

RELIGIOUS LIBERTY PROTECTION ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1691

MAY 12, 1999

Serial No. 73

Legislative Office
MAIN LIBRARY
U.S. Dept. of Justice



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 2000

62-491

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin	JOHN CONYERS, JR., Michigan
BILL McCOLLUM, Florida	BARNEY FRANK, Massachusetts
GEORGE W. GEKAS, Pennsylvania	HOWARD L. BERMAN, California
HOWARD COBLE, North Carolina	RICK BOUCHER, Virginia
LAMAR S. SMITH, Texas	JERROLD NADLER, New York
ELTON GALLEGLY, California	ROBERT C. SCOTT, Virginia
CHARLES T. CANADY, Florida	MELVIN L. WATT, North Carolina
BOB GOODLATTE, Virginia	ZOE LOFGREN, California
ED BRYANT, Tennessee	SHEILA JACKSON LEE, Texas
STEVE CHABOT, Ohio	MAXINE WATERS, California
BOB BARR, Georgia	MARTIN T. MEEHAN, Massachusetts
WILLIAM L. JENKINS, Tennessee	WILLIAM D. DELAHUNT, Massachusetts
ASA HUTCHINSON, Arkansas	ROBERT WEXLER, Florida
EDWARD A. PEASE, Indiana	STEVEN R. ROTHMAN, New Jersey
CHRIS CANNON, Utah	TAMMY BALDWIN, Wisconsin
JAMES E. ROGAN, California	ANTHONY D. WEINER, New York
LINDSEY O. GRAHAM, South Carolina	
MARY BONO, California	
SPENCER BACHUS, Alabama	
JOE SCARBOROUGH, Florida	

THOMAS E. MOONEY, SR., *General Counsel-Chief of Staff*
JULIAN EPSTEIN, *Minority Chief Counsel and Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION

CHARLES T. CANADY, Florida, *Chairman*

HENRY J. HYDE, Illinois	MELVIN L. WATT, North Carolina
ASA HUTCHINSON, Arkansas	MAXINE WATERS, California
SPENCER BACHUS, Alabama	BARNEY FRANK, Massachusetts
BOB GOODLATTE, Virginia	JOHN CONYERS, JR., Michigan
BOB BARR, Georgia	JERROLD NADLER, New York
WILLIAM L. JENKINS, Tennessee	
LINDSEY O. GRAHAM, South Carolina	

CATHLEEN CLEAVER, *Chief Counsel*
BRADLEY S. CLANTON, *Counsel*
JONATHAN A. VOGEL, *Counsel*
PAUL B. TAYLOR, *Counsel*

CONTENTS

HEARING DATE

May 12, 1999	Page 1
--------------------	-----------

TEXT OF BILL

H.R. 1691	2
-----------------	---

OPENING STATEMENT

Canady, Hon. Charles, a Representative in Congress from the State of Florida, chairman, Subcommittee on the Constitution	1
--	---

WITNESSES

Anders, Christopher E., Legislative Counsel, American Civil Liberties Union ..	81
Feldblum, Chai, Professor of Law and Director, Federal Legislation Clinic, Georgetown University Law Center	96
Hamilton, Marci, Professor of Law, Benjamin N. Cardozo School of Law	145
Hodges, Clarence E., Vice President, Seventh Day Adventist Church of North America	78
Jacob, Bradley, Provost and Dean of the College, Patrick Henry College	135
Keetch, Von G., Counsel, The Church of Jesus Christ of Latter-Day Saints	22
Land, Richard, President, Ethics and Religious Liberty Commission of the Southern Baptist Convention	6
Laycock, Douglas, Associate Dean for Research, University of Texas Law School	100
Malloy, Reverend C.J., Jr., First Baptist Church of Georgetown	134
McFarland, Steven T., Director, Center for Law and Religious Freedom, Christian Legal Society	151
Sager, Lawrence G., Robert B. McKay Professor of Law, New York University School of Law	10
Saperstein, Rabbi David, Director and Counsel, Religious Action Center of Reform Judaism	91
Thomas, Oliver S., Special Counsel for Religious and Civil Liberties, National Council of Churches	130
Walker, J. Brent, General Counsel, Baptist Joint Committee on Public Affairs	54

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Anders, Christopher E., Legislative Counsel, American Civil Liberties Union: Prepared statement	82
Eisgruber, Christopher L., Professor of Law: Letter to Hon. Canady dated May 17, 1999	74
Farris, Michael P.: Prepared statement	137
Feldblum, Chai, Professor of Law and Director, Federal Legislation Clinic, Georgetown University Law Center: Prepared statement	98
Hamilton, Marci, Professor of Law, Benjamin N. Cardozo School of Law: Prepared statement	147
Hodges, Clarence E., Vice President, Seventh Day Adventist Church of North America: Prepared statement	79
Keetch, Von G., Counsel, The Church of Jesus Christ of Latter-Day Saints: Prepared statement	24

IV

	Page
Land, Richard, President, Ethics and Religious Liberty Commission of the Southern Baptist Convention: Prepared statement	8
Laycock, Douglas, Associate Dean for Research, University of Texas Law School: Prepared statement	104
Malloy, Reverend C.J., Jr., First Baptist Church of Georgetown: Prepared statement	135
McFarland, Steven T., Director, Center for Law and Religious Freedom, Christian Legal Society: Prepared statement	152
Nadler, Hon. Jerrold, a Representative in Congress from the State of New York: Prepared statement	71
Sager, Lawrence G., Robert B. McKay Professor of Law, New York University School of Law: Prepared statement	13
Letter to Hon. Canady dated May 17, 1999	74
Saperstein, Rabbi David, Director and Counsel, Religious Action Center of Reform Judaism: Prepared statement	93
Thomas, Oliver S., Special Counsel for Religious and Civil Liberties, National Council of Churches: Prepared statement	132
Walker, J. Brent, General Counsel, Baptist Joint Committee on Public Affairs: Prepared statement	56

RELIGIOUS LIBERTY PROTECTION ACT OF 1999

WEDNESDAY, MAY 12, 1999

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

The subcommittee met, pursuant to notice, at 1:10 p.m., in Room 2226, Rayburn House Office Building, Hon. Charles Canady [chairman of the subcommittee] presiding.

Present: Representatives Charles Canady, Asa Hutchinson, Bob Barr, Melvin L. Watt, Barney Frank, Lindsey O. Graham, and Jerrold Nadler.

Staff present: Cathleen Cleaver, Chief Counsel, Subcommittee on the Constitution; Bradley S. Clanton, Counsel, Subcommittee on the Constitution; Susana Gutierrez, Clerk, Subcommittee on the Constitution; Anthony Foxx, Minority Counsel, Subcommittee on the Constitution, and David Lachmann, Minority Counsel, Committee on the Judiciary.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY [presiding]. The Subcommittee on the Constitution convenes today to consider the Religious Liberty Protection Act, which is a bipartisan bill that protects the free exercise of religion against burdensome State and local laws and regulations by putting them to the most rigorous legal test.

The Religious Liberty Protection Act will help people, like the adult children in New York who have been prevented by health regulations from volunteering to care for their elderly parents in government-run nursing homes despite the fact that their desired service was to fulfill their Fifth Commandment obligation to honor one's father and mother. They have been forced to choose between practicing their faith and obeying the restrictive regulations of the law. Sadly, their case is just one of a growing number of instances in which the religious freedom of Americans is not respected.

I will mention two other examples which illustrate the nature of the problem. In recent years, Catholic churches have had to go to court to protect the right of prisoners to practice the sacrament of confession without fear of their confidential testimony being turned over to police. And churches in Chicago with permits pending for commercial buildings have found the land under the building reclassified as a manufacturing zone by aldermen who wanted to keep them out of the neighborhood.

Traditionally, the courts protected this type of free exercise from far-reaching government intrusion, but in 1990, the Supreme Court jeopardized the religious practices of people of all faiths by ruling that only intentional violations of free exercise were of constitutional concern.

As we know, Congress responded to that decision of the Supreme Court by passing in 1993 the Religious Freedom Restoration Act, also known as RFRA, but in 1997, the Supreme Court dealt its second blow to religious liberty by ruling that the Religious Freedom Restoration Act could not be applied against State or local law on the grounds that the statute exceeded the constitutional authority of the Congress.

I believe that it is time for Congress to once more act to protect religious liberty. H.R. 1691 addresses this serious situation by restoring the general rule that State or local officials may not substantially burden religious exercise without demonstrating a compelling interest in doing so. Where a religious activity or—excuse me, where a religious activity affects interstate commerce, the religious activity will be protected by the bill as will the religious exercise of participants in State or local programs receiving Federal financial assistance.

H.R. 1691 will also protect religious gatherings and institutions against unjustified actions by zoning boards and includes procedural help for religiously motivated people so that they will have their day in court if they can show their religious freedom has suffered at the hands of State or local government.

Americans deserve to have their religious beliefs and practices respected and protected. Religious freedom is too important to be trampled by the unthinking and insensitive actions of bureaucracy or as a consequence of bad public policy. That is why we are here today, and I want to thank all the witnesses that we are going to hear from for being here. We have a long list of witnesses, but this is an important issue that deserves serious consideration and reflection in the committee process, so I want to express my gratitude to all of the members of the three panels we will be hearing from for their assistance to the subcommittee in this important legislative undertaking.

[The bill, H.R. 1691, follows:]

106TH CONGRESS
1ST SESSION

H. R. 1691

To protect religious liberty.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1999

Mr. CANADY of Florida (for himself, Mr. EDWARDS, Mr. HYDE, Mr. WEINER, Mr. SENBRENNER, Mr. HUTCHINSON, Mr. GREEN of Texas, Mr. SMITH of Texas, Mr. ROGAN, Mr. PETERSON of Minnesota, and Mr. CANNON) 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 1999”.

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 any case in which the substantial burden on the person’s religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with 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) **REMEDIES OF THE UNITED STATES.**—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. However, nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or the United States or any agency, officer, or employee thereof under other law, including section 4(d) of this Act, to institute or intervene in any action or proceeding.

SEC. 3. ENFORCEMENT OF CONSTITUTIONAL RIGHTS.

(a) **PROCEDURE.**—If a claimant produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of a provision of this Act enforcing that clause, the government shall bear the burden of persuasion on any element of the claim; however, the claimant shall bear the burden of persuasion on whether the challenged government practice, law, or regulation burdens or substantially burdens the claimant’s exercise of religion.

(b) **LAND USE REGULATION.**—

(1) **LIMITATION ON LAND USE REGULATION.**—

(A) Where, in applying or implementing any land use regulation or exemption, or system of land use regulations or exemptions, a government has the authority to make individualized assessments of the proposed uses to which real property would be put, the government may not impose a substantial burden on a person’s religious exercise, unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

(B) No government shall impose or implement a land use regulation in a manner that does not treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions.

(C) No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(D) No government with zoning authority shall unreasonably exclude from the jurisdiction over which it has authority, or unreasonably limit within that jurisdiction, assemblies or institutions principally devoted to religious exercise.

(2) **FULL FAITH AND CREDIT.**—Adjudication of a claim of a violation of the Free Exercise Clause or 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.

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) **AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.**—The United States may sue for injunctive or declaratory relief to enforce compliance with this Act.

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 restricting or burdening 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) **GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.**—A government may avoid the preemptive force of any provision of this Act by changing the policy that results in the substantial burden on religious exercise, by retaining the policy and exempting the burdened religious exercise, by providing exemptions from the policy for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) **EFFECT ON OTHER LAW.**—In a claim under section 2(a)(2) of this Act, proof that a substantial burden on a person's religious exercise, or removal of that burden, affects or would affect commerce, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any other law.

(g) **BROAD CONSTRUCTION.**—This Act should be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution.

(h) **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 “conduct that constitutes the exercise of religion under the first amendment to the Con-

stitution; however, such conduct need not be compelled by, or central to, a system of religious belief; the use, building, or converting of real property for religious exercise shall itself be considered religious exercise of the person or entities that use or intend to use the property for religious exercise.”.

(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 conduct that constitutes the exercise of religion under the first amendment to the Constitution; however, such conduct need not be compelled by, or central to, a system of religious belief; the use, building, or converting of real property for religious exercise shall itself be considered religious exercise of the person or entities that use or intend to use the property for religious exercise;

(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;

(3) the term “land use regulation” means a law or decision by a government that limits or restricts a private person’s uses or development of land, or of structures affixed to land, where the law or decision applies to one or more particular parcels of land or to land within one or more designated geographical zones, and where the private person has an ownership, leasehold, easement, servitude, or other property interest in the regulated land, or a contract or option to acquire such an interest;

(4) 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);

(5) the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion; and

(6) the term “government”—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, subdivision, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 3(a) and 5, includes the United States, a branch, department, agency, instrumentality or official of the United States, and any person acting under color of Federal law.



Mr. CANADY Mr. Graham is recognized if you would like to make any comments.

Mr. GRAHAM. Thank you, Mr. Chairman. Let us proceed on. I waive any right I would have to speak.

Mr. CANADY. Okay, thank you. Mr. Watt.

Mr. WATT. I pass.

Mr. CANADY. Oh, okay. Thank you, Mr. Watt.

We will now proceed to our first panel which has been patiently waiting, and, as I indicated, will be the first of three panels of the afternoon. Our first speaker this afternoon will be Dr. Richard Land of the Southern Baptist Convention. Dr. Land is president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, and he is also an ordained Baptist minister.

Following Dr. Land, will be Professor Lawrence G. Sager. Professor Sager is the Robert B. McKay professor of law at the New York University. Professor Sager has litigated before a number of State

and Federal tribunals and has appeared before the United States Supreme Court.

Our next witness on this panel will be Von G. Keetch, counsel to the Church of Jesus Christ of Latter-Day Saints. Mr. Keetch has clerked on the United States Supreme Court for Chief Justice Warren Berger and Associate Justice Scalia. His present practice includes the first amendment and church law.

Our final speaker on this first panel will be J. Brent Walker of the Baptist Joint Committee. Mr. Walker is general counsel of the Baptist Joint Committee on Public Affairs. Mr. Walker is an adjunct professor of law at the Georgetown University Law Center where he teaches an advanced seminar in church State law. Additionally, Mr. Walker is an ordained Baptist minister.

I want to thank all of you for being here, and we will recognize Dr. Land to begin. As you know, we have the 5 minute rule, and so I will encourage you to do everything you can to confine your spoken comments to the 5 minutes allotted. Of course, without objection, your full written statements will be made a part of the permanent record. We don't strictly enforce the 5-minute rule against witnesses, but I would encourage you to do your best, because we do have a very long afternoon ahead of us, and with the interruptions that we may get from votes and so on, we are going to be—we need to move as expeditiously as possible.

Dr. Land.

STATEMENT OF RICHARD LAND, PRESIDENT, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION

Mr. LAND. Thank you for the opportunity to testify on this issue of critical important to all of us who cherish religious liberty. As president of the Ethics and Religious Liberty Commission, I am frequently in the position to hear from people across the America about their religious concerns. These individuals are not legal scholars. They do not spend their spare moments perusing legal opinions published by our judicial system. They are not familiar with the meaning behind legal terms. They do not talk about strict scrutiny or compelling interests or a least restrictive means. But despite their unfamiliarity with the nuances of specialized areas of the law, they sense that something is fundamentally wrong with the status of religious liberty in our country particularly when it clashes with the secular interests of government.

As government's pervasive influence increases, so does the concern of millions of Americans who sense that their fundamental right to the free exercise of religion is being made subordinate to the current whims of fancy of those who control the power levers of government. Their feelings are neatly summed up, I believe, by the comments that Professor Douglas Laycock of the University of Texas Law School, who is going to be testifying later today, said to me—he summed it up this way, "It seems that at the local and State level now, the motto is render unto Caesar that which he asks and render unto God whatever is leftover."

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.

The Religious Freedom Restoration Act was a courageous attempt to rectify an egregious decision by the U.S. Supreme Court in the *Smith* case. The *Smith* decision was the worst religious liberty decision handed down by the Supreme Court in my lifetime, and I am 52 years old. Given the fact that the Court's decision strikes down attempts by the Congress, through RFRA, to rectify the Court's significant restriction of religious liberty in *Smith*, the *Boerne* decision has now dethroned *Smith* as the worst religious liberty decision in my lifetime.

As Justice O'Connor says in her eloquent dissent, the first amendment Free Exercise Clause, and I quote, "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." And Justice O'Connor continues, "Before *Smith*, our Free Exercise cases were generally in keeping with this idea. For a law substantially burdened religiously motivated conduct, we require 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," she concluded, and then she added, "The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more 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 straight-forward and trenchant prose, although I think Justice Blackman may have in his own dissenting opinion when he said, "The distorted view of our precedence leads the majority to conclude that the strict scrutiny of a State law burdening the free exercise religion is a luxury that a well-ordered society cannot afford and that the repression of minority religions is an unavoidable consequence of Democratic government." Justice Blackman responded, "I do not believe the Founders thought their dearly bought freedom from religious persecution a luxury but an essential element of liberty, and they could not have thought religious intolerance unavoidable for they drafted the religion clauses precisely in order to avoid that intolerance."

Our free exercise rights as American citizens, I believe, are in peril. The first amendment's Free Exercise Clause is there to protect all people's religious liberty particularly those who are in a minority or in a vulnerable position. As U.S. Solicitor General Walter Dellinger told this court during oral arguments, minority religious groups will be discriminated against pervasively and consistently without RFRA protection.

As a result of the *Smith* decision, the free exercise of religion must defer to the interest of the government where any "rational basis" is shown. The practical effect of this is that there is barely any constitutional safeguard against governmental interference in the free exercise of religion.

RFRA was based upon the simple premise that Congress had every right to afford religious liberty greater protection than what the Constitution provides as interpreted by this Supreme Court. If the Supreme Court had reviewed it properly, it simply would have asked itself whether RFRA was constitutional. In other words, it would have asked itself whether RFRA was in any contrary to the first amendment's provisions on religion? Had they asked themselves the proper question, they would have reached an entirely different result than they reached in the *Boerne* case.

The Supreme Court incorrectly focused on the issue of who's right it is to interpret the Constitution. From the Supreme Court's perspective, it was turf war. It is important to note, this is genuinely not an issue of who may interpret the Constitution. The real issue is whether or not it is constitutional for Congress to give greater protection to religious liberty than is provided for in the Constitution as interpreted by this Supreme Court.

The *Boerne* decision was wrong. In effect, Bishop Flores argued that a church has inviolate first amendment religious protections that cannot be abrogated by the whims and dictates of a municipal government's historic preservation desires. In other words, you can't treat a church or a mosque or a synagogue the same way you treat a bowling alley or a used car dealership. This Supreme Court, despite eloquent dissent from Justices O'Connor and Blackman, said "Yes, you can." This is outrageous, and it is dangerous, and I encourage the Congress to continue forward with at least a partial answer in the Religious Liberty Protection Act. It is a good faith and magnanimous effort at legislation which conforms to the ruling in *Boerne*.

I am convinced that one of the greatest threats that we face as Americans is the suppression and the restriction of our free exercise rights in the area of religious conviction in the United States, and I believe that H.R. 1691 is a very significant and important first step to rectify that danger and abuse by local and State government.

[The prepared statement of Mr. Land follows:]

PREPARED STATEMENT OF RICHARD LAND, PRESIDENT, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION

Thank you for the opportunity to testify on this issue of critical importance to all who cherish religious liberty. As president of the Ethics & Religious Liberty Commission of the Southern Baptist Convention, I am frequently in a position to hear from people across America about their religious liberty concerns. These individuals are not legal scholars. They do not spend their spare moments perusing legal opinions published by our judicial system. They are not familiar with the meaning behind technical legal terms. They do not talk about "strict scrutiny" or "compelling interests" or "least restrictive means." Yet, despite their unfamiliarity with the nuances of a specialized area of the law, they sense that something is fundamentally wrong with the status of religious liberty in our country, particularly when it clashes with the secular interests of government. As government's pervasive influence increases, so does the concern of millions of Americans who sense that their fundamental right to the free exercise of religion is being made subordinate to the current whims of fancy of those who control the powers of government.

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. The Religious Freedom Restoration Act (RFRA) was a courageous attempt to rectify an egregious decision by the U. S. Supreme Court in *Employment Division*,

Department of Human Resources of Oregon v. Smith (1990). The *Smith* decision was the worst religious liberty decision handed down by the Supreme Court in my lifetime. Given the fact that the court's decision strikes down attempts by the Congress (through RFRA) to rectify the court's significant restriction of religious liberty in *Smith*, the *Boerne* decision has now dethroned *Smith* as the worst religious, liberty decision in my lifetime (51 years).

As Justice O'Connor says in her eloquent dissent, 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 casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more 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 and trenchant prose. The Supreme Court dealt an extremely damaging blow to free-exercise, religious-liberty rights in *Smith*. When the Congress rectified the Supreme Court's terrible mistake, the Supreme Court surveyed the situation and, having painted the American people into a religious liberty corner in *Smith*, promptly applied a second coat of paint in striking down RFRA in the *Boerne* decision.

Our free-exercise rights as American citizens are in peril. The First Amendment's Free-exercise Clause is there to protect all people's religious liberty, particularly those in a minority or vulnerable position. As U. S. Solicitor General Walter Dellinger told this court during oral arguments, minority religious groups will be discriminated against pervasively and consistently without RFRA protection.

As a result of the *Smith* decision in 1990, the free exercise of religion must defer to the interests of the government where any "rational basis" is shown. The practical effect of this is that there is barely any constitutional safeguard against government interference in the free exercise of religion. As the members of this committee are well aware, RFRA passed through Congress and was signed into law with strong bipartisan support. RFRA was based upon the simple premise that Congress had every right to afford religious liberty greater protection than what the Constitution provides, as interpreted by this Supreme Court. If the Supreme Court had reviewed RFRA properly, it would simply have asked itself whether RFRA was constitutional. In other words, it would have asked itself whether RFRA was in any way contrary to the First Amendment's provisions on religion. Had they asked themselves the proper question, they would have reached an entirely different result than they did reach in the *Boerne* case. The Supreme Court incorrectly focused on the issue of whose right it is to *interpret* the Constitution. From the Supreme Court's perspective, it was a turf war. However, it is important to note, that this is genuinely not an issue of who may interpret the Constitution. The real issue is whether or not it is constitutional for Congress to give greater protection to religious liberty than is provided for in the Constitution, as interpreted by this Supreme Court.

The *Boerne* decision was wrong. In effect, Bishop Flores argued that a church has inviolate First Amendment religious protections that cannot be abrogated by the whims and dictates of a municipal government's historic preservation desires. In other words, you cannot treat a church or a mosque or a synagogue the same way you treat a bowling alley or a used car dealership. This Supreme Court, despite eloquent dissent from Justice O'Connor, said, "Yes, you can." That is outrageous and dangerous.

Congress must respond. The Religious Liberty Protection Act (RLPA) is a good faith and magnanimous effort at legislation which conforms to the ruling in *Boerne*. RLPA is an attempt to give religious liberty the greatest protection possible, given the framework within which the Supreme Court has given to make that happen. For some, RLPA is more controversial than RFRA because of its use of the "commerce" and "spending" clauses to extend greater protection to religious liberty. Let

me be clear, that while I may be sympathetic to the concerns of those who object to this legislation on the grounds of anti-federalism, I think that their concerns are misguided in this instance. The purpose of this legislation is not to empower the federal government. The purpose of this legislation is to restrain the use of power of *any* government which interferes with religious liberty. Admittedly, the act invokes the power of the federal government to extend this protection. However, this is no less true when speaking of invoking the powers of the federal government on the basis of the First Amendment. In other words, we should be less concerned about where the federal government finds its authority to act, than we are concerned with what will result if the federal government fails to act. We believe that the anti-federalist argument is not only misguided, but it also places a higher value upon governmental process than it does upon religious liberty. Greater weight must be given to the precious value of religious liberty than to the value of strictly adhering to a political theory to which no one is bound.

I will not attempt to review RLPA. Others will be doing that. I want to close my testimony by again emphasizing how important it is that Congress do everything within its power to respond to the U. S. Supreme Court's decision in *Boerne*. Let me be even more blunt than I have been to this point, and state that I believe that the *Boerne* decision is one of the worst decisions rendered by the Supreme Court in its long history. It is consistent with a pattern on the part of this Court to restructure the basic values of our society in a manner consistent with its own set of values and not those prescribed by the Constitution to which it should be bound. The people I talk to are increasingly aware, and increasingly concerned about, the scope and power of a court which is barely accountable to "the people." There is a growing sense of frustration over the feeling of powerlessness to respond to a court which is supposed to understand that it is covenant bound to protect the original meaning of the original parties to the Constitution of the United States. Failure to respond is to concede to the Supreme Court that any legislation which this Congress passes must not only be consistent with the Court's interpretation of the Constitution, but must also be consistent with the Court's own narrow way of protecting the liberties secured by the Bill of Rights.

*The Ethics & Religious Liberty Commission is the public policy and religious liberty agency for the Southern Baptist Convention. The Southern Baptist Convention is the nation's largest non-Catholic denomination, with over 40,000 local churches and 15.9 million members. Dr. Richard D. Land has served as the president of the agency since 1988.

Mr. CANADY. Thank you, Dr. Land.
Professor Sager.

**STATEMENT OF LAWRENCE G. SAGER, ROBERT B. MCKAY
PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW**

Mr. SAGER. Thank you, Mr. Chairman and members of the subcommittee. My written testimony, today, is submitted not just on my own behalf of my colleague and co-author Professor Christopher Eisgruber, and the remarks I will make today I think that reflect that, but any mistakes I make aren't attributed to him, I suppose.

I want to say at the outset, in light of the position that I plan to take about H.R. 1691, that Professor Eisgruber and I regard religious liberty as a core value of the Constitution of the highest order and have spent a significant segment of our careers addressing and defending that liberty. In addition, Congress clearly has a crucial role to play in protecting religious liberty; the Court could not do without Congress' steady assistance in this area, and, finally, the Congress, in general, has done a nuance, vigilant, and superb job as the partner of the Court.

I say all of this because I regard RFRA to have been a serious mistake by Congress and RLPA to be, in anything, worse. RLPA is unnecessary, unwise, and unconstitutional. In our written remarks, we defend that—those strong statements by addressing Es-

tablishment Cause issues, Enumerated Powers or federalism issues, and, finally, Separation of Powers issues.

But in the brief time I have to speak to you today, I plan to just single out two propositions and emphasize them. The first is that RLPA undermines rather than protects religious liberty—and I am using RLPA to refer to the Religious Liberty Protection Act. And the second is, I would like to focus the subcommittee's attention particularly on section 3(b)(1)(a), the most robust of the land use protections in the act, because that provision, we believe, is particularly unwise and flatly inconsistent in light of the Supreme Court's decision in the *Flores* case.

So, to begin with, I would like the subcommittee to consider three groups of people; two sets of parents, first. Each of set of parents wish to educate their child at home or, perhaps, to send their child to public school but to exempt that child from sex education. That is one pair; a group of two sets of parents who have this view. The second is two charitable groups who wish to enlarge their non-residential facility in a residential neighborhood and feed the homeless and house the homeless in a shelter facility but find themselves blocked by zoning laws. And, finally, two landlords, each of which wishes to refuse occupancy to tenants on the basis of their sexual relationship which they find—they, the landlord, find repellent.

Now, these are not easy questions about the clash of personal liberty and public policy, and I don't mean to suggest that they are, and they are not necessarily questions that ought to come out the same way. We may very well discriminate among these cases. But what I want to emphasize is the core vice of RLPA is that RLPA makes the opportunity of these two sets of parents, these two charitable groups, or these two landlords turn on the deep structure of their moral commitments. If one set of parents is recognizably religious and the other set of parents merely have strong moral views about how children should be raised in America, RLPA gives the religiously-motivated parents almost certain assurance to be able to home school their children or very strong arguments to exempt their children from sex education. But the non-religiously-motivated parents, the parents whose sole concern is the sound raising of their children and the moral commitment to that raising, they have no benefits from RLPA. They are at a loss under this provision.

So, too, the two charitable groups. If there is a church group which wishes to add a third story to a facility of an extant church facility in a residential neighborhood under RLPA, wishes to have a homeless shelter and a food kitchen in that neighborhood in contravention of local zoning laws, it is given a presumptive right to do so under RLPA, but if it is merely a group which has spent 25 years deeply committed to the plight of the homeless and the hungry in their community, that group has no claim under RLPA. The church group could be experimenting for the first time with one aspect of its commitment to good works. It could be a flyer for the church group. The non-church group could be fulfilling 40 years of commitment to its community of feeding and housing the homeless and the hungry, and, nevertheless, have no such opportunity.

Likewise, the two landlords. Mere repulsion isn't enough; mere deep moral repulsion isn't enough. It is recognizably religious motivation that signifies.

Now, if there is one value that is at the absolute core of religious liberty in the United States, it is this: one's deep, personal, and abiding moral commitments ought not—and beliefs—ought not be the basis of strong advantage or disadvantage. My complaint about RLPA is not that it extends liberty; it is that it extends liberty selectively and makes recognizable religious motivation a talisman of advantage. That is a flat contradiction of religious liberty at its essence, and the Supreme Court would say so pursuant to the Establishment Clause of the first amendment.

Now, as to the second point that I wish to make which concerns the particular provision of section 3(b)(1)(a) of RLPA, which is the most robust of the land use provisions, I want to go back to the church in a residential neighborhood. This church wants to add a floor or two to an extant building. It wishes to house the homeless, and it wishes to feed the hungry, and it finds that some aspect of its desires are blocked by residential zoning restraints on the height of building, on the persons in attendance, on the residential versus non-residential activities that take place. RLPA, in section 3(b)(1)(a) gives that church group an almost irrebuttable presumption of liberty to disregard local zoning procedures. It is a remarkable intrusion by the United States Congress on local zoning autonomy. It federalizes every land use controversy between a church and a municipality literally making a Federal case out of it, and it does so in terms that don't involve the centrality of this to the religious group's activities; does not seriously question whether the church group has other places and other ways in which to facilitate its strong commitment to good works. Without any other justification than the fact that this associates with a religious group's general motivation to do good works in society, RLPA creates an almost irresistible presumption that local zoning ordinances must yield, whatever the circumstances, however minor the religious impulse. RLPA specifically pulls back from any test of centrality or any test of religious compulsion and does so particularly in the context of land use in section 8 of the act.

Now, this is not only unwarranted by the first amendment of the Constitution, this free pass from the local zoning ordinances. It is, I believe, flatly and correctly and unconstitutional under the *Flores* decision. This is exactly what the *Flores* court was objecting to when it objected to the lack of proportionality in RFRA. Clearly, churches should be protected against discriminatory, insensitive, and hostile land use decisions, but the radical presumption of section 3(b)(1)(a), as the distinguished chairman of this committee said, by applying the strongest legal test the Constitution knows, the compelling State interest test, that is out of all proportion and congruence to the underlying concern with protecting religious groups against hostility, insensitivity or discrimination. That is exactly what the court objected to in *Flores*, and 3(b)(1)(a) portrays exactly that vice and does so, perhaps, even more pointedly than RFRA because of section a's insistence that centrality or religious commandment is not—or compulsion is not at stake. These are two instances of the strong feelings that Professor Eisgruber—and ar-

guments I hope that Professor Eisgruber and I bring to bear on this act.

I want to close by emphasizing that this subcommittee is part of the United States Congress which has consistently and vigilantly protected religious liberty by individual nuance acts, and I wish this committee and this body would return to that role and abandon the mistake of RFRA and abandon RLPA.

[The prepared statement of Mr. Sager follows:]

PREPARED STATEMENT OF LAWRENCE G. SAGER, ROBERT B. MCKAY PROFESSOR OF LAW, 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 the "Religious Liberty Protection Act" (H.R.1691) (hereafter, "RLPA").

RLPA is a response to the Supreme Court's decision in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). There, the Supreme Court held that the Religious Freedom Restoration Act ("RFRA"), was unconstitutional, at least as applied to the conduct of state and local governmental entities.¹ RLPA tries to replicate many of the results that RFRA would have secured; indeed, RLPA is in some key respects more sweeping than RFRA. We think that RLPA is unnecessary, unwise, and unconstitutional—indeed, in some respects, we think it is more blatantly unconstitutional than was RFRA. We strongly encourage the Members of the House of Representatives to abandon RLPA, and return to more conventional, efficacious and constitutional means of protecting religious liberty.

I. CONGRESS, RELIGIOUS LIBERTY AND THE MISTAKEN TURN TO RFRA AND RLPA.

Religious liberty is a constitutional value of the highest order. Many of the members of the generation that founded the Constitution were deeply aware of the vulnerability of religious believers to persecution and denigration targeted at the very fact of their belief and its nonconformity with other more widely-held beliefs. Today, the threat of religious persecution is far less great; in general, public officials in the United States are sensitive to religious interests, and they often make attractive and successful efforts to accommodate the needs of religious persons and practices. But in one sense, the need for vigilance in protecting members of our political community from thoughtless, insensitive or discriminatory behavior with regard to their deep religious commitments has grown: In the United States today, there is a vast range of spiritual and moral commitment. Some of these commitments are widely-shared and broadly familiar; but others are less widely-shared, somewhat exotic or even personally idiosyncratic.

Congress has played a commendable role in protecting these more vulnerable commitments. 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 make it possible for members of the Native American Church to use Peyote as part of their sacrament of worship (see 42 U.S.C. § 1996). In each of these cases, Congress had reason to believe that the concerns of minority religious believers were being slighted; and in each, Congress moved to accommodate those concerns in a way that was entirely consistent with the general capacity of state, local and federal governmental entities to govern fairly and well.

But RFRA and now RLPA represent a sharp and mistaken turning away from this traditional congressional role of vigilant and nuanced oversight. They both involve a radical, sweeping and dangerous invocation of the "compelling state interest

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.

test” whenever religiously-motivated persons find their projects blocked or substantially burdened by perfectly legitimate, thoroughly even-handed, entirely reasonable laws. RLPA goes even further—and in the process amends whatever survives of RFRA in this regard as well—by insisting that the projects of religiously-motivated persons need not be compelled by or central to the beliefs of those persons in order to qualify for protection under the act.

If enacted, the effects of RLPA would be harrowing. The objections to RLPA are substantial, and easily rise to the level of constitutional complaint. RLPA—a constitutional difficulties fall into three broad categories:

- RLPA would create two classes of citizens: those who have religious reasons of just the right sort for their actions and those whose reasons for acting—however laudable and heartfelt—do not so qualify. The former would be entitled by RLPA to defy otherwise perfectly valid governmental regulations which the latter would be required to obey. In some cases the selective conferral of this privilege to defy the law would be especially inequitable: RLPA could, for example, be invoked by landlords who would justify their violation of some anti-discrimination laws on the basis of their religiously-inspired objections to would-be tenants, even when those objections were neither compelled by nor central to their religious beliefs. RLPA would undermine the capacity of governmental entities at every level to pursue perfectly legitimate, democratically-endorsed goals; and RLPA would do so on behalf of persons privileged by virtue of the content of their systems of belief. This would be in stark violation of the establishment clause of the First Amendment.
- RLPA reaches in desperation for a source of congressional authority to replace section 5 of the Fourteenth Amendment; it would surely be struck down by the Supreme Court on enumerated powers grounds, and would invite the Supreme Court to place new inhibitions on the capacity of Congress to act as the Court’s partner in addressing questions of constitutional justice. No one believes that RLPA is addressed to increasing interstate commerce, to the control of interstate commerce, or to the benefit of the economy generally. RLPA seizes on the entirely coincidental fact that some laws which regulate religiously motivated conduct will thereby have some effect on interstate commerce in order to find a commerce clause rationale for the blanket exemption from the force of such laws that it grants religiously-motivated persons. This flies in the face of the Supreme Court’s decision in *United States v. Lopez*, 115 S.Ct. 1624 (1995). Alternately, RLPA restricts itself to programs or activities that receive Federal monies, and relies on Congress’s broad spending power authority. But even the spending power requires a nexus between Federal restrictions and the goals of any particular spending program, and RLPA is unsupported by any such connection. Finally in what are likely its most important provisions, involving land use regulation, RLPA, like RFRA before it, depends upon section 5 of the Fourteenth Amendment. Especially given RLPA’s insistence that religiously-motivated behavior need not be central to or required by an individual or group’s religious commitments, the land use provisions are plainly and flagrantly in violation of the Supreme Court’s ruling in the *Flores* case.
- RLPA tells the federal judiciary how it is to proceed in hearing claims that arise directly under the free exercise provisions of the Constitution, as well as those that arise under RLPA itself. RLPA’s effort to choreograph constitutional adjudication is an obvious, back-door attempt to accomplish precisely what the *Flores* decision prohibits, and would violate settled principles of separation of powers.

In the discussion which follows, we will elaborate upon each of these observations.

II. RLPA’S CREATION OF TWO CLASSES OF PERSONS DISTINGUISHED ONLY BY THE DEEP STRUCTURE OF THEIR PERSONAL BELIEFS VIOLATES THE ESTABLISHMENT CLAUSE

RLPA, even more so than RFRA, indefensibly favors religious commitments over the other deep concerns and interests of member 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 a myriad of human projects to which individuals may be deeply and passionately committed. Imagine two sets of parents, both of whom have deep and conscientious reasons for wanting to exempt their children from sex education classes; or two groups of people who are profoundly upset by the thought of the homeless and the hungry, and who wish to open shelters and food kitchens in residential neighborhoods but are barred by zoning law from so doing; or two landlords, each of whom is deeply offended by the

sexual relationship between two unmarried persons who wish to share an apartment; or two persons on the brink of bankruptcy, each of whom badly wishes to contribute what remains of their resources to charitable causes that occupy a central place in their life.

