promptly.

Mr. CANADY. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Green, you have indicated that a compelling state interest is needed in the legislation. What chance is there of the Supreme Court actually agreeing to that position in light of their expressed hostility in the *Boerne* decision where they quoted, government's ability to enforce generally applicable prohibitions on socially harmful conduct cannot depend on measuring the effects of a government action on a religion's objective spiritual development to make an individual's obligation to obey such law contingent upon the laws coincident with his religious beliefs except where the State's interest is "compelling" contradicts both constitutional tradition and common sense.

With that kind of hostility, what chance do you think that they would accept the compelling interest test?

Mr. GREEN. Well, Congressman Scott, I don't read that statement as the Supreme Court being hostile to the compelling interest standard.

Mr. SCOTT. Say that again.

Mr. GREEN. I do not read *Boerne*—that part of *Boerne*—as the Supreme Court indicating hostility to the application of the compelling interest standard across the board in many areas of civil rights. I think it was made within the context of the problems that the Court saw with the Religious Freedom Restoration Act.

Quite clearly, courts have found that antidiscrimination laws like other important governmental interests, can constitute compelling interests. And I don't think the Court in any way is stepping back from this position or saying that when this body and other bodies enact legislation, that the interests are not sufficiently important, that they cannot be compelling interests, to override some type of constitutionally protected claim.

Mr. SCOTT. Well, they also—another reason underlying their decision was the fact that the RFRA was not at all targeted. If you are going to develop this compelling state interest, you ought to target it where the need is. And they said the RFRA was kind of a shotgun approach and shot at everything, whether it was needed or not.

Is this bill more targeted than RFRA?

Mr. GREEN. Yes, it is. Now, some of Professor Raskin's concerns are well taken. But as Professor Laycock said, that is exactly what we are trying to do by establishing the record by providing testimony of specific instances where there are problems.

Once again, I don't view the Supreme Court as necessarily stepping back from the compelling interest standard when it comes to situations where it is needed as much as in free exercise situations. The Court merely believed that there was not congressional authority to enact RFRA in the way that Congress enacted it.

Mr. SCOTT. If we have the compelling State interest, if some courts have already said that sexual orientation, antidiscrimination does not represent a compelling State interest, how would this bill affect cities' enforcement of their antidiscrimination laws when the religious freedom claims are made?

Mr. GREEN. What this will do, by using the compelling interest standard as it has been used in the past, is allow the claims to be raised and allow the claims to be balanced and litigated. This is not an attempt to stack the deck one way or the other.

Mr. SCOTT. Well, compelling State interest really does stack the deck.

Mr. GREEN. The compelling State interest is a rigorous standard, no doubt. And some people would say that courts have interpreted the compelling State interest too weakly because courts wanted to ensure that important governmental regulations are put in place. But this is a standard that is applied to other types of fundamental rights, too. And as I said and as my written testimony indicates, there are many interests that courts have found to be compelling that fall short of a constitutionally mandated interest.

Consequently, just because in other contexts courts have distinguished between different types of rights does not mean that the interest that this body would have, or any other legislative body, in eradicating discrimination generally would not be considered a compelling interest.

Some of those same courts—and other courts that have dealt with this issue—have clearly ruled that way.

Mr. SCOTT. Well, speak specifically to antidiscrimination involving sexual orientation. If it is not a compelling State interest, what happens under a RLPA claim?

Mr. CANADY. The gentleman's time has expired. The gentleman will have 2 additional minutes.

Mr. SCOTT. Thank you.

Mr. GREEN. Certainly. If the Court finds it is not a compelling interest, then the RLPA claim would likely prevail. That is not necessarily the entire analysis, though. At least in the *Smith* case, the Court found that there was no substantial burden on the religious claimant's claim by virtue of her involvement in the commercial enterprise.

Courts have often looked at the substantial burden side of the equation when it comes to religious claims to see whether there is a sufficient, necessarily constitutionally significant burden.

I don't believe that the passage of RLPA is going to necessity invite any more claims. It certainly is not going to predetermine any particular outcomes. Mr. McFarland testified earlier about whether RLPA would be applied to some of these types of cases. Yes, it may be. You cannot prevent people from raising these claims legitimately. But that does not mean that RLPA is going to predetermine how these cases are going to turn out.

Mr. SCOTT. Well, the State is compelled—is required to show a compelling interest. If they can't show a compelling interest, then the claimant would win.

Mr. GREEN. That is true. And that is the same with other areas of the law, too.

Mr. SCOTT. Professor Laycock, you don't agree with that?

Mr. LAYCOCK. Well, I don't agree with it stated with that level of generality, Mr. Scott. Much depends on context.