None of these is an easy case. But what seems clear about them is this: It is profoundly wrong to treat one set of parents, one group that wishes to feed and house the homeless, one landlord, or one debtor, more favorably than the other and to make the gravamen of the preference turn upon the deep structure of the belief systems of the implicated persons or groups. But RLPA makes it matter and matter crucially whether the parents, the person running the soup kitchen, the landlord, or the soon-to-be-bankrupt person are motivated to act by what we recognize to be religious principles. RLPA selectively distributes liberty between the recognizably religious and those whose are merely motivated by their abiding passion for and commitment to good works, sound parenting, or what they deem to be moral behavior.

The idea that some persons are entitled to ignore the laws that others are required to obey, and that this privilege depends upon the actor's system of beliefs, is both extraordinary and transparently inconsistent with our constitutional values. Indeed, in two cases, the Supreme Court has held laws unconstitutional precisely because they granted special privileges to religiously-motivated persons. In *Texas Monthly, inc. v. Bullock*,² the Court struck down a Texas law that exempted religious publications from a sales tax applicable to other publications; and in *Thorton v Caldor*,³ the Court held unconstitutional a Connecticut law which gave all religious employees the right not to work on their Sabbath.

Of course, Congress and state legislatures have the authority to see that religiously-motivated persons and groups are dealt with fairly and reasonably. Congress may—and as we observed at the outset of this testimony, often has—act to “accommodate religious needs by alleviating special burdens”⁴ occasioned by religious belief. When doing so, however, legislators must respect the “neutrality” commanded by the Religion Clauses.⁵ Often, the appropriate form of accommodation will benefit religious and comparable non-religious interests alike—as is the case, for example, with tax exemptions that extend to both religious and non-religious non-profit organizations. On rare occasions, religious organizations and persons may be uniquely burdened, or uniquely susceptible to prejudice or insensitivity; then and only then may legislatures craft exemptions that are specific to religious motivation.⁶

But RLPA's blunt invocation of the compelling state interest test fits neither of these constitutionally permissible models. RLPA sharply discriminates between religious and non-religious behavior. And RLPA applies indiscriminately to all of the objects of governmental regulation, making no effort at all to confine its reach to those few cases where religious persons and institutions may have genuinely special needs.

In this regard, RLPA perpetuates the mistaken understanding of RFRA as to the state of religious liberty jurisprudence prior to the Supreme Court's decision in *Department of Employment Services v. Smith*, 474 U.S. 872 (1990). In the three decades of religious liberty jurisprudence prior to *Smith*, the Court paid 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. But 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

² 489 U.S. 1 (1989).

³ 472 U.S. 703 (1995).

⁴ *Kiryas Joel Bd. Of Education v. Grument*, 512 U.S. 687, 705 (1994).

⁵ *Ibid.*

⁶ This is the best understanding of *Corporation of Presiding Bishops v Amos*, 483 U.S. 327 (1987), which permitted the exemption of churches and other religious employers from federal anti-discrimination in employment provisions.

Smith Court did not cause or even precipitate the compelling state interest test's demise in the area of religious liberty. The *Smith* Court merely announced what had always been true.

And true for good reason. 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. The broad dictum of *Sherbert* would have created an unrecognizable, unmanageable and unjust world. The Court had the best of reasons for treating that dictum as rhetorical rather than operational.

For the Court in the *Flores* case it was precisely the use of the compelling state interest test which made RFRA so poorly suited to the enterprise of protecting religious liberty test. The blunt, extreme and unfocused demands of that test created, in the words of the Court, "a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."⁷

RLPA exacerbates RFRA's Establishment Clause problems. Section 8(1) of RLPA insists that "religious exercise . . . need not be compelled by, or central to a system of religious belief" in order to enjoy protection under its provisions. RLPA also amends RFRA to incorporate this new language. Section 7(a)(3). Even in its strongest, most rhetorically-heated form, the Supreme Court's pre-*Smith* jurisprudence was keyed to cases in which the religiously-motivated claimant was compelled by the dictates of her belief to act in the manner for which she sought the protection of the Court. And, while, under RFRA, few courts had insisted that religious exercise be "compulsory" in order to trigger the statute's provisions, most courts held, in effect, that RFRA applied only to "substantial burdens" upon beliefs which were in some significant way and to some significant degree "important" to religious believers.⁸

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.

⁷ 117 S.Ct at 2171. We have criticized this use of the compelling state interest 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).

⁸ 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").

It is unlikely that these arguments would remain available under RLPA. To be sure, Sections 8(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 means by which to pursue their religious convictions. That construction of the "substantial burden" test, however, would render both provision—especially Section 7(a)(3)—essentially meaningless. If, as appears to be the case, RLPA makes the invocation of religious motivation talismanic, and directs attention away from the particularized and extreme burdens on religious believers, RLPA exacerbates RFRA's already troubling disparity between the treatment of religious and non-religious commitments and concerns. RLPA would violate the establishment clause even on the hypothesis that RFRA does not.

III. RLPA EXCEEDED CONGRESS'S ENUMERATED POWERS AND IN SO DOING VIOLATES SOUND PRINCIPLES OF FEDERALISM.

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: Congress has broad license to act under its commerce clause and spending powers; but RLPA stands out as depending upon a tenuous and improbable connection between those powers and the subject of religious liberty. Congress has an important and generous role to play as the Court's partner in enforcing the rights and liberties of members of our political community, but RLPA plainly lies outside the scope of that authority as well. Far from curing the constitutional vices of RFRA, RLPA's somewhat desperate hunt for constitutional authority proliferates such difficulties.

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.⁹

Supporters of RLPA point to the example of Title VI, which stipulates in effect that no program receiving federal funds may engage in racial discrimination. But RLPA differs from Title VI in two crucial respects. First, under *South Dakota v. Dole*, 483 U.S. 203 (1987), Congress may impose conditions upon the receipt of federal funds only if those conditions are related “to the federal interest in particular national projects or programs.” (internal quotations omitted). Because Title VI is an anti-discrimination measure, it bears an obvious relationship to the goals of every federal spending program. Congress has an interest in seeing that all persons are able to participate fairly and equally in federal programs. Title VI facilitates that goal. Title VI therefore satisfies *Dole*’s nexus requirement: it bears a relationship to the federal interest in national projects and programs.

No comparable claim can be made on behalf of RLPA. RLPA is not an anti-discrimination statute. It does not ensure that all Americans will be able to participate in federally funded programs on equal terms; on the contrary, it creates special privileges for some religiously motivated participants and denies those privileges to participants with interests that are non-religious but equally dignified and important.

Second, precisely because Title VI is an anti-discrimination statute, it does not tell us anything about the scope of congressional power under the Spending Clause. Title VI is fully defensible as an exercise of the power granted Congress by Section Five of the Fourteenth Amendment. Title VI would therefore remain constitutional even under very restrictive readings of the Spending Clause (readings much more restrictive, for example, than the Supreme Court’s decision in *South Dakota v. Dole*). The fact that Congress has the power to enact Title VI does not permit one to draw any conclusions about the scope of congressional power under the Spending Clause.

Commerce Clause Issues. Section 2(a)(2) of RLPA attempts to substantially limit the ability of state and local governments to regulate religious exercise in any case where the presence or absence of such regulation “would affect” interstate commerce. That Section is an effort to draw upon Congress’ commerce 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 RLPA. 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 RLPA is largely parallel to the theory of Section 2(a)(1): it presupposes that once the congressional commerce power touches some ac-

⁹ 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.

tivity 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*.

RLPA 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. In *Lopez*, the Court emphasized that a "general regulatory statute" is defensible under the Commerce Clause only if it "bears a substantial relation to commerce. . . ." *Id.* at 1629, quoting *Maryland v. Wirtz*, 392 U.S. 183, 197, n. 27). To make this principle concrete, the Court identified "three broad categories of activity that Congress may regulate under its commerce power." The first two categories cover only laws with either "regulate the use of the channels of interstate commerce," or "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Ibid.* These categories apply to laws which regulate (for example) highways, interstate telecommunications, shipping companies, interstate packages and interstate travelers. RLPA sweeps too broadly to fit within either of these categories.

RLPA's constitutionality therefore depends upon the third and final category identified by the *Lopez* Court. The Court described that category as follows: "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30. This is the broadest of the three headings of congressional power under the Commerce Clause. As the *Lopez* Court acknowledged, "the *de minimis* character of individual instances arising under the statute is of no consequence" provided that the sum of all such instances, considered in the aggregate, has a substantial effect upon interstate commerce. 115 S. Ct. at 1629, citing *Wirtz*, 392 U.S. at 197, n. 27. The Court has accordingly upheld a wide range of statutes that regulate, among other things, "intrastate coal mining; . . . intrastate extortionate credit transactions; . . . restaurants utilizing substantial interstate supplies; . . . inns and hotels catering to interstate guests; and production and consumption of home-grown wheat." 115 S. Ct. at 1630.

The *Lopez* Court made clear that this category of congressional authority, although broad, is not unlimited. *Lopez* involved the constitutionality of the Gun Free School Zones Act of 1990. That Act made it a crime for individuals to possess a firearm within 1000 feet of a school. The Justice Department defended the Act on the ground that the possession of guns near schools substantially affected interstate commerce. The Department argued, for example, that the possession of guns near schools would interfere with education, and that poorly educated students would be less likely to make valuable contributions to the interstate economy. The *Lopez* Court rejected this rationale, and others like it, on the ground that they piled "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." *Id.* at 1634.

RLPA is a far more extreme example of what worried the Court in *Lopez*. RLPA does not emerge from or reflect any honest concern with interstate commerce. Congress' purpose is not, for example, to encourage churches and religious persons to participate more extensively in interstate commerce. Nor is Congress concerned that churches are harmed by the effects of interstate commerce. Nor has anybody suggested any reason to believe that states are trying to exclude churches from commercial intercourse, or that states are more likely to discriminate against those churches that happen to be involved in commercial activities. Nor, finally, is RLPA comprehensible as an effort to promote interstate commerce; RLPA addresses any regulation of religious conduct that affects interstate commerce, whether it *affects* such commerce beneficially, adversely, or in some random, oscillating way.

In sum, the point of RLPA is to promote religious conduct, and to do so regardless of what effect that conduct has upon commerce, or commerce upon it. The connection between religious activity and commerce is being used as a constitutional excuse for a regulatory program which Congress wishes to enact for reasons having nothing at all to do with commerce. The nexus between RLPA and legitimate Commerce Clause goals is thus weaker than the nexus between the Gun Free School Zones Act and legitimate Commerce Clause goals.

Moreover, RLPA's Commerce Clause provisions sweep much more broadly than did the Gun Free School Zones Act. Those provisions have the potential to invade nearly every imaginable domain of local government. For example, the law would affect zoning (insofar as church activities substantially affect interstate commerce), education (insofar as public and private schools substantially affect interstate com-

merce), and family law (insofar as separation decrees and child support orders substantially affect interstate commerce). To the extent that the Court is worried about “convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States,” *Id.* at 1634, RLPA poses this threat much more vividly than did the Gun Free Schools Zone Act.

RLPA’s defenders do not really claim that its goals have anything to do with commerce. Nor do they deny that RLPA amounts to a sweeping invasion of traditionally local domains. Instead, they suggest that RLPA’s jurisdictional proviso will save the statute. Section 2(a)(2) limits RLPA’s application to regulations of religious exercise whose presence or removal would “affect” interstate commerce. The Gun Free Schools Zone contained no comparable stipulation. The *Lopez* Court drew attention to this fact; the Court pointed out that the Act “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” 115 S. Ct. at 1631.

Surely, though, the requirements imposed by *Lopez* are not so formal and hollow as to be circumvented in this way. Suppose, for example, that the Gun Free School Zones Act had applied only to possession of a gun within 1000 feet of a school “substantially affecting interstate commerce.” Would that have been sufficient to save the Act? It seems unlikely, to say the least. A jurisdictional proviso will bring a statute within the scope of the Commerce Power only if it creates a reasonable relationship between the goals of the statute and the goals of the Commerce Clause. The statute in *Lopez* contained no jurisdictional proviso whatsoever; the Court accordingly had no occasion to analyze which provisos would create an adequate nexus between a challenged statute and the goals of the Commerce Clause. It would be a mistake to think that boilerplate references to commerce give Congress a free hand to regulate can save an otherwise unconstitutional statute.

In the scramble to find some jurisdictional base, however improbable, RLPA’s supporters have ignored the unintended, undesirable, but quite probable by-products of the Commerce Clause approach. First, RLPA invites religious groups and religious persons who wish to duck the burdens of otherwise valid and reasonable regulations to distort their conduct in order to qualify for attention under Section 2(a)(1). No law which distorts the focus of religious efforts in this way should be welcome.

Second, by flying in the face of the Supreme Court’s concerns in *Lopez*, RLPA could well provoke the Court to attempt the creation of clearer boundaries on Congress’s Commerce Clause authority. *Lopez* was viewed by many commentators as a “shot across bow”, which was intended to remind Congress that the Commerce is not infinitely elastic, but which was intended to leave the superintendence of the Commerce Clause in Congress’s hands, where it belongs. The rather stark manipulation of the Commerce Clause threatened by RLPA could easily undo what is an entirely desirable posture of restraint by the Supreme Court in this area.

Issues Pertaining to Section Five of the Fourteenth Amendment. In Section 3(b), RLPA purports to limit the zoning authority of state and local governments. This provision is freestanding, proceeds under the general heading in Section 3 of “Enforcement of Constitutional Rights”, and is not limited to programs which receive federal monies or to regulations that affect interstate commerce. Apparently, Section 3(b), 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)(1)(A) of RLPA unquestionably repeats the vices that proved fatal to RFRA. Section 3(b)(1)(A) involves a sweeping and unwarranted federalization of local decision-making. It is no exaggeration to say that, under this provision, any contentious 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)(1)(A) of RLPA: “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)(1)(A) of RLPA is therefore clearly unconstitutional under *Flores*.

Supporters of RLPA might respond by invoking the example of the four Supreme Court decisions which applied the compelling state interest test to the decisions of state administrative tribunals. In each of the cases in the “*Sherbert quartet*”, the claimant was an individual who fully qualified for unemployment insurance save only that he or she was required by the tenets of his or her faith to refuse to work in particular, narrowly-defined conditions (the claimant could not work on Saturdays, or could not participate directly in the manufacture of weapons of war). And in each case, a state administrative tribunal ruled that the observation of the applicable religious commandment did not constitute “good cause” for refusing to accept or for leaving particular employment. Some commentators, ourselves included, are inclined to understand these cases—which are unique in free exercise clause jurisprudence—as plausible efforts by the Supreme Court to protect against the very high risk that the tribunals in question were indifferent or insensitive to the powerful commands of religious belief under which the claimants were acting. Supporters of Section 3(b)(1)(A) might be tempted to invoke the principle of the *Sherbert Quartet* on behalf of that provision.

But there are two radical differences between Section 3(b)(1)(A) and the circumstances of each of these four unemployment insurance cases. First, in each of these cases, the claimant fully satisfied the requirements for insurance eligibility, save only a narrow inability to accept or maintain a limited group of job opportunities—an inability that in no way threatened the integrity or purpose of the eligibility standards. And second, in each of these cases, the claimant was unable to take advantage of this limited group of opportunities because of a sharp and nonnegotiable demand of their religious faith. Under these circumstances, it was perfectly reasonable to presume that a refusal to find “good cause” was the product of indifference, insensitivity or bald discrimination. But Section 3(b)(1)(A) is not limited to claimants who fully satisfy the purposes and requirements of the land use regime they are contesting, save only some limited circumstance that does not threaten the integrity or purpose of the zoning requirement at issue. And Section 3(b)(1)(A) is not limited to circumstances in which the claimant is operating under the compulsion of a religious command; on the contrary, Section 8(1) refers specifically to land use cases in the course of disavowing that conduct need be compelled by, or central to a system of religious belief in order to qualify as “religious exercise” under RLPA.

What was a reasonable prophylaxis in the four unemployment insurance cases thus becomes an entirely indefensible privilege to disregard all but the most critical of land use restraints in RLPA. This is precisely what the Court in *Flores* decried as a lack of proportionality.

IV. RLPA IS AN UNCONSTITUTIONAL ASSAULT ON THE INDEPENDENCE OF THE JUDICIARY.

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*. See *Klein’s First Principle: A Proposed Solution*, 86 Georgetown L.J. 2525 (1998). 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 had adopted Congress’ constitutional judgment as their own. Congress has the power and responsibility to arrive at its own view of constitutional sub-

stance, 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 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. This effort requires ongoing vigilance and nuance of legislative response, and Congress' performance in this context has been superb.

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 constitutional 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.

Mr. CANADY. Thank you, Professor Sager.

Mr. Keetch.

STATEMENT OF VON G. KEETCH, COUNSEL, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

Mr. KEETCH. Thank you, and good afternoon, Mr. Chairman and members of the subcommittee. I greatly appreciate the opportunity to represent the LDS Church here today and on its behalf to strongly endorse H.R. 1691.

When I testified here about 14 months ago, I provided to this committee a religious land use study undertaken by a group of law professors at Brigham Young University and attorneys from a prestigious law firm in Chicago. That study shows a very troubling trend in purported generally applicable neutral ordinances as they are applied to minority religions. In my written testimony, I reintroduce that study to this subcommittee today and reemphasize its central conclusion; that there is a huge disparity in the outcome when these ordinances and local regulations are applied to majority or so-called mainstream religions as compared to when they are applied to minority religions.

The conclusions of the study, in my view, leave little doubt that minority religions carry a much heavier load as they deal with so-called generally applicable and neutral laws. That is of special concern to all of us, Mr. Chairman, because throughout this great Nation of religious diversity, in one place or another, every religious body is a minority.

During my testimony last year, I also told you about the LDS Church's attempt to build a house of worship in the City of Forest Hills, Tennessee. A full recount of the circumstances surrounding the church's experience is included in my written testimony. Sufficed to say that applying purported generally applicable and neutral laws and grandfathering all of the existing majority religions, city officials were able to totally close the city's doors to any new church buildings, including the building that the LDS Church sought to locate there.

In the resulting litigation in Tennessee—that is also detailed in my written testimony—a State court judge upheld the city's actions under *Smith*, finding that the city's anti-development ordinance was generally applicable and neutral. The judge concluded that even though the city had absolutely prevented the LDS Church from constructing a church building anywhere within the boundaries of the city, the ordinance satisfied the rational basis test simply because it preserved the, and I quote the judge's words, "aesthetics and suburban estate character" of the city. I submit, Mr. Chairman, that when such peripheral interests are allowed to trump a sincerely held devotion to attend a house of worship in one's community, the test protecting minority religion is really no test at all.

In addition to land use difficulties, the Church of Jesus Christ of Latter-Day Saints has experienced a wide range of other problems. For instance, local governments have attempted to impair or altogether eliminate proselyting of Church missionaries by passing so-called generally applicable and neutral ordinances placing severe restrictions on the times and places that missionaries may contact door-to-door. One city, for example, requires our LDS missionaries to obtain door-to-door proselyting permits 30 days in advance; to limit proselyting by these missionaries to 7 work days per year, and to limit all door-to-door contacting in the city to only one charitable, religious, or other commercial group per week.

Our local communities and neighborhoods are currently attempting to utilize generally applicable and neutral restrictions on the residential use of property to prohibit religious families, even, from organizing and holding religious study groups in their own home to which young people living in and around the community are invited. They are using so-called generally and applicable and neutral ordinances which limit the number of commercial or other gatherings one may have in his or her own home in a single period of time.

Mr. Chairman, Professor Michael McConnell has concluded some time ago that in the wake of *Smith*, "Religious exercise is no longer to be treated as a preferred freedom. So long as it is treated no worse than commercial or other secular activity, religion can ask no more." That is essentially what I hear Professor Sager saying today. That has certainly been our experience since *Smith*. In navi-

gating the generally applicable and neutral regulations enacted by local governments, our proselyting missionaries who believe that they have a sacred obligation to spread the word of God person-to-person across the Nation, find themselves on the same footing and with the same minimal protections against government intrusion as those applicable to brush salesmen who go door-to-door.

Our congregations who desire nothing more than to build religious facilities where they can gather to worship God, find themselves with no greater protection for their devoutly held beliefs than those provided to commercial developers who want to build a grocery store or a gas station or a strip mall.

And even our member families who desire nothing more than to invite young people to bible study class in their own homes are subjected to local ordinances and restrictions which treat them the same as those individuals who seek to operate full-fledged businesses out of their homes.

Under *Smith*, religious belief and free exercise no longer occupy a pedestal; they instead are simply viewed as a part of the marketplace subject to the same rules and regulations and subject to the same infringements and governmental intrusions as any commercial concern.

To conclude, Mr. Chairman, religious freedom has long been recognized as one of the first freedoms of our Republic. The right to religious liberty applies to all, from border to border, in every State across this great Nation. Such freedom should never be diluted by a lowest common denominator type of analysis by providing only the minimal protections to religion as those provided to purely commercial concerns. I urge speedy passage of H.R. 1691 to protect the religious liberty of all. I thank the Chair.

[The prepared statement of Mr. Keetch follows:]

PREPARED STATEMENT OF VON G. KEETCH, COUNSEL, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

Good morning Mr. Chairman and members of the Committee. I am very honored to appear before this Committee and to sit at this table with colleagues for whom I have the greatest respect and who have long provided excellent leadership in the protection of religious liberty. I especially appreciate the opportunity to share my views and insights on one of the most important topics facing Congress today: passage of legislation ensuring religious liberty throughout the United States.

For almost a decade, as an attorney in the law firm of Kirton & McConkie in Salt Lake City, I have served as counsel to The Church of Jesus Christ of Latter-day Saints (sometimes referred to as the "LDS Church" or "Mormon Church"). With almost 11 million members worldwide, and with over 5 million of those members in the United States, the Church has a significant presence in every State of the Union, with active members in almost every city and town.

At different times over the past 175 years, the Church and its members have faced numerous assaults on their religious liberty. Some of those assaults have been stark and violent; others have been much more subtle and difficult to discern. I will provide a more general discussion of some of these modern-day difficulties towards the end of my testimony. However, at the outset, I desire to focus on one of today's most important—and sometimes overlooked—issues of religious liberty: The right of individual members to gather together in a place of worship, where they may learn from one another, edify each other, instruct one another, and receive important ordinances and blessings.

As eloquently expressed in The Williamsburg Charter, "Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and as free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular [religious]

communities.”¹ Rather than existing at the whim of the majority, the Charter continues, this right “is premised upon the inviolable dignity of the human person.”

These provisions reflect a deep commitment—a “social compact”—to respect and accommodate the religious sentiments, practices, and needs of the many and diverse religions in this nation, even when to do so is inconvenient or annoying. Our history affirms that such constitutional provisions and the commitment they represent also constitute “articles of peace” among our nation’s numerous religious denominations, allowing them to live together tranquilly despite at times profound theological differences. As such, they constitute an indispensable ingredient of America’s relatively peaceful pluralistic society.

From its very inception, The Church of Jesus Christ of Latter-day Saints has recognized and strongly supported this concept. The Church’s Eleventh Article of Faith states: “We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may.”

For tens of millions of Americans, “worship” means worship in community—in chapels, synagogues, and temples, in the communion and strength of fellow believers. Community faith and the prayers of co-believers are often essential to the deeply personal meaning of religion. Indeed, entire modes of worship—the sermon and the mass, for instance—can only be experienced in community. The right to erect buildings where communities of faith may gather is therefore a fundamental and indispensable aspect of the inalienable right to worship.

This is especially true in the LDS faith. In order to gain eternal exaltation—which for LDS believers means the ultimate spiritual glory—members of the Church strongly believe that they must receive specific ordinances through the authority and power of God. According to central Church doctrine, the highest of these ordinances can only be performed in the most sacred and hallowed of LDS buildings: the temple. Thus, for members of The Church of Jesus Christ of Latter-day Saints, the right to erect buildings (especially temples) lies at the core of their religious practice. Without these buildings, certain ordinances cannot be performed. And without these ordinances, exaltation is not possible.

As a result of these strongly held beliefs, and because The Church of Jesus Christ of Latter-day Saints is one of the fastest growing religious organizations in America, the Church by necessity is constantly engaged in the building of temples and other church buildings. It therefore finds itself continuously before planning commissions, city councils, boards of commissioners and other local governmental entities that control land-use and planning within the community. While an overwhelming majority of these government officials work with the Church in good faith, I fear that ignorance and even hostility toward religion do sometimes operate behind the facade of ostensibly neutral land use regulations. In these instances, local communities—most times just ignorant of religious beliefs, but at times antagonistic towards them—set broad “generally applicable” and “neutral” policies and development plans without any attempt to understand the religious beliefs affected thereby, and without any attempt to craft what can often times be a very minimal exception which will allow full religious liberty.

The growth of government at all levels, combined with government’s tendency to over-regulate, demand additional protection for religious practice if a full measure of religious liberty is to be realized. Land use provisions in particular characteristically involve permit schemes which grant local officials virtually unlimited discretion to determine whether religious practices may go forward. Free exercise rights are of little practical value if we permit control of the meeting place of a church to pass from its members to government outsiders without any real examination of the government’s asserted need for such control. Yet, unless the goals of regulatory agencies are tested against more searching scrutiny than “neutrality” and “general applicability”, agency officials have no occasion and no motivation to weigh the value of pursuing their regulatory goals against the substantial burdens this pursuit may impose on the free exercise of religion.

Under the current application of free exercise law, a claimant whose religious practice is burdened by an otherwise “generally applicable” and “neutral” law can obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind a law, and thus, that it is not truly neutral or generally

¹The Williamsburg Charter was drafted by representatives of many of America’s faiths and signed in 1988 by nearly 200 philosophically and religiously diverse national leaders of religion, politics, law, academia, business, and labor. Signers included former Presidents Carter and Ford, Chief Justices Rehnquist and Burger, and many others from across the political spectrum. See *The Williamsburg Charter* (1988), reprinted in 8 J.L. & Religion 1 (1990).

applicable.² The difficulties in doing so are considerable. Assuming that government decision makers intend the reasonably foreseeable consequences of their lawmaking actions, judges can of course make responsible judgments about the purpose of a law based on its language and effect. Once the inquiry ventures past these external indications of purpose to the subjective intentions of members of the lawmaking body, however, reliable conclusions about government motivations are nearly impossible to reach. Although statements of intention by individual decision makers can sometimes be found in legislative histories, such histories are not always compiled, particularly in cases involving state and local legislation or discretionary administrative action, and are in any event subject to manipulation. Even when they exist, statements of individual decision makers, while highly probative of the intentions of those who make them, are only circumstantial evidence of the motivation of the decision making body as a whole. Finally, courts are understandably reluctant to find unconstitutional motivations because of the implicit insult such a finding directs at members of the decision making body.³ This is especially true when, as is almost always the case, direct evidence of unconstitutional motivation is totally lacking.⁴

The virtual impossibility of adducing strong evidence of illicit motivation, combined with the reticence of judges to find such motivation on anything but the strongest evidentiary record, suggest that deserving religious claimants will frequently be unable to show the impermissible motivation behind facially neutral and general laws, even in situations in which the government decision making body in fact intended to restrict their religious practice, or consciously valued secular interests over religious ones. That suggestion is born out strongly in the land use area, where discretion of local government entities—and the reluctance of courts to second guess the motives of those entities—are at their strongest.

Given the difficulties described above, there is certainly no exact way to measure religious animus or anti-religious motivation within the land use context. However, in an effort to provide some basic guidance and understanding in this area, a group of highly regarded law professors at Brigham Young University joined together with attorneys at the prestigious law firm of Mayer, Brown & Platt in Chicago to conduct a study of religious liberty in the land use arena. The full study, completed in 1997, is attached as Appendix A to my testimony. I urge the Committee to review it in depth. In the interests of brevity, I shall provide you only with some highlights.

The study starts from the basic proposition that “generally applicable” and “neutral” land use decisions and policies should impact all religions (and other land use applicants as well) in a consistent way. The joint study not only failed to find this consistency, it found a huge disparity. Most striking is that, while minority religions represent just less than 9% of the general population, they were involved in over 49% of the cases regarding the right to locate a religious building at a particular site, and in over 33% of the cases seeking approval of accessory uses of an existing church site (such as sheltering or feeding the homeless). This disparity becomes even more distressing if one takes into account cases involving non-denominational religious groups, or groups that could not be classified on the basis of information in the case reports. If these unclassified cases are counted, over 68% of reported location cases, and over 50% of accessory use cases, involve minority and unclassified religions.

To be sure, Mr. Chairman, a study of this type can never provide a perfect and full picture of the land use process as it affects religion. There may indeed be other factors which have some influence on the study's outcome. Taking that into account, we who have reviewed the study might not be so concerned if there were only some minor disparity. But the huge disparity—in some cases in excess of 50%—revealed by the study is very difficult to dismiss on the basis of other, unrelated factors. Put bluntly, at least in the area of land use, minority religions are apparently carrying a much heavier load as they deal with so called “generally applicable” and “neutral” laws. That is of special concern to all of us, because throughout this great nation of religious diversity, there is one area or another where every religious body is a minority.

The difficulties faced in the land use area are clearly exemplified by the recent experience of The Church of Jesus Christ of Latter-day Saints with the City of Forest Hills, Tennessee, just outside Nashville. In 1991, coincidentally only a short time after the United States Supreme Court's decision in *Employment Division v.*

² See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524, 533 (1993).

³ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1093 (1969).

⁴ Cf. *United States v. O'Brien*, 391 U.S. 367, 384 (1968) (observing that “the stakes are sufficiently high for us to eschew guesswork” in determining whether government action was unconstitutionally motivated).

Smith⁵, the City of Forest Hills adopted an entirely new Comprehensive Plan covering development within the City. The Plan was based on "the overwhelmingly residential aspect of the City",⁶ and limited any new development within the City to single family unit dwellings. Specifically as it applied to churches, the City's Plan set up an "Educational and Religious Zone" for schools and churches, but then limited that zoning designation to schools and churches that already existed within the City. Thus, the four existing churches within the City received the "ER" zoning designation, as did the one school. No other land was zoned "ER", and under the Plan, there was therefore no other property available for the construction of a new religious building.⁷

Additionally, the City established extremely strict requirements for the changing of any zone under the existing City Plan. Although any entity could make a request for such a zone change, the zoning would be changed only if the applicant seeking the change could satisfy the City either that (1) "the City made a mistake in zoning the property" in the first place; or (2) "a change in condition has occurred making the property more suitable for ER use than for residential use."⁸

In 1994, The Church of Jesus Christ of Latter-day Saints determined a need for a temple within the City of Forest Hills. Accordingly, under the established City procedures, it sought a zone change for property that it owned within the city limits. This application was resoundingly rejected by the Planning Commission and by the City Commissioners.⁹

Believing that the City's rejection of its application may have resulted simply because its parcel was in a relatively sensitive area of the City, and taking the City at its word that it would give open and fair consideration to a zone change of another more appropriate parcel, the Church abandoned its attempts to have the first piece of property rezoned and acquired a second piece of property for its temple. This twenty-acre parcel sat on the northwest corner of an intersection of two major arterial roads. Several years before (previous to the City's adoption of its new Comprehensive Plan) a church building had actually stood on this piece of property. Three other churches of different denominations are immediately nearby: one diagonally across the same intersection, one directly across the street to the west, and another just one lot further to the west.¹⁰

Sensitive to the City's concerns about the size, height, acreage and capacity of the temple, the Church surveyed the four existing churches in the City. It then designed a temple well in keeping with the size and the capacity of the other church buildings within the community.¹¹ The following table shows the comparison:

	Otter Creek Church of Christ	Forest Hills Methodist Church	Hillsboro Church of Christ	Hillsboro Pres- byterian Church	Church's proposed Temple
Square Footage	25,000±	50,000±	50,000±	50,000±	50,000±
Height	25 feet	80 feet	110 feet	60 feet	115 feet
Number of Floors	2	2	2	3	2
Site Acreage	9.7	11.4	15.9	17.0	21.8
Capacity	675	400	400	—	300

With these comparisons, and now with a site that was bordered by other churches, the Church approached the Planning Commission to seek rezoning of its parcel. In a divided decision, the Commission refused. Citing the "suburban estates character of the area", and also expressing some concern that traffic could be increased, the Planning Commission expressly concluded that granting the Church permission to build a temple on the site would not be "in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of

⁵ 494 U.S. 872 (1990).

⁶ Order, *Findings of Fact* ¶15, p. 2. (Citations are to the Order of the Chancery Court for Davidson County, Tennessee, in *The Corporation of the Presiding Bishop of the church of Jesus Christ of Latter-day Saints v. The Board of Commissioners of the city of Forest Hills*. Nos. 95-1135, 96-868, 96-1421, issued on January 27, 1998. For the convenience of the Committee a full copy of this judicial order is attached as Exhibit B to this testimony.)

⁷ Order, *Findings of Fact* ¶¶9-10, p. 3.

⁸ Order, *Findings of Fact* ¶12, p. 3.

⁹ Order, *Findings of Fact* ¶¶15-16, p. 4.

¹⁰ Order, *Findings of Fact* ¶17, p. 4.

¹¹ Order, *Findings of Fact* ¶¶31-32, p. 6.

the City.”¹² The City’s Board of Commissioners accepted this recommendation and denied the rezoning for identical reasons.¹³

With it now painfully clear that the City would not approve any site within its boundaries for a zone change, and with all property zoned “ER” already occupied by the four existing churches, the LDS Church—with some reluctance—determined that it would file suit against the City. It did so because of the important legal and religious freedom principles that it believed were in play: Specifically, that a City did not have the right to zone out all new churches.

Suit was filed by the Church in 1995 in the Tennessee State Chancery Court. The parties generally stipulated to the facts, as I have related them above. The judge issued her decision in January of 1998. In assessing the City’s adoption of its new Comprehensive Plan, the judge determined—exactly as the Church claimed—that “[t]he City adopted ER zoning districts to better control the development of religious use within the City.” She also found that there was “no existing undeveloped site zoned ER in the City”—that is, there is “no property in the City . . . zoned ER on which the Church can construct a temple.”¹⁴ Lastly, the judge determined that the City’s refusal to rezone the site was “essentially aesthetic, to maintain a ‘suburban estate character’ of the City.”¹⁵

With these findings, the Church argued strenuously to the judge that she must apply the strict scrutiny analysis to the City’s refusal to rezone the property. If not, the Church argued, then a City can essentially shut its doors to new churches merely by stating that the building of a new church within City boundaries is not in keeping with the “aesthetic” interests of the community. Such a test gives complete and absolute discretion to the City, while unjustly and unnecessarily trampling on the religious rights of individuals to worship together in a community.

Given the governing First Amendment standard, however, the judge simply could not get past the “generally applicable” and “neutral” test established in *Smith*. Determining that the City desired to control—and essentially to eliminate—all non-single dwelling development within the City, the Court determined that the City’s actions were “generally applicable” and “neutral” as they affected religion. The intent of the City, she concluded, “was not directed to restricting the right of an individual to practice their religion, the intent was to regulate the use of the City’s land.”¹⁶ She then stated:

This Court has labored long to determine the appropriate standard of review in light of the seriousness of the religious challenge raised by the Church. However, there does not appear to be any direct or overt discrimination contained in the Ordinance or Plan, there is no evidence of discriminatory intent directed at the Church, specifically or generally, there is no proof of any indirect discrimination which this Court can discern from the record before it, nor is there any proof that the Ordinance is anything but neutral and generally applicable. In light of the U.S. Supreme Court’s holdings in similar matters, this Court must hold that the challenge to the Ordinance as unconstitutional is without basis and must fail.¹⁷

I want to make one thing very clear, Mr. Chairman. I know of absolutely no definitive evidence showing that City officials in Forest Hills intentionally engaged in religious discrimination against the LDS Church. That, however, is exactly the problem. If the Church had such direct evidence of religious prejudice, it would not be in need of any new statutory protection. *Smith* itself makes absolutely clear that, if a party can show religious animus or prejudice in a governmental decision, the strict scrutiny test must be applied. The difficulty is that such direct prejudice is impossible to prove in all but the most unusual cases. When any city can close its doors to new churches while allowing other, long-established churches to operate within its boundaries, when that city can give the thinnest of reasons for that action (such as “aesthetics” or preserving the “suburban estate character” of the city), and when a court will only review those reasons under the lowest form of scrutiny to determine if they are “rational” or “irrational”, I submit to you that we leave some of the most essential components of religious freedom at the total mercy of local governments. In such situations, at least in the land use context, city government becomes judge, jury, and executioner. For minority religions especially, this is an extremely sobering thought.

¹² Order, *Findings of Fact* ¶20, p. 4.

¹³ Order, *Findings of Fact* ¶21, p. 5.

¹⁴ Order, *Findings of Fact* ¶¶9–10, p. 3.

¹⁵ Order, *Findings of Fact* ¶40, p. 7.

¹⁶ Order, p. 9.

¹⁷ Order, pp. 10–11.

Mr. Chairman, I do not wish my testimony to be misunderstood. Local governments and local citizens should have a strong say in how their community is to be developed. A city need not and should not merely bow to the absolute demands of a church as to where it will construct a religious building within the city and as to how that building may appear. All of us who work daily on these issues, I believe, think that there is a balance to be struck here. But the current status of the law leaves no balance at all, vesting the entire decision and power as to where a church may locate—or even if it may locate at all—in the hands of local elected officials. Those of us who spend most of our time working on religious liberty issues find it extremely dismaying and somewhat ironic that, under current controlling First Amendment principles, a city like Forest Hills most probably cannot zone out of its community a sexually oriented adult bookstore, but can totally zone out a church that desires to erect a temple for the use and edification of its religious members. Something is wrong here, and it needs to be fixed.

Mr. Chairman, although I have focused today on the land use issues that plague churches in many different areas across the country, I do not want to leave the impression that this is an isolated topic as far as infringement on religious freedom is concerned. In my experience, numerous religious organizations are experiencing significant infringement upon their beliefs and activities from a wide range of government interference.

A sampling of contemporary post-*Smith* cases demonstrates that “neutral” laws of “general applicability” now dramatically intrude upon virtually every aspect of religious life. As a result of “neutral” and “general” laws, a Catholic hospital has been denied accreditation based on its refusal to instruct its residents on the performance of abortions notwithstanding their strong religious objections,¹⁸ a religious mission for the homeless operated by the late Mother Teresa’s order has been shut down because it was located on the second floor of a building without an elevator,¹⁹ and adult children with strong religious convictions about serving their feeble parents have been prevented from volunteering to care for their elderly parents housed in government-regulated nursing homes.²⁰ In fact, the potential incursion of facially “neutral” and “generally applicable” laws upon religious belief and practice is breathtaking. As noted in an earlier Senate Report, the *Smith* standard places “all religious activity . . . at risk.”²¹

Of course, not every post-*Smith* intrusion upon religious belief and practice is likely to provoke a collective cry of alarm. Some religious liberties infringed by “neutral” and “generally applicable” laws (such as the right of Old Order Amish to refuse to display a fluorescent orange triangle on a horse-drawn buggy²² or of a Sikh to decline to wear a motorcycle helmet because of a religious obligation to wear a tur-

¹⁸ *Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. at 157 (1992) (statement of Edward Gaffney, Dean and Professor of Law, Valparaiso University School of Law (citing *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990)); (“even on a belief so deeply and widely held as conscientious objection to the performance of an abortion, State officials ignored the [Supreme] Court’s suggestion that it is desirable for the political branch to provide free exercise exemptions. And the courts, after *Smith*, thought it perilous to provide a remedy.”).

¹⁹ *Id.* at 149.

²⁰ In *Greater New York Health Care Facilities v. Axelrod*, 770 F. Supp. 183, 187 (S.D.N.Y. 1991), the district court summarily rejected challenges to health regulations that limited the service of volunteers in nursing homes despite the fact that, for some of the volunteers, the services represented their fulfillment of the Fifth Commandment obligation to honor one’s father and mother.

²¹ *Religious Freedom Restoration Act of 1990; Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 23 (1990) (statement of Rep. Lamar Smith). Accord *Religious Freedom Restoration Act hearings before the Senate Comm. on the Judiciary*, 102d Sess. 44 (1992) (statement of Rev. Oliver S. Thomas, Baptist Joint Committee on Public Affairs) (“Since *Smith* was decided, Governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. * * * In time, every religion in America will suffer.”); *Religious Freedom Restoration Act of 1990: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 39–40 (1990) (statement of Rev. Robert P. Dugan, Jr., Director, Office of Public Affairs, National Association of Evangelicals) (“Must a Catholic church get permission from a landmarks commission before it can relocate its altar? Can orthodox Jewish basketball players be excluded from interscholastic competition because their religious belief requires them to wear yarmulkes? Are certain evangelical denominations going to be forced to ordain female ministers, or the Catholic church to ordain female priests? * * * Are school children, contrary to their religious beliefs, to be forced to salute the flag?”).

²² See *Minnesota v. Hershberger*, 444 N.W.2d 282 (Minn. 1989), *vacated and remanded*, 495 U.S. 901 (1990), *upheld on state law grounds*, 462 N.W.2d 393 (Minn. 1990).

ban)²³ seem rather prosaic in a pervasively secular society. The long-recognized concepts of religious liberty, however, exist precisely because even prosaic violations of conscience are deeply felt. The Constitution exists to protect unpopular ideas, not popular ideas; and many “neutral,” “generally applicable” assaults upon religious practice are significant indeed.

As only one example, in *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990), the district court held that an unnecessary autopsy on a young Hmong man did not constitute a violation of the Free Exercise Clause, despite the religiously-based belief of his family that the autopsy condemned the spirit of the deceased. *Id.* at 560. The court had originally ruled in favor of the Yangs, but—following *Smith*—felt compelled to reverse its earlier ruling. The court nevertheless expressed its deep regret in applying the neutral, generally applicable autopsy law to the facts of the case:

My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs’ testimony provided stark support for the depth of the Yangs’ grief. *Id.* at 558.²⁴

The Church of Jesus Christ of Latter-day Saints has experienced a wide range of difficulties, similar to those discussed by my colleagues today. Many of these infringements go to the core teachings and beliefs of the Church.

For instance, local governments have attempted to impair or altogether eliminate the proselyting of Church missionaries by passing “generally applicable” and “neutral” ordinances placing severe restrictions on the times and places that missionaries may contact door-to-door.²⁵ One city, for example, has passed an ordinance prohibiting all door-to-door contacting—including religious proselyting—on some days of the week, and has attempted to severely limit the hours of such contacting on the other days.²⁶ Other city agencies, purportedly applying “generally applicable” and “neutral” non-solicitation ordinances, have attempted to prohibit our missionaries from engaging others in religious conversation at bus stops and other mass transit loading platforms.²⁷

Other local communities and neighborhoods are currently attempting to utilize “generally applicable” and “neutral” restrictions on the residential use of property to prohibit religious families from organizing and holding religious study groups in their own home, to which young people living in and around the community are invited.²⁸ The strict confidentiality of communications between member and clergy has come under strong attack, with litigants attempting to gain information or otherwise discover sacred confessional information for sometimes trivial reasons in the pursuance of civil claims.²⁹

Mr. Chairman, when I sat before this same Subcommittee a little over a year ago, I cited to you another problem. Utilizing their avoidance powers under the Bankruptcy Code, bankruptcy trustees were seeking to recover millions of dollars paid in tithing funds and donations made to the LDS and other churches. At the time I testified fourteen months ago, the LDS Church had literally hundreds of such cases—cases in which no fraud or deceit was alleged by the trustee, and in which it was undisputed that the debtors in bankruptcy had made these donations because they felt a compelling religious obligation to do so.

Shortly after the hearing last March, Congress acted decisively to pass the Religious Liberty and Charitable Donation Protection Act. Today, in instances where religious donations were made in good-faith, litigation is practically non-existent. I thank you, Mr. Chairman and your colleagues for moving so quickly and decisively on that single important issue of religious freedom. And I urge you to work with

²³ See *Buhl v. Hannigan*, 20 Cal Rptr. 2d 740 (Ct. App. 1993).

²⁴ See also *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff’d*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt, conservative Jewish beliefs).

²⁵ In the past two years alone, local officials have attempted to curtail Church proselyting in such cities as Mundelein, Illinois; Dover, New Jersey; Flemington, New Jersey; Chester, Connecticut; Valencia, California; Media, Pennsylvania; Downers Grove, Illinois; Marin County, California; and Seven Hills, Ohio.

²⁶ Frontenac, Missouri.

²⁷ Berkeley, California; Arlington Heights, Illinois.

²⁸ Jefferson County, Colorado.

²⁹ See, e.g., *Hadnot v. Shaw*, 826 P.2d 978, 981 (Okla. 1992); *Scott v. Hammock*, 870 P.2d 947 (Utah 1994).

the same diligence and fervor to right the much broader infringements which are now occurring.

Professor Michael McConnell, has concluded that the impact of *Smith* has been an extremely far reaching one. In short, “[r]eligious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more.”³⁰ In a broad number of contexts since the Supreme Court’s decision in *Smith*, that has certainly been our experience. In navigating the “generally applicable” and “neutral” regulations enacted by local governments, our proselyting missionaries—who believe they have a sacred obligation to spread the word of God person-to-person across this nation—find themselves on the same footing with door-to-door commercial salespersons. Our congregations, who desire nothing more than to build religious facilities where all may come together to worship God, are subjected to the same regulations as commercial developers who desires to build grocery stores, gas stations, or strip malls in the community. And even our member families—who desire nothing more than to invite young people to Bible study class in their own homes—are subjected to local ordinances and restrictions which treat them the same as those individuals who seek to operate commercial enterprises out of their homes. Under *Smith*, religious belief and free exercise no longer occupy a pedestal; they instead are simply viewed as a part of the marketplace, subject to the same rules and regulations, and subjected to the same infringements and governmental intrusions, as commercial concerns.

Mr. Chairman, religious freedom has long been categorized as one of the “First Freedoms” in our Republic. The right to religious liberty applies to all, from border to border, in every State across this great nation. Such freedom should never depend upon the amount of religious sensitivity in a particular community, or on the willingness of local governments to craft appropriate exemptions for religious practice. I urge you and your colleagues to continue your close study of the problem and to craft statutory solutions to protect the religious liberties of all.

I thank you, Mr. Chairman.

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),³¹ all cases cited in the section of a leading treatise on zoning that addresses issues of religious land uses,³² 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.

³⁰ Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Univ. of Chicago L.R. 1109, 1153 (1990).

³¹ 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).

³² A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ¶20 (4th ed. 1992).

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 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. Gerecke*, 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 Dep't 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 Westminister Presbyterian Church v. City Council, 393 N.Y.S.2d 180 (App. Div. 1977) (G) (L)
Westminister 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 Havurah 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:

Milharic 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)

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE CORPORATION OF THE PRESIDING)	
BISHOP OF THE CHURCH OF JESUS)	NO. 95-1137- III(II)
CHRIST OF LATTER-DAY SAINTS)	NO. 96-868-III(II)
	NO. 96-1421-I(II)
VS.)	
THE BOARD OF COMMISSIONERS OF)	
THE CITY OF FOREST HILLS)	

FILED
 96 JAN 27 PM 1:49
 CLERK AND MASTER
 DAVIDSON CO. CHANCERY
 COURT

ORDER

On April 7, 1995, The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, ("Church"), filed a petition (95-1137-III) against the Board of Commissioners of the City of Forest Hills ("City") for a Writ of Certiorari and Declaratory Judgment challenging the City's refusal to rezone 1776 Old Hickory Boulevard (Site 1) from Residential Estates B to ER (Educational and Religious) in order that they might build a temple for religious worship. The Church sought damages and attorney's fees for violation of the Religious Freedom Restoration Act,¹ the Civil Rights Act of 1963, the First, Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 3, 8, and 19 of the Tennessee Constitution. On August 1, 1995, the City filed an answer denying the allegations.

On March 19, 1996, the Church filed a 42 U.S.C. §1983 complaint (96-868-III) seeking an Order which would require the City to rezone Site 1 and a second site at the corner of Old Hickory Boulevard and Hillsboro Road (Site 2) from Residential Estates B to ER (Educational and Religious) in order that it might build a temple for religious worship in the City and requested damages and attorney's fees for violation of their constitutionally protected civil rights. On April 24, 1996, the City filed an answer denying the allegations.

On May 6, 1996, the Church filed another petition (96-1421-I) for Writ of Certiorari and Declaratory Judgment¹ challenging the City's zoning scheme and its denial of the Church's rezoning applications. Answer was timely made. On July 5,

¹ In *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 138, L.Ed 2d 624 (1997), The Religious Freedom Restoration Act of 1993 was declared unconstitutional by the U.S. Supreme Court and accordingly, this claim is no longer viable.

1996, an order was entered granting the City's motion to dismiss the petition for writ of certiorari in No. 95-1137-III. These three actions were consolidated in July, 1996.

In November, 1997, cross motions for summary judgment were heard by the Court. The City contends that it has the right to zone property within its jurisdiction in any reasonable manner, provided that it does not infringe upon any fundamental constitutional right. The Church contends the City's zoning ordinance is unconstitutional since the ordinance precludes any reasonable opportunity to obtain rezoning and therefore imposes an impermissible burden on the free exercise of religion. The Church also contends the City's denial of its application for rezoning was based on vague, subjective standards, was arbitrary and capricious and placed an impermissible burden on the free exercise of religion, both under the U.S. and Tennessee Constitutions.

Findings of Fact

There do not appear to be any material facts in dispute. They are as follows:

1. The City of Forest Hills, incorporated in 1957, is located in the southern part of Davidson County and within the jurisdiction of the Metropolitan Government of Nashville/Davidson County, Tennessee. The first Comprehensive Zoning Ordinance was adopted by the City of Forest Hills in 1961 (Ord. No. 61-12). At that time, there was limited commercial use, one public school and four churches within the City. The remaining property was residential. During the next thirty years, Ordinance No. 61-12 was amended many times.
2. Under the zoning scheme that existed in the City of Forest Hills before 1988, there was no educational or religious zoning district. A place of worship could have been built in any zoning district throughout the City without any requirement for rezoning and every church that requested variances to construct a church building in a residential zone district was granted such a variance.
3. Ordinance 88-119, adopted in 1988, amended Ordinance 61-12, and created a new designation of zoning districts in the City known as Educational and Religious. Each of the four existing churches in the City was built before the adoption of Ordinance 88-119 and each was zoned Educational and Religious in 1988.
4. In December of 1991, the City repealed all of its prior zoning ordinances and adopted a Comprehensive Plan (the Plan), a City Zoning Map, a Major Thoroughfare Plan, Zoning Ordinance 91-130, and Subdivision Regulations.
5. The Plan reflects the overwhelmingly residential aspect of the City and recommends maintaining the existing zoning districts on the City's zoning maps. As of 1990, approximately 75% of the City had been developed. In 1990, the population census of the City was 4,231 and the population of Davidson County was 487,973. There are 340 incorporated towns and cities in the state of Tennessee. Of those towns and cities, 257 have

a population which is smaller than the population of the City, including 44 of the state's county seats. Only 25 of the state's towns and cities have a population of more than 15,000.

7. Page 9 of the Plan states the City's intention to restrict future development to low density residential as follows:

The City is generally a suburban estate community. Its low density, large lots, and slow growth over many decades, have given the community an estate character. The heavy vegetation and relatively mature trees in most areas of the City combined with the hills to create a unique suburban estate community. The natural appearance of many of the hillsides, old stone walls, and large trees enabled the city to retain many rural images. This sharply enhances the City's character....

It is somewhat unusual to find a community with this character so close to the downtown of a major city. It is clearly in the interest of the residents of Forest Hills to preserve this character. It is also important to the metropolitan area as a whole.

8. The Plan provides for five Educational and Religious (ER) zoned properties: the four parcels for the existing churches and one parcel for Percy Priest School. The Plan's land use map reflects the existing use for which each parcel of property in the City was zoned at the time of its adoption in 1991. Under Ordinance 91-130, the four existing church properties in the City remained zoned ER. The Plan recommended that rezoning of vacant land to ER not be permitted. All of the properties in the City are zoned residential, with the following exceptions:
- a. the four churches in operation are zoned ER;
 - b. Percy Priest School is zoned ER;
 - c. a gas station/store is zoned Historic Commercial (HC); and
 - d. Richland Country Club is zoned Country Club (CC).
9. The City adopted ER zoning districts to better control the development of religious use within the City. There is no existing undeveloped site zoned ER in the City.
10. With the exception of four properties in the City where churches are already located and one property where a Metro school is located, no property in the City is zoned ER on which the Church can construct a temple.
11. Under the provisions of the zoning ordinance of the Metropolitan Government, if a church meets all the bulk regulations of the Metro zoning ordinance, it may locate in any residential or commercial zoned district in the geographical limits of Metro.
12. Under the City's Zoning Ordinance, residential property cannot be rezoned for ER use, unless the applicant for rezoning can satisfy the City that one of the following has occurred:
- a. the City made a mistake in zoning the property residential; or
 - b. a change in condition has occurred making the property more suitable for ER use than for residential use; or
 - c. the Comprehensive Plan for the City has been amended.
13. No mistake was made in mapping the zoning map and the City has not amended its

Comprehensive Plan.

14. The first site (Site 1) on which the Church applied for a zone change is located at 1776 Old Hickory Boulevard, an arterial road which is the southern boundary of the City. That site, approximately 16.7 acres, is bordered on three sides by residential properties at least two acres in size and zoned for residential use.
15. In 1994, the Church applied to rezone Site 1 for religious use to construct a temple. The City Planning Commission reviewed the application and voted unanimously to recommend disapproval stating the following reasons:
 - a. the traffic on Old Hickory Boulevard was already too intense and the accident rate too high;
 - b. a religious use of the property would have a greater impact on natural resources than low density residential use;
 - c. there had been no showing that the character of the immediate neighborhood had changed;
 - d. there had been no change of condition in this particular location;
 - e. residents of the area had relied upon the existing residential zoning when buying their property;
 - f. no mistake had been made in the zoning for this area when the Comprehensive Plan had been adopted; and
 - g. the requested zone change was not in compliance with the Comprehensive Plan.
16. The City Commissioners voted unanimously to disapprove the rezoning for the reasons stated by the Planning Commission.
17. In 1995, the Church applied to rezone Site 2 for religious use to construct a temple. Site 2 is located at the northeast corner of Old Hickory Boulevard and Hillsboro Road, both of which are major arterial roads. This approximately 22 acre corner lot is zoned residential and bordered on two sides by residential properties, each at least two acres in size. At the southwest corner of the same intersection is the Forest Hills Baptist Church. Immediately across Old Hickory Boulevard from Site 2 is Temple Micah, to the west of which is the Harpeth Hills Church of Christ. During these lawsuits, the State of Tennessee announced that it may reconstruct the intersection of Old Hickory Boulevard and Hillsboro Road to provide four lanes and two turning lanes in all four directions, 1300 feet from the intersection.
19. The Church's application to rezone Site 2 met the City's ordinance requirement that property zoned ER use have a minimum frontage of two hundred (200) feet on an arterial street and a minimum size of ten (10) acres.
20. The City Planning Commission reviewed the application and voted 4-3 to recommend disapproval for the following reasons:
 - a. the failure to maintain the suburban estates character of the area;
 - b. traffic safety concerns;
 - c. violation of the zoning requirements by failing to be consistent with, in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City and the specific area in which the use district would be located; and
 - d. no showing of a change of condition as required by the Zoning Ordinance.

21. The City's Board of Commissioners accepted this recommendation and voted 2-1 to deny rezoning for the reasons stated by the Planning Commission.
22. As to the Church's application to rezone Site 2 for ER use, the City did not consider any changes which had occurred outside of the City in making its determination of whether a "change in condition" as provided in 808 (c) of the Ordinance had occurred. The City only considers changes within the City and not changes outside of the City, when deciding whether a "change in condition" has occurred in a particular neighborhood, even if the outside change impacts that neighborhood. "Changing conditions" means a change that is basically beyond the City's control or a change in the City's philosophy regarding development.
23. The Church's traffic engineer, Ragan-Smith and Associates, advised the City that the construction of the Temple on Site 2 would not significantly impact the level of service on Old Hickory Boulevard or Hillsboro Road, nor would it significantly impact the accident rate at the intersection of Old Hickory Boulevard and Hillsboro Road.
24. The City's traffic engineer, RPM and Associates, advised the City that the construction of the temple on Site 2 would not significantly impact the level of service on Old Hickory Boulevard or Hillsboro Road, or the accident rate at the intersection of Old Hickory Boulevard and Hillsboro Road. Further, unless major road improvements were made by the State, the level of service at the intersection of Hillsboro Road and Old Hickory Boulevard would drop regardless of whether the temple was constructed.
25. The City's urban planner testified at the hearing that the development plans submitted by the Church for Site 2 could be designed so as to meet the objectives and goals of the Comprehensive Plan, leaving only the question of whether such use would be in keeping with the suburban estates character of the City. The City conceded that Site 2 may be an appropriate site for religious use.
26. The term "suburban estates character" means low density single family residential housing.
27. None of the four existing churches in the City necessarily conform with the City's suburban estates character. Further, no place of religious worship can be constructed on Site 2 that meets the definition of suburban estates character.
28. According to the City, the use of Site 2 as a place of worship would not be consistent with, and in the best interests of, and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City and the specific area for the following reasons: the inconsistency of the land use between large scale religious or educational use and low density single family residential use, the difficulty of integrating large parking spaces in residential areas; the impact of impervious surfaces; the impact of lighting; the impact of interior traffic, both number and kind on the site; and the amount of activity on the site.
29. Any property in the City rezoned for ER would be located in a residential neighborhood.
30. In order to establish that a 'change in condition' justifies rezoning, the applicant for rezoning

must show that the character of the immediate neighborhood in the City has changed.

- 31. The proposed Temple is approximately the same size as three of the four existing places of worship in the City. Site 2 is in a residential area as are the other four churches in the City, but Site 2 is a larger parcel than those upon which any of the other four churches are located.
- 32. The following compares data regarding the four existing churches in the City and the Church's last Revised Plan for Site 2:

	Otter Creek Church of Christ	Forest Hills Methodist Church	Hillsboro Church of Christ	Hillsboro Presbyterian Church	Church's Proposed Temple
Square Footage	25,000±	50,000±	50,000±	50,000±	50,000+
Height	25 feet	80 feet	110 feet	60 feet	115 feet
Number of Floors	2	2	2	3	2
Site Acreage	9.7	11.4	15.9	17.0	21.8
Capacity	675	400	400	—	300

- 33. Rezoning the City's Zoning Map involves both the use of objective criteria and the discretionary judgment of the local legislative body. The objective criteria would entitle an applicant to a building permit if the zoning or rezoning permits it.
- 34. In view of the ER site requirements of minimum 10 acres and road frontage of at least 200 feet on a major road, the City cannot identify any parcel of land in the City which is better suited than Site 2 to be rezoned for ER use.
- 35. The Church's application to rezone Site 2 did not comply with the Plan or the requirements and objectives of the Zoning Ordinance. The Plan designated this property as residential; the Zoning Ordinance implemented that policy decision by zoning it residential and the application was at variance with the Plan and the Zoning Ordinance. The Church made no request to amend the Plan.
- 36. Under the City's Zoning Ordinance, no applicant is entitled to have a parcel of property rezoned for ER use.
- 37. At the meetings of the City Planning Commission and the Board of Commissioners, including public hearings where evidence was reviewed and the Church's applications for rezoning were considered, people spoke both in favor of, and in opposition to, the rezoning request. Some who spoke identified themselves as neighbors and expressed opposition based on traffic and aesthetics; others expressed opposition to the particular use of the site as a Mormon Temple.
- 38. Existing property can be used for religious use only if it is rezoned to an ER classification. Such religious use is permitted only on a case by case basis subject to compliance with both

objective and subjective standards.

39. There is no evidence in the record of any reasonable or present danger to the best interest, public health, safety, morals, convenience, order, prosperity or general welfare of the City or to the property adjacent to Site 2, related to the rezoning of that site for religious use.
40. The City's reason for refusing to rezone Site 2 is essentially aesthetic, to maintain a "suburban estate character" of the City.

Conclusions of Law

Since there are no material facts in dispute, summary judgment is appropriate. As noted, the City has a Plan for development which is implemented by its zoning Ordinance. This Court is mindful that

[z]oning is a legislative matter and as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. In enacting or amending zoning legislation, the local authorities are vested with broad discretion and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority. If there is a rational or justifiable basis for the enactment and it does not violate any state statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination. In accordance with these principles, ...courts should not interfere with the exercise of the zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary...

Fallin v. Knox County Board of Commissioners, 656 S.W.2d 338, 342-343 (Tenn. 1983).

In 1991, the City, through its police power, established zoning classifications for the real property located within its boundaries through a Comprehensive Plan, a new Zoning Ordinance and a City zoning map. All legislative classifications, state or federal, that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978). (See also, Fallin v. Knox County, 656 S.W.2d 338 (Tenn. 1983); McCallen v. City of Memphis, 786 S.W.2d 633 (Tenn. 1990); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 108 L.Ed. 2d 876 (1990). Under the "rational basis test," the classification may be upheld 'if any state of facts may reasonably be conceived to justify it.' *Id.* The question is whether the classifications have a reasonable relationship to a legitimate state interest. Doe v. Norris, 751 S.W. 2d 834, 841 (Tenn. 1988). In such an instance, there is a presumption of validity. A legislative body may make distinctions and treat various

groups differently so long as the classification is reasonable. Reasonableness depends upon the facts of the case and no general rule can be formulated for its determination.

The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute. If any statement of facts can reasonably be conceived to justify the classification or, if the reasonableness of the class is fairly debatable, the statute must be upheld. *Harrison*, supra, 569 S.W.2d at 825-826.

First, the Church alleges that the zoning scheme does not permit any changes and hence, no changes can be proven. To the contrary, the record reflects that the zoning scheme is subject to change, just as the Plan may be amended in the future. Further, the Church did not offer any proof to demonstrate a change in the condition of the property or a change in the Plan.

The Comprehensive Plan clearly sets out the justification for the zoning districts. The City planned to maintain its low density residential nature, to slow growth and to preserve the natural environment. Such justification is reasonable and entitles the Ordinance to be upheld under the rational basis test. While the Church may disagree with the expressed intent of the City to retain its "suburban estates" character, the Church has not demonstrated that the City's refusal to rezone the property is arbitrary or capricious. The rationale in refusing the Church's request to rezone was based upon a clearly expressed desire to maintain almost exclusively low density single family residential housing.

Second, the Church urges this Court to apply the "strict scrutiny" test based upon a violation of its constitutionally protected religious rights. Clearly, the zoning ordinance does not proscribe the Church from following its religious tenets, but it does proscribe any variation from the zoning districts unless one of three conditions is met, that is, the Comprehensive Plan is changed, a mistake had been made in zoning when the Comprehensive Plan was adopted or there has been a change of condition in the zoned area. The Church submits that its inability to meet one of these three conditions demonstrates that the Ordinance is unconstitutional since no new church can be built. The findings of fact do not support such a conclusion. The Plan is subject to change if the legislative body decides to amend it; it has not done so within the last seven years, but it is not inconceivable that the Plan may be

amended. The Church argues that the Zoning Ordinance does not permit any change in the zoning districts, but such was the initial intent of the Plan and the Ordinance. The intent was not directed to restricting the right of an individual to practice their religion, the intent was to regulate the use of the City's land.

The general proposition is that a neutral and generally applicable statute "need not be justified by a compelling governmental interest even if the law had an incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. ___, 113 S.Ct. 2217, 124 L.Ed.2d 472, 489 (1993). The Church cited McDonald v. Chaffin, 529 S.W.2d 54 (Tenn. App. 1975) in which the court held property used for church services violated a restrictive covenant that the property be used for residential purposes. The Church focused on the following: "We are not here faced with a situation in which persons are effectively restricted from establishing a place of worship due to a pervasive system of restrictive covenants or zoning throughout the area." *Id.* at 58. (Emphasis added).

While not ignoring this statement, it is particularly instructive to this Court that the holding provided "[e]nforcement of a facially neutral restriction on the use of land for other than residential purposes works only an incidental or indirect burden on... [church members] no different from that borne by other property owners and does not rise to the level of a violation of their rights of assembly or free exercise of religion. See Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961)." The system of zoning in the City is extensively residential. As such, church owners of property are on the same plane as other property owners with respect to the use of the land.

In Bowen v. Roy, 476 U.S. 693, 699, 106 S.Ct. 2147, 90 L.Ed.2d 735, 744 (1986), the U. S. Supreme Court held that the requirement that all applicants for welfare and food stamp benefits have a social security number did not violate the religious beliefs of Native Americans. In so holding, Justice Burger explained that the Free Exercise Clause of the First Amendment was written in terms of what the government could not do to the individual and did not require the government to "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* Comparable to the legislation discussed in Bowen, the City's Zoning Ordinance does not place a direct condition or burden on the dissemination of religious views, it does not affirmatively compel the Church, by

threat of sanctions or otherwise, to refrain from religiously motivated conduct or require them to engage in conduct that they find religiously objectionable. Rather, the Church requested the City to change, or excuse it from complying with, its Zoning Ordinance that is binding on all other applicants that come before the City. "This is far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment. ...[W]e cannot ignore that.....denial...by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." *Id.* 90 L.Ed.2d at 747.

Bowen stands for the proposition that the enforcement of a facially neutral and uniformly applicable requirement for the administration of a welfare program should not be put to the strict scrutiny test absent proof of an intent to discriminate against a particular religious belief or against religion in general. The Church contends that the Plan and Ordinance discriminate against religion in general and hence are subject to strict scrutiny. The Plan reflects that there are four churches in the City. The facts do not support the conclusion that the Plan and Ordinance discriminate against a particular religion or against religion in general. The Ordinance is facially neutral and applies equally to all property owners in the City.

In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc., v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), Lakewood's comprehensive zoning plan prohibited the construction of a place of worship on a lot purchased by the Congregation. The record reflected that Lakewood had limited the location of new churches to ten percent of the city. The Congregation was entitled to purchase an existing church or build in appropriately zoned areas. In *Lakewood*, there were still lots available for the construction of a church. Here, there are lots zoned ER in the City, but unless one of the existing churches sells to the Church, it may not be able to build within the City. "[T]he First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches." *Id.* at 307.

This Court has labored long to determine the appropriate standard of review in light of the seriousness of the religious challenge raised by the Church. However, there does not appear to be any direct or overt discrimination contained

in the Ordinance or Plan, there is no evidence of discriminatory intent directed at the Church specifically or generally, there is no proof of any indirect discrimination which this Court can discern from the record before it, nor is there any proof that the Ordinance is anything but neutral and generally applicable. In light of the U.S. Supreme Court's holdings in similar matters, this Court must hold that the challenge to the Ordinance as unconstitutional is without basis and must fail.

The rationale for the Ordinance is reasonable and the refusal to rezone was neither arbitrary, capricious nor discriminatory. Accordingly, the Defendant's motion is well taken and Summary Judgment upholding the validity of the City's Zoning Ordinance is granted. This case is dismissed with costs taxed to the plaintiff.

It is so ORDERED.


CHANCELLOR

cc: Mr. Peter Curry
Mr. Matthew Sweeney
Mr. Thomas White
Mr. George Dean

Mr. CANADY. Thank you, Mr. Keetch.
Mr. Walker.

**STATEMENT OF J. BRENT WALKER, GENERAL COUNSEL,
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS**

Mr. WALKER. Thank you, Mr. Chairman and members of the sub-committee for this opportunity to speak to you about this important religious liberty bill. I also appreciate the kind introduction, but I speak today only on behalf of the Baptist Joint Committee on Public Affairs. The BJC serves a dozen different Baptist bodies, focusing exclusively on public policy issues concerning religious liberty and its essential constitutional corollary, the separation of church and State.

For more than 60 years, the BJC has followed a sensibly centrist approach to church-State issues. We take seriously both religion clauses in the first amendment—no establishment in free exercise—as essential guarantors of what we judge to be God-given religious freedom. Accordingly, we stand against attempts to return State-sponsored prayers to the public schools and vouchers for parochial education. For example, we opposed the Religious Freedom

Amendment to the Constitution in the 105th Congress, but, on the other hand, we support a robust version of free exercise too.

Under the leadership of my able predecessor, Oliver Thomas, and now mine, the Baptist Joint Committee has had the privilege of directing traffic for the 75-plus member Coalition for the Free Exercise of Religion for nearly the past decade. Some would say a metaphor of herding cats is a better one than directing traffic, but we have been busy doing that for nearly a decade.

This diverse coalition, from People for the American Way and the National Council of Churches to the Christian Legal Society and the National Association of Evangelicals, led the charge to support the passage of the Religious Freedom Restoration Act unanimously by this House of Congress in 1993 and then over the past 2 years have worked tirelessly to urge support of the Religious Liberty Protection Act.

The button I wear today—"Religious Liberty for All"—was worn by hundreds on the Hill the day that the Senate passed RFRA. It bears witness to our common commitment to provide increased protection for religious freedom without advancing or carving out any particular sectarian interest. This button highlights the fundamental notion that if anyone's religious liberty is left unprotected, everyone's rights, both religious and civil, are threatened. These same principles inspire our unqualified support for the Religious Liberty Protection Act.

To my friend, Professor Sager, RLPA is narrowly crafted and tailored for the purposes intended to reestablish religious freedom in a way that will survive reexamination by the court. It is constitutional. It simply lifts burdens on the exercise of religion; it doesn't establish religion in any way.

To my friend, Mike Farris, RLPA helps, rather than hurts, even those who do not like the Commerce Clause. The commerce provisions in this bill do you no harm, but they will greatly benefit millions of religious organizations. We must use every tool available to protect religious liberty.

And to my friend, Chai Feldblum and Chris Anders, RLPA does not threaten civil rights law in general or those banning sexual orientation discrimination in particular. The courts will balance religious and civil rights when they conflict. In any case, everyone, including those particularly concerned about civil rights, needs increase protection for religious freedom.

And to this subcommittee, until the Supreme Court begins once again to interpret the Free Exercise Clause in a way that provides full protection for religious liberty, Congress must do its part by passing RLPA, and I urge you to lay aside your political differences and your partisan divisions in order to seek something transcendent, religious freedom for everyone.

You know, RLPA is the unusual church-State issue, because it should unite us, not divide us. I mean, if Dr. Land and I can agree about something, we must be on the right track. [Laughter.]

This isn't a debate about whether public school teachers can lead a classroom in prayer; this is a debate about whether a Jewish student should be able to wear a yarmulke in a public school. This isn't a debate about vouchers for parochial schools; this is a debate about whether privately funded parochial schools should be free

from unnecessary and unreasonable governmental regulation. Surely, we can agree that these students and these schools, along with many other religious persons and institutions across this Nation, deserve protection for their first freedom. Thank you for your time.

[The prepared statement of Mr. Walker follows:]

PREPARED STATEMENT OF J. BRENT WALKER, GENERAL COUNSEL, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to speak to you about the need to pass the Religious Liberty Protection Act of 1999 (RLPA)—H.R. 1691. I am J. Brent Walker, general counsel of the Baptist Joint Committee on Public Affairs (BJC). I am an ordained Baptist minister. I also serve as an adjunct professor of law at the Georgetown University Law Center, where I teach an advanced seminar in church-state law. I speak today, however, only on behalf of the BJC.

The BJC serves the below-listed Baptist bodies,¹ focusing exclusively on public policy issues concerning religious liberty and its political corollary, the separation of church and state. For more than sixty years, the BJC has adopted a well-balanced, sensibly centrist approach to church-state issues. We take seriously both religion clauses in the First Amendment—No Establishment and Free Exercise—as essential guarantors of God-given religious liberty. Accordingly, we have stood against attempts to return school-sponsored prayers to the public schools and to provide public money for vouchers for parochial education. For example, we opposed the so-called “Religious Freedom Amendment” to the constitution in the 105th Congress. On the other hand, we supported the Equal Access Act of 1984 and defended it from constitutional attack as we applauded its effectiveness in ensuring voluntary, student-initiated religious exercise in the public schools. Significantly for our purposes today, the BJC—under the leadership of my predecessor, Oliver Thomas, and now mine—has had the privilege of coordinating the 75-member Coalition for the Free Exercise of Religion for nearly a decade. This diverse coalition—from People for the American Way and the National Council of Churches to the Christian Legal Society and the National Association of Evangelicals—led the charge to support the passage of the Religious Freedom Restoration Act in 1993 (RFRA), defended its constitutionality in the courts, and over the past two years has urged the passage of RLPA.

This button I wear today—“Religious Freedom for All”—was worn by hundreds on the Hill the day that the Senate passed RFRA. It bears witness to our common commitment to providing increased protection for religious liberty, without advancing any particular sectarian interest. It highlights the fundamental proposition that if anyone’s religious liberty is left unprotected, everyone’s rights—religious and civil—are threatened.

So, in 1993, the Coalition said “no” to those who wanted exemptions from RFRA for claims and defenses concerning abortion, public education, prisons, historical landmarking, and land use. We said “yes” to a bill that would provide wall-to-wall for religious liberty without dictating a specific outcome in any particular case. Restoring the “compelling state interest” standard testified to the importance of the Free Exercise Clause in the panoply of constitutional rights, and that government should be put on a short leash whenever it tries to run roughshod over the dictates of conscience.

These same salutary principles motivate the BJC’s support for RLPA. We applaud your attempt to provide legislative protection consistent with the U.S. Supreme Court’s decision in *City of Boerne v. Flores* (1997), which struck down parts of RFRA as unconstitutional. We also applaud your courage exhibited in restoring the commerce clause provision in the bill, and we urge you to stand fast in that commitment.

Some critics claim that RLPA is not needed to protect religious freedom. They are wrong. True, in America we do not have the clear and obvious persecution of religion that plague many foreign countries. And, fortunately, some states enjoy increased protection for religious freedom, either as a matter of state constitutional

¹ Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Conference, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention, Inc., Religious Liberty Council, Seventh Day Baptist General Conference, Baptist state conventions and churches. The BJC does not purport to speak on behalf of all Baptists.

interpretation or due to the passage of state Religious Freedom Restoration Acts.² It is also true that some courts are using the few tools available to them under the U.S. Supreme Court's decision in *Employment Division v. Smith* (1990), including finding hybrid rights and lurking discrimination against religion.

However, we need a national commitment to preserve and protect our "first freedom"—religious liberty—across the board. This patchwork of protection has not eliminated violations of free exercise. This was dramatically portrayed at this subcommittee's hearings in the 105th Congress. A parade of witnesses detailed instances of governmental suppression of and insensitivity to religion and religious freedom. This was only a small slice of incidents across the country where governmental officials violate religious freedom and the rights of conscience.