I don't know what particular cases you are thinking of. There is a California case that says a gay rights ordinance did not serve a compelling interest where it was being applied to force a church to hire a gay organist who would be participating directly in the liturgy of the church.

There is a D.C. Court of Appeals case that says that gay rights laws are compelling interests in most of their applications to Georgetown University and higher education. I think that in the great bulk of contexts, the gay rights claim is going to prevail, but that in contexts, at the heart of the religious operation, they may not prevail and should not prevail.

I am on record in print as supporting gay rights laws. But I think that this is a deeply felt moral conflict. And the only way to resolve it is to realize that no one in the religious community can enforce their morality on the gay community, and similarly, the gay community cannot enforce its morals at the heart of the religious community.

In the commercial context, the civil rights claim is going to win always or nearly always. Inside the church, the religious liberty claim ought to win. And the disputed turf is precisely the cases like *Mrs. Smith*, cases of that kind that Congress carved out of the Fair Housing Act, with what we call the *Mrs. Murphy* exception for small landlords with only a few units. People disagree about that, and the courts are going to resolve that.

But in large commercial operations and probably in small commercial operations, the gay rights claim is going to win. When it is race or sex rather than sexual orientation, the civil rights claim is always going to win any place except the clergy. Even inside the

church, the churches have most lost race and gender cases except with respect to the clergy.

Mr. SCOTT. Thank you, Mr. Canady.

Mr. CANADY. The gentleman's time has expired.

Mr. Nadler.

Mr. NADLER. Thank you. I want to continue exploring this for a moment with Professor Laycock. So if the church or, rather, if an individual—if the individual or church, for that matter, taking both cases, was the landlord of an apartment building, a 50-unit apartment building and said, I don't want to rent to gay couples, and you had an antidiscrimination ordinance, what prevails, do you think?

Mr. LAYCOCK. My prediction would be that the gay rights ordinance prevails.

Mr. NADLER. Because?

Mr. LAYCOCK. Because a 50-unit building is a commercial operation. And even if it is owned by the church—we have the *Tony Alamo* case, a commercial operation owned by a church. The church thought of it as a mission—the church thought it was providing employment for people who might otherwise be unemployable. But once the courts characterize it as commercial, the religious liberty claim loses; and that has been the experience.

Mr. NADLER. And under the Mrs. Murphy exception in the Civil Rights Act, let's assume that under a local gay rights act there were no such exception, the religious—but the landlord said, my religious belief prevents me from renting to a gay person or a gay couple. If that person owned a two-family house and lived in one section, do you think the religious claim would prevail?

Mr. LAYCOCK. The religious claimant may prevail in some courts some of the time. The religious claimant is going to lose in some courts some of the time. But that category of cases is the one set of cases where we are getting divided results in the State courts.

Mr. NADLER. What about employment cases?

Mr. LAYCOCK. Pardon?

Mr. NADLER. What about employment cases?

Mr. LAYCOCK. I think that there may be a similar area of disputed territory with respect to the employment cases. There is a Ninth Circuit case, *EEOC v. Townley Manufacturing*. The owner of a substantial business said that his business was dedicated to the Lord, it was part of his religious exercise, and he was going to violate Title VIII. He lost that case.

Mr. NADLER. And you would think that would be true with respect to—

Mr. LAYCOCK. To lose that case under RLPA—

Mr. NADLER. But to lose that case under RLPA with respect to a gay rights ordinance, even though the Court has never held sexual orientation to be a suspect class.

Mr. LAYCOCK. That would certainly be my prediction. The cases that will be litigated and might produce conflicting results are the three-man office where he says, I want the other two people I am working with to share my religion because religion is a large part of what we are doing here. We do a lot of pro bono work for religious organizations.

In those very small-scale operations, courts have disagreed about whether this is really more like the church or more like the outside world. But courts have never disagreed that in the outside-world, religiously motivated people have to comply with the civil rights law.

Mr. NADLER. I see. Again, you would not disagree with Mr. Green that the bill does not mandate the outcome, but only the standard that this Congress intends?

Mr. LAYCOCK. That's right. Indeed, precisely because the bill mandates only the standard, I don't think we can say it codifies the result in any particular case, unless that case has been widely accepted, and there have been a lot of similar cases. With respect to these cases about very small operations where the courts disagree, I think it is particularly clear that you are enacting a standard and not codifying a particular result.

Mr. NADLER. And talking about what would happen, there would be speculation?

Mr. LAYCOCK. I am sorry, talking about what would happen with respect to what?

Mr. NADLER. Those very small cases would be speculative?