As we call upon all nations around the world to respect human rights and religious liberty and to take seriously the teachings of the Universal Declaration of Human Rights, we must demonstrate our resolve as Americans to do the same for everyone in this country. Our words will not be taken seriously unless they are backed up with action that matches our rhetoric.

In addressing the charge that RLPA is not needed, I am reminded of a lesson from our nation's early history. When the constitution was being debated in Congress, many of our nation's founders, including James Madison of all people, thought there was no need for a Bill of Rights or any specific protection for religious freedom. After all, state-churches had been disestablished throughout almost all of the colonies, and religious liberty protection was included in nearly every state constitution. The federal government was to be a government of delegated powers. Since no powers respecting religion would be given to it, there was no need to limit the federal government from exercising a power it did not have in the first place. However, Baptists, Presbyterians, and other people of faith wisely disagreed. They knew from painful persecutions what havoc even well-meaning governments could wreak. Thus, they demanded a Bill of Rights, including specific protection for religious freedom. Aren't we glad our spiritual forebears prevailed! Had they not been able to negotiate a Bill of Rights in 1789, I doubt that political conditions would ever again have been congenial to its adoption.

Thus, this bill is needed to signal a clear and constant federal commitment to ensuring protection for religious liberty.

Some say RLPA will not effectively protect religious liberty, and that restoring the compelling interest test to the law is only window dressing. They say that the courts will apply it lackadaisically and unevenly.

While this Congress should not and cannot tell the courts how to apply the compelling interest test, recent history suggests that having the standard in place does make a difference. After the Court's decision in *Employment Division v. Smith*, the BJC began tracking cases decided under the new, attenuated standard put forth in that case. Of the hundreds of religious liberty cases decided from 1990 to 1993, the religious claimant prevailed in only a handful of them, and then usually because of the presence of a more protective state constitutional protection. However, from 1993 to 1997, the time during which RFRA saw its most widespread application, religious claimants did much better. Indeed, the religious claimant either prevailed or obtained a favorable result in approximately one third of the cases we reviewed during this time.

Also, just because the compelling interest test has not always been applied vigorously or correctly is no excuse to not restore it where possible.

Moreover, those of us who advise constituents and clients who have run-ins with government know about the prophylactic effect that a strong statute has. When there is strong protection for religious freedom, many cases, as they should be, are resolved without litigation and are never seen by those who like to keep score by counting court decisions.

Some people have claimed that increased protection for religious liberty through RLPA threatens other rights and constitutional values.

These are the folks who are members of what I think Doug Laycock has referred to as the "religious liberty, but . . ." crowd. They claim to be for religious liberty in principle, BUT are willing to compromise it away in one specific application after another. "Yes, I'm for religious liberty, but not if it will compromise historical preservation, and not if it means compromising student curriculum opt-out requests, or if it means letting prisoners worship like the rest of us." Unfortunately, folks who

²The following states have interpreted their state constitution to provide strict scrutiny for religious liberty claims: Massachusetts, Minnesota, Wisconsin, Kansas, Oregon, Vermont, Michigan. The following have passed legislation: Rhode Island, Connecticut, Florida, and Illinois. Alabama adopted a state RFRA as a new constitutional amendment.

make these qualifications do not think religious freedom is that important. To them, it is not the first freedom; it stands in line behind their own parochial interest.

In the current political milieu, those who lack this sense of the pre-eminence of religious liberty come from both ends of the ideological spectrum. Some of the strongest criticism of RLPA has come from the far right, including the Home School Legal Defense Association. This is ironic, because Mike Farris, the Association's president, helped draft RFRA! They do not object to RLPA in principle, but oppose Congress exercising its commerce clause powers in enforcing RLPA's protections. Their disdain for the commerce clause is greater than their devotion to religious liberty. In no way will protection under the commerce clause hurt homeschooling families. But it will certainly help others, such as religious organizations that engage in or affect commerce. We must use every tool available to protect religious liberty.

Then there are opponents on the left. Some in the civil rights community—particularly many who advance gay and lesbian rights—have argued that RLPA may prejudice those rights. They seek an exemption so that, in cases where religious liberty and civil rights are seen to conflict, their claims will always prevail over the religious claim. This is simply wrong.

There should be no carve-outs to religious liberty, even for good causes such as non-discrimination. RLPA is formulated in such a way that courts will balance these two fundamental principles—religious freedom and civil rights—and that is the way it should be. If a court finds a compelling interest in enforcing non-discrimination, including on the basis of sexual orientation, that claim will prevail; where the interest cannot be shown, the religious liberty claim will prevail. Thus, as with other parts of society, the gay and lesbian community will win and lose some cases under RLPA. However, it would be unwise, and maybe unconstitutional, for Congress to judge ahead of time these deep-seated and delicate issues that rage in national debate.

No, there should be no carve-outs to religious liberty, even for good causes such as federalism and civil rights. Those who object to RLPA for parochial reasons should temper those concerns by enjoying the happy circumstance of increased protection for religious liberty for *themselves* as much as for society in general.

In conclusion, I urge members from both sides of the aisle to rise above this political maelstrom and to do the right thing by our nation's first freedom which the wise architects of our republic gave us more than two hundred years ago. Many of us at this table opposed last year what we thought were misguided, if well-meaning, attempts to restore religious freedom by amending the constitution. We do not need to amend the constitution. Our founders—yes, even Mr. Madison—got it right the first time. What we need is for the Supreme Court to begin to once again interpret the Free Exercise Clause in a way that is consistent with their intention and which provides full-blown protection for religious liberty. In the meantime, however, it is incumbent upon Congress to stand in the gap. I urge you to do so by passing RLPA.

Mr. CANADY. Thank you, Mr. Walker. You get the award for completing your testimony within the time allotted.

Mr. WALKER. I came in without the red light coming on. [Laughter.]

Mr. CANADY. Mr. Watt, if you would like to proceed.

Mr. WATT. Thank you, Mr. Chairman, and thank the chairman for convening these hearings, and I apologize to the witnesses for being a tad late getting here.

Mr. Sager, I was struck by your concern that this proposed bill extends liberty selectively, and it occurred to me that the Constitution extends liberty selectively. How do you respond to that? Isn't what you are saying that because religion and speech and association are spelled out in the Constitution that somehow all the other things that are not spelled out in the Constitution should be afforded a higher degree of protection? How do you afford those things that are spelled out in the Constitution a higher degree of protection under the concern that you have expressed?

Mr. SAGER. Thank you, Representative Watt, for the question. I swung at this bill, because I have been very frustrated by the avalanche of RFRA and now the continued emphasis on RLPA, and I welcome the opportunity to explain myself on exactly this point.

First, with regard to the Constitution's singling out of religion for special constitutional concern, which it plainly and laudably does, there are two ways that the Constitution can be concerned with religion. It can think that religious believers enjoy some special privilege that others do not or it can think that religious believers require a special protection against discrimination because of the peculiar vulnerability of religious belief, and, as Mr. Keetch emphasized, in particular, minority religious belief in the United States. I believe strongly that the only way to understand the Constitution's concern with religion is that it protects religious believers and belief against indifference, hostility, and discrimination. So, those bits of legislation—those pieces of legislation which address such things as the right of Jewish believers to wear yulmulke in the military which bring those believers to parody with other members of the military who may have special medical requirements to be out of uniform, for example, and, in general, worry that the military has not been sufficiently sensitive to the needs of Jewish believers, that legislation is superb. So, too, the legislation which defunded the road in the Lyng case. But what the Constitution does not do is say that religious believers have license to do those things which other deeply committed people do not.

Now, when you turn to other provisions of the Constitution, such as the first amendment's commitment to free expression, speech is indeed privileged but not a particular group of speakers based on the deep structure of their beliefs, and nowhere in our constitutional regime is there space for saying that some people have the opportunity to do things that others do not, not because of the depth of their motivation or the depth of their commitment or the importance to them as individuals, but simply because of the structure of their belief. There is no room in our constitutional tradition for that.

I think, as a matter of fact—I want to emphasize in this regard—this is not the lowest common denominator. I am not saying that religious believers are on a par with commercial interests. Those people who solicit door-to-door on behalf of religious causes are on a par with other deeply motivated speakers, whether they are motivated by religion or politics or other concerns.

Minority religious groups have done more for the first amendment's commitment to free expression than anyone else in the United States, but the converse is true as well, Representative Watt, namely, the first amendment's broad protections of speech have done more for religious believers than anyone else, because they and other commitments to liberty in general make space for deeply motivated, non-conforming behavior of every kind. So that, for example, *Pierce v. Society of Sisters* protects people in regard to their parents regard to their control over schools and where they send their children to school and what those schools have.

So, this is not an attempt to take religion out of the Constitution. It is an attempt to give religion in the Constitution its proper shake.

Mr. CANADY. The gentleman's time has expired. The gentleman will have, without objection, two additional minutes.

Mr. WATT. Let me switch—I sounded like I was adverse to what you were saying that time—let me switch and sound like I agree

with you on a point and ask Mr. Keetch, if you tie this to the Commerce Clause to make it constitutional, don't you really run the risk of setting up different standards for local religions—if there is such a thing; I can have my own personal religion, I suppose—as opposed to those religions that cut across State lines or deal arguably with interstate commerce. How do you address that?

Mr. KEETCH. I suppose the circumstances that you provide are theoretically possible, Mr. Watt; that is, a large church involved in commerce in its buying of its carpet and its architectural services and everything else would be able to benefit from RLPA where some very small church that bought everything locally and that was not involved in commerce would not be able to avail itself of the Commerce Clause. Now, remember there are other areas—there is a whole land use section in the bill, as well, that would cover that and as well as, hopefully—

Mr. WATT. I agree with Mr. Sager, the land use section I think is just absolutely unconstitutional, but I am trying to find a hook for the rest of the commerce, and I have some concerns that we are setting up a situation where two different religious groups do exactly the same thing, one of them, then, is covered by this bill; the other one is not covered by this bill, and the sole determinant is whether you can establish some nexus with commerce. You get exactly different results.

Mr. CANADY. The gentleman's time has expired. The gentleman will have one additional minute.

Mr. KEETCH. Let me respond quickly to both of those points, if I may, Mr. Chairman.

The first is, I agree, I can't tell you that this bill will cover every church across the country under the Commerce Clause. We tried to do that; we tried to cover every single church under RFRA, and the Supreme Court said we went too far and that there were federalism concerns there. I can merely tell you that we will cover a large majority of the churches.

Quickly, as to your question on the land use regulation, it is in section B(1)(a) where we have our most difficult problems, because by definition when you have individualized assessments, that you means you have got a city council sitting and saying, "Well, you know, we have discretion, and we can allow this or we can't allow this. We don't think this really comports with the aesthetics of our community. Therefore, we will not allow it." That is exactly what happened to the LDS Church in Forest Hills, Tennessee.

Mr. WATT. How do you get that to be—

Mr. KEETCH. That is not interstate. That is not interstate; that is actually a section 5 power that Congress has under the generally applicable test. What Congress would be doing there is simply saying it is not generally applicable or neutral for communities to make individualized assessments of religious entities that appear before them.

Mr. WATT. Thank you, Mr. Chairman.

Mr. CANADY. Thank you. The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman, and I want to thank you for your diligent work on the drafting of this bill. I know it has been very difficult. You have tried to adhere very carefully

to the constitutional standards, and you have done a remarkable job on this.

I wanted to ask a couple of questions. I appreciate the panelists and their testimony here this morning; it has been constructive. But going to Professor Sager, I wanted you to comment and make sure I understand what your testimony is in regard to Mr. Keetch's illustration. He made a contrast between missionaries that might be going door-to-door having no more protection than brush salesmen—I think that was the illustration he gave. Is it your testimony that it would be inappropriate under the first amendment to provide any additional protections for someone based upon a religious exercise claim versus someone else who's carrying out the same activity for a secular reason?

Mr. SAGER. It is—I will try to be much briefer than I was before; I apologize, this is an academics disease.

Mr. CANADY. Congressmen are sometimes error to the same. [Laughter.]

Mr. SAGER. We may share this, Mr. Chairman. It is my position that in order to distinguish between secular non-commercial speech causes and religious speech causes, that there must be some reason to suppose that religious speech causes are particularly handicapped or subject to discrimination.

Mr. HUTCHINSON. Just talk in the real world. I am talking about brush salesmen versus missionaries.

Mr. SAGER. The difference between brush salesmen and missionaries is clear, but the difference between missionaries and other charitable and political door-to-door solicitations is what is not at all clear, Representative, so that commercial speech is clearly and should be on a different footing, and the ability of governments to protect homeowners from intrusion by brush salesmen is quite substantial, but there are serious first amendment speech restrictions on the ability of the State to make it impossible for people who have political causes or charitable causes or religious causes, in particular, to reach out to individuals in places of their residence. And, so I want to distinguish sharply between the brush salesmen, but if the State were to distinguish between religious solicitation and political and charitable solicitation, in general, it must have a justification born of some sense of peculiar disability or peculiar threat of discrimination. I stopped talking, remarkable. [Laughter.]

Mr. HUTCHINSON. Well, I am worried about that brush salesman.

Mr. SAGER. The brush salesman I am prepared to brush aside. [Laughter.]

Commercial speech is increasingly protected under the Constitution but at nowhere near the level of other speeches.

Mr. HUTCHINSON. So, a city can appropriately restrict and prohibit commercial calling door-to-door, but you are saying, though, someone who asserts himself by going for religious purposes from door-to-door should not be able to assert that they are exercising the freedom of religion, and that not be anymore protected than the brush salesman?

Mr. SAGER. No, that is not my position, Representative, and I am sorry I haven't been clear.

Mr. HUTCHINSON. So, you said, "Yes," but you are contrasting that to someone who is going to hand out political brochures.

Mr. SAGER. Or solicit for charitable causes, the environment, other political or secular movements that move people to reach out and talk to one another. Now, there is an occasion in which religion can be singled out. It is that circumstance in which there is reason to suppose that religion has very distinct needs from other causes or are subject to distinct risks or vulnerability of discrimination from other causes. That is not obviously endemic to door-to-door solicitation by persons with charitable and political motivation.

Mr. HUTCHINSON. Dr. Land, did you have any comment on that discussion?

Mr. LAND. Well, I understand the distinction between commercial and non-commercial, but I would say that the Constitution's first amendment is specific in granting protection to religious beliefs and to religiously-motivated activities, but it does not grant the other speech and other non-religious activities. That is what free exercise is all about, and that is what the first amendment does. No governmental interference of free exercise of religion, and that is exactly what has been under attack by this present Supreme Court which doesn't seem to either get it or chooses how to change it, and that is what Justice Blackman and Justice O'Connor tried unsuccessfully to explain to a majority of their colleagues.

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

Mr. HUTCHINSON. Go ahead.

Mr. LAND. Well, I believe that the Free Exercise Clause of the first amendment of the Constitution does say that you have to treat religiously-motivated activities differently than you treat other forms of non-commercial activity or non-commercial speech, and I believe that that was the intent of our Forbearers. It was the reason why, prior to the *Smith* decision, the Supreme Court had erected the compelling State interest test which they have not obliterated much to the detriment of the religious liberty free exercise rights of American citizens particularly when they find themselves to be in a minority, and in this increasingly diverse culture, every religious group is going to be a minority somewhere.

Mr. HUTCHINSON. Dr. Land, thank you, and Professor Sager, as well. Thanks to all the panelists, and I yield back.

Mr. CANADY. Thank you. The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman. I find this an extraordinarily difficult issue. I suppose I should be grateful in some way, because after a while around here, things tend to be fairly familiar, and the exercise of having to grapple with things is not common, and maybe I am just feeling the strain of unused muscles, but— — [Laughter.]— — I would begin with Dr. Land. Obviously, there is a pole and the commercial door-to-door salesperson is one end and you can say the religious people on the other, but are you—it sounded almost as if you were arguing that the first amendment is better for religion than speech. I mean, speech is in the first amendment. How do we avoid fully extending to anybody who wants to go door-to-door for political purposes whatever right the religious people have? Or you are not trying to avoid that?

Mr. LAND. I am not trying to avoid that. I am just saying that our Forbearers, when they wrote the first amendment, seemed to

believe that there was a particular need to specifically protect religious speech, and Justice Blackman pointed that out.

Mr. FRANK. No, I understand that, although, I get the notion that some of them were still hot for letting Mormons and Jews go around—I guess there weren't Mormons then—but for letting Jews and Seventh Day Adventists and others going knocking on people's doors, and I am little skeptical, frankly. The Founding Fathers—but whatever they did say, they said it about free speech as well.

This bill would appear to give rights to door-to-door solicitors on behalf of religion that it does not give to people on behalf of some non-religious, moral, or political clause. Do you agree that that is what the bill does?

Mr. LAND. No sir. I would say that what it does is restore the understanding that the court had prior to *Smith* of free exercise means.

Mr. FRANK. You are being too rhetorical for me on this. I am not trying to make points; I am trying to understand this. The bill, does it not give people who are doing something for religious motivation more rights to resist an ordinance restricting people going door-to-door than someone doing the exact same activity for purely political?

Mr. LAND. Well, my answer would be that it— —

Mr. FRANK. Does the bill do that, sir?

Mr. LAND. It restores their constitutional protection to do that, and I would also assert that—Representative Frank, I would assert that in many places in the United States today, it is precisely those who are going for religiously-motivated reasons— —

Mr. FRANK. Dr. Land, please answer— —

Mr. LAND [continuing]. That are minorities that are most likely to face that persecution.

Mr. FRANK. I am really sorry, you are disappointing me. I am trying to deal with this in an intellectual way. I just asked you a question; I am trying to answer it, but you just don't—I guess the answer is, yes, it does; that it does give—you say it is a restoration of these rights. Fine, whatever it is, but you are acknowledging that the bill then says you have got rights to do things for religious purposes that you don't have for political purposes. That is troubling to me.

Mr. LAND. If I may, I disagree with that— —

Mr. FRANK. No, because I haven't asked you a question; I won't ask you a question.

Mr. LAND. I would like to address the speech question, if I could, at some point.

Mr. FRANK. Well, go ahead. You have got both religion and speech— —

Mr. LAND. The answer is, no, it does not give a leg up to religious speech. The speech clause— independent speech clause, properly and robustly applied and interpreted, would give comparable speech rights to non-religious communicants.

Mr. FRANK. So, on the door-to-door salesperson, the commercial one—on the door-to-door solicitor, you are saying that even if the bill passes, someone going door-to-door for religious purposes has no greater rights than someone going door-to-door— —

Mr. LAND. I think so, in terms of— —

Mr. FRANK. Let me finish the question. So, that someone going door-to-door for religious has no greater rights with the bill than someone going to door-to-door for a political cause?

Mr. LAND. Absolutely.

Mr. FRANK. So, what is the purpose?

Mr. LAND. There is a robust protection for non-religious speech, as well, in the first amendment.

Mr. FRANK. So, to the extent that people who are going door-to-door, it is irrelevant, the bill is, because if people going for non-religious speech—non-religious, non-commercial speech will have the same rights after the bill passes, and they are not in the bill. So, the bill must not make any difference.

Mr. LAND. They are not prejudiced at all.

Mr. FRANK. So, the bill doesn't make any difference on the door-to-door situation, is what you are saying?

Mr. LAND. I think not.

Mr. FRANK. Okay.

Mr. LAND. But it does make a big difference other places, and that is why—

Mr. FRANK. Well, I understand that. I realize when I ask one question, the answer to that question is not an answer to every other question that could have been asked, but we do have a time problem.

Now, on page 7—this is the core of one of my philosophical problems—and I should be explicit about this. I am a member of a religious minority, not a terribly observant one, but I encountered some discrimination for being Jewish, although that was mostly in the past, but I see much more discrimination based on sexual orientation as a gay man than I do—not, personally, me, because we have exemptions; whether they are constitutional or not, people tend to treat us better than they treat other people—so, I am obviously concerned about the extent to which this would undermine any sexual orientation discriminations, and I am just troubled philosophically, Mr. Walker. You mention several times in here your unhappiness with the court. Indeed, you and Dr. Land agreed that the courts have been inadequate here, and you believe that the court has not done a very good job, and this is an invitation to Congress to overturn the court, correct, in some of these regards?

Mr. WALKER. Not to overturn the court, no.

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

Mr. FRANK. To change the result that the court has reached.

Mr. WALKER. Right, to increase the standard by which governmental actors will have to—

Mr. FRANK. To reach a different result in those issues than the court did, correct?

Mr. WALKER. Right.

Mr. FRANK. What I have a hard time doing, though, is reconciling that on page 7 where you say "The RLPA as formerly situated, courts will balance these two fundamental principles—religious freedom and civil rights." That is the way it should be. If a court finds a compelling interest in enforcing non-discrimination, including on the basis of sexual orientation, the claim will prevail. It

would be unwise and maybe unconstitutional for Congress to judge ahead of time these deep-seeded and delicate issues. That is the core of my philosophical disagreement; the notion that it is inappropriate for Congress to decide this especially when this comes in the context of your asking Congress to reach a different result than the court has reached in precisely this sort of balance. So, you say, "Well, the court got it fundamentally wrong, and Congress ought to change it," but then let us leave it to the courts. As a philosophical matter, how do you reconcile this notion that it is wrong and maybe unconstitutional for Congress to reconcile these when asking Congress in fact to set aside the results the court reached overall?

Mr. WALKER. I think it would be blatantly unconstitutional for this body to try to tell the court that the elimination of discrimination on the basis of sexual orientation or any other—

Mr. FRANK. That is not the question, Mr. Walker. I asked you how—

Mr. WALKER. [continuing.] Is a compelling interest. You cannot do that; that is a judicial function to determine what is and what is not a compelling interest.

Mr. FRANK. But why is it not a judicial function then to—that I guess I don't understand. The Congress can't define the compelling interest? You are asking Congress to reach a very different result than the court has reached. This is an expression of the Democracy's right to say, "No, the court has got this one wrong, and there has been a lot of criticism, of course," and I think—I am suspicious when all of sudden now this is only up to the courts. I don't understand—the Congress is creating this whole framework. Congress could not decide what is a compelling interest?

Mr. WALKER. You are not overturning a court; you are not telling the court what to do.

Mr. FRANK. I didn't say overturn.

Mr. WALKER. You are simply increasing the protection for religious liberty and leaving it to the court, a quintessential judicial function, to balance the rights.

Mr. FRANK. Again, I am disappointed. I had expected, frankly, more forthrightness. Of course, we are overturning the result the court reached. Of course, we are reaching a different result. Your own testimony is full—as it is appropriately full when you disagree—of criticism with the court. Well, you say, "Well, we are not overturning; we are just restoring"—

Mr. WALKER. With all due respect, we may not be overturning it. I mean, the courts may uniformly decide that there is a compelling interest in eliminating discrimination, and there is no net increase to the religious liberty rights.

Mr. FRANK. Mr. Walker, I am sorry, you are avoiding the point. The point is that this whole bill is an invitation to do something very different than the courts have been doing. In fact, the first bill, RFRA, was because people thought the courts were not giving sufficient attention, and you asked Congress to tell the courts to change their balance. We tried it once. The courts said it was unconstitutional. You are back here again. It simply doesn't work for you to say, "Oh no, we must always defer to the courts," and, again, I am just disappointed for you to deny that the purpose of

this is to, in fact, overturn what the courts have been doing. Your testimony is full of criticism of what the courts have been doing.

Mr. CANADY. The gentleman's time has expired. There is a series of votes taking place. The subcommittee must stand in recess. We will continue this discussion through other questions as soon as we return, and I will make sure Mr. Walker has a chance to say some more on my time if on nobody else's, but, right now, the subcommittee will stand in recess. I have encouraged the members to come back just as soon as possible after the votes, because we have quite a few witnesses ahead of us. Thank you.

[Recess.]

Mr. CANADY [presiding]. The subcommittee will be in order.

I will now recognize myself for 5 minutes, and, to begin, I would like to let Mr. Walker continue with his response of what Mr. Frank—

Mr. WALKER. Mr. Frank is not here.

Mr. CANADY. Well, I regret that he is not, but we are going to have to proceed.

Mr. WALKER. I understand.

Mr. CANADY. If we wait for everybody to get back, we won't get done today.

Mr. WALKER. My point that I was trying to make simply was that we are asking Congress to change the standard that will be employed in judging the behavior of governmental actors on the basis of discreet article I powers of the Commerce Clause and the Spending Clause powers with some residual from section 5 of the 14th amendment based on what the Court taught us in the *Boerne* case and then leave it to the courts to make that judgment of how you balance those conflicting equities; how you apply the compelling interest test in a judicial context.

Mr. CANADY. And isn't it the case that that is exactly what we were doing in RFRA?

Mr. WALKER. In a sense, but the exercise of congressional power is much more tailored and so it appears—

Mr. CANADY. No question about that; that is understood. We are operating on the basis of different constitutional authority. The scope of the bill is affected by that, but the essential task to be performed here does involve the application of this standard, and that is why I am puzzled. I am not puzzled that people oppose this, because I can understand that people might have principal basis for that with which I disagree with, and I am not puzzled that Professor Sager opposed, because Professor Sager opposed RFRA, and so I think he has been very consistent. What puzzles me a little bit are those folks who supported the Religious Freedom Restoration Act and were in some cases leading the charge in favor of the Religious Freedom Restoration Act who now see some flaws in this bill which simply reflect the same policy objectives that we were pursuing in the Religious Freedom Restoration Act. So, that it puzzling to me, and I don't know what has changed.

Now, I understand that there are some people who do have concerns about the constitutional grounds we are using here, and that is a different category, and that is something we will discuss later, but there are some people that have never seen a use of the Commerce Clause they didn't like and never seen a use of the spending

power they didn't like, but in this context, all of sudden, they have gotten nervous and concerned about the effort to protect religious liberty using those powers, and their concerns, I don't relate to the use of those powers. I am a little mystified by how people can reconcile their vote for RFRA with opposition to this bill now.

Mr. WALKER. Not to mention co-sponsorship of RLPA in the 105th Congress.

Mr. CANADY. Well, I was going to leave that out, but that is a valid point, because the very same objections that are raised with respect to concerns about this trumping certain civil rights laws in certain context, those were equally applicable to RFRA, and I don't know anybody who has made the claim that those same concerns would not have been applicable to RFRA. If that argument can be made, I would be interested in seeing it made.

Now, I want to just follow up on something Professor Sager said. You seem more upset about—you don't like any of this, and I understand—but you seem to think that the zoning portion is more offensive than the other portions. Can you help me understand why it is more offensive?

Mr. SAGER. I think that—more offensive, I would not necessarily say, Mr. Chairman. More clearly unconstitutional in this respect—not the land use provisions in their entirety, by the way; I have focused my attention intentionally on section 3(b)(1)(a) for two reasons. First, because there is no possible claim of non-article 5 authority here that it must rest on article 5 and in that sense sort of clearly comes under the aegis of the court's decision in *Flores*, and, second, because I think it is quite extreme in exactly the vice that *Flores* condemned, namely its disproportionality. I think the case that Mr. Keetch described in Tennessee is an outrageous outcome. I think that there is both local, State, and Federal legislation that could address that much more narrowly, but this is a cannon that is inappropriate.

Mr. CANADY. My time is expired. Without objection, I will have three additional minutes.

Mr. SAGER. I apologize, Mr. Chairman.

Mr. CANADY. No, that is fine. I think you have attempted to address the question I asked.

Mr. Walker, would you like to respond to that concern about the zoning? I mean, I will just say that in this context, we believe that there is a clear record which has been established that shows a pattern of abuse across the country and this goes beyond a few anecdotes. We believe that there is a pattern which can be demonstrated, and in light of that pattern of abuse that we have found and that we have considered in hearings here of this subcommittee as we have been working on this issue. That the response is not disproportionate but is carefully tailored to provide the protection that is needed to prevent the abuse of religious organizations of individuals that is currently taking place. I think you can go all over country, and you find this sort of abuse, and it takes place in an arena where traditionally, you are right. A great deal of deference is given to the final decisionmaking of the local governmental authority.

But it is a particularly serious problem in my view, because if people cannot have a place to assemble for worship, at least in

many traditions, this is a big problem. This goes to the heart of what it means to be a part of a religious community. If you cannot have a place of worship, a place to assemble for worship within the area where you live, and I think it is a very serious problem, and I believe that that is the sort of thing that is at the heart of the free exercise of religion. You combine that with the fact that we have got this pattern of abuse, and I think a compelling case is made.

Now, I understand you disagree with that, but, again, I have to, with all due respect, discount your opposition to that provision, because you have been opposed to this whole enterprise from the outset, and I understand that, and I can respect your opposition to the whole enterprise beginning with RFRA. But I am inclined to think that probably there is much we can do in this arena to sure up these protections that we want to sure up that would meet the test you would have us meet.

Mr. SAGER. Mr. Chairman, would you permit a very brief response?

Mr. CANADY. Sure.

Mr. SAGER. I want to note that, for example, that this—when I said this was a blunderbuss or a cannon, this provision does not restrict itself to houses of worship. It says, essentially, any religious enterprise and then defines religious enterprise very, very broadly in section 8, so I think I could agree with much of what you say and believe that a much more narrowly drawn statute would be equally or more effective and more legitimate.

Mr. CANADY. Well, unfortunately, my time is expired. If there is not objection, I would like to take an additional minute to let Mr. Walker respond.

Mr. WALKER. I think the record has clearly been made before the subcommittee to satisfy the proportionality and congruence requirements for the *Boerne* decision, and the record is replete with instances of discrimination. Also, I wanted to point out that this section is key to the so-called individualized assessments aspect of the jurisprudence in *Smith* where there is continuing a modicum of constitutional protection where you have cases involving individualized assessments, and to that extent, this provision is simply enforcing a constitutional right that section 5 of the 14th amendment was employed to do.

Mr. CANADY. Okay, thank you, Mr. Walker. I yield back my additional extra time, and now recognize the gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. Mr. Chairman, we have been talking at least to some extent during this discussion about individuals who have a particular religious preference and part of their religious belief entails talking to people in communities, going to homes and so forth. We have also been talking about the proverbial brush salesman. We don't get a lot of these people at our house, but it isn't because we don't, in the Seventh District of Georgia, don't appreciate either religion or good brushes. It is because our house is quite a ways back from the road. I think that is sort of intimidating. It is quite a walk. If we lived closer to the road and had more people come by, it seems that having any of these people bothered me, whether a brush salesman or a member of a particu-

lar religious organization the remedy would be twofold. One, to post a sign that they are not welcome on the property and would be considered trespassers or not to answer the door.

So, it seems to me that there is a pretty simple remedy, and I am wondering why any—why the Constitution would in any way, shape, or form be used to provide a remedy for the State to interfere in that exercise of discretion that any landowner or any homeowner has, particularly with regard to the protected areas of speech that we are talking about here—religious speech, political speech? What exactly is the basis for the government exercising any restraint in that particular area. Therefore, I think legislation of this type becomes necessary because government seems to be interfering when I am not sure it has any rational basis whatsoever, rather a much less compelling State interest to regulate this type of political or religious speech.

Can anybody explain to me why there is a compelling State interest or any State interest in regulating this particular aspect of either religious or political freedom. Such as somebody coming up to your house, given the fact that I believe that in any community in America, people have the right to either turn somebody away to keep them off of their property? What is the compelling State interest that would seem to override in any way, shape, or form the first amendment here?

Mr. KEETCH. Congressman, I will take a quick shot at that one if you want. The power that the cities generally impose insight to, which is given to them by the States, is simple police power, and they claim that there is a great deal of crime when unknown people are in the area and that people may be out to defraud the older people, and they make a record about police power.

Mr. BARR. But the public safety power would override this, and I think we probably all agree on that. If you have somebody coming up that poses a security threat, whether they are doing under the name of religion or politics, Congressman Frank's observation that people treat us more kindly than others notwithstanding, I find that is not really the case. But where you have an instance where there is any sort of threat of that or it becomes a problem—destruction of property, people banging on the door carrying weapons or what not. I am not saying that the general police power ought not override any of these protected areas of activity, and we certainly have provided for that. That aside, recognizing that the State does have essentially plenary authority to protect the public from those sorts of things. I am just somewhat mystified, as we are in this discussion, as to what power there is to the State, what the legitimate power the State has to regulate this?

Mr. KEETCH. As am I, Congressman. I extremely mystified by it, and the things that I talked about in my oral testimony only scratch the surface. I have the ordinance for one of the cities in front of me that is attached to my testimony, and you don't only have to do those things that I have described. You have to submit a most recent financial statement for the organization that you are representing. You have to submit a one-by-one picture taken within the last 60 days. You have to provide a written physical description of your religious representative. You have to give at least two ref-

erences within the State of Illinois that will testify to your character—honesty and integrity. You have a number of—

Mr. BARR. And these are clearly restraints on the exercise of certain types of activity, whether it is religious or political. Professor, what is the basis for the State imposing such burdens? What is the overriding or compelling or, indeed, even a superficial basis for the States to do this?

Mr. SAGER. Representative, I share your skepticism that there is a justification for an ordinance this restrictive of what I would regard as very fundamental rights of free expression.

Mr. BARR. That being the case, is not this legislation, at least in so far as it addresses those sorts of restrictions, a good piece of legislation?

Mr. SAGER. My nervousness, as I have emphasized to a great length, is the idea that we should protect religiously-motivated solicitors but not those merely motivated by deep moral commitments or politics, and I think that—

Mr. BARR. So, your objection is that the legislation is too narrow.

Mr. SAGER. It is too narrow and narrow along a fault line of the structure of belief which is a fault line that we should be constitutionally uncomfortable with.

Mr. BARR. So, if, for example—

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

Mr. BARR. Thank you, Mr. Chairman. If it were broadened to include other categories of constitutionally protected activity, would you be much more inclined to support it?

Mr. SAGER. Absolutely.

Mr. BARR. That is interesting. Thank you, I agree. Mr. Walker.

Mr. WALKER. I just want to respond to one thing. Of course, what we are talking about here is far broader than just religious belief; we are talking about religious practice and other types of religious accommodation that is necessary that is not captured by and protected under the Free Speech Clause. So, it is an important question, but I don't want us to lose our broader view of the problems that we have had in the exercise of religion.

Mr. BARR. No, I am not. I am just sort of focusing on that. It seems to me that the one aspect of State authority for which there is no rational basis whatsoever. In some of these other areas where you get into certain things, such as zoning ordinances, it muddies the water a little bit or building codes. It muddies the water a little bit, but it seems to me there is a very pure question presented when you are talking about somebody coming up to your house of which you have complete control for the government interference.

Mr. WALKER. Yes, the government may or may not be able to demonstrate a compelling to justify it, but don't forget, there is that second element of least restrictive means, and I am not sure that it is ever the least restrictive means of accomplishing a compelling interest to ban speech altogether and certainly not to discriminate on the basis of viewpoint.

Mr. BARR. Thank you, Mr. Chairman. I would like to thank the panelists. This has been a very, very interesting and I think very worthwhile discussion.

Mr. CANADY. Thank you, Mr. Barr. The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you, Mr. Chairman. I regret I wasn't here to hear the presentation of the panelists, so I am not going to ask them any questions, but I do want to take this opportunity to do a special welcome to Professor Sager from NYU in my district and to ask unanimous consent to submit for the record an opening statement.

Mr. CANADY. Without objection.

Mr. NADLER. Thank you.

[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 consider legislation which is intended to restore the application of strict scrutiny in those cases where a law of general applicability has the effect of placing a substantial burden on an individual's free exercise of religion.

The purpose of this legislation is to restore the protections afforded religious liberty which were eviscerated by the Supreme Court's decision in *Employment Division v. Smith*. We thought that we had rectified that problem with the Religious Freedom Restoration Act, but the Supreme Court in *Boerne* applied a new construction of Congress' powers under section 5 of the 14th Amendment which I believes threatens other civil rights legislation, including the Voting Rights Act. I hope they don't push their reasoning in *Boerne* that far, but the cumulative effect of both cases, and the Court's assault on Congress' other enumerated powers bodes ill for the protection of all civil rights in the future.

Nonetheless, *Boerne*, for better or ill, is the law of the land, and we must abide by it. The legislation we have before us is an attempt to restore the protections which existed for the free exercise of religion prior to *Smith*, within the confines of the rules laid out by the Supreme Court.

That rule we must restore was best summarized by Mr. Justice Jackson in *West Virginia Board of Education v. Barnette*,

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.

Justice Scalia, in *Smith*, took a radically different approach. Writing for the majority in that case, he observed,

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in. . . ."

He went on to dismiss this problem by observing that this plainly foreseeable tyranny of the majority is the "unavoidable consequence of a democratic government." He dismissed our proud heritage of protecting minority rights as a "luxury" we "cannot afford." I disagree, and I think most of my colleagues on both sides of the aisle disagree.

The problem with Congressional attempts to address *Smith* has never been the general principle, the problem has always been how the general rule might be applied in specific cases. Would it be used to create a new right to abortion? Would it be used by prison inmates to disrupt good order in prisons? Would it be used to reverse civil rights gains in other areas? Would it be used to undermine landmarks preservation laws? Would it be used to disrupt our schools?

I must say, that some of the hypotheticals raised recently have me very much concerned, but I am extremely reluctant to move from a general rule to one which starts the Congress down the path of protecting particular religious practice one at a time. This is a process, which Justice Scalia even recognized, would result in the disparate treatment of religious minorities, something which is forbidden under the free exercise clause after *Smith*. I would ask those witnesses who have hypotheticals which concern them to also address this issue in proposing solutions.

This is a problem not of Congress' making, but of the Court's. Nonetheless, it is a mess we must clean up. I hope we can work together to preserve the rights of all Americans in a fair and effective manner.

Thank you Mr. Chairman.

Mr. CANADY. Thank you. The gentleman from South Carolina, Mr. Graham, is now recognized.

Mr. GRAHAM. Thank you, Mr. Chairman. Let us walk through a couple of hypotheticals to see if I understand how the law works in the area of solicitation of speech.

I am going door-to-door to try to sign people up to save the whales or whatever—we will just use that as an example—and someone tries to prevent me from doing that as an organization or as an individual because of a zoning law or a city ordinance, and I claim as a defense—for lack of a better term—my first amendment rights, how would those laws be analyzed legally? What standards would come to bear? The activity is I am going to door-to-door trying to get people to be more sympathetic to the whale and some law is used to prevent me from doing that at the city or State level. I claim you can't do that, because the first amendment allows me to do this. Is the standard to be applied to that law a compelling State interest? What would be the legal standard?

Mr. SAGER. That is an excellent and not easy to answer question, but as briefly as I can—and I will be brief—the court, I think, would first ask whether the nature of this law was one which involved the government in what is sometimes called content or viewpoint-specific regulation.

Mr. GRAHAM. It is general and neutral.

Mr. SAGER. I mention that, however, because were RLPA to extend special solicitation rights to those whose motivations are religious, it is possible that would violate first amendment free expression on viewpoint-specific grounds, although we do not argue that in our testimony.

The second proposition would be the court might be very tempted to say this is a place, manner, and time regulation that you have hypothesized as genuinely neutral in its implications, then the question would be whether one's front door is, in effect, a public forum. This Supreme Court might very well say that question was decisive and that it was not a public forum, and this Supreme Court might be reluctant to extend substantial speech rights. I think that would be an error on the Court's part.

Mr. GRAHAM. But the point of my question is that when one claims a first amendment privilege, whether it is to solicit an airport or go door-to-door to save the whales, there is a body of case law that is supplied in terms of the first amendment, and there is certain criteria that you walk yourself through. If the court deems it to be a protected speech activity, then the statute comes under severe scrutiny. Is that generally true?

Mr. SAGER. That is correct.

Mr. GRAHAM. Now, as I understand the reason we are here today, when you go to the Free Exercise Clause which is specific for religious activity and speech, that the case law has taken a dramatic turn, and that is what brings us here today. And if you have a general and neutral zoning ordinance that has the effect of denying a Mormon family the right to gather and practice their religion,

how does one handle that without this statute under existing case law? The effect of the statute—zoning ordinance, in this case—is that it is general and neutral on its face, but the effect is that if you are a minority religious person or group—in this case, a Mormon—it is going to stand alone now. There is no special recognition of your religious status because of the *Smith* decision.

How would we handle that situation, if you think that is egregious, without this statute? Anybody is welcome to jump in.

Mr. KEETCH. I don't think you can, Mr. Graham. We tried exactly to argue to the Tennessee State court that there were protections that it should utilize—utilizing the hybrids exemption to *Smith*, utilizing a number of other arguments to try to get around the *Smith* decision and to show the court that there were specific rights there.

And we simply were unsuccessful. The courts came back to *Smith* and said that this is a generally applicable neutral statute on its face; we can't find intentional discrimination here. And therefore, we are going to uphold the statute as against the Mormon Church's desire to build a building in the city.

Mr. WALKER. I think there is some truth, Mr. Graham, to what you say. Reading *Smith* the way I think it should be read, one could argue that this is not facially neutral, generally applicable. They are being targeted for discriminatory treatment. And even under *Smith*, where there is targeting, you have strict scrutiny and close examination. The problem is in the proof. As Mr. Keetch has said, sometimes it is not easy to prove, particularly where it is facially neutral that it is begin targeted in its application.

So section 3 of RLPA is an attempt to help remedy that problem by making it easier for plaintiffs to state their case.

Mr. GRAHAM. If I may interject this point—

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

Mr. GRAHAM. Thank you. Let's assume for a moment that the proof is that it really is general and neutral, but the consequence, regardless of the intent, has the effect of chilling the exercise and practice of religion. What do we do then?

Mr. SAGER. I just want to point out two things, Representative Graham. First, that in the 27 years between *Sherbert v. Verner* and *Smith*, the Free Exercise Clause without a showing of discrimination or unfair treatment, only worked in two exceedingly narrow contexts to the advantage of the claimants, four unemployment-compensation cases, the *Sherbert Quartet*, and the *Amish* case, *Wisconsin v. Yoder*.

Mr. WALKER. May I disagree with that?

Mr. GRAHAM. Well, let me just—

Mr. WALKER. Sorry. Thought you were finished.

Mr. SAGER. Post—I want to suggest secondly that after *Smith*, in the lower Federal courts, there is a substantial and vigorous and free exercise tradition which is ongoing, most recently the *Keeler* decision in the third circuit.

And if, Representative Graham, you would like, we can submit additional material indicating that vibrant tradition.

Mr. GRAHAM. Sure.

[The information referred to follows:]

May 17, 1999.

Hon. CHARLES CANADY, *Chairman,*
Subcommittee on the Constitution,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CONGRESSMAN CANADY: In response to a question from Representative Graham at the May 12 hearing on H.R. 1691, we promised to supplement our written testimony with a description of Free Exercise jurisprudence after the *Smith* decision. We do so here; we hope that this letter may be added to the permanent hearing record as an appendix to our original testimony.

Somebody who listened only to the proponents of RLPA and RFRA might conclude that Free Exercise claims were rendered extinct by the Supreme Court's *Employment Division, Department of Human Resources of Oregon v. Smith*.¹ The groups supporting RLPA and RFRA have deliberately fostered that misimpression.² They have sought to focus congressional attention on one portion of the *Smith* decision—namely, the Court's assertion that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"³ They have used this sentence to assert that *Smith* overruled the Court's decision in *Sherbert v. Verner*;⁴ they have allowed Congress to infer that, after *Smith*, religious believers never enjoy a constitutional right to exemption from a burdensome law. But that is an incomplete and misleading account of the *Smith* decision. In fact, the *Smith* Court was careful to preserve the authority of *Sherbert* and its progeny.⁵ According to the *Smith* Court, those cases stand for the proposition that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."⁶ Far from repudiating that proposition, the *Smith* Court reaffirmed it.

As subsequent cases in the Supreme Court and other federal courts have shown, this rule provides substantial constitutional protection for religious liberty. The Supreme Court itself applied *Smith's* interpretation of *Sherbert* to vindicate a Free Exercise Clause claim in *Church of the Lukumi Babalu Awe v. Hialeah*.⁷ In that case, the Court reviewed a city ordinance which prescribed punishments for "whoever . . . unnecessarily . . . kills any animal." The Court held the ordinance unconstitutional, observing that

Because [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason.⁸

Federal circuit and district courts have also continued to apply the *Sherbert* rule to protect religious conduct after *Smith*. For example, in a case decided in March of this year, the United States Court of Appeals for the Third Circuit invoked *Smith* and *Lukumi Babalu Awe* to uphold a Free Exercise challenge to the dress code for Newark, New Jersey police officers. Two officers wished to wear beards for religious

¹ 494 U.S. 872 (1990).

² In his scholarly writings, Professor Douglas Laycock—who has testified repeatedly on behalf of both RLPA and RFRA—admits that witnesses who testified on behalf of RFRA "portrayed the problem in its worst possible light to maximize the need for legislative action," Douglas Laycock, "Conceptual Gulfs in *City of Boerne v. Flores*," 39 Wm. & Mary L. Rev. 743, 775 (1998). More specifically, he notes that some of "RFRA's supporters [told Congress] that nearly all laws are neutral and generally applicable and that *Smith* had all but repealed the Free Exercise Clause." *Id.* at 774 & n. 169. Laycock adds, "My own testimony in those hearings avoided the worst of this rhetoric, but I did not contradict the general impression." *Id.* at 774.

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

⁴ 374 U.S. 398 (1963).

⁵ By *Sherbert's* "progeny," we mean the three other unemployment benefits cases in which the Supreme Court followed *Sherbert*: *Thomas v. Review Bd. of the Indiana Empl. Sec. Division*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); and *Frazee v. Illinois Dept. of Empl. Sec.*, 489 U.S. 829 (1989). In only one other pre-*Smith* case did the Supreme Court find religious believers entitled to an exemption from a law that burdened their religious practice; that case was *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁶ *Smith*, 494 U.S. at 884 (quotations, citations, and alterations omitted).

⁷ 508 U.S. 520 (1993).

⁸ 508 U.S. at 537–538.

reasons. The department's grooming regulations prohibited facial hair; the department made an exception only for those officers who suffered from skin conditions that made it unhealthy for them to shave. The Third Circuit held that Newark was constitutionally obligated to accommodate religious burdens along with medical burdens:

the medical exemption raises concern because it indicates that the Department has made a value Judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.⁹

Likewise, in *Keeler v. Mayor and City Council of Cumberland*, a federal district court exempted a church from a local landmarking ordinance, claiming that the ordinance was constitutionally defective because it contained exemptions for financial hardship but not religious hardship.¹⁰ In *Rader v. Johnston*, a federal district court found evidence of discrimination when the University of Nebraska granted various freshmen the privilege of living off campus but denied permission to a religious student who wished to live in a Christian residence.¹¹

These cases are not marginal. on the contrary, cases involving "systems of individualized exemptions" are very much the norm. Many statutes either contain specific exemptions (as was the case in the Newark police department case) or provide for the individualized review of reasons for conduct (as was the case in *Lukumi Babalu Ave*). Indeed, intrusions upon religious liberty are much more likely to result from indifference or hostility on the part of bureaucrats exercising power on a case-by-case basis, than from bright-line rules enacted by legislative bodies.

In light of the way *Smith* has been described to Congress, it may seem surprising that the decision affords so much protection to religious believers. But the views expressed above are by no means ours alone. On the contrary, Professor Douglas Laycock, who is among the most ardent supporters of RFRA and RLPA, has taken a very similar position in his scholarly writing. Professor Laycock says that *Smith's* rule must be interpreted in light of "*Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah*, which appears to have given real content to the requirements of neutrality and general applicability."¹²

According to Professor Laycock,

If the standard is lack of general applicability, then many statutes violate *Smith* and *Lukumi*. Federal, state, and local laws are full of exceptions for influential secular interests. Moreover, the details of federal, state, and local laws are frequently filled in through individualized processes that provide ample opportunity to exempt favored interests and refuse exemptions to less favored interests, often including religious practice.¹³

Professor Laycock treats this point as particularly important with regard to *Smith's* application to land use cases:

The processes of administering zoning laws and designating landmarks are highly individualized. Standards tend to be vague and manipulable; zoning for a parcel is easily changed if those in power desire to change it. Many key decisions are made at the level of individual parcels in applications for special permits or variances or in votes on zoning changes or in landmark designations. These land-use laws are often not neutral, and they are almost never generally applicable in any meaningful sense. The courts should subject resulting burdens on churches to strict scrutiny under *Employment Division v. Smith*.¹⁴

Of course, we do not mean to suggest that RLPA merely replicates existing First Amendment doctrine. If that were case, RLPA would be pointless but otherwise unproblematic. The rule in *Shebert*, as affirmed by the Court *Smith*, is a rule that applies when true religious hardship is unaccountably given short shrift in a regime of exemptions that defers to other important (secular or mainstream religious) interests. RLPA effectively and intentionally renounces these preconditions of the

⁹*Fraternal order of Police Newark Lodge No. 12 v. City of Newark*, 170 F. 3d 359, 366 (3rd Cir. 1999).

¹⁰940 F. Supp. 879 (D. Md. 1996).

¹¹924 F. Supp. 1540 (D. Neb. 1996).

¹²Douglas Laycock, "Conceptual Gulfs in *City of Boerne v. Flores*", 39 Wm. & Mary L. Rev. 743, 778(1998).

¹³*Id.* at 772.

¹⁴*Id.* at 781 (footnotes omitted).

Sherbert in a variety of ways: by its novel and breathtakingly expansive definition of religious conduct; by its rigid insistence upon a "least restrictive means" requirement; and by its across-the-board use of the compelling interest standard to demand that exemptions be granted for religious conduct even under circumstances where no exemption would be granted to analogous secular claimants. Almost all land use laws, for example, have some provision for exemptions in the face of extreme hardship, often through the mechanism of a variance or special use permit. RLPA exploits this fact: through a combination of Section 3(b)(1)(A) and Section 8, to create a presumptive right for any church engaged in any church business to disobey any zoning restraint, however reasonable and evenhanded in its application. This is a caricature of the *Sherbert* rule. Some systems of exemptions, applied even-handedly and reasonably to churches, fall short of generating any constitutional complaints. In these cases the compelling state interest test is plainly inapt.

We have argued, and we continue to believe, that RLPA's novelties render it unwise and flagrantly unconstitutional. Whether or not one accepts that argument, however, the cases summarized above establish two points beyond any doubt. First, the case for RLPA cannot possibly rest upon the claim that *Smith* somehow barred relief to all, or nearly all Free Exercise litigants. That claim is demonstrably false. Indeed, since the track record of Free Exercise claims in the federal courts prior to *Smith* was notoriously poor, and since so many Free Exercise claims pertain to "individualized systems of exemptions," it is actually possible that courts after *Smith* may prove more sympathetic to Free Exercise claimants than they were before *Smith*. Second, the argument for RLPA's Section 3(b)(1)(A) (applying the compelling interest standard to burdens imposed by land use regulations) cannot turn upon the premise that *Smith* somehow made Free Exercise claimants worse off in land use cases. It did not; as Professor Laycock points out, those cases almost always involve "individualized systems of exemptions." They are therefore still governed by the standard that applied before *Smith*; if Professor Laycock and RLPA's other supporters have a quarrel with the Supreme Court's decisions in this area, their quarrel must be with *Sherbert*, and not just with *Smith*.

Sincerely,

LAWRENCE G. SAGER, *Robert B. McKay Professor of Law.*
CHRISTOPHER L. EISGRUBER, *Professor of Law.*

cc: Hon. Melvin Watt
Hon. Lindsey Graham

Mr. SAGER. That vibrant free exercise tradition is based on the sense of unfairness or discrimination. It is, frankly, impossible for me to imagine that a substantial city in Tennessee can close out a church without having behaved with deep unfairness. And I did not criticize or in any sense cast aspersions on those aspects of section 3 of this statute which make, which insist on reasonable accommodation and which make it a Federal offense to treat churches unfairly.

That, I think, is embodied in the Free Exercise Clause as it stands, but the redundancy of this statute is no offense. But three—the provision that I have constantly cited accurately but am now about to cite erroneously, 3(b)(1)(a), does something far too broad to accomplish the result of addressing this.

Mr. GRAHAM. My point is that I believe unintended consequences do occur regularly in the law, that the worst thing that could happen here is that you take someone's claim that I am exercising my religious freedom through practice or speech, and the statute in question has to go under a stronger legal standard—that's the worst thing that could happen. And that when someone makes a claim that my first amendment rights have been violated, there is a body of law that allows that claim to be adjudicated if you meet certain gates. Then that same scrutiny applies to your case.

So I don't really see that we are changing or holding up one group over to the other. Just seems to me that the *Smith* case has left a big hole in the law and we are trying to fill it in.

With that, I will yield back the balance of time.

Mr. CANADY. Thank you. I want to thank all the members of this panel for being with us today. Your testimony has been very helpful to the deliberations of the subcommittee.

We will now go to the second panel.

While you are taking your places here, I want to thank the members of the subcommittee who are here also. I personally appreciate the members, and we have had a good representation. This has been a busy day for the Judiciary Committee. There have been many things going on today, which have required some members to not be here or to not be here during the whole time. But I do appreciate all the members of the subcommittee who have been here and participating for this hearing.

Now we will go to the second panel, and I ask all of you on the second panel to come forward and take your seats. And I will proceed with the introduction of the members of this panel.

The first speaker on this panel will be Mr. Clarence E. Hodges, the General Conference's Seventh Day Adventists. Mr. Hodges is currently the vice president and director of public affairs in religious liberty. Mr. Hodges has been listed among Who's Who in Black America and Who's Who in Social Service and has been a member on the board of directors of numerous civic and educational institutions. He also served as deputy assistant secretary of state in two administrations.

Following Mr. Hodges will be Christopher E. Anders of the American Civil Liberties Union. Mr. Anders is presently legislative counsel with the ACLU's Washington National Office. His issues areas include lesbian and gay rights, fair housing, and the rights of those with HIV-AIDS.

Our next speaker will be Rabbi David Saperstein of the Religious Action Center of Reformed Judaism, where he serves as director and counsel. Rabbi Saperstein was recently appointed by Congress to the U.S. Commission on International Religious Freedom. Rabbi Saperstein teaches seminars in both first amendment church-State Law and in Jewish Law at the Georgetown University Law Center.

I want to especially thank Rabbi Saperstein's son for being with him here today, and we are hopeful that as this bill is passing the House, Rabbi Saperstein's son will be with us on the floor of the House of that event.

The next speaker on this panel will be Professor Chai R. Feldblum of Georgetown University Law Center. Prior to joining the faculty at Georgetown, Professor Feldblum was legislative counsel for the ACLU. Professor Feldblum served as a judicial clerk for the Honorable Frank M. Coffin of the First Circuit Court of Appeals as well as for the Honorable Harry A. Blackmun of the United States Supreme Court.

The final speaker on our panel today will be Professor Douglas Laycock of the University of Texas Law School. Professor Laycock serves as associate dean for research and holds the Alice McKean Young Regents Chair in Law at the University of Texas-Austin. Professor Laycock has taught and written on the law of religious liberty for more than 20 years.

Again, I want to welcome all of you. And I would encourage you to do your best to stay within the 5 minutes, which will be indi-

cated by green light, and the termination of which will be indicated by the red light. And we look forward to your testimony; we look forward to an opportunity to ask questions.

So we will begin with Mr. Hodges.

**STATEMENT OF CLARENCE E. HODGES, VICE PRESIDENT,
SEVENTH DAY ADVENTIST CHURCH OF NORTH AMERICA**

Mr. HODGES. Thank you very much, Mr. Chairman, honorable committee members, and distinguished panel members. I was honored by the invitation to appear and testify before this distinguished committee regarding H.R. 1691, the Religious Liberty Protection Act of 1999.

With human rights in general as the centerpiece of our foreign policy, I have appreciated my country's support for religious freedom around the world. During my service as deputy assistant secretary of the U.S. Department of State in two presidential administrations, it was my privilege to promote freedom in such countries as apartheid South Africa, Communist Nicaragua, the Soviet Union, and Communist Poland. I was pleased to be a part of the process of helping to advance our own policy beyond constructive engagement in apartheid South Africa after visiting from one end of that great country to the other promoting freedom and visiting with leaders of all racial groups.

During the 1960's and 1970's, I was honored to have been elected on several occasions to leadership positions in a variety of civil rights organizations, including the NAACP and CORE, the Congress of Racial Equality.

This, the greatest Nation on earth, has at times moved too slowly in advancing the cause of freedom in this great land while trying to help others achieve this same great blessing in other lands. I am here today to urge support for H.R. 1691 in the interest of religious liberty protection. Since the June 1997, ruling of the U.S. Supreme Court declaring the Religious Freedom Restoration Act unconstitutional, we have experience a backward move in the area of religious freedom.

The Seventh Day Adventist Church has an impressive history in religious freedom for all. Our resources have been expended not just for our members and our institutions, but for all as religious against discrimination one is tantamount to religious discrimination against all. It is only a matter of time.

We operate hundreds of hospitals and health-care facilities and the second largest private or parochial school system in the world. We have often experienced discrimination in the issuance of zoning and building permits.

In just one active case in the State of Illinois, we have done severe damage to our legal reserve funds as we try to keep a faith-based school, one which believes in God and country, open. This is due to the loss of RFRA.

Zoning boards seem not to be aware of the contributions religion makes to the national economy. They have given no thought to the schools, churches, community centers, hospitals, which are built, furnished, staffed, and maintained by religious organizations.

Prior to 1998, bankruptcy courts were seeking to deplete the bank accounts of religious organizations by recovering contribu-

tions made by persons who later sought bankruptcy protection. This was due to the loss of RFRA.

The problem has been partially corrected by the courageous leadership of key members of this committee and the 105th Congress with the enactment of H.R. 2604. I call for continuation of the process by enacting H.R. 1691.

Too many employers, in both the public and private sectors saw the striking down of RFRA as a signal for open season on religious freedom. Religious discrimination in the workplace has led to thousands of complaints. Sometimes, even today, racial and gender discrimination is hidden behind discrimination against religion because discrimination against religion is perceived as less objectionable.

Jobs have been lost, mortgages foreclosed, evictions activated, cars and furniture repossessed, children withdrawn from college, health-care benefits lost, and families broken due to this attitude which emanated from the loss of RFRA.

The courts support the concept of religious freedom as embodied in Title 7 of the Civil Rights Act of 1964 and CFR 1605; however, without RFRA, it often takes in excess of 10 years to achieve final confirmation of freedom and rights. The economic and social suffering for families for such a period of time confirms that freedom delayed is freedom denied.

We may speak lightly of government burdens on a person's religious exercise. The lessons I learned during my 20 years of government service in both the legislative and executive branches stressed that government's compelling interest is both to lighten burdens and to avoid being the burden.

Individuals should not be forced by government employers to choose between their religion and their employment. Governments should not be a part of the problem. This bill allows government to accomplish its mission with the least possible burden or restriction, if any.

Religious institutions relieve burdens on government and improve the quality of life for all citizens. Communist economies collapsed in large part because they did not allow religious institutions to provide social services, health care, and education as freedom allows in America.

To minimize the burdens on religious institutions is to maximize the relief these institutions can give to government.

Mr. Chairman, it is time to send a new signal. It is time for the world to see that we are not only a military superpower but a moral superpower leading the world to higher heights in the area of human rights than we have gone before.

Thank you for your consideration and for your support of religious liberty.

[The prepared statement of Mr. Hodges follows:]

PREPARED STATEMENT OF CLARENCE E. HODGES, VICE PRESIDENT, SEVENTH DAY
ADVENTIST CHURCH OF NORTH AMERICA

Mr. Chairman, honorable Committee Members and distinguished panel members, I was honored by the invitation to appear and testify before this distinguished Committee regarding H.R. 1691, the "Religious Liberty Protection Act of 1999." With human rights in general as the centerpiece of our foreign policy, I have appreciated my country's support for religious freedom around the world.

During my service as Deputy Assistant Secretary at the U.S. Department of State in two presidential administrations, it was my privilege to promote freedom in such countries as apartheid South Africa, communist Nicaragua, the Soviet Union, and communist Poland. I was pleased to be a part of the process of helping to advance our own policy beyond constructive engagement in apartheid South Africa after visiting from one end of that great country to the other, promoting freedom and visiting with leaders of all racial groups.

During the sixties and seventies, I was honored to have been elected on several occasions to leadership positions in a variety of civil rights organizations, including the NAACP and CORE, the Congress of Racial Equality. This, the greatest nation on earth, has at times moved too slowly in advancing the cause of freedom in this great land while trying to help others achieve this great blessing in other lands.

I am here today to urge support for H.R. 1691 in the interest of religious liberty protection. Since the June 1997 ruling of the U.S. Supreme Court declaring the Religious Freedom Restoration Act unconstitutional, we have experienced a backward move in the area of religious freedom.

The Seventh-day Adventist Church has an impressive history in seeking religious freedom for all. Our resources have been expended not just for our members and our institutions but for all as religious discrimination against one is tantamount to religious discrimination against all. It is only a matter of time. We operate hundreds of hospitals and health care facilities and the second largest private or parochial school system in the world.

We have often experienced discrimination in the issuance of zoning and building permits. In just one active case in the State of Illinois, we have done severe damage to our legal reserve funds as we try to keep a faith based school (one which believes in God and country) open. This is due to the loss of RFRA. Zoning boards seem not to be aware of the contributions religion makes to the national economy. They have given no thought to the schools, churches, community centers, and hospitals which are built, furnished, staffed, and maintained by religious organizations.

Prior to 1998, bankruptcy courts were seeking to deplete the bank accounts of religious organizations by recovering contributions made by persons who later sought bankruptcy protection. This was due to the loss of RFRA. The problem has been partially corrected by the courageous leadership of key members of this Committee and the 105th Congress with the enactment of H.R. 2604. I call for continuation of the process by enacting H.R. 1691.

Too many employers in both the public and private sectors saw the striking down of RFRA as a signal for "open season" on religious freedom. Religious discrimination in the workplace has led to thousands of complaints. Sometimes, even today, racial and gender discrimination is hidden behind religious discrimination because religious discrimination is perceived as less objectionable. Jobs have been lost, mortgages foreclosed, evictions activated, cars and furniture repossessed, children withdrawn from college, health care benefits lost, and families broken due to this attitude which emanated from the loss of RFRA. The courts support the concept of religious freedom as embodied in Title VII of the Civil Rights Act of 1964 and CFR 1605. However, without RFRA, it often takes in excess of ten years to achieve final confirmation of freedom and rights. The economic and social suffering for families for such a period of time confirms the freedom delayed in freedom denied.

We may speak lightly of government burdens on a person's religious exercise. The lessons I learned during my twenty years of public service in both the legislative and executive branches stressed that government's compelling interest is both to lighten burdens and to avoid being the burden. Individuals should not be forced by government employers to choose between their religion and their employment. Government should not be a part of the problem. This bill allows government to accomplish its mission with the least possible burden or restriction, if any.

Religious institutions relieve government burdens and improve the quality of life for all citizens. Communist economies collapsed, in large part, because they did not allow religious institutions to provide social services, health care, and education as freedom allows in America. To minimize the burdens on religious institutions is to maximize the relief these institutions can give to government.

Mr. Chairman, it is time to send a new signal. It is time for the world to see that we are not only a military super power but a moral super power, leading the world to higher heights in the area of human rights than we have gone before. Thank you for your consideration and for your support of religious liberty.

Mr. CANADY. Thank you very much, Dr. Hodges.
Mr. Anders.

**STATEMENT OF CHRISTOPHER E. ANDERS, LEGISLATIVE
COUNSEL, AMERICAN CIVIL LIBERTIES UNION**

Mr. ANDERS. Mr. Chairman and members of the subcommittee, the American Civil Liberties Union greatly appreciates the opportunity to present this testimony on the potentially harmful effect that the Religious Liberty Protection Act may have on the enforcement of State and local civil rights laws.

The ACLU urges the Judiciary Committee to respond to these concerns by either amending the legislation or considering other alternatives to enhancing the protection of religious exercise without causing any unintended consequences on hard-won civil rights laws enacted and enforced by State and local governments.

RLPA is generally consistent with the ACLU's historical position favoring stronger protection of religious exercise even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn RLPA's shield for religious exercise into a sword against civil rights. Thus the ACLU regrets we have no choice but to ask the committee to refrain from passing RLPA as introduced.

For nearly a decade the ACLU has fought in Congress and the courts to preserve or restore the highest level of constitutional protection for claims of religious exercise. We have directly represented persons asserting burdens on their religious beliefs, filed amicus briefs with the Supreme Court, and were founding members of the coalition that supported RFRA in 1993 and RLPA during most of the last Congress.

However, we are no longer part of the coalition supporting RLPA because we could not ignore the potentially severe consequences that RLPA may have on State and local civil rights laws. Although we believe the courts should find civil rights laws compelling and uniform enforcement of those civil rights laws the least restrictive means, we know that at least several courts have already rejected that position. We have found that landlords across the country have been using State religious liberty claims to challenge the application of State and local civil rights laws protecting persons against marital status discrimination.

None of the claims involved owner-occupied housing. All landlords own so many investment properties that they were outside the State laws' exemptions for small landlords. These landlords all sought to turn the shield of religious exercise protections into a sword against the civil rights of prospective tenants.

The U.S. Court of Appeals for the Ninth Circuit recently decided a case in which it applied the same strict scrutiny standard contained in RLPA to a claim by landlords that compliance with a local civil rights law protecting unmarried couples from discrimination based on marital status burdened their landlord's religious beliefs.

The court held that the governmental interest in preventing marital discrimination was not compelling. As a result, the landlords did not have to comply with the Anchorage civil rights law.

The Massachusetts Supreme Court and a plurality of the Minnesota Supreme Court have also found that defendants in similar civil rights cases may have a religious liberty defense against State civil rights claims.

The only two State court decisions that have found in favor of the civil rights plaintiffs in similar cases are in California and Alaska. But both States are in the ninth circuit.

RLPA may jeopardize more than marital status protection. The ninth circuit's analysis calls into question all State and local civil rights laws which are not motivated by a, "firm national policy," in favor of eradicating specific forms of discrimination. Those persons protected because of characteristics such as marital status, familial status, pregnancy status, sexual orientation, disability, and, perhaps, religion itself and gender could find their protections under State or local laws eroded by RLPA.

If RLPA becomes law, an applicant for a job or housing may have no State law protection against having to answer questions such as: Is that your spouse? Are those your children? Are you straight or gay? Are you pregnant? Are you HIV-positive? Mentally ill? What is your religion?

In the wake of the recent court decisions, the committee should not leave the problem of RLPA's potential effect on civil rights laws unresolved. The stakes are too high.

Instead, the ACLU urges you to consider other alternatives for providing a shield for religious exercise without creating a sword against civil rights laws. A properly drafted amendment to RLPA is one approach.

Another approach is to pass legislation that specifically addresses each area of law where State laws often conflict with religious exercise by linking protection of such religious exercise to specific sources of Federal funds. That approach can provide at least as much protection as RLPA but with a more effective enforcement mechanism, no questions about its constitutional authority, and no effect on State and local civil rights laws.

The ACLU respectfully urges the committee to take the time to consider such alternatives.

Members of Congress who justifiably care deeply about protecting both religious exercise and State and local civil rights laws should not be forced to choose. It is a false choice because both goals can be made compatible.

We hope to work with subcommittee members to resolve this problem. Thank you once again for this opportunity to present our concerns.

[The prepared statement of Mr. Anders follows:]

PREPARED STATEMENT OF CHRISTOPHER E. ANDERS, LEGISLATIVE COUNSEL,
AMERICAN CIVIL LIBERTIES UNION

I. INTRODUCTION

The American Civil Liberties Union appreciates the opportunity to present its testimony on the potentially harmful effect that H.R. 1691, the Religious Liberty Protection Act of 1999 ("RLPA"), may have on the enforcement of state and local civil rights laws. The ACLU urges the Judiciary Committee to respond to these concerns by either amending the legislation or considering other alternatives to enhancing the protection of religious exercise without causing any unintended consequences on the hard-won civil rights laws enacted and enforced by state and local governments.

RLPA is consistent with the ACLU's position favoring stronger protection of religious exercise—even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn RLPA's shield for religious exercise into a sword against civil rights.

The ACLU historically supports religious exercise claims of persons seeking the protection of the law as a shield against governments that are burdening such religious exercise for reasons that are not compelling or by regulations that are not the least restrictive means. Our concern is that some landlords or employers may turn the shield created by RLPA into a sword used against the civil rights of others. Although we believe that courts should find civil rights laws compelling and uniform enforcement of those civil rights laws the least restrictive means, we know that at least several courts have already rejected that position.

Thus, the ACLU regrets that we have no choice but to ask the Committee to refrain from passing RLPA as introduced. For nearly a decade, the ACLU has fought in Congress and the courts to preserve the highest level of constitutional protection for claims of religious exercise. Our record of support for persons seeking protection for religious exercise against governmental burdens is even longer. We have directly represented persons asserting burdens on their religious beliefs, filed amicus briefs with the Supreme Court, and were founding members of the coalition that supported the Religious Freedom Restoration Act of 1993, and the RLPA legislation during most of the last Congress.

However, we are no longer part of the coalition supporting RLPA because we could not ignore the potentially severe consequences that RLPA may have on state and local civil rights laws. During hearings last summer before this Subcommittee, a landlord testified that her religious beliefs were burdened by having to comply with a state fair housing law protecting people based on marital status.

We researched the issue and found that landlords across the country were using state religious liberty claims to challenge the application of state and local civil rights laws protecting persons against marital status discrimination. None of the claims involved owner-occupied housing; all landlords owned so many investment properties that they were outside the state laws' exemptions for small landlords.

The U.S. Court of Appeals for the Ninth Circuit (covering California and seven other Western states) recently decided a case in which it applied the same strict scrutiny standard contained in RLPA to a claim by landlords that compliance with a local civil rights law protecting unmarried couples from discrimination based on marital status burdened the landlords' religious beliefs. The court held that the governmental interest in preventing marital status discrimination was not compelling. As a result, the landlords did not have to comply with that civil rights law.

The Massachusetts supreme court and a plurality of the Minnesota supreme court have also found that a defendant in a civil rights case may have a religious liberty defense against state civil rights claims. The only two state court decisions that found in favor of the civil rights plaintiffs in similar cases are in California and Alaska—but both states are in the Ninth Circuit.

RLPA may jeopardize more than marital status protection. The Ninth Circuit's analysis calls into question all state and local civil rights laws which are not motivated by a "firm national policy" in favor of eradicating specific forms of discrimination. Thus, persons protected because of characteristics such as marital status, familial status, pregnancy status, sexual orientation, disability, and perhaps religion or gender, could find their protections under state or local laws eroded by RLPA.

If RLPA becomes law, an applicant for a job or housing may have no state law protection against having to answer questions such as: Is that your spouse? Are those your children? Are you straight or gay? Are you pregnant? Are you HIV-positive? Mentally ill? What is your religion?

In the wake of the recent court decisions, the Committee should not leave the problem of RLPA's potential effect on civil rights laws unresolved. The stakes are too high.

Instead, the ACLU urges you to consider other alternatives for increasing the protection for religious exercise without causing the unintended consequence of jeopardizing civil rights laws. A properly drafted amendment to RLPA is one approach. It would make clear that RLPA has no effect on state or local civil rights laws, thus leaving in place both the rights of civil rights plaintiffs *and* the existing constitutional exception from civil rights laws for the ministerial functions of religious organizations and the numerous statutory exceptions for religious organizations and small landlords.¹

¹ During subcommittee mark-up of H.R. 4019 in the 105th Congress, Congressman Robert C. Scott unsuccessfully offered an amendment to ensure that the legislation would not create any defense to civil rights claims. Specifically, that amendment provided that "[n]othing in this [RLPA] Act shall be construed to provide a defense to any other civil or criminal action based on any Federal, State, or local civil rights law." The Scott amendment is only one of several ways to remedy the civil rights problem.

Another approach is to pass legislation that specifically addresses each area of law where generally applicable state laws often conflict with religious exercise by linking protection of such religious exercise to specific sources of federal funds. That approach can provide at least as much protection as RLPA—but with a more effective enforcement mechanism, no questions about its constitutional authority, and no effect on state and local civil rights laws.

II. SCOPE OF THE POTENTIAL PROBLEM

RLPA would provide extensive statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1980 Supreme Court decision that lowered the standard of review for religious exercise claims. RLPA provides, in relevant part, that:

a [state or local] government shall not substantially burden a person's religious exercise in a program or activity, operated by a government, that receives federal financial assistance [or impose a substantial burden on religious exercise if the burden affects interstate commerce], even if the burden results from a rule of general applicability. . . . [unless 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.

As introduced, the legislation does not have any provision specifically addressing RLPA's potential effect on state and local civil rights laws.

The scope of the potential civil rights problem raised by religious freedom statutes is broad. The U.S. Court of Appeals for the Ninth Circuit and four state supreme courts have recently decided five cases with nearly identical fact patterns, namely, landlords claiming that their religious beliefs defeat housing discrimination claims brought by unmarried heterosexual persons based on marital status.² The decisions were split, with the Ninth Circuit and the Massachusetts and Minnesota courts holding that a religious liberty defense could defeat civil rights claims based on state or local laws. The courts could apply the reasoning in those decisions to civil rights claims made by members of other groups that also receive less protection from the courts and the federal government.

The intent of at least some of the supporters of RLPA is clear. Several witnesses during hearings before the House and Senate Judiciary Committees specifically stated their belief that RLPA could and should be used as a defense to civil rights claims based on gender, religion, sexual orientation, and marital status.

In applying standards of review substantially similar to the RLPA religious exercise standard, numerous courts have recently decided cases in which defendants raised a religious liberty defense to civil rights claims based on state or local laws protecting against discrimination in housing based on marital status. *See Thomas v. Municipality of Anchorage*, 165 F.3d 692 (9th Cir. 1999) (governmental interest in preventing marital status discrimination was not compelling); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) [hereinafter "*Smith v. FEHC*"] (no substantial burden on religious exercise found); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) (the government's interest in providing equal access to housing was compelling and uniform application of the state anti-discrimination law was the least restrictive means); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) ("marital status" did not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination). Thus, in the Ninth Circuit and Massachusetts and Minnesota, defendants may successfully use their religious beliefs to defeat at least certain civil rights claims based on state or local laws.