Mr. LAYCOCK. Yes. I think the cases I think the churches ought to win, and I hope will win under RLPA, were the cases inside the church itself. Who can be a minister, who can be a choir director, who can do the religious work of the church, the churches ought to win those cases. They will certainly win the minister cases. I am not confident that they will win all the cases about other employees in every jurisdiction.

We heard testimony this morning about a religious day care center that was being charged with respect to hiring members of its own faith—not sexual orientation, but religious discrimination. So I am not confident they will always win those cases about non-ministerial employees. But they should win those cases where the employee is doing the work of the church.

The cases where you might get mixed results, at least for a while, are very small operations that can be plausibly characterized as private and as operated in an intensely religious way. You might get mixed results in those cases. But without the factor of smallness and without the factor of operating in an intensely religious way, I think there is no way in the world courts are going to say that civil rights laws don't prevail. And if it is race, the civil rights law will prevail no matter how small the operation.

Mr. NADLER. Thank you. Let me ask you a different question.

Mr. CANADY. The gentleman's time has expired. The gentleman will have 2 additional minutes.

Mr. NADLER. Thank you, Mr. Chairman.

On land use cases, we keep hearing about the zoning cases. I mean, this has been—in effect, all the testimony we have heard on land use, this and other hearings, has been on zoning. How would this affect, say, wetlands or environmental laws?

Mr. LAYCOCK. Well, I think that most environmental laws, emission controls and the like, apply no matter what piece of land you are using. They are not site specific. I don't think they are really land use regulation. They are under the general standard of RFRA

if they are Federal, or if it is State and it affects commerce, it is under the general provisions in section 2.

Site-specific regulation like wetlands is a little different. Again, if it is Federal it is under RFRA anyway. If it is State wetlands regulation, and it is site-specific, it is under the land use section. So then the question would simply be whether the State can show substantial harm to neighboring properties or to health and safety.

If we are talking about a mud puddle, they probably won't be able to show that. If we are talking about a marsh that extends to neighboring properties or flows to neighboring properties and will affect those other properties when it is drained, the State probably can show that.

Mr. NADLER. So you think the major effect, then, would be on the zoning question?

Mr. LAYCOCK. Yes. You know, the problem the land use provisions are trying to solve is local land use regulation as that has traditionally been understood. We don't have a history of religious disputes over wetlands.

Mr. NADLER. And that is zoning that you are talking about?

Mr. LAYCOCK. That is zoning, and in some places landmarking; you may think that is different from zoning or a part of zoning.

Mr. NADLER. Although landmarking in the *St. Bart's* case even under *Sherbert* was upheld, in effect, as compelling State interest, wasn't it?

Mr. LAYCOCK. We had very mixed results in the landmarking cases. There, too, we have evidence that churches suffered either targeting or at least very dramatic disproportionate impact. In New York, churches are 42 times more likely to be landmarked than any other kind of property.

Mr. NADLER. Thank you.

Mr. CANADY. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I had, I guess, somewhat related questions.

Is there any question on the land use in terms of jurisdiction? Are we using the Commerce Clause to get to land use? And is there a substantial nexus?

And, Mr. Green, you wanted to, I think, say something about the Establishment Clause, whether or not in land use cases religion has a leg up which other nonprofit charitable organizations don't have, and whether or not that constitutes an establishment.

Mr. GREEN. So far as the Establishment Clause is concerned, Professor Laycock is correct. Many of the land use problems have been disproportionate to religious institutions, and that is a concern that they have. What RLPA is trying to say that you have to consider the religious interests, vis-a-vis a land use claim, and give the religious interest the same consideration as any other interest considered by the zoning authority. In essence, the religious claim cannot be disregarded just because it is religious or in conflict with some other interest.

Exempting churches from certain provisions of landmarking laws, especially when you are dealing with the edifice itself or the ability of the church to do its ministry, and where you are relieving a landmarking burden on that that church is not giving the church some type of advantage that results in an Establishment Clause

violation. It is removing that burden on the church in order for it to go forward with its ministry.

It also alleviates entanglement concerns that would be present when you have governmental entities making determinations about what types of structures should be built and should not be built. So I do not see that as presenting an Establishment Clause concern.

Mr. LAYCOCK. The other question you asked, Mr. Scott, was, what is the relationship of the land use provisions, first in section 5 of the 14th Amendment and then to the Commerce Clause. I think that over a wide range of applications, either power is sufficient to support the land use provisions.

The section 5 power may reach a little further depending on what findings Congress makes. But certainly the church construction cases can be reached under the Commerce Clause. Congress regulates the construction industry in lots of contexts.