In those housing cases, the owner-occupied exceptions found in all state fair housing laws did not apply; the rental properties at issue were not owner-occupied, but

²In addition, the supreme courts of Michigan and Illinois recently vacated decisions that had held that their respective state fair housing laws protecting persons based on marital status served a compelling governmental interest and were narrowly tailored. *McCready v. Hoffius*, 1999 Mich. Lexis 694 (Mich. April 16, 1999), *vacating and remanding*, 586 N.W.2d 723 (Mich. 1998); *Jasniowski v. Rushing*, 685 N.E.2d 622 (Ill. 1997), *vacating for lack of case or controversy*, 678 N.E.2d 743 (Ill. App. 1997). The Michigan supreme court reversed its own earlier decision after newly elected justices joined the court. The Illinois supreme court vacated an intermediate appellate decision for the procedural reason of a lack of a case or controversy.

instead were used solely for investment purposes. See *Thomas*, 165 F.3d 692 (statute provides exception for "space rented in the home of the landlord"); *Desilets*, 636 N.E.2d at 238 n.8 (law applicable only to "dwellings that are rented to three or more families living independently of each other"); *Swanner*, 874 P.2d at — (statute provides exception for individual home "wherein the renter or lessee would share common living areas with the owner"); *French*, 460 N.W.2d 2 (owner did not live in subject property, a two-bedroom house); *Smith v. FEHC*, 913 P.2d at 912 (Smith "does not reside in any of the four units"). The landlords all claimed that their sincerely held religious beliefs about premarital sexual relations required them to deny housing to unmarried couples, despite state or local laws prohibiting discrimination on the basis of marital status in housing. Although the religious liberty defense was not always successful, the courts were split on whether the anti-discrimination laws impose a substantial burden on the exercise of the landlord's religion, and on whether the governmental interest in eradicating marital status discrimination in housing is compelling and pursued by the least restrictive means.

Defendants in civil rights cases have also raised religious liberty defenses in cases involving such characteristics as race or sexual orientation and in contexts ranging from educational institutions to employment. For example, defendants or courts unsuccessfully raised religious rationales for racially discriminatory practices. *E.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (religious university claimed that its religious beliefs about miscegenation justified racial discrimination in admissions); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a Virginia antimiscegenation statute).³

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon v. Smith*, 485 U.S. 660 (1988), the use of religious liberty defenses to civil rights claims was widespread. See, *e.g.*, *Bob Jones Univ.*, 461 U.S. 574, 604; *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house claimed that dismissing employee in retaliation for bringing discrimination charges was based on religious doctrine forbidding members of the church from bringing lawsuits against the church); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (health club's owners insisted on hiring only employees whose religious beliefs were consistent with the owners' religious beliefs despite state anti-discrimination law forbidding employment discrimination based on religion, sex, and marital status); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (religious university argued that its religious beliefs justified the denial of "university recognition" to gay student group, despite a District of Columbia civil rights law prohibiting discrimination on the basis of sexual orientation).

In addition, during congressional hearings last year, advocates for religious groups testified that RLPA could be used as a defense to allow a sectarian vocational-tech school receiving federal funds to offer single-sex education, despite federal laws prohibiting sex discrimination in education; to permit a religiously-affiliated day care center to discriminate on the basis of religion in hiring instructors; to permit employers with sincerely held religious beliefs to discriminate against gay men and lesbians in hiring employees, despite state or local laws prohibiting discrimination on the basis of sexual orientation; and to allow landlords with religious objections to refuse to rent to unmarried couples, despite state or local fair housing laws protecting against discrimination based on marital status. State and local laws also provide protection based on other characteristics that receive less than strict scrutiny, such as disability, familial status, or pregnancy.

Although the governmental interest in eradicating discrimination has usually been found compelling, providing a new defense in civil rights actions will—at minimum—increase the cost of litigation for plaintiffs. However, the risk for persons claiming civil rights protection based on characteristics that receive lower levels of scrutiny is substantial. Because many of the groups claiming protection under state and local civil rights laws do not currently receive heightened scrutiny for their claims in court, and receive little or no explicit federal statutory protection from Congress, it is likely that at least some courts would find that the governmental interest in ending discrimination against these groups is not compelling. As noted above, the courts are divided on the question, and these decisions have come from

³In *Loving*, the Supreme Court reversed a decision of the Virginia Supreme Court which had affirmed, in part, a Virginia state trial court decision that stated:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Decision of Circuit Court for Caroline County (Jan. 6, 1959), (quoted in *Loving*, 388 U.S. at 3).

states which traditionally have been vigorous and strict in enforcing their civil rights laws.

III. APPLICATION OF THE FOUR-PART RLPA TEST TO CIVIL RIGHTS CLAIMS

RLPA provides, in relevant part, that:

a [state or local] government shall not substantially burden a person's religious exercise in a program or activity, operated by a government, that receives federal financial assistance [or impose a substantial burden on religious exercise if the burden affects interstate commerce], even if the burden results from a rule of general applicability. . . . [unless 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.

Thus, in deciding a challenge to a civil rights claim based on a state or local anti-discrimination law, a court must apply a four-part test: (i) is the defendant's discrimination "religious exercise?"; (ii) does the applicable state or local anti-discrimination law "substantially burden" the defendant's religious exercise?; (iii) is the government's interest in eradicating the discrimination "compelling?"; and (iv) are uniformly applied anti-discrimination laws the least restrictive means of furthering any compelling governmental interest?

A. Is Discrimination "Religious Exercise" Under RLPA?

The first part of the RLPA test is whether a refusal to comply with civil rights laws is religious exercise. Because RLPA defines religious exercise broadly as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief," any civil rights defendants who can show that his or her discriminatory actions were "substantially motivated by religious belief" will be able to meet this prong of RLPA. Under the pre-*Smith* Free Exercise Clause jurisprudence which RLPA purports to restore, the "Supreme Court free exercise of religion cases have accepted, either implicitly or without searching inquiry, claimants' assertions regarding what they sincerely believe to be the exercise of their religion, even when the conduct in dispute is not commonly viewed as a religious ritual." *Desilets*, 636 N.E.2d at 237 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 137 (1987); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)).

Courts have held that refusal to rent an apartment to an unmarried heterosexual couple based on the landlord's religious belief that promoting premarital sex is sinful is religious exercise. *See, e.g., Smith v. FEHC*, 913 P.2d at 923 ("While the renting of apartments may not constitute the exercise of religion, if Smith claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA."); *Desilets*, 636 N.E.2d at 237 ("Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion."). Similarly, in the employment context, courts have accepted the argument that hiring decisions are religious exercise, if the employer can demonstrate that the decision was based on religious belief or doctrine. *See, e.g., Pacific Press*, 676 F.2d at 1280 (retaliatory action taken by religious publisher against employee who instituted EEOC proceedings alleging sex discrimination was religious exercise because church doctrine prohibited lawsuits by members against the church).

The question of whether a corporate employer or corporate landlord may raise a religious liberty defense is less clear than whether an individual serving as an employer or landlord may raise that defense. In *McClure*, the Minnesota Supreme Court held that a health club had standing to raise a free exercise defense, but noted that because the "corporate veil" was pierced, the three owners were held liable for any illegal actions of the corporation, and the free exercise rights being asserted were their rights rather than the rights of the health club. *McClure*, 370 N.W.2d at 850-51. In contrast, the Minnesota Court of Appeals found that when a corporation itself has been held liable for discrimination, it may not raise the free exercise rights of its principals. *See Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784, 790 (Minn. App. 1985), *aff'd without op.*, 389 N.W.2d 205 (Minn. 1986). In *Blanding*, the court analyzed the representational standing issue and held that the standing requirements were not met because the "evangelical religious commitment of its principals is not germane to the Club's purpose, profit-seeking." *Blanding*, 373 N.W.2d at 790.

B. Do State and Local Civil Rights Statutes “Substantially Burden” Religious Exercise?

The purpose of the second part of the RLPA test is to avoid litigation over neutral laws which have only a minimal impact on religious exercise. Congress has not defined “substantial burden,” and there is no generally applicable test to determine whether a substantial burden exists. *See Smith v. FEHC*, 913 P.2d at 924. However, several circuit courts have adopted a broad reading of “substantial burden,” holding that

a substantial burden on the free exercise of religion, within the meaning of the [RFRA], is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack v. O’Leary, 80 F.3d 1175, 1179 (7th Cir. 1996); *see also Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (“To exceed the ‘substantial burden’ threshold, governmental regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person’s] individual beliefs.”); *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (substantial burden imposed when person is compelled, “by threat of sanctions, to refrain from religiously motivated conduct”) (quotations omitted). *But cf. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 171–72 (4th Cir. 1995) (substantial burden not imposed where plaintiffs “have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take”); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (same); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam) (same).

Economic cost alone does not constitute a substantial burden. *See Braunfeld v. Brown*, 366 U.S. 599, 605 (1961); *Smith v. FEHC* at 926–27. However, even those courts that have adopted a narrow definition of substantial burden—where a substantial burden is imposed only where someone is compelled to engage in conduct forbidden by his or her religion, or forbidden to engage in conduct mandated by religious belief—have held that imposing liability on an employer for non-compliance with employment anti-discrimination laws constitutes a substantial burden when compliance would contradict religious belief or doctrine. *See, e.g., Pacific Press*, 676 F.2d at 1280 (“there is a substantial impact on the exercise of religious beliefs because EEOC’s jurisdiction to prosecute . . . will impose liability on Press for disciplinary actions based on religious doctrine”).

One court has held that compliance with state fair housing laws does not impose a substantial burden, in part because “one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an anti-discrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.” *Smith v. FEHC*, 913 P.2d at 925. The court also noted that “the landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples. No religious exercise is burdened if she follows the alternative course of placing her capital in another investment.” *Id.* at 926.

Because the court in *Smith v. FEHC* used an analysis for “substantial burden” that may be more stringent than the analysis required by RLPA, other courts are likely to view the “choice” of engaging in a different occupation or complying with the anti-discrimination law and violating one’s religious beliefs as too harsh, and conclude that the burden is substantial. *See, e.g., Desilets*, 636 N.E.2d at 237–38 (substantial burden imposed because the civil rights law “affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation,” and “both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants’ religion”). Indeed, all courts, other than the court in *Smith v. FEHC*, that have considered the question in the housing context have found that the state or local anti-discrimination law substantially burdened the defendant’s exercise of his or her religious beliefs.

C. Is the Governmental Interest in Eradicating Discrimination Compelling?

The third part of the RLPA test provides that only a compelling governmental interest justifies imposing a substantial burden on the exercise of religion.⁴ The courts that recently decided civil rights cases in which a defendant raised a religious liberty defense have split most sharply on this part of the test.

The governmental interest in eradicating certain types of discrimination, particularly racial and sex-based discrimination, should meet the compelling interest standard. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. . . . [T]he government has a fundamental, overriding interest in eradicating racial discrimination in education. . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (the state government's "compelling interest in eradicating discrimination against its female citizens justifies the impact . . . on the male members' associational freedoms"). Such plaintiffs, however, should anticipate incurring litigation costs as defendants raise the defense.

Because sexual orientation, marital status, disability, and other newly protected classes currently do not receive the same level of judicial scrutiny as race and sex, however, it may be more difficult to persuade all courts that the governmental interest in preventing discrimination on those grounds is compelling. For example, courts have reached divided results in determining whether preventing discrimination based on characteristics such as sexual orientation or marital status is compelling. See, e.g., *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. App. 1987) (District of Columbia's interest in prohibiting educational institutions from denying equal access to tangible benefits on the basis of sexual orientation is compelling); *Swanner*, 874 P.2d at 282-83 (Anchorage's interest in prohibiting marital status discrimination in housing is compelling); *Desilets*, 636 N.E.2d 233 (remanding for further consideration of whether the government's interest in prohibiting marital status discrimination is compelling); *French*, 460 N.W.2d at 10-11 (plurality op.) (no compelling governmental interest in ending discrimination against unmarried couples).

Because RLPA requires that the "government demonstrate[] that application of the burden to the person is in furtherance of a compelling governmental interest" (emphasis added), courts could require the government to prove that there is a compelling interest in requiring the specific landlord or employer to comply with the civil rights law. See, e.g., *Desilets*, 636 N.E.2d at 238 (the issue is "whether the record establishes that the Commonwealth has or does not have an important governmental interest that is sufficiently compelling that the granting of an exemption to people in the position of the defendants would unduly hinder that goal"); *French*, 460 N.W.2d at 9 ("French must be granted an exemption . . . unless the state can demonstrate compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption to French."). However, the majority of courts interpreting RFRA considered simply whether the government had a compelling interest in enforcing the law at issue.

When a state or municipality chooses to target and prohibit a specific form of discrimination, presumably it does so because it believes that there is a serious problem. See *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'"). Courts have sometimes found that legislative determination alone, however, is not always dispositive of whether the state's interest is compelling. See *Gay Rights Coalition*, 536 A.2d at 33 ("While not lightly to be disregarded, the Council's strong feelings do not resolve the issue whether its ban on sexual orientation discrimination represents a compelling governmental interest."); *Desilets*, 636 N.E.2d at 240 ("we are unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the state has" a compelling interest in ending marital status discrimination in housing).

To the extent that other state or municipal laws or policies discriminate against the class, courts are sometimes less likely to find that the governmental interest in

⁴In *Employment Division v. Smith*, 494 U.S. 872, 888 (1990), the Supreme Court noted that the compelling government interest test from *Sherbert* used to analyze free exercise cases was less strict than the test used in strict scrutiny in equal protection or free speech cases. However, RLPA uses language that suggests the strict scrutiny equal protection test. On the other hand, the legislative history to RFRA includes statements that Congress intended to "restore" the pre-*Smith* free exercise jurisprudence. Thus, it is unclear whether RLPA would require courts to apply a pre-*Smith* level of scrutiny or the higher level of scrutiny applied in strict scrutiny equal protection analysis.

ending discrimination against that class is compelling. Thus, anti-fornication or sodomy statutes have provided additional support for concluding that there is no compelling governmental interest in protecting against discrimination based on marital status or sexual orientation. *See, e.g., French*, 460 N.W.2d at 10 (plurality op.) (“How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?”); *Desilets*, 636 N.E.2d at 240 (the existence of a criminal statute against fornication “suggests some diminution” in the state’s interest).

Similarly, state or local policies favoring married couples also have been used by courts to determine that the governmental interest in ending discrimination against unmarried couples is not compelling. *See, e.g., Desilets*, 636 N.E.2d at 239–40 (“in various ways, by statute and by judicial decision, the law has not promoted cohabitation and has granted a married spouse rights not granted to a man or woman cohabiting with a member of the opposite sex”); *French*, 460 N.W.2d at 10 (plurality op.) (noting differential treatment of married couples in employee life and health insurance benefits); *Smith v. Fair Employment and Housing Comm’n*, 39 Cal. App. 4th 877, 894 (Cal. App. 1994) (relying on the absence of strict scrutiny for marital status classifications and the existence of other state laws or policies favoring married couples, including insurance benefits and conjugal visits to determine that state interest was not compelling), *rev’d on other grounds*, 913 P.2d 909 (Cal. 1996) (plurality op.);⁵ *but see Swanner*, 874 P.2d at 283 (noting that differential treatment of married and unmarried people in areas other than housing does not prove that the state views marital status discrimination in housing as insignificant).

Courts have taken different positions on defining the scope of the governmental interest at stake in prohibiting discrimination. Defining the governmental interest broadly, the *Swanner* court had no difficulty in concluding that the state’s “interest in preventing discrimination based on irrelevant characteristics” is compelling. *Swanner*, 874 P.2d at 282–83. “The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one’s opportunities results in harming the government’s transactional interest in preventing such discrimination.” *Id.*; *accord Gay Rights Coalition*, 536 A.2d at 37 (“The compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty, and property that the Founding Fathers guaranteed to us all.”).

In contrast, the Massachusetts Supreme Court in *Desilets* insisted on a much more narrow reading of the governmental interest, noting that “[t]he general objective of eliminating discrimination of all kinds . . . cannot alone provide a compelling State interest that justifies the . . . disregard of the defendants’ right to free exercise of their religion. The analysis must be more focused.” *Desilets*, 636 N.E.2d at 238. This narrow reading led the court to insist that Massachusetts “demonstrate that it has a compelling interest in the elimination of discrimination in housing against an unmarried man and an unmarried woman who have a sexual relationship and wish to rent accommodations to which [the civil rights statute] applies.” *Id.*

D. Are Uniformly Applied Anti-Discrimination Laws the Least Restrictive Means Available?

The fourth part of the RLPA test is whether the challenged state or local law uses the least restrictive means to achieve the government’s compelling interest. There is agreement among the state courts that have decided the compelling government interest issue in favor of the government that uniform application of the anti-discrimination laws is the least restrictive means available. *See Swanner*, 874 P.2d at 280, n.9 (“The most effective tool the state has for combating discrimination is to prohibit discrimination; these laws do exactly that. Consequently the means are narrowly tailored and there is no less restrictive alternative.”); *Gay Rights Coalition*, 536 A.2d at 39 (“The District of Columbia’s overriding interest in eradicating sexual orientation discrimination, if it is ever to be converted from aspiration to reality, requires that Georgetown equally distribute tangible benefits to the student groups.”); *McClure*, 370 N.W.2d at 853 (“the state’s overriding compelling interest of eradicating discrimination based upon sex, race, marital status, or religion could

⁵ Because the California Supreme Court found that there was no substantial burden imposed on Smith’s religious exercise, the court did not reach the issue of whether the government’s interest was compelling. *See Smith*, 913 P.2d at 929.

be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected class"). However, another state supreme court has held that the government may be required to prove that "uniformity of enforcement of the statute . . . [is] the least restrictive means for the practical and efficient operation of the antidiscrimination law." *Desilets*, 636 N.E.2d at 241.

RLPA defendants could argue that the government cannot have a compelling interest in uniformity of application of civil rights laws, as the civil rights laws typically contain some exemptions for religious organizations, and therefore a less restrictive means is available: granting an exemption to persons who hold sincere religious beliefs. However, at least one court has recognized that while the government permits exemptions for "religious corporations when religious beliefs shall be a bona fide occupational qualification," "the state's overriding interest permits of no exemption to appellants in this case. . . . [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of citizens of the state as a whole in an effort to eliminate pernicious discrimination." *McClure*, 370 N.W.2d at 853; *but see Desilets*, 636 N.E.2d at 240 ("the compulsion of the state's interest appears somewhat weakened because the statute permits discrimination by a religious organization in certain respects . . . if to do so promotes the principles for which the organization was established").

Moreover, because granting religious exemptions to an individual employer, landlord or institution from civil rights laws will likely increase the number of people claiming a religious defense for their discriminatory actions, uniform application is the least restrictive means to accomplish the goals of the anti-discrimination laws. *See McClure*, 370 N.W.2d at 853, n.16 (warning that if the court permitted the exemption in this case, other employers, "if they could demonstrate their beliefs were sincere and based on accepted theological concepts, would be permitted to discriminate contrary to the state's public policy of affording equality of opportunity and equal access to public accommodation to all its citizens. To permit such an exception would substantially emasculate the state's public policy of ensuring civil rights for citizens."); *Desilets*, 636 N.E.2d at 240 ("the practical problems of administering a law with the exemption that the defendants seek may be shown to be such as to make the operation of such an exemption impractical"); *see also Brown v. Dade Christian Schools*, 556 F.2d 310, 323-24 (5th Cir. 1977) (Goldberg, J., concurring) ("[W]hen recognizing the [free exercise] claim will predictably give rise to further claims, many of which undoubtedly will be fraudulent or exaggerated, the situation is different. In that event the court must either recognize many such claims . . . or draw fine and searching distinctions among the various free exercise claimants. The latter course would raise serious constitutional questions with respect to the proper functioning of the courts in sensitive religion clause adjudication.").

IV. CONCLUSION

Unless Congress amends RLPA to respond to the serious civil rights problem—or develops an alternative approach to addressing the problem of increasing protection for religious exercise against neutral state and local laws—the resulting statute may provide a new defense to state and local civil rights claims made by persons who already receive the least protection from the courts and the federal government. Several court decisions holding that religious liberty claims could defeat civil rights claims based on marital status protection portend an undermining of civil rights protection for many persons who only recently gained protection from discrimination, and an increase in litigation for persons belonging to groups that receive heightened scrutiny. For that reason, Congress should not pass RLPA without ensuring that it will not deprive persons of their civil rights under state and local laws.

Mr. CANADY. Thank you, Mr. Anders. You also get an award for completing your testimony within the allotted time.

Mr. ANDERS. Thank you.

Mr. CANADY. I'm not sure what the award will be, but—
[Laughter.]

Rabbi Saperstein.

Mr. ANDERS. An amendment? [Laughter.]

Mr. CANADY. I feel quite certain it won't be in that form.

Let me now recognize Rabbi Saperstein and thank him again very much for being here today.

STATEMENT OF RABBI DAVID SAPERSTEIN, DIRECTOR AND COUNSEL, RELIGIOUS ACTION CENTER OF REFORM JUDAISM

Mr. SAPERSTEIN. It's a delight and honor to be here, Mr. Chairman, to address this issue. I represent the 1.5 million Reform Jews and 1,800 Reform Rabbis in our 900 congregations nationwide. For the Jewish community, this is an issue of fundamental importance.

America has given minorities religious minorities in particular, and religious groups in general more freedoms, more rights than anywhere else in the world. But in the wake of the Supreme Court decisions in *Smith* and *Boerne*, religious groups in general and religious minorities most particularly are no longer guaranteed the protections that have made our religious experience in America so unique and remarkable.

Even Justice Scalia acknowledged explicitly in *Smith* that religious minorities would suffer disproportionately as a result of this decision. That simply should be unacceptable. It has resulted in a number of violations of the religious freedom of the Jewish community as well as many of the other groups from whom you have heard.

But I want to focus on the interaction between RLPA and other civil rights statutes. This is not a struggle between religious freedom and civil rights—because protection of religion is in and of itself a civil right. And I know that the vast majority in this room are deeply committed to civil rights. I know in my role on the national board of the NAACP and the Leadership Conference on Civil Rights—I will point out with irony that the last time I testified before this committee was to oppose the Defense of Marriage Act). That most of us cross the gamut of concerns at the hearing.

And as we wrestle how to weigh our religious freedom and other civil rights concerns, we should see that, in the main, we are all deeply committed to these concerns and do so respectfully. And that is certainly true of whatever decisions are made by the members of this committee.

It seems there are two sets of concerns here raised by this bill. The first is that a new civil rights law, based on the Commerce and Suspending Clauses, might end up going to the Supreme Court and the Court—an unsympathetic Court—might issue a restrictive ruling that would affect many civil rights claims. That is, of course, true of a wide range of civil rights laws, women's rights laws, and other concerns. If the Court wants to reach that decision, it doesn't need this bill.

Now that concern may affect the way we go about litigation after the law is passed. But it cannot be used to defend the exclusion of an entire category of civil rights protection—that is for religious freedom.

The other concern is that we it will have a negative impact on civil rights by providing a "new" legal right to make a religious claim to engage in discrimination. In some cases, the argument goes, the civil rights claim will lose. In others, it will lead to a diversion of resources and staff necessary to litigate such cases. And that will weaken important civil rights efforts.

Now all of these concerns are valid, but there are three principles implicated in weighing them out. First, you raised the question of what is the difference between RLPA and RFRA. Let me just add to that: What is the difference between the Bill of Rights and RLPA?

We all agree that *Smith* was wrongly decided. I presume none of the civil rights groups would fail to join us in seeking to overturn *Smith*. If the first amendment were intact, and the Court had not eviscerated its protection of religious freedom, every one of these concerns would exist. I don't understand the difference between us all working together to overturn *Smith* or our working together legislatively to mitigate the damage that *Smith* has wrought.

Second, these issues exist with every one of the claims that might be subject to the "compelling-interest, least-restrictive means" test. Pro-life and pro-choice groups in our coalition, including a number testifying today; thoughtful "law and order" advocates concerned deeply about security and discipline in prisons; historical preservationists and zoning authorities; military and school officials—all of whom had legitimate concerns; all in the main agreed to forgo efforts at exemptions, to forgo putting their valid concerns in a special category.

This legislation works only where there is a uniform standard. Grant an exemption or "carve-out" in any area (either directly or by exempting many areas via a limited "carve-in" bill), and the entire conceptual and political support structure for the bill topples. Religious freedom ought to be indivisible. It is the right thing to do.

And then we need to work together, to move onto my third concern, to protect civil rights, in and of themselves. Now I must acknowledge in the RLPA coalition there is no consensus amongst the most compassionate supporters of RLPA either on this committee or in our coalition on this issue. So I am speaking for my own organization and a number of the organizations in this coalition effort, but by no means all.

We believe that preventing discrimination constitutes a compelling State interest on all grounds, but on no issue, because of divisions in our coalition, do we move to put that being a "compelling interest" in the law itself. But we are winning far more cases than we are losing on this. Not universally, but in the main, civil rights claims prevail against religious right claims in these areas. You have to show a substantial burden on religion—a very hard claim. And in the main, they are winning.

One last point, even if RLPA goes down because of efforts at carve-outs, most of these cases involve State RFRA's, State Constitutions where the religious claims are already present. It won't affect the balance that will be going on. Those of us concerned about civil rights more broadly are going, in the main, to have the same difficulties.

We shouldn't abandon the fundamental principle of universal protection of religious freedom for the little gain that it would get us in terms of the civil rights claims. So I really want to work together to pass this law and then work together in terms of the issues of civil rights, broadly, and gay rights, more particularly, to

fight that battle in the legislatures and courts of America until we win.

[The prepared statement of Rabbi Saperstein follows:]

PREPARED STATEMENT OF RABBI DAVID SAPERSTEIN, DIRECTOR AND COUNSEL,
RELIGIOUS ACTION CENTER OF REFORM JUDAISM

I. INTRODUCTION

Thank you, Mr. Chairman, for the opportunity to address this Committee on an issue of vital importance to the American people and of special concern to the American Jewish community. I am Rabbi David Saperstein, and, in addition to representing 1.5 million Reform Jews and 1,800 Reform rabbis in 870 congregations nationwide, I come before you today as an attorney who teaches church-state law at Georgetown University Law Center, and as a member of the clergy who cherishes America's religious vitality.

This afternoon the Committee is hearing from some of the nation's leading authorities on religious liberty. Their testimony makes clear, in great detail, the perilous state of our first freedom, and the urgent need for this legislation. In my brief comments, therefore, I will focus on two issues: first, the importance of the Religious Liberty Protection Act (RLPA) to religious minorities in general, and to the Jewish community in particular; and, second, the concerns that have been raised about the interaction of RLPA and our nation's civil rights statutes.

II. RLPA AND RELIGIOUS MINORITIES

At the outset, I need to express, in the strongest terms possible, that the Reform Jewish community, as with most mainstream Jewish religious and secular organizations support this legislation. The organization I represent, the largest in American Jewish life, has made passage of legislation addressing the *Smith* decision one of our top legislative priorities, believing that failure to pass such legislation would make empty the 16 words that have allowed Judaism to flourish in America as it flourishes nowhere else outside Israel, words that have provided Jews with more freedom and opportunities than we have ever known in Diaspora life: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

For much of American Jewry, the struggle to protect our religious liberty, to ensure that we, and our neighbors, are free to follow the dictates of our conscience, is a survival issue.

Our history, so often marked by oppression at the hands of societies intolerant of minority religions, has taught us the cost of governmental interference with religion. The fundamental freedoms enshrined in our nation's Constitution have allowed minority faiths to develop their rich and varied traditions free from majoritarian protections and as Jews, we are painfully aware of the danger of governmental restrictions upon religious freedom.

In fact, the American experiment teaches us the value of religious freedom. Today, we live in the most religiously diverse nation in the history of the world, where more than 2,000 religions, denominations, and sects thrive and co-exist in harmony. We rejoice that America—the golden land of inalienable liberties—is the nation where all religions, including minority religions, enjoy the most freedoms, the most rights, and the most opportunities in the world.

But today, in the wake of the Supreme Court decisions in both *Smith* and *Boerne*, religious groups in general, and religious minorities most particularly, are no longer guaranteed the protections that have made our religious experience in America so unique and remarkable. Even Justice Scalia acknowledged in *Smith* that, religious minorities would suffer disproportionately as a result of the decision.

For instance, the Jewish principle of *kavod hamet*, respect for the dead, mandates that a dead body is not left alone from the moment of death until burial and that we must not disturb the body in any manner. For this reason, autopsies, in all but the most serious situations, are forbidden. Following *Smith*, courts in both Michigan and Rhode Island forced Jewish families of accident victims to endure intrusive government autopsies of family members, even though the autopsies directly violated Jewish law and there was no finding that the autopsies were necessary for compelling government purposes (e.g. suspicion of foul play or a contagious disease).¹

¹ See *Montgomery v. County of Clinton*, 743 F. Supp. 1253, (W.D. Mich. 1990), aff'd, 940 F. 2d 661 (6th Cir. 1991); *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990)

A court in Los Angeles declined to protect the rights of fifty elderly Jews to meet for prayer in the Hancock Park area, because Hancock Park had no place of worship and the City did not want to create precedent for one.² Similar cases involving land use have arisen across the nation.

III. INTERACTION BETWEEN RLPA AND OTHER CIVIL RIGHTS STATUTES

Before turning to the concerns about RLPA raised by the ACLU and some of my colleagues in the civil rights community, I want to emphasize a point that, too often, has gotten lost in this debate. Whatever disagreement there may be over the concerns raised by the ACLU, I ask each of you on this Committee to remember that the issue is not about RLPA on the one hand and "civil rights" on the other. Because, of course, the right to "free exercise" of religion is, itself, a protected civil right. Our nation's civil rights laws must, and generally do, offer protection to religious individuals and organizations.

Equally importantly, those here with me who will argue for changes in RLPA to accommodate non-religious civil rights concerns are deeply committed to the cause of religious liberty; and those who will argue for a uniform, indivisible standard for the protection of religious liberty are also passionate advocates supporters of civil rights more generally. However the members of this Committee vote on specific proposals which may be offered to address the concerns raised by the ACLU and others, I believe that their commitment to the twin causes which are discussing today—religious liberty and civil rights more broadly—should be measured by their broader records rather than on this specific question.

There are two categories of valid concerns that the civil rights community raises, although, as this panel indicates, the civil rights community is split—albeit respectfully so—about how to best address them. The first set of issues arises from concerns that a new civil rights law based on the Commerce Clause and/or Spending Clause may result in an unsympathetic Supreme Court issuing a decision repudiating the validity of rooting civil rights in those clauses. This would, of course, greatly restrict civil rights coverage generally. Needless to say, this is a very serious concern but one that, while shaping our subsequent decisions regarding timing and nature of litigation and appeals, should not be deny protection to a whole category of civil rights. The Court does not need this legislation to bring those issues before it; there are a number of civil rights and women's rights cases in the courts that run the same risks.

The other set of concerns is that this legislation may have a negative impact on civil rights claims by providing a new legal right to make a religious claim to engage in discrimination. In some cases, the argument goes the civil rights claims will lose. And even where the civil rights claims prevail, the diversion of resources and staff necessary to litigate such cases may well weaken important civil rights efforts.

There are, I believe, three fundamental principles implicated by this set of concerns.

First, the very purpose of the Bill of Rights was to enumerate certain fundamental liberties that are so sacred that they cannot be limited without a compelling governmental interest. There is almost universal agreement, including from those segments of the civil rights community questioning RLPA, that *Smith* was wrongly decided—that the "compelling interest/least restrictive means" test is the right approach. In that sense, let me remind all the members of the Committee: If the Court had not abandoned its role as the protector of our fundamental rights, the traditional test would still be in effect and we would face this very dilemma in pursuing civil rights and gay rights claims. If we believe that the framers of our Bill of Rights were right, and if we want to restore the strong protection of religious freedom they sought, than whether the Court reverses *Smith* or we pass this legislation, all claims will need to meet the same test. I would assume that the entire civil rights community would support a reversal of *Smith*. Why then a different standard when seeking a legislative remedy to the damage wrought by *Smith*?

Second, with one difference (which I will discuss in a moment), these issues exist with every one of the claims that might be subject to the "compelling interest/least restrictive means" test. Pro-life and pro-choice groups in our coalition, including a number of those testifying today, agreed that they would not seek an exemption for their concerns or claims. Thoughtful law and order advocates, deeply concerned about security and discipline in prisons, rejected an exemption. Historical preservationists and zoning authorities were willing to forgo exemptions. The military and school officials—all of whom had legitimate concerns—were willing to forgo an ex-

² See *Troubled House of Worship*, Los Angeles Times, July 9, 1997, *One Zoning Law, Two Outcomes*, Los Angeles Times, November 11, 1997

emption. This legislation works only when there is a uniform standard. Grant an exemption or "carve-out" in any area (either directly or by exempting many areas via a limited "carve-in" bill) and the entire conceptual and political support structure for the bill topples. Religious freedom ought to be indivisible.

One aspect of the concerns of those of us who care about gay rights particularly, however, bears special attention and sensitivity. Unlike most of these other categories of claims, there is an organized effort from some segments of the religious community to use religion as a basis to justify discrimination against people because of their sexual orientation. The political atmosphere in which this hearing occurs should not be ignored—but it does not justify abandoning a universal standard of religious freedom.

On the third concern, however, I must acknowledge that there is no consensus at all among the most passionate supporters of RLPA in our coalition or this committee. It is the view of my organization, and many with whom I work, that governmental efforts to prevent discrimination constitute a compelling state interest. Because of our differences on strongly held concerns, we have all agreed that what is or is not a compelling interest should not be written into the law.

Whether the "least restrictive means" prong of the traditional test requires or allows religious exemptions in certain situations—ranging from religious organizations to the grandmother who rents out two rooms in her own home—is not the issue here. The compelling concern of eradicating discrimination is. We cannot, however, guarantee the outcome of any particular court decision. But over the past 30 years the courts of America have increasingly found a compelling interest in limiting religious claims for discrimination. Even the limited case record in the area of anti-sexual orientation discrimination bears that out. Indeed, the hurdles religious liberty plaintiffs must surmount are quite high. To prevail, they must first demonstrate that there is a "substantial burden" on their Free Exercise right. As the California *Smith* case,³ illustrates, this is often not an easy standard to meet. Further, they must show why the effort to prevent discrimination is not a compelling interest. Despite ebbs and flows, the direction of the cases has been toward rejecting religious claims to the right to discriminate.⁴

Mr. Chairman, the stamp of the divine is found in the souls of all God's children—gay, lesbian, and straight. Discrimination against any individual because of their race, sex, religion, national origin or sexual orientation is wrong and violates the highest ideals of American democracy. We believe that preventing discrimination is a compelling interest. Together with many of the national organizations that hold our view on RLPA, we will work tirelessly in the legislatures and the courts to ensure that every state and locality across the nation enacts legislation that repudiates that discrimination.

IV. CONCLUSION

Whatever our views on civil rights generally and gay rights particularly, I hope all of us can agree that there should be a universal, uniform standard of religious freedom. We, therefore, urge the Committee to reject any "carve-outs." They are conceptually problematic and would open political floodgates that would, practically speaking, kill this legislation. However, if this standard applies to the civil rights concerns, so too does it apply to the claims of prison officials, zoning authorities, military brass and educators. You will be hearing from some of them. If this Congress sees fit to abandon the concept of universal coverage, if it allows an exemption or "carve-out" in any area or limits the bill's coverage by depriving all those religious activities that would come under the Commerce Clause from protection, then we, and a number of the other groups in the coalition, will immediately and vigorously endorse a civil rights "carve-out" generally or a gay rights "carve-out" specifically—for no area of concerns has a greater claim for such an exemption than our government's efforts to end the scourge of discrimination.

Mr. Chairman, I thank you for the opportunity to share my views this afternoon. I look forward to your continued leadership in advancing this important legislation.

Mr. CANADY. Thank you, Professor. I am sorry, Rabbi. You are also professor, Rabbi—and Professor Saperstein.

³*Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143 (1996)

⁴Let me also point out that, on a functional level, most non-religious civil rights claims (including marital status and gay rights claims) that interact with religious liberty protections also involve state constitutional religious freedom provisions and, increasingly, state-level versions of the Religious Freedom Restoration Act (RFRA). Thus, if consensus support for RLPA falls apart in the face of efforts to create "carve-outs," and RLPA is abandoned, the functional benefit to other civil rights claims will be relatively small.

And we will now go to Professor Feldblum.

**STATEMENT OF CHAI FELDBLUM, PROFESSOR OF LAW AND
DIRECTOR, FEDERAL LEGISLATION CLINIC, GEORGETOWN
UNIVERSITY LAW CENTER**

Ms. FELDBLUM. Thank you. My name is Chai Feldblum. I teach at Georgetown University Law Center and run a Federal legislation clinic there. I am testifying here today just in my personal capacity as a professor.

The current legal situation facing Congress on this is not easy. I would echo Congressman Frank's comment that this is tough, both legally and policy-wise. It's tough because of what the Supreme Court has done in terms of setting up the contours. And it is tough in terms of a policy issue.

The Supreme Court in *Smith* made clear that government is not constitutionally required to justify a neutral law of general applicability even if that law is going to burden someone's free exercise of religion. And Justice Scalia, and perhaps only the way Justice Scalia can do, said get well in an acerbic but eloquent pronouncement. His analysis was, "to make an individual's obligation to obey such a law"—he was talking about a generally applicable prohibition of some socially harmful conduct—"to make the individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling, permitting him by virtue of his beliefs," says Scalia, "to become a law unto himself, contradicts both constitutional tradition and common sense."

That is Scalia's assessment of this free exercise claim. Now the reasons Scalia thought this rule would contradict common sense was what he perceived as the absurd result of requiring government to justify every neutral law that might burden religious belief or conduct. Here is his statement:

"If 'compelling interest' really means what it says, and watering down here would subvert its rigor in the other fields where it applies, many laws will not meet the test. Any society adopting such a system would be courting anarchy. But that danger increases in direct proportion to the society's diversity of religious beliefs and its determination to coerce or suppress none of them. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind, ranging from compulsory military service to the payment of taxes to health and safety regulations such as child-neglect laws, social welfare legislation such as minimum wage laws, environmental protection, and laws providing for an equality of opportunity for the races."