Whether every single church land use dispute—whether renting a storefront, whether a residential prayer group can be reached under the Commerce Clause—I don't know. I talk about some of those difficulties in my written statement for today's hearing. But certainly the location of new churches can be reached under the Commerce Clause.

I think that all of these cases can be reached under section 5 of the 14th Amendment if the Congress believes that land use regulation is not done through neutral and generally applicable laws and that there is substantial disparate impact on churches, or that discretion being exercised in church cases in a more hostile fashion than it has been exercised in cases of secular properties.

Mr. SCOTT. Thank you.

Mr. CANADY. Mr. Nadler, do you have any additional questions?

Mr. NADLER. No. Thank you.

Mr. CANADY. What I would like to do is just ask if any of you have any additional comments you would like to make. You have been very patient in being with us through, not only your own panel, but the first panel of the day.

Mr. Green, let me thank you, Mr. Green, for your perspective on some of these issues. Before you proceed, I will just say that I think that you have highlighted an important factor here; and that is that the compelling interest test is a standard that people are going to have some differing opinions on in different circumstances.

There are some cases where some of us might think that one result would obtain and there would be others who would disagree. And then there are going to be some there in the middle, you know, that everyone would recognize as kind of questionable. But I appreciate the perspective that you gave us on that issue.

Please proceed.

Mr. GREEN. Thank you, Congressman. Professor Laycock is exactly right. It really depends on how close the activity looks like a church or how close it looks like a run-of-the-mill commercial activity. Of course, that is always something that is figured into the formula.

Try to follow up on and respond to Congressman Scott, the focus of analysis when it comes to compelling interests is on the authority of the body to enact the law itself and the vestiges of discrimi-

nation that the legislative authority is attempting to eradicate, not on a stratification of rights or to parse the rights to see whether one particular right carries some type of priority over the others.

The authority rests with Congress and legislative entities to prevent discrimination generally. Also, because courts have looked and have found compelling interests in a host of other areas that have no constitutional mandate themselves, then there would be a finding compelling interest analysis lies here too.

Mr. CANADY. Professor Laycock.

Mr. LAYCOCK. I should have said this earlier when it was more immediately relevant, but just so the record is clear: Professor Raskin said the Civil Rights Act of 1964 already prohibits religious discrimination. I just want to make clear that I assume he is referring to Title VII, which forbids religious discrimination in employment. But Title VI about discrimination in Federal spending programs is confined to race, color, and national origin. There is no existing prohibition on religious discrimination in federally assisted programs. RLPA would provide that for the first time.

Mr. CANADY. Reverend Ivory and Mr. Shoulson, I wanted to particularly thank you for your information and your testimony on the zoning issues. We haven't asked a lot of questions about it. I think the kind of information you have provided will be very helpful to us. It adds to the information that we have previously obtained about the very real problems that exist in the zoning context. I think your contribution is very significant, and we thank you for that.

Mr. NADLER. Mr. Chairman.

Mr. CANADY. Yes, Mr. Nadler.

Mr. NADLER. I would like to ask unanimous consent to ask one additional question despite the fact I yielded it before.

Mr. CANADY. Without objection.

Mr. NADLER. Thank you.

Mr. Green, let me ask you the following question: In your analysis, let us assume that RLPA were on the books, an assumption devoutly to be wished for. Let us assume that RLPA had passed and that you have got a discrimination case by some religious person or institution or whatever as you were talking about before.

You had said that the question is, does the State have a compelling State interest? Does it meet the compelling State interest test obviously? Would the question be, does the State have a compelling State interest in eradicating discrimination? Or would it be a separate determination as to whether the compelling—it has a compelling State interest in eradicating discrimination in housing, in employment, and, you know, different areas as opposed to discrimination in general?

Mr. GREEN. The State has compelling interest in eradicating discrimination in all of those general categories. But the State also has a compelling interest to ensure that discrimination is eradicated generally. Discrimination takes many forms, of course, but it also has common attributes. All forms involve the stereotyping of individuals according to certain traits, and discrimination affects commerce. It affects the ability of people to achieve self-fulfillment. These are all traits and concerns that are common to all forms of discrimination. And Congress and States and locales certainly have

a compelling interest in attempting to eradicate all of those concerns. And this is why courts have held in these cases is that they are not going to start dividing up and parsing out, that interest by looking at the rights concerned; rather, they are going to look at the overall authority of the State to enact the law and the overall interest in eradicating discrimination. Thus, the relevant focus for determining compelling interest is the authority of the State to enact laws to eradicate discrimination generally.

Mr. NADLER. Thank you.

Mr. CANADY. I want to thank you again for participating in our hearing today. Your contribution has been valuable. This will conclude the hearing, and the subcommittee does stand adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]