This is what Justice O'Connor said in her dissent was that the parade of horrors that Justice Scalia was presenting. To which Justice Scalia said, what he found horrible was to contemplate that Federal judges will regularly balance against the importance of general laws the significance of religious practice. That is what he was afraid of.

Now, as we all know, Congress disagreed with this as a matter of policy. Right? In 1993, you decided that as a matter of public policy and as a matter of appropriate concern for the tradition of religious liberty in this country, you believed that individuals should be given the opportunity to challenge neutral laws of general applicability that would burden their free exercise.

As we also know, the Religious Freedom Restoration Act, which you passed in 1993, was then invalidated by the Supreme Court in 1997 as beyond Congress' authority to act under section 5 of the 14th amendment. And Justice Kennedy then, writing for the court, said, it's clear that RFRA changes the substantive result that we set forth in *Smith*, and we can't see this law as being a remedial, proportionate law. Hence, the legal and policy challenge, I think, that faces Congress today.

There is still, it seems to me, widespread substantive agreement across broad aspects of the country that in fact there should be greater protection to people who are subject to a law that requires them to engage in some action that their religion prohibits, or prohibits them from engaging in some action that their religion requires or encourages.

I mean, it is true that there is some gut sense that there is something different about religion than ethical ideas, philosophical ideas, that somehow there is something different and that government should be more protective when they are going to be burdening people's religious beliefs. And I think there is pretty widespread belief that there shouldn't be absolute protection for religious beliefs but that government should be put to the test of showing that that law, that rule that is burdening religious belief is narrowly tailored to a compelling government interest.

The question is how to implement that policy in a judicious and thoughtful manner. And with all due respect, I don't think RLPA as currently drafted meets that standard.

First, as you have already heard, there is significant concern about the impact of RLPA on the effective enforcement of State and local civil rights laws. And I don't think it is sufficient to say that there should just be a uniform standard that applies to all laws, because making that choice—of adding civil rights laws to the panoply of laws that will be affected—such as zone laws, et cetera, is itself taking a substantive position on civil rights law.

It is in fact saying that there are some civil rights laws that are not compelling government interests.

If I could have few minutes to conclude.

Such a result would not only be harmful as a practical matter to lots of individuals but would send the wrong message from Congress about the role and value of civil rights laws.

But second, the concern about RLPA's effects on civil rights laws is simply a reflection of a larger, more basic concern. While I don't subscribe to every aspect of Justice Scalia's parade of horrors, I do think it is correct that he is admonishing us to consider the practical effects of requiring government to justify each and every neutral law that might have a burden on religion.

And with all due respect to Rabbi Saperstein, there is a big difference between the first amendment and RLPA because the Supreme Court doesn't have the authority to carve-out a standard,

one standard here and another standard there. They were trying to decide what the first amendment means. And it is clearly why Justice Scalia and an interesting combination of conservative and liberal judges decided the Free Exercise Clause didn't require a compelling interest standard, as opposed to Congress, which is now figuring out what to do as a matter of policy.

As Congress decides how to approach this issue in a judicious manner, I think it is useful to think about some of the concerns Justice Scalia raised.

So where does that leave me? To me it seems there are several areas in which Congress has been sufficiently informed that potential difficulties exist for religious individuals and organizations, who could be burdened by neutral laws, and in fact, where it may be that there is a not a compelling government interest.

And as someone who grew up as an Orthodox Jew, I can tell you there are many neutral laws that I can tell you burdened people who are Orthodox Jews.

But RLPA as currently drafted doesn't apply just to those specific areas. Instead as currently drafted it allows an individual religious defense to be put forward in any situation where the government is operating a program or activity that receives Federal financial assistance or any situation where there is a substantial burden on commerce.

That drafting format, which is so broad and has potentially severe adverse consequences is, I believe, neither as thoughtful nor as judicious as it could be. I believe it is possible to craft a more narrowly targeted piece of legislation that will appropriately provide religious individuals and entities with the protection they need and deserve in a selected number of areas but not run the risk of causing significant adverse effects in others.

I also believe that, if properly drafted, RLPA will much more likely stand the test of time when it goes up to the Supreme Court. I think that drafting it in a more narrow way not only stops the adverse consequences from happening but is much more likely to be a piece of work that will last the test of time.

[The prepared statement of Ms. Feldblum follows:]

PREPARED STATEMENT OF CHAI FELDBLUM, PROFESSOR OF LAW AND DIRECTOR,
FEDERAL LEGISLATION CLINIC, GEORGETOWN UNIVERSITY LAW CENTER

Good afternoon. My name is Chai Feldblum and I am a law professor at the Georgetown University Law Center in Washington, D.C.¹ I both teach courses in civil rights law, constitutional law, and the legislative process at the Law Center, and direct a Federal Legislation Clinic. I am testifying today in my personal capacity as a law school professor.²

I am pleased to offer to the Committee some observations on H.R. 1691, the Religious Liberty Protection Act of 1999 (RLPA). The current legal situation facing Congress is not an easy one. The Supreme Court, in *Employment Division v. Smith*, 494 U.S. 872 (1990), has made it clear that government is not constitutionally required to justify a neutral law of general applicability, even if such a law might burden an individual's free exercise of religion. As Justice Scalia pronounced for the Supreme Court: "To make an individual's obligation to obey such a law [a generally

¹ In accordance with House Rule XI, clause 2(g)(4), I state that I have not received any federal grant, contract, or subcontract during the current or preceding two fiscal years. I am not representing any entity or individual, other than myself, in this testimony.

² The Federal Legislation Clinic, which I direct, represents several organizational clients. In addition, outside of my academic work, I serve as a legal consultant to the National Gay and Lesbian Task Force (NGLTF). The views I present here today should not be attributed to any of the Clinic's clients. These views are consistent with those of NGLTF.

applicable prohibition of socially harmful conduct] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense."³

The reason Justice Scalia believed such a rule would contradict common sense was apparent when he set forth what he perceived as the absurd result of requiring government to justify every neutral law that might burden religious belief or conduct. As Justice Scalia explained:

[I]f "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. . . . The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination, [and] drug laws, to social welfare legislation such as minimum wage laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races."⁴

Justice Scalia recognized, of course, that courts would not necessarily grant the religious exemption in each of these circumstances. Nevertheless, he found it "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."⁵

Despite Justice Scalia's concerns, Congress decided in 1993 that appropriate public policy, and appropriate concern for the tradition of religious liberty in this country, dictated that individuals be given the opportunity to challenge neutral laws of general applicability when those laws burdened their free exercise of religion. That policy, embodied in the Religious Freedom Restoration Act (RFRA) of 1993, was—as we all know—invalidated in part by the Supreme Court in 1997 in *City of Boerne v. Flores*, 117 S.Ct. 2157. Justice Kennedy, writing on behalf of himself and Justices Rehnquist, Stevens, Thomas, Ginsburg, and Scalia, observed that Congress' power under Section 5 of the Fourteenth Amendment was limited to "enforc[ing]" the provisions of that Amendment, and that RFRA went beyond that authority. As Justice Kennedy observed: "Laws valid under *Smith* would fall under RFRA, without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA."⁶ Moreover, the Court failed to see how RFRA could be considered "remedial, preventive legislation," since—as the Court observed—the law's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."⁷

Hence the legal and prudential challenge before Congress today. There is still, I believe, widespread substantive agreement across broad spectrums of society that—as a matter of public policy, and as a matter of respect for the tradition of religious liberty in this country—greater protection should be available to individuals who may be subject to a law that requires them to engage in some action their religion prohibits, or that prohibits them from engaging in some action their religion requires or encourages. Moreover, as a matter of policy, I believe there is also widespread agreement that, while there should not be *absolute* protection of religious liberty in such circumstances, the government should generally be required to demonstrate that the law at issue is narrowly tailored to a compelling government interest.

The question, however, is how to implement such a policy in a judicious and thoughtful manner. RLPA, as currently drafted, fails this standard in several respects. First, as you have already heard, there is significant concern regarding the impact RLPA will have on the effective enforcement of state and local civil rights laws. It is not sufficient to say there must be a uniform standard to which government must adhere with regard to *any* neutral law it passes, and that civil rights laws must simply take their place alongside zoning laws and laws governing autopsies. Making that choice—that is, *adding* civil rights laws to the coverage of RLPA—

³ *Employment Division v. Smith*, 494 U.S. 872, 884 (1990) (internal case citation deleted).

⁴ *Id.* at 888–89 (internal case citations omitted).

⁵ *Id.* at 889, n. 5.

⁶ *City of Boerne v. Flores*, 117 S.Ct. 2157, 2171 (1997).

⁷ *Id.* at 2169.

reflects a *substantive* position on civil rights law generally. The substantive position is that civil rights laws may, indeed, *not* reflect a compelling government interest, and hence, it is legitimate to subject those laws to a case-by-case individual religious defense in the courts. Such a result would not only be harmful, as a practical matter, to a range of individuals across this country who are currently protected by state and local civil rights, but would also send an unfortunate and destructive message about the importance of state and local civil rights laws from the United States Congress.

Second, the concern about RLPA's effect on civil rights laws is simply a reflection of a larger, more basic, concern. While I do not personally ascribe to every aspect of the "parade of horrors" presented by Justice Scalia in his opinion in *Smith*, I do believe he had a valid point in admonishing us regarding the practical effects of requiring a "narrowly tailored to a compelling government interest" test to be met with regard to *each* and *every* neutral law that may be passed. As Congress decides how to approach this issue in a judicious manner, it may well be worth its while to revisit that portion of Justice Scalia's opinion.

There are several areas in which Congress has been sufficiently informed that potential difficulties exist for religious individuals or organizations who may be burdened by neutral laws of general applicability. As someone who grew up in an Orthodox Jewish community (and who comes from a long line of Orthodox Jewish rabbis), I am personally aware of the unfairness and damage that can be inflicted by a range of local and state laws—including laws that mandate autopsies, or that prohibit the placement of "eruv" (a symbolic "four walls" that allow Orthodox Jews to carry items on the Sabbath within a particular geographic area), or that require Orthodox synagogues to have parking lots, or that deny prisoners the ability to pray, or that prohibit students from wearing yamulkes. In each of these areas—zoning laws, laws regulating bodily integrity post-death, religious practice within prisons, religious garb rules, and rules governing transportation (e.g., requiring Amish buggies to display certain signs)—it appears there is a *basis* to believe that a potential burden on free exercise exists, *as well* as a basis to believe the government's rule may not, in fact, be narrowly tailored to a compelling government interest.

But RLPA, as currently drafted, does not apply solely to specific areas in which Congress has been presented with information that potential problems may exist, and in which it may be fair to say the government does not have a compelling interest in burdening the religious belief or conduct. Rather, as currently drafted, the bill allows an individual religious defense to be put forward in any situation in which some program or activity, operated by the government, receives federal financial assistance, or in *any* situation in which the substantial burden on the person's free exercise of religion affects interstate commerce. A bill drafted this broadly presents the specter of unintended, adverse consequences for public policy, and is not firmly grounded in Congressional findings of fact.

As I noted at the outset, Congress is faced with a difficult legal and prudential challenge if it wishes to craft legislation that will provide religious individuals and entities with a defense against neutral laws of general applicability. I personally believe this challenge is worth rising to and that Congress is acting appropriately when it engages with this issue. With all due respect, however, I do not believe RLPA, as currently drafted, is a worthy example of rising to that challenge. The breadth of the law, with its potential adverse consequences, is unfortunate and unnecessary. It is possible to craft a more narrowly targeted piece of legislation that would appropriately provide religious individuals and entities with the protection they need and deserve in a selected number of areas, but would not run the risk of causing significant, adverse consequences in other important areas.

Thank you for inviting me to testify today. I would be happy to work with the Committee in drafting a narrower version of RLPA, if the interest in doing so exists.

Mr. CANADY. Thank you, Professor.
We will now go to Professor Laycock.

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

Mr. LAYCOCK. Thank you, Mr. Chairman. The current state of protection for religious liberty has some ambiguities in it about what are the limits of the *Smith* rule and what are its exceptions. Within the scope of the *Smith* rule, the protection for religious liberty for law-abiding, free citizens of the United States is now less

than the protection that existed for imprisoned felons prior to the *Smith* case.

We just got a holding to that effect from the district court in Wisconsin, which held that a prison rule had not been shown to bear any reasonable relationship to any legitimate penological interest—but that was okay because under *Smith* it doesn't have to. The burden on religion can be irrational, and it okay under *Smith* as long as it applies to everybody.

That is the current state of the law that the opponents of this bill are defending. Make them defend that proposition because that is what they are defending. This bill would restore the standard that existed for 4 years under RFRA, for 27 years under the Free Exercise Clause. The parade of horrors that we have heard about from Professor Sager and that we are going to hear about from Professor Hamilton didn't happen. The judges are too cautious, not too reckless.

We did not have law enforcement coming to a halt. We did not have all sorts of core laws being struck down as unconstitutional. We had a situation much better than the status quo but very limited, very cautious enforcement.

This bill would restore that standard that existed for 31 years to the extent that Congress has power to do so. Congress has power under the Spending Clause. The connection to the Federal expenditure of money is to ensure that the intended beneficiaries of that Federal money are not excluded from the program because of their religion or not forced to trade off the practice of their religion in order to accept the benefits of the program.

Congress has power under the Commerce Clause, which will clearly help in the construction of churches, including many of the land-use cases. They are included in section 2, the Commerce Clause section. Clearly the Commerce Clause section will help in the employment cases and in other contexts where in order to exercise your religion you first have to engage in a commercial transaction—to build the building or buy the supplies or buy the materials that you are going to be using.

If there is no effect on commerce, the section simply doesn't apply. So it is difficult for it to be unconstitutional. This bill as drafted fits the Commerce Clause as it is now being interpreted by the courts of appeals in the wake of *United States v. Lopez*. What those cases say, since 1995, is that if the bill includes what the courts call a jurisdictional element—I might call it a Commerce Clause hook—if you have to prove a connection to commerce in each case, then it is constitutional. The connection can be de minimis, because the belief is that if there is at least some connection in each case, in the aggregate that connection will be substantial.

The eighth circuit just decided a case involving arson of a church, a Federal prosecution under the Federal arson law. The court said the property was used in an activity that affects interstate commerce. The church bought materials in interstate commerce. It was an easy case. The de minimis connection was sufficient.

The fourth circuit case that struck down the Violence Against Women Act, *Brzonkala v. Virginia Tech*, draws exactly the same distinctions. So that statute didn't have a jurisdictional element,

didn't have a Commerce Clause hook. That was what was wrong with it. RLPA does have a jurisdictional element.

The Enforcement Clause provisions in section 3 track the exceptions that *Smith* and *Lukumi* make available in the Supreme Court's free exercise law. Those exceptions have been fought about in the lower courts. There are inconsistent cases: some courts are willing to take those exceptions seriously; some courts are refusing to take them seriously. All those exceptions present difficult questions of proof: trying to prove motive, trying to prove lack of general applicability, which gets you into whether your religious exception is analogous to the secular exception, trying to prove hybrid right. These provisions in section 3 track those exceptions, and shift the burden of proof after a threshold showing by the religious claimant.

Section 3(b)(1)(a), which Professor Sager was so upset about, takes phrases out of the *Smith* opinion itself. "Individualized assessment" and "systems of exemptions" where the State is permitted to consider the reasons for the activity are exceptions to the *Smith* opinion.

We hope the courts will take those exceptions more seriously when they are written in an act of Congress than when they are in the subordinate clauses of Justice Scalia's opinion. But they are there. They are in *Smith*, and unless the Court says we didn't mean it, we were lying to you, this Congress has power to enforce those provisions of the Free Exercise Clause as interpreted in *Smith*.

So quite apart from the factual record, section 3 is constitutional. It is a direct implementation of what the Supreme Court has said in its cases. In addition, today and in the hearings last year, this committee assembled an enormous record of widespread discrimination against churches in land-use regulation. The case in Tennessee is not unusual. It is typical. It is common. There are surveys of reported cases in the record. There are surveys of municipal codes in the record. There is much anecdotal evidence in the record.

Let me just add two more recent cases to the record. One involves the Metropolitan Church in Corinth, Texas. It has always been my view that the Metropolitan Church would be unusually exposed to zoning problems as soon as it moved out of the largest cities. We are seeing that happening. The city wants to exclude it for no better reason than, "It doesn't fit our plan."

They are not saying it harms the neighbors, not saying it is bad for anything. "It doesn't fit our plan." Metropolitan Church, go away.

The other case involves Rolling Hills Estates, California, and the Morningstar Christian Church with classic illustrations of the techniques that are available. First they created an institutional zone. Churches and other institutional buildings could only be in the institutional zone, and the institutional zone existed only in every parcel in town where there was already a church. So it is illegal to build a new church in Rolling Hills Estates. But with a conditional use permit you could build it in a commercial zone.

Morning Star Christian Church acquired rights to a building in a commercial zone, a former theater, and applied for a permit.

They complied with every condition, and so the city passed an emergency ordinance to exclude churches from commercial zones even on conditional use permit. It is now illegal to open a church in Rolling Hills Estates, period, flat, no exceptions, no permit. Illegal. But all the existing churches are grandfathered in.

That is basically what is going on in Forest Hills, Tennessee. It is going on in a number of suburbs. John Mauk testified that in a number of suburbs of Chicago, exclusions of all new churches is not an uncommon pattern. Section 3(b) is fully justified on a factual record to enforce the Free Exercise Clause.

Finally, let me say just a little bit about civil rights. The only issue I have invested as much time in as RLPA and RFRA the last 2 years is affirmative action at the University of Texas. We have that case up on appeal again. I have supported gay rights. Lots of people in this coalition have supported gay rights. The goal here is for people with fundamentally different beliefs and values to be able to live together in peace in the same society. And the way to make that happen is with strong gay rights legislation and strong religious liberty legislation, and sort out case by case the relative reach of those two statutes.

We know that race discrimination is compelling. The Supreme Court has said so. We know that preventing gender discrimination is compelling. The Supreme Court has said that. I doubt very much that protecting smokers is a compelling interest, but they are in the Colorado civil rights law. A carve-out for civil rights is a blunderbuss that doesn't make any sense.

We have got cases all around the country about student religious groups on college campuses and on high schools that are told you can't be an on-campus organization if you have a statement of faith for your members or for your voters or for your officers. To be a religious organization is a form of religious discrimination. Those cases would be cut out of this bill by a civil rights exclusion.

The Catholic priesthood, the Orthodox Rabbinate—I don't think even the civil rights side wants to say they must ordain women, not as a matter of theology, not as a matter of being persuaded, but as a matter of the law forcing them to do so.

The compelling interest test and the substantial burden test can balance these cases, case by case. And we know from experience that overwhelmingly the civil rights side wins. But a carve-out would also take out the handful of cases where the religious liberty side has a plausible claim that deserves to be heard.

I mentioned the Metropolitan Church zoning case. I am also involved in another case in Texas where a divorced mother has been ordered not to take her daughter to Sunday School at the Metropolitan Church because the judge thinks it is not a mainline church, and only mainline churches are permitted, at least in his court.

A civil rights carve-out is a bad idea. This is a civil rights bill. Religious liberty is also a civil right. And we can balance these cases, case by case.

Thank you, sir.

[The prepared statement of Mr. Laycock follows:]

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

Thank you for the opportunity to testify in support of H.R. 1691, 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.

Other witnesses have addressed the need for this bill, in this hearing and in earlier hearings. I will not repeat that testimony, except to say that RLPA is not a bill for left or right, or for any particular faith, or any particular tradition or faction within a faith. 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. You will hear today from witnesses opposed to the bill, witnesses who are intensely committed to the view that there is no right to practice a religion, and that religion should be regulated to the same extent as everything else in our pervasively regulated society. There is no room for religious liberty in that view of the world. Congress rejected that view by overwhelming margins when it passed the Religious Freedom Restoration Act. To the extent that it still has power to do so, Congress should again enact substantive protection for religious liberty.

My own testimony will explain the detailed workings of the bill, the sources of 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.

This bill would use those powers that are available to Congress to provide as much protection as is possible under existing Supreme Court interpretations. There is ample precedent in other civil rights legislation for using such a combination of federal powers to protect as much as possible of what Congress wanted to protect. The Civil Rights Act of 1964 used the power to enforce the Fifteenth Amendment in Title I, the commerce power and the power to enforce the Fourteenth Amendment in Title II, the power to enforce the Fourteenth Amendment in Title III, the spending power and the power to enforce the Fourteenth Amendment in Title IV, the spending power in Titles VI, VIII, and X, the commerce power in Title VII, and all these powers in Title V. 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. 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 §8(6) 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 should be interpreted to protect both the person who avoids violation of his religious beliefs by refusing to participate in a federally-assisted program for which he is eligible, and the person who participates in the program at the cost of violation his religious beliefs. The burden on religious exercise is the same in each case: each has been subjected to the choice of abandoning the practice of his religion or of forfeiting governmental benefits. The Supreme Court has long recognized that government burdens religious liberty when it imposes such a choice. *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court has not questioned that part of *Sherbert*, although it has largely eliminated the governments duty to justify such burdens.

The Spending Clause 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*. Section 2(a)(1) is clearly constitutional under existing law.

“Program or activity” is defined in §8(4) 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. 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. We may be able to agree on such language, or we may leave such cases 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. A far more effective remedy is provided in §4, which authorizes individuals to sue for appropriate relief, and authorizes the United States to sue to enforce compliance. 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. Guinnett 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)).

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.

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 agreed that this language is neutral and that no side's position will be undermined by this bill.

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. Congress has provided similar statutory protections where needed in the private sector, most notably in the employment discrimination laws, the public accommodations laws, and the church arson act. 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 any case in which a substantial burden on religious exercise, or the removal of that burden would affect interstate or foreign commerce. This language embodies the historic constitutional standard, and it is similar to language in many other statutes that require an effect on commerce as a condition of applicability.² 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.

Hearings held in the previous Congress documented parts of the enormous volume of commerce that is based on religious exercise. See especially the testimony of Marc Stern before this Subcommittee on June 16, 1998. These data make 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 construction of churches, the employment of people to do the work of the church, and the purchase of supplies and materials all are conducted in interstate commerce. Courts have upheld federal arson prosecutions for the burning of churches, on the grounds that the property destroyed was used in an activity that affected commerce. *United States v. Rea*, 169 F.3d 1111 (8th Cir. 1999). 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

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").

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 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 commerce clause provisions of the Federally Protected Activities Act, 18 U.S.C. 245 (1994), which the Tenth Circuit has upheld, *United States v. Lane*, 883 F.2d 1484, 1489-93 (10th Cir. 1989), the church arson act, 18 U.S.C. § 247 (1994 and Supp. II), which has not been challenged, and many other provisions of Title 18.

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).

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.

Equally important, the offense in *Lopez* contained no jurisdictional element. That is, the government was not required to prove an effect on commerce, or a jurisdictional fact from which an effect on commerce could be inferred. This bill does have such a jurisdictional element. In every case under the commerce clause section of this bill, plaintiff must prove either that the burden on religious exercise affects commerce, or that removal of the burden would affect commerce.

These distinctions have been critical in the lower courts' interpretation of *Lopez*. *Lopez*'s skeptical attitude toward the commerce power has been confined to cases in which Congress tries to dispense with case by case proof of any connection to the commerce power. Thus, in *United States v. Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999), and cases there cited, the court held *Lopez* inapplicable to statutes that require proof of a jurisdictional element, and further held that when Congress requires proof of such an element, "even a *de minimis* connection to interstate commerce" is sufficient. By contrast, when the Fourth Circuit struck down the Violence Against Women Act, it emphasized that "in contrast to the statutes that the Supreme Court has previously upheld as permissible regulations under the substantially affects test, but analogously to the Gun-Free Schools Zones Act, [VAWA] either regulates an economic activity nor contains a jurisdictional element." *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 833 (4th Cir. 1999). Because RLPA contains a jurisdictional element, requiring proof of a connection to commerce in each case, it raises no serious constitutional question under the commerce clause.

These and similar lower court cases read *Lopez* 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 the burden on that church substantially affects commerce all by itself; it is enough to show that the burden affects commerce to some extent. An

individual need not show that the burden on his religious practice substantially affects commerce all by itself; it is enough to show that the burden affects commerce to some extent. If the statute's jurisdictional element is satisfied case by case, Congress can rely on the aggregate effect of all similar burdens that satisfy the jurisdictional element.

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.

Persons who would normally defend religious liberty have attacked this bill for treating religion as commerce. Of course the bill does no such thing; at most it recognizes that commercial transactions are sometimes necessary to enable persons to exercise their religion. But this year's version does not even do that. It does not require a finding that the religious exercise affects commerce; it requires a finding that the burden, or the removal of the burden, affects commerce.

The spending clause section protects only those people who accept government benefits or participate in government programs, and only within the scope of the program. The land use section protects only land use decisions. The only protection for churches outside the land use context, and the only protection for individual believers outside the scope of government funded programs, is the commerce clause section. We should not abandon the bill's principal protection for religious liberty to accommodate a theory of the commerce clause that was itself abandoned more than a century ago.

III. THE ENFORCEMENT CLAUSE PROVISIONS.

Section 3 would be enacted 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.

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); *Fraternal Order of*

Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (rule against beards, with medical exception, must have religious exception; exception for undercover officers is distinguishable and would not require religious exception). As these examples suggest, 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 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) is an overlapping alternative to the commerce clause provision in section 2. Many land use cases will be covered by both sections, because the burden affects commerce and because one or more of the elements of section 3(b) is satisfied. Some cases may fall under only one section, or the elements of one section may be easier to prove than the elements of the other section.

Section 3(b)(1)(A) provides that "in any system of land use regulation or exemption" in which "a government has the authority to make individualized assessments of the proposed uses to which real property would be put," government may not substantially burden a person's religious exercise except in furtherance of a compelling interest. This applies the language of *Employment Division v. Smith*, 494 U.S. 872, 884 (1990), in the context of land use regulation; it is a provision to enforce the free exercise clause as interpreted in that case.

Section 3(b)(1)(B) requires that land use regulation treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions. Section 3(b)(1)(C) forbids discrimination against any assembly or institution on the basis of religion or religious denomination. These subsections also enforce the free exercise clause as interpreted in *Smith* and the free speech clause as interpreted in many cases. Discrimination between different categories of speech, and especially discrimination between different viewpoints, already requires strong justification;³ these subsections implement this rule as applied to land use regulation that permits secular assemblies while excluding churches.

Section 3(b)(1)(D) provides that zoning authority shall not be used to "unreasonably exclude from the jurisdiction," "or unreasonably limit within the jurisdiction," assemblies or institutions devoted to religious exercise. This enforces the free speech clause as interpreted in *Schad v. Borough of Mount Ephraim*, 425 U.S. 61 (1981), which held that a municipality cannot entirely exclude from its boundaries a category of first amendment activity. It enforces the analogous right to assemble for worship or other religious exercise under the free exercise clause, and the hybrid free speech and free exercise right to assemble for worship or other religious exercise under *Schad* and *Smith*.

Legislative power to enforce constitutional rights depends on Congress having "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*, 521 U.S. 507, 532 (1997). Note that the standard is not certainty, but "reason to believe" and "significant likelihood." This bill, and the hearing record on which it is based, satisfy that test in two ways.

First, the test is satisfied legally. Each of these subsections is designed to enforce a specific element of a constitutional right as interpreted in *Smith* and *Lukumi* or in *Schad*. No further showing of constitutional power is required. In cases of discrimination, or of exclusion of first amendment activity from a jurisdiction, all or nearly all the laws affected will violate the Constitution. Similarly, in cases in which religious exercise is burdened despite a system of individualized assessments and exemptions, many of the laws affected will be unconstitutional under *Smith* and *Lukumi*. Constitutionality follows from the close connection between the legal stand-

³See, 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).

ard in the bill and the legal standard in the Supreme Court's interpretation of the Constitution.

Second, and independently, the test is satisfied factually. This subcommittee has also assembled a massive factual record on land use regulation. The record of hearings in the last Congress is replete with statistical and anecdotal evidence of likely constitutional violations in land use regulation. I believe this factual record is ample to support §3(b) as legislation to enforce the Fourteenth Amendment. I have reviewed and summarized this evidence at considerable length in my testimony on July 14, 1998. I incorporate that testimony by reference here, and will summarize far more briefly today.

The hearing record shows that land use regulation is administered through highly individualized determinations not controlled by generally applicable rules. Land use regulation thus regularly 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.

It is important to summarize this hearing record and report Congressional findings in the committee report. It would probably also be prudent to insert a conclusory statement of those findings in the text of the bill itself. RFRA was criticized because its findings were in the committee reports instead of in the statutory text, and while the argument seemed to me absurd it was made repeatedly. So it may be better to put basic findings in the bill and to elaborate in the report.

Let me briefly describe two more recent examples that have come to my attention since the last hearing. The case of Morning Star Christian Church in Rolling Hills Estates, California, illustrates some of the techniques available and the lengths to which municipalities will sometimes go to exclude churches. Rolling Hills Estates created an "Institutional Zone," in which a variety of public buildings, including churches, should be located. The Institutional Zone of all the spots on which a church or other covered institution was already located—and no other land whatever. In effect, all existing churches were grandfathered in, and a presumption was raised against any new churches.

The presumption was not absolute, because churches could still be located in commercial zones with a conditional use permit. Morning Star Christian Church acquired rights to a building in a commercial zone. The building had formerly been a theater with 884 seats; then it had been converted to a skating rink with occupancy limited to 300 during business hours and to 500 on evenings and weekends. The church's congregation was much smaller, with about 170 adult members, and that size had been stable. During extended consideration of its permit application, the time limits on the church's contract ran out, and it was forced to buy the property. The church agreed to limit further growth in the conditional use permit, so as to comply with the most restrictive reading of parking requirements.

When it became clear that the church had satisfied all requirements for a conditional use permit, the city passed an emergency ordinance declaring a moratorium on all institutional uses in commercial zones. No application was pending except the church's. During the moratorium, the city amended its zoning code to ban churches in commercial zones. It is now the law in Rolling Hills Estates that new churches are banned. Churches are conditionally permitted in the Institutional Zone, which is entirely occupied by existing churches and other institutions. The city's zoning law makes extensive provision for places of secular assembly, including public and private schools, government buildings, public and private clubs, recreational centers, movie theaters, live theaters, clubs for games with spectator seating, and many others. The city's zoning law violates every provision of section 3(b) of this bill. It also violates the Constitution, but obviously the Constitution is not sufficiently explicit for the city council to understand.

I know fewer details about the second case, which has not yet entered the public record. But it is an important example, not only because it again illustrates the dangers of discretionary land use regulation, but also because it illustrates how the bill could protect churches at all points on the political spectrum. Corinth, Texas is a small city in the Dallas-Fort Worth metroplex. It has a conservative citizenry and a conservative mayor, and you might expect it to be friendly to churches. But it has a church in its industrial zone that it is determined to eliminate, and the mayor has devoted enormous effort to the cause. The church has no harmful impact on its neighbors, which are more intense users than it is. The city simply says that churches in the industrial zone are inconsistent with its plan. The other essential fact about this case is that the church is the Metropolitan Church, a denomination with basically Protestant theology that especially ministers to gays and lesbians. It has been perfectly foreseeable that the Metropolitan Church would be especially vulnerable to zoning problems outside the largest and most tolerant cities, and now we have a clear example. As I said at the beginning, this is not a bill about left or right. Every American with any beliefs about religion needs this bill.

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.

IV. 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 federal law on remedies and immunities under other 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.

Section 4(d) provides that the United States may sue for injunctive or declaratory relief to enforce the Act.

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, and that judgment has been vacated by the court en banc.⁴

I have followed this litigation closely for my casebook, *Modern American Remedies*. I expect that the PLRA will be upheld 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 commit 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.

On remand in *Sasnett*, after the invalidation of RFRA, the district court concluded that the general rule that *Smith* applies to all citizens is less protective than the rule formerly applicable only to prisoners. The court said it could not hold on cross-motions for summary judgment that the prison’s rules had a reasonable relationship to any legitimate penological purpose. No. 94–C–52–C (W.D. Wis. 1999). But it held that under *Smith*, no such relationship is required. Under existing free exercise law, the American people are subject even to irrational burdens on religious liberty if the burdensome law court is generally applicable.

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.

V. 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) pro-

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).

vides 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 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. These provisions were carefully negotiated with Americans United for Separation of Church and State, People for the American Way, and the American Civil Liberties Union, in exchange for their commitment to vigorously support the bill.

Section 5(e) states explicitly what would be obvious in any event—that a 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 either on the face or the law or in application of the law, 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.

Section 5(f) provides that proof that a burden on religious exercise affects commerce for purposes of this bill, or that removal of such a burden would affect 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(g) states that the Act should be construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution."

Section 5(h) 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.

VI. 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.

VII. DEFINITIONS.

Section 8 contains definitions. Section 8(1) defines "religious exercise" by incorporating the first amendment definition, with two clarifications of issues that have been the subject of litigation. First, religious exercise "need not be compelled by, or central to, a larger system of religious belief." Second, "the use, building, or converting of real property for religious exercise shall itself be considered religious exercise."

The current draft of the bill introduces these clarifications with the word "however," which might be taken to suggest that these clarifications would not be included in the basic definition. I believe they are included in the basic definition, and are set out here to avoid unnecessary litigation. The word "however," in section 8(1) and also in section 7(a)(3), should be changed to "provided that".

This definition, with the provisos, 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.⁵

⁵ *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*, 521 U.S. 1114 (1997); *Muslim v. Frame*, 891 F. Supp.

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.⁶

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 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*, 522 U.S. 801 (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. RLPAs 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 "land use regulation". This definition was negotiated at a time when the draft bill provided different standards in section 3(b)(1)(A) and in section 2; under that draft, much more turned on what was a land use regulation. The definition is now less important, but it still matters to the application of section 3(b). The application of section 3(b)(1)(A) matters when plaintiff cannot show, or chooses not to show, that the burden or removal of the burden affects commerce. And sections 3(b)(1)(B), (C), and (D) provide protection not found in section 2.

Land use regulation is a law or decision that restricts a private person's use or development of land or structures affixed to land, where the private person has any kind of property interest in the land or a contract to acquire such a property interest. The law or decision must apply to "one or more particular parcels of land," as in spot zoning or a permit requirement, or "within one or more designated geo-

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*, 522 U.S. 801 (1997).

⁶*City of Boerne v. Flores*, 521 U.S. 507, 538 (Scalia, J., concurring) ("religiously motivated conduct"); *id.* at 540 (same); *id.* at 546 (O'Connor, J., concurring) (same); *id.* at 548 (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").

graphical zones," as in conventional zoning rules. The intention here is to exclude regulation that applies generally to all real property, such as housing discrimination laws.

The definition of "program or activity" in section 8(4) has been discussed in connection with the spending clause provision.

The definition of "demonstrates" in § 8(5) is incorporated verbatim from the Religious Freedom Restoration Act.

Section 8(6) defines government to include both state and local governments throughout the bill, and to include the federal government in sections 3(a) and 5. These are the sections shifting the burden of proof in free exercise cases and the rules of construction, some of which are not included in RFRA. The federal government is not included in the rest of the bill because it is already subject to the compelling interest test under RFRA as amended. RFRA was struck down only insofar as it attempted to enforce the Fourteenth Amendment against the states; it still applies to the federal government. *In re Young*, 141 F.3d 854 (8th Cir.), cert. denied, 119 S.Ct. 43 (1998); *EEOC v. Catholic University*, 83 F.3d 455, 470–71 (D.C. Cir. 1996).

VIII. OTHER CONSTITUTIONAL OBJECTIONS.

A. *The Establishment Clause.*

Justice Stevens suggested that RFRA might violate the Establishment Clause. *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (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. RLPAs 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). RLPAs avoid 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 RLPAs, 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*, 521 U.S. 898 (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 935.

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, §5(e) 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.” 521 U.S. at 925–26.

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 conditioned 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 an excellent article on a range of constitutional objections to RFRA and RLPA,⁷ 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)

Except as provided in this subsection,
a State, political subdivision of a state, or political
authority of at least 2 States
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
that may provide air transportation under this sub-
part.

Religious Liberty Protection Act, § 2

Except as provided in subsection (b),
a government [defined elsewhere to mean states
and their subdivisions]
shall not substantially burden a person's religious
exercise
(1) in a program or activity, operated by a govern-
ment, that receives Federal financial assistance; or
(2) in any case in which the substantial burden on
the person's religious exercise affects, or in which
a removal of that substantial burden would affect,
commerce with foreign nations, among the several
States, or with 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.

In place of the pre-empted state burdens, Congress would substitute its only policy of religious liberty. Congress has applied the same rules to itself and to federal agencies and officials, universally and across the board, whether or not there is government spending, or land use regulation, or an effect on commerce. Congress has provided similar statutory protections where needed in the private sector, most notably in the employment discrimination laws, the public accommodations laws, and the church arson act. The federal policy is one of religious liberty; that policy is pursued quite generally; and inconsistent state law is pre-empted to the extent that Congress has power to do so. There is nothing constitutionally suspect about that under existing law.

⁷Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 UALR L.J. 715, 761-62 (1998).

IX. POLICY OBJECTIONS

A. *Professor Hamilton's Parade of Horribles*

I wish also to address a few of the principle policy objections to the bill. They are remarkable. Professor Marci Hamilton has repeatedly testified, and presumably will testify again, that no public policy is safe from RLPA. Wives will be beaten, children will be abandoned, people will die—all in the name of religious liberty. Of course she has no examples of these dire consequences.

The truth is that religious liberty legislation has been underenforced, not overenforced. Courts have been quite cautious about taking risks with religious liberty. The great danger with RLPA is not that important public policies will be undermined, but that courts will too often defer to bureaucratic rationalizations and permit the suppression of harmless religious practices.

When confronted with the long history of judicial underenforcement of religious liberty rights, or with precedents holding certain government interests to be compelling, Professor Hamilton tends to say that those cases were decided without benefit of the least restrictive means test. With respect to the RFRA cases, this is obviously false; RFRA had an express least restrictive means test. With respect to the pre-*Smith* free exercise cases, it is also false. Least restrictive means and similar formulations were a regular part of the Court's formulation of the pre-*Smith* free exercise standard, as she well knows.⁸ The least restrictive means test never had the terrible consequences that Professor Hamilton predicts, and it was not interpreted in the bizarre way that she claims to interpret it. The conclusive answer to her parade of horrors is that for four years under RFRA and for twenty-seven years under the free exercise clause, they did not happen.

B. *The Demand for a Civil Rights Exception*

Other witnesses have demanded an exception for civil rights claim, across the board, without regard to context, wholly subordinating any exercise of religious liberty to any interest that can be slipped into a civil rights law. This demand is a

⁸ See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 19 (1989) (Brennan, J., for plurality) ("We noted that '[n]ot all burdens on religion are unconstitutional, and held that 'the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'"); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 142 (1987) ("Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., for plurality) ("Once it has been shown that a governmental regulation burdens the free exercise of religion, 'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,' or represents 'the least restrictive means of achieving some compelling state interest.'"); *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. . . . The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no 'less restrictive means' are available to achieve the governmental interest."); *United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. . . . This mandatory participation is indispensable to the fiscal vitality of the social security system."); *Thomas v. Review Board*, 450 U.S. 717, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (Burger, C.J., for plurality) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ("For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.") (all emphases added). Professor Hamilton has seen this list of quotations, but she continues to misstate the prior law.

In *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), the Supreme Court actually said—in a parenthetical phrase inserted without citation of any authority—that least restrictive means was not part of the pre-*Smith* law. This erroneous statement was taken from the City's brief, written by Professor Hamilton. The Court can change the law for the future, but neither the Court nor Professor Hamilton can rewrite the past, and the Court's own past opinions are clear. Least restrictive means, or equivalent formulations such as "no alternative forms of regulation," "essential to accomplish," "not otherwise served," or "indispensable to," were part of nearly every significant Supreme Court case on the free exercise of religion prior to 1990. Least restrictive means is not a new and untried standard; it was the law for thirty-one years, under the federal Constitution and under RFRA, with no untoward consequences.

betrayal of the fundamental agreement on which the Coalition for Free Exercise has depended—neither right nor left would demand carveouts for its own special interests. A civil rights carve out would be wholly unnecessary in the great bulk of cases, and wrongheaded in those few cases where the religious liberty interest is entitled to a respectful hearing.

A civil rights exception is unnecessary, because most civil rights claims satisfy the compelling interest test. The Supreme Court has held, in a free exercise case, that eradicating racial discrimination in education serves a compelling interest by the least restrictive means. *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). The Court has held, in free speech cases, that eliminating sex discrimination in places of public accommodation serves a compelling interest by the least restrictive means. *Board of Directors v. Rotary Club*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623–29 (1984). Dictum in *Rotary Club* said generally (without regard to the basis of discrimination) that “public accommodations laws ‘plainly serv[e] compelling state interests of the highest order.’” 481 U.S. at 549. Race discrimination is even more suspect than sex discrimination, and employment is at least as important as public accommodations. Those who resist civil rights laws in the name of religion will, in nearly every case, lose.

An across-the-board civil rights exemption would take RLPA out of cases in which the religious practice should clearly be protected. The example that is hardest to argue with is the line of cases typified by *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). Similar cases have arisen on college campuses around the country. Each such case involves a student religion club of a particular faith, which requires a statement of faith for membership, for voting, and/or for holding office. In the name of civil rights, the school argues that the statement of faith is a form of religious discrimination, and demands that the club abandon the statement of faith or be dissolved as a campus organization. In *Hsu*, the court reached the remarkable conclusion that a Christian club could require that its President, Vice-President, and Music Coordinator be Christians, but that it could not require that its Secretary, its Activities Coordinator, or its members be Christian. On the same theory pursued in *Hsu*, a church may be a place of public accommodation that discriminates on the basis of religion. These cases mistake the existence of religious organizations for religious discrimination. In *Hsu*, the club relied on the Equal Access Act, but that does not apply to the college cases. RLPA should not be available; a civil rights amendment would make it unavailable.

A civil rights amendment would also invite challenges to core religious practices, presenting difficult issues that should be left unresolved until and unless they arise. Catholics and Orthodox Jews restrict the priesthood and rabbinate to males, in violation of the literal language of the employment discrimination laws. Convents and monasteries rent dwellings, within the definitions in some fair housing acts, to only one sex and to adherents of only one religion. Religious organizations operate retirement residences and nursing homes, and some may give priority to their own members. Some churches and other religious organizations require church employees to adhere to the religion’s moral code; as applied to unwed mothers, this is easily converted to a claim of pregnancy discrimination.

Current law permits religious organizations to prefer employees of their own faith to do the organization’s work, but there are many ambiguous limits to that exemption. A preference for Jews might be attacked as racial rather than religious. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). The Texas Attorney General has attacked a preference for Christians as unprotected, insisting that only a preference for particular denominations is within the statutory exception. *Speer v. Presbyterian Children’s Home*, 847 S.W.2d 227 (Tex. 1993). That issue remains unresolved. A preference for persons of any faith so long as they are not overtly hostile to the religious mission is probably unprotected.

Reasonable people can disagree about how such issues should be resolved. If such cases arise, both sides will be fully heard under the statutory standards of substantial burden and compelling interest. Fair and just results may depend on context: a pastor is different from a youth director, and both are different from a custodian; a convent is different from a retirement home. There are few occasions for religious exceptions from the civil rights laws, but it would not be right to simply enact that any civil rights claim automatically trumps any religious liberty claim without debate or discussion.

Any exception to RFRA violates the core agreement that has held together supporters of religious liberty legislation. This bill has broad support across the political spectrum from left to right, bipartisan, interfaith, religious and secular. The core agreement that has held that broad coalition together is that RFRA bills should enact uniform standards, applicable to all religious practices and all governmental interests, and that the groups within the coalition will argue out their disagree-

ments under those standards. Every private interest group and every government agency has an agenda that could be insulated from future argument by an exception exempting that agenda from RFRA. Some of those potential exceptions involve deep moral commitments, as deeply felt as civil rights. It is impossible to make one exception without inviting many others. It is impossible even to consider many exceptions without abandoning the principle of religious liberty and substituting a series of votes on what religious practices can hold a majority vote in a crowded legislative session. Rep. Stephen Solarz, the sponsor of RFRA, explained the most fundamental reason why he would not entertain proposed exceptions to his bill:

If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeeded in codifying rather than reversing *Smith*.

He correctly described the effect of exceptions then, and that would still be the effect of exceptions today.

Let me say that this should not be an issue that divides left and right. It should not be a litmus test of support for civil rights. I spent most of April helping to write a brief defending the constitutionality of affirmative action in a renewed appeal in *Hopwood v. Texas*, and I worked publicly and privately for three years to make that renewed appeal happen. Turning to the agenda that is principally driving the demand for a civil rights carve out, I voted for my city's gay rights ordinance, and I have publicly defended the constitutional rights of sexually active gays and lesbians. This is not about whether one supports civil rights; it is about whether civil rights is for all Americans and all their fundamentally personal beliefs and activities, or only for selected groups, selected beliefs, and selected activities.

Civil rights and religious liberty are both about living together with our differences. There should be legal protection for gays and lesbians and also for persons with religious commitments to traditional sexual morality. There should be a general gay rights law, and there should be religious exemptions. And it should be obvious that gay rights laws will be far easier to enact if there are exemptions for religious objectors—the most legitimate and often the most intensely felt source of opposition.

It should also be clear that gays and lesbians also have religions, and exercise them, and are especially likely to need the protection of religious liberty legislation. I have already mentioned the zoning problems of the Metropolitan Church. Let me describe another case, in which I have committed to file a friend of the court brief.

LG v. G, now pending in the state court of appeals in Texas, involves a lesbian mother, now divorced from her former husband. She and the father have joint custody, and a complicated agreement concerning their respective rights to guide the religious instruction of the child. The mother was taking the daughter to the Metropolitan Church. The father objected. The mother offered in evidence the tape of a typical service, and expert testimony on the best interests of the child; there is no suggestion of any age-inappropriate content at the church. The father offered no evidence about the church and refused to visit a service; he simply objected. The court decided that the mother could take the daughter to "mainline" churches and no others, and that the court would decide what counted as mainline. The Metropolitan Church was unacceptable.

The source of hostility here is the sexual orientation of the mother. But the target of discrimination is her church and her religious exercise. The court has not suppressed her sexual behavior; it has suppressed her religious behavior. In the course of doing that, it has undertaken to decide what are acceptable religions and what are not.

I doubt that RLPAs can reach that case, although the Constitution might, and state law surely could. The point is not that this particular bill will fix that particular case, but that religious liberty should be important to both sides of the dispute over sexual orientation. I will join in defending the rights of gays and lesbians. I wish their leaders would join me in defending the rights of religious believers. And I wish that all concerned would recognize that these are not mutually exclusive categories.

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. Thank you, Professor Laycock.

Mr. WATT.

Mr. WATT. Thank you, Mr. Chairman.

I just have one question, Professor Laycock. I think we all acknowledge that the hook here is the Commerce Clause. Right?

Mr. LAYCOCK. We have three hooks. That is probably the one with the widest reach. Yes.

Mr. WATT. That is the one with the widest reach. What happens—aren't we, isn't that hook setting up a separate standard, a different standard for larger denominations than small, single-member or single, and how do you get around that?

Mr. LAYCOCK. I don't think it is setting up a different standard based on the size of the church because—

Mr. WATT. No, not different standard, a different result.

Mr. LAYCOCK. Okay. Not a different result either because of the aggregation rules. What the Supreme Court said, repeated in *Lopez*, and has been enforced in the lower-court interpretations of *Lopez* is this: if transactions of a certain type in the aggregate affect commerce, you can reach every one of them as long as you make that jurisdictional element a part of the cause of action. So if a little church buys a hundred dollars worth of books in interstate commerce, and a big church buys \$10,000 worth of books in interstate commerce, they both affect interstate commerce and they are both protected by this bill. You don't have to get into the question of whether a hundred dollars is substantial all by itself, you can aggregate that little church's hundred dollars with all the other churches. And to defend the constitutionality of the bill, a de minimis effect on commerce is sufficient if you have a jurisdictional element.

Mr. WATT. Rabbi Saperstein.

Mr. SAPERSTEIN. It would also be somewhat fact specific in the end and could have the exact opposite result, in the sense that some of the very large denominations, let's say the Southern Baptist Convention, are large enough to have their own printing presses in more States. Smaller churches are much more likely to actually engage in interstate commerce in order to get what they need, and so it would really depend on the fact situation. I don't know that there would be a pattern that would have a result one way or the other on this.

Mr. WATT. I, for the life of me, can't understand how you get to that conclusion. But I mean, my mind is not functioning very clearly today. So maybe I will understand it in due course. Does anybody have a different opinion?

Ms. FELDBLUM. Well, I mean, the truth is we are all probably at something of a disadvantage here in terms of knowing how this is really going to play out because all we have is this Supreme Court statement in *Lopez*, and then we have a lot of cases after *Lopez* that have tried to figure out the contours of Commerce Clause, and whether, in fact, the aggregate rule that Professor Laycock says is in fact the rule they will apply—I think it is, the rule that should

apply for purposes of Congress' commerce power—but, you know, the Supreme Court is the one that said—

Mr. WATT. The bullets in *Lopez* might have been shipped interstate. The gun might have been shipped interstate, but the purpose was a strictly local purpose. So I still don't see how you get the—the Supreme Court made no effort to try to bootstrap its way around this, and I don't see them. If you are doing this in the face of a recalcitrant Supreme Court, what makes you think that the Supreme Court is going to bootstrap its way around to find a Commerce Clause violation. I just don't see that.

Mr. LAYCOCK. Sir, we cannot predict what the Supreme Court might do in the future. They may adopt Mike Farris' view and decide that interstate highways are unconstitutional, but they haven't done it yet. And what they did so far in *Lopez* is very carefully limited. The gun in *Lopez* might have traveled in interstate commerce, but the government didn't have to prove that. There was no jurisdictional element in that offense. And that is central to the *Lopez* opinion. All the government had to prove was non-commercial activity, and it didn't have to prove any connection to interstate commerce.

They appear, in the language in *Lopez*, to reaffirm *Wickard v. Filburn*. That is the farmer who fed his own wheat to his own hogs and the Court said it was within the reach of the commerce power because in the aggregate all the farmers feeding wheat to hogs would affect the price of wheat. They reaffirmed that.

If you include a jurisdictional hook, the lower courts say that *Lopez* hasn't changed much. It may change something in the future, but this bill is drafted on the basis of what the Court has said so far.

Mr. WATT. I yield back, Mr. Chairman.

Mr. CANADY. Thank you. The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you. I have a number of questions. Mr. Anders, first of all, you state in your testimony on page 9 and I quote, "Prior to the Supreme Court lowering the standard of review for religious liberty claims, in *Employment Division of Oregon v. Smith*, the issue of religious liberty defense for civil rights claims was widespread," and then you cite chapter and verse with mixed results.

And yet the ACLU, and I have testimony here from Ms. Strossen at hearings this committee held a few years ago, was very strong in support of the Religious Freedom Restoration Act, which established the general strict scrutiny standard. So apparently the ACLU didn't mind that at that time. What has changed?

Mr. ANDERS. Our expectation in 1993 under RFRA was that those civil rights laws as a group would be found to be serving compelling interests.

Mr. NADLER. By that time, there had been some negative court decisions. Had there not?

Mr. ANDERS. In this kind of collection of cases in the fair housing area under marital status discrimination, there was only one case, and it was a plurality decision, *Cooper v. French* in the Minnesota Supreme Court, that was prior to RFRA being passed in 1993.

Mr. NADLER. So now you think the courts have gone the wrong way and therefore it is too great a risk?

Mr. ANDERS. That's right.

Mr. NADLER. Okay. Let me ask you the following question. I read your memo, and I read your testimony that largely follows the memo. Tell me why my following concern is wrong. You establish, I think fairly persuasively, that if we establish, or re-establish, a strict scrutiny standard such as we had under *Sherbert* before the *Smith* decision, that there would be challenges, there would be litigation. Of course, who likes to have to fight things that you thought you had.

And some cases would win. Professor Laycock, Rabbi Saperstein say the vast majority would win, but some would lose and therefore we shouldn't subject gay rights or certain civil rights to that risk because some cases, perhaps a small minority, would lose. We don't need that risk.

Assuming the accuracy of that observation for the moment, the other side of the equation though is that we have no protection whatsoever for the free exercise of religion. Let's assume for some reason that the specific legislation were off the table, which I will talk about in a moment, and that you couldn't do a carve-out. If you had only two alternatives, pass RLPA as drafted or don't. And therefore you had to say, your two choices are don't put any kind of doubt on the local civil rights laws where you might lose some cases at the cost of having no free exercise protection for religion in this country at all, a rather absolutist situation, or re-establish protection for the Free Exercise Clause at some risk to some civil rights?

How do you come down on that? And justify it please.

Mr. ANDERS. Well, obviously, in our testimony we do take a position on that exact question.

Mr. NADLER. Well, state it then.

Mr. ANDERS. And so our position is that if it is an up or down vote on RLPA without taking care of the civil rights problem, where we know that at least in some courts and in some States there is going to have a negative impact on enforcement of State and local civil rights laws, we would urge Members of Congress not to vote for it.

Mr. NADLER. So in other words, the American Civil Liberties Union is telling us that a risk to some civil rights laws is worth eliminating religious freedom totally?

Mr. ANDERS. No. I think what's been created by the internal politics of the coalition that has been supporting this is really a false choice. That is, you have to choose either stronger protection for religious freedom or you have to choose State and local civil rights laws.

Mr. NADLER. If you had that choice, because it may be that that is the only choice we have, would you do a balance, where you have some risk to one and some protection for the other? Or no risk to one and no protection for the other? Which do you think is a fairer balance?

Mr. ANDERS. The only Federal court that has applied the pre-*Smith* decision since *Smith* to a civil rights claim was the ninth circuit in *Thomas*, which just came down in January. In that case, the

analysis that the court applied, was the opposite of what the Alaska Supreme Court, in reviewing its own fair-housing law under strict scrutiny, took.

And in the ninth circuit decision—

Mr. CANADY. The time is expired. The gentleman will have two additional minutes.

Mr. NADLER. Can I ask—all right. I will need more than that.

Mr. CANADY. Three additional minutes. [Laughter.]

Mr. ANDERS. But in that ninth circuit decision, the ninth circuit decided that the—

Mr. NADLER. I know what the ninth circuit decided, but there were other courts that went the other way.

Mr. ANDERS. The two courts that have gone the other way are the Supreme Courts of Alaska and California, which are both in the ninth circuit. And in terms of the ninth circuit's analysis, it didn't look to how Alaska views its own laws until after it looked at Federal sources of law.

Mr. NADLER. We don't have much time, so bottom line, if that is the risk, no protection for religion and no risk to civil rights is where you come down. You don't like—with the current court decisions, you wouldn't like the pre-*Smith* rule is what you are saying.

Let me ask you a different question. You suggest that in order to protect religious freedom, you came up with a working draft of an issue-specific religious bill.

Mr. ANDERS. That's right.

Mr. NADLER. A working draft I understand. Now my problem with this approach, obviously, is that you won't think of everything, and that Congress won't pass protections for the unpopular minority religions. But just leafing through here, you have got protection of land use, which has come up, we've talked about it, religious exercise of institutionalized persons, prisoners, protection of privileges, penitentiary privileges from State interference, protection of dignity after death, autopsies, religious apparel worn by students, period. So if a State passed a law prohibiting Jewish ritual slaughter in the name of animal rights, that would be okay under this bill?

If a State passed a law saying nobody under 21, because we have a problem with drunk driving by kids, nobody under can drink any wine and doesn't make an exception for the mass or for sacramental wine, that should stand too?

I cite these not because I think that is your intent but because that is the danger of drafting legislation like this.

Mr. ANDERS. That is also why it is a working draft. We worked with other groups to look at areas where cases are being brought right now. It's a limited number of areas, and we believe that it is at least worth having this committee look at whether we can respond to those specific areas.

Mr. NADLER. I would just point out that it is an inherent danger, for instance, religious apparel for students but not for teachers. Professor Laycock, could you comment on this?

Mr. LAYCOCK. Well, I think you are right. Specific legislation means we are forever closing the barn door after it is too late and after a bunch of people have suffered and a bunch of litigation has finally risen to the level of public attention. And smaller and un-

popular religions don't get protected. The Metropolitan Church will not pass a bill to solve its problems in this Congress, I fear.

Mr. NADLER. The Metropolitan Church is a church that ministers to lesbians and gays, correct?

Mr. LAYCOCK. The Metropolitan Church is a Protestant church that ministers especially to gays and lesbians. Yes.

Unpopular churches won't get protected, and no church will get protected until they have already suffered enough problems to rise to the level of national attention.

Ms. FELDBLUM. Can I?

Mr. NADLER. Go ahead. I have one more question.

Ms. FELDBLUM. It is just that—I mean I think you are absolutely posing why I said before that this is a tough legal and policy area, but it is a little, I think, inappropriate to say no religious protection versus protecting the civil rights, the question you were asking—

Mr. NADLER. Versus some risk.

Ms. FELDBLUM. Versus some risk to the civil rights. Because there is of course a significant amount of religious exercise that continues to be protected under *Smith*. Even the question about the Orthodox Jews having to ordain women, that is not going to be affected at all by *Smith*. I mean that is under the Free Exercise Clause, the ministerial exception. The fifth circuit a few weeks ago said the ministerial exception exists post-*Smith*. So let's not—it is a tough enough question as it is, so let's not pose it in a way that makes it more tough.

There is still a question that we are saying, if you go just to specific areas, what you might end up doing is missing some. I think that is right.

Mr. NADLER. Well, what you are going to miss is some by inadvertence, and you are going to discriminate against all the minority religions.

Ms. FELDBLUM. No, but not—

Mr. NADLER. I didn't see in this bill, for example, in this draft bill, for example—

Mr. CANADY. The gentleman's time has expired. I will tell you, we are going to have to go vote, and I think Mr. Frank has a question, Mr. Barr may have questions. I hate to ask you to wait, but I think the subcommittee, given the fact that a vote is going to take place in about 7 minutes, will have to recess. We will come back, and if there is no objection—

Mr. FRANK. I try to be accommodating, Mr. Chairman, and not have any questions, but I made the mistake of listening. So now—[Laughter.]

Mr. CANADY. When we come back, if there is not objection, then Mr. Nadler will have a little additional time to finish up. But the subcommittee will now stand in recess. I would ask that the members come back just as soon as possible after this vote.

[Recess.]

Mr. CANADY [presiding]. The subcommittee will reconvene. The subcommittee will be in order.

I apologize—a thousand times I apologize for the delay. It ended up being longer than we anticipated because we had a series of votes. But now, without objection, I would like to recognize Rep-

representative Nadler for an additional 2 minutes to ask additional questions.

Mr. NADLER. Yes, and thank you. Thank you, Mr. Chairman, I appreciate the courtesy. I was finishing asking Mr. Anders question. I said that as an example, or to illustrate my skepticism of the individual, the approach of guaranteeing specific religious liberties through legislation only, I mentioned that just off the—looking at this very quickly, it does not protect Jewish ritual slaughter, for instance, against legislation—that would outlaw it. It does not protect the mass of Jewish sacramental practices from alcoholism legislation. And for that matter, it does not pass the case that got—this does not protect that got all this started—the Indian use of peyote as a religious ritual. These are just illustrations. The problem with such an approach is that a, you won't think of cases, and b, when you do, the unpopular groups won't end up getting protected and their protection should not depend on popular majorities. The whole point of the first amendment is you are entitled to your protection as unpopular as you may be.

Mr. ANDERS. If I could just respond to that for a second. What we sent to you is really a working draft, and it came out of a process with some of the members of the Coalition where we tried to look at areas where there are cases being litigated and see if there is a way that we can respond to those specifically, and respond to those by tying them to specific sources of Federal funds so we could also get around some of the constitutional questions that have been raised. We do not believe that RLPA would be unconstitutional for lack of authority, but there certainly have been questions that have been raised by people who do have that view, and we do not know how the courts are going to come out on that. And so, I think that was an attempt to address those questions.

But I think, more importantly, it was an attempt on our part and the part of the some of the members who are also interested in both increasing protection for religious exercise and also protecting State and local civil rights laws to take people who care about both issues out of this box that they have put in by this deal that the Coalition has made. And we are not wedded to this approach or to this specific list, but I think that we do owe it to—certainly, for the ACLU, we do feel like we owe it to—Members of Congress to not put them in this box of choosing between two goods, and that we should think outside that box.

Mr. NADLER. Well, let me just say thank you. I know I have tried to illustrate by this line of questioning some of the problems with what I thought was a somewhat of an imbalanced approach in the memo. I do recognize we have been put into an unfortunate box by the Supreme Court obviously. I think you know that I share and we share an abiding concern for the civil rights of all people. And I do not know ultimately how I am going to vote on this. I agree with Rabbi Saperstein on objections to the carve-out. I understand the problems that arise with respect to possible threats in some cases to civil rights or gay rights legislation, which I certainly support, that is, the legislation, not the threats. I am very concerned with the general protection of free exercise rights, and I look forward to working with the ACLU and with other Coalition members to figuring out a way of getting ourselves out of this box. I do not

think the individual approach that you have outlined is the answer, but maybe we will find an answer. I certainly hope we will.

Mr. ANDERS. And we would look forward to working with you.

Mr. NADLER. I thank you.

Mr. CANADY. The gentleman's addition additional time has expired.

Mr. NADLER. And I thank the chairman for his indulgence.

Mr. CANADY. I appreciate the gentleman's participation. I will now recognize myself for 5 minutes, although I hope not to take it because I—we have another panel, and we need to move to them.

I just want to ask Professor Feldblum a question or two. Let me—and you may have answered this already, and I may have missed it. Do you believe that the *Smith* case was rightly decided?

Ms. FELDBLUM. Not in its entirety. I think that the Supreme Court did not give the due regard to the religious belief in that case. That is, I actually believe one of the things that is important if Congress would, in fact, do select areas, I think sacramental use of wine or other sort of elements is something that should have been included—the government should have been forced to show that it was narrowly tailored to compelling government interests. So, yes, I mean, they were wrong in that particular case.

Mr. CANADY. Wait, when you say not entirely. Do you think the test of the Supreme Court had applied in these sorts of cases for a long period prior to the decision in *Smith* was an appropriate test? I mean, I do not really—

Ms. FELDBLUM. Oh, actually they had not really applied it in a lot of these ways in the way that sometimes the Coalition I think likes to say. I actually think it is interesting. I think if I had been on the Supreme Court, I would probably have voted with Justice Scalia potentially, because of the problem that on the court, you cannot shape out the standard in a way that does not have all the possible adverse consequences.

Mr. CANADY. But wait, I do not understand how you get—

Ms. FELDBLUM. But when you are in Congress, you actually, and if I were in Congress, I would actually vote to get a different result for religious people in this country than is the result in *Smith*.

Mr. CANADY. Okay, well, I—

Ms. FELDBLUM. See there is distinction between a Member of Congress and being a member of the Supreme Court—what is constitutionally required versus what right you decide you are actually going to extend.

Mr. CANADY. Let me try to reclaim my time.

Ms. FELDBLUM. Since I am not a Member of Congress or the Supreme Court.

Mr. CANADY. Okay, I guess that I do not understand why you qualify your answer and instead of just saying that you think the case was rightly decided. Why do you?

Ms. FELDBLUM. Well, because I did not—I would not agree with the end result. I do not think that should have happened. I do not think that people should—

Mr. CANADY. But as a matter of—

Ms. FELDBLUM. [continuing.] Have a neutral drug law applied against their religious sacrament.

Mr. CANADY. But as a matter of constitutional law, I mean, forget about policy and what you would do if you were a Member of Congress. But as a matter of constitutional law, do you think it was rightly decided?

Ms. FELDBLUM. I think that is tough. I am not ready to say right now—

Mr. CANADY. Well, I understand.

Ms. FELDBLUM. [continuing]. That it was completely rightly decided.

Mr. CANADY. We can all agree on that. I am just trying to, well—

Ms. FELDBLUM. Yes.

Mr. CANADY. Okay, I do not think that is going to be productive. Did you support RFRA?

Ms. FELDBLUM. Well, actually, it is interesting.

Mr. CANADY. I think that lends itself to a yes or no answer.

Ms. FELDBLUM. No, I would not support RFRA without—

Mr. CANADY. And you did not support RFRA?

Ms. FELDBLUM. Well, actually I was at the ACLU at the time, and it was not in my job description. I was working on the Americans with Disabilities Act.

Mr. CANADY. Okay. Okay. Alrighty. I think that really answers it. Does anybody, Professor Laycock, Rabbi Saperstein, do you have anything you want to add in the little bit of time I have left here?

Mr. SAPERSTEIN. I really thought that Mr. Nadler was on to a very important point. Mr. Watt, I know that you particularly are concerned about the civil rights issues here. For groups like the ACLU, who believe *Smith* was wrongly decided; who believe our fundamental rights—whether they are speech, press, or religion—are entitled to the highest level of protection, requiring a compelling interest and least restrictive means test. I do not understand how they could support overturning *Smith*, and restoring that if it ends up in the courts that way, and not doing the same legislatively. I do understand the Congress is different. I could even understand moving for a carve-out, but if you fail to get the carve-out, then you are left with exactly the choice you are left with in the Supreme Court, it went back to overturn *Smith*. And you have got to be consistent. You have got to say: look, we are willing to support it if the Court moved here to restore that high level of protection, even though we know it means we are going to be in court fighting for civil rights claims against it; here we should be consistent here if the carve-out fails. We need to support this legislation. We cannot abandon it all.

The only other thing, very quickly, I would say is on *Thomas*, the ninth circuit case. I just want to point out here, the only times where religious claims have prevailed are in marital status cases; civil rights claims almost always win. And only in the marital status cases, only in the marital cases, where the State tries to have it both ways, Mr. Watt. That is, where the State says we will discriminate against them; we won't give them insurance; we won't give unmarried couples room in our dormitories—but if there is a religious claim against. Then, the religious claim is not entitled to any protection. And there, the Court has said, there has to be consistent standard here.

On the whole, we are winning these cases. We will win them. I can understand the argument for a carve-out, but if we fail, not at the expense of passing such a vital bill to our freedoms.

Mr. WATT. Okay, could I just—

Mr. CANADY. Without objection, I will give myself an additional 3 minutes and yield to—

Mr. WATT. Yield me, yield me 20 seconds.

Mr. CANADY. And yield some time to Mr. Watt, and then we will come back to—

Mr. WATT. I am not sure why that was directed at me. I have not said one word about a carve-out or about civil rights, so I think my concerns with this legislation are probably different than the ones that ACLU is suggesting. First of all, I am not sure where I come down on it yet, but this whole notion of every time we do not like what the Supreme Court does going and setting up a whole new body of law I think is just a bad idea. And I am going to have to—I have a long way to go to overcome that before I even get to these carve-outs. And so I have not—I have not said anything about the carve-out, civil rights. All of my questions today have had to do with the Commerce Clause.

Mr. SAPERSTEIN. I apologize, and I accept that here. But if there is one area we should try to remedy legislatively, it is when it deals with our first freedoms. This not like other things.

Mr. CANADY. Okay, Professor Laycock, do you have something you would like to add?

Mr. LAYCOCK. Just two points. I think I can make them briefly. Nearly the whole body of Federal civil rights law expands on rights that the Supreme Court has construed very narrowly. The Supreme Court requires racial motive. Congress protects against racial impact, and so on and so forth through example after example. And the first amendment should benefit from that process just as the fourteenth and the fifteenth do.

Second, with respect to the Coalition's position against carve-outs. It is not some political box that was artificially created. It was a determination of principle made at the very beginning. Steve Solarz, who sponsored RFRA the first time around, was the lead sponsor; he explained it in the very first hearing. If we begin to put on special amendments from either the left or from the right, what we wind up with is a list of those religious practices that can assemble a majority vote in Congress. They will be protected. And there will be another list of all the ones who could not assemble a majority vote in Congress, and they won't be protected. And, as he put it, we will not have repudiated *Smith*, we will have codified *Smith*. We will have protected only those practices that can get a majority vote, and that is exactly what Justice Scalia gave us in *Smith*. And an awful lot of people on both sides of the aisle, and on both ends of the Coalition, have stood up for that principle over the years. Right to life people stared down demands from their grassroots for a carve-out. The Senate of the United States stared down the prisoner directors and voted against a carve-out. People for the American Way stared down the school boards and told them they could not get a carve-out. The American Indian lobby stared down some of their people and said, you do not get a carve-out. On both left and right, people have lived by that principle, and it is

the right principle. It is the principle of the first amendment—that all religious practices should be subject to a compelling interest test.

Mr. CANADY. Well, with that principle, we will conclude this panel. And I want to thank all of you for your patience, and your great contribution to the deliberations of the subcommittee. Thank you very much, and we will now move to the third panel.

If members of the third panel would come forward to take your assigned seats, I will proceed to—with the introductions, if you will allow me to do that. The first speaker on this final panel will be Oliver S. “Buzz” Thomas, of the National Council of Churches. Mr. Thomas is presently special counsel for religious and civil liberties at the National Council of Churches. Mr. Thomas is a well known expert in church State relations. He is also an ordained Baptist minister.

Following him will be the Reverend C.J. Malloy, Jr., of the First Baptist Church of Georgetown here in Washington, D.C. Reverend Malloy has been involved with the ministry for over 40 years. He has also been involved with the National Council of Churches and the Baptist joint committee, serving on numerous committees.

The next speaker on this panel is Bradley Jacob, Provost and Academic Dean for the new Patrick Henry College, and a staff attorney for the Home School Legal Defense Association. Mr. Michael Farris has planned to be with us, but due to scheduling conflicts and the fact that our hearing has been delayed, he was unable to be here. But we are very pleased to have Mr. Jacob here in his stead.

Following Mr. Jacob will be Professor Marci Hamilton of the Benjamin N. Cardozo School of Law in New York City. Professor Hamilton has recently been a visiting professor of law at Emory University in Atlanta and Princeton Theological Seminary. Professor Hamilton clerked for Supreme Court Justice Sandra Day O’Connor, and gets a great deal of credit for us being here today. I won’t—you will understand that—know her role in the Bernie case.

Our final speaker on this panel today will be Steve McFarland of the Christian Legal Society. Mr. McFarland is the director of the Center for Law and Religious Freedom, the advocacy arm of the Christian Legal Society. Mr. McFarland has litigated numerous cases relating to religious liberty issues around the country and before the United States Supreme Court.

And thank you for your great patience, and I will now recognize Mr. Thomas.

STATEMENT OF OLIVER S. THOMAS, SPECIAL COUNSEL FOR RELIGIOUS AND CIVIL LIBERTIES, NATIONAL COUNCIL OF CHURCHES

Mr. THOMAS. Thank you, Mr. Chairman. It is a pleasure to be here today. I bring greetings on behalf of the Florida, North Carolina, and New York Councils of Churches. I am here today on behalf of the National Council of Churches of Christ and in accordance with House rules want to disclose to the committee that we do receive and administer a number of Federal grants, including food distribution programs through the Church World Service, refugee resettlement, and two AmeriCorps grants that are received by

our ecumenical partnership for rural and urban services. And I will submit a detailed budget to the committee of those activities.

Mr. Chairman, since its inception 50 years ago, the National Council of Churches has been an advocate of religious liberty for all persons. Not just for Christians. Not just for Judeo-Christians. But for all.

We are here today not so much because we suffer, although there are some cases involving mainline Protestants, Anglicans, and Orthodox Christians, but mostly because other Americans are suffering; because minority religious groups throughout the country have found their rights infringed.

Other institutions of government have responded admirably to the Supreme Court's decision in *Employment Division v. Smith*. Lower courts have found exceptions to the rule. State courts have used their own constitutions to provide a measure of protection. Some State legislatures have passed statutes to protect religious freedom, and at least one State, Alabama, has used a ballot initiative to amend its own constitution.

As encouraging as these developments are, they leave our Nation with a patch work of protection. A constitutional safety net shot full of holes. You may not fall through, but again you might.

Such an arrangement cannot stand. This body, the Congress of the United States, has an opportunity to come to the assistance of the religious community. God bless you, you did it once. You passed a broad-based, universally applied statute that brought Americans together. It brought this Coalition together. It was a statute that Mr. Hyde and Mr. Frank both supported. It was a statute that not a single member of the House of Representatives voted against. President Clinton said not long ago that signing that statute was the proudest moment of his presidency. But the Supreme Court struck it down.

For almost 2 years, the Coalition for the Free Exercise of Religion has been working with this subcommittee, with leading scholars and with the Justice Department to craft a statute that we believe can pass constitutional muster. And, then, the politics changed.

On the right, my friend, Mike Farris—Brad, I see you are here today, and Brad will represent his position well—with a relatively small but very energetic group of followers have decided that the Commerce Clause should not be used to protect religious liberty. It has been used to protect a lot of other things, but they will lobby you aggressively to strip out the provisions that we believe are necessary to protect missionary agencies, church publishing houses, theological seminaries, and most likely the parent denominations of tens of thousands of local congregations across the United States.

On the left, my colleagues at the American Civil Liberties Union have decided that the Religious Liberty Protection Act poses a threat to gay rights. Now, let me make clear that the National Council of Churches is a strong supporter of civil rights for all Americans, including gays and lesbians. We are unapologetic about our support for the Employment Non-Discrimination Act. There is nothing Christian about discrimination.

RLPA does not threaten civil rights. The compelling interest test contained in RLPA is the same test we all supported just a few

years ago. There is nothing new here. What is more, not a single reported case has held that landlords or employers can avoid a gay rights law by protesting on the grounds of religion. Not one.

Here are the facts. The only time a religious objection has been used successfully to challenge a civil rights law pertains to marital status cases. That is because States have systemically and routinely undermined their compelling interest by themselves discriminating against the very group of people they seek to protect. As long as States deny dormitory space, insurance benefits, death benefits and the like to unmarried couples for secular reasons, they can expect to lose cases against those who wish to do the same thing for religious reasons. That is why that handful of cases have been decided the way they have, and it does not extend outside the marital status area.

The opposition's problem with this statute is really, as the chairman notes, not with the Religious Liberty Act, it is with the compelling interest test. It is with the pre-*Sherbert* rule. But the question that I think the committee has to ask itself and ultimately the Congress will have to ask itself is this, is religious liberty for everyone? Is religious liberty for everyone or will we each construct our list of protected groups. We all have different lists. We all have different preferences, but what brought the Congress together last time was an unyielding commitment to the principle that the same rule would apply to everyone.

I close by acknowledging to you that I too am an elected official. I am the chairman of my local board of education. My experience confirms what opinion polls suggest that people are sick and tired of public officials that care more about politics than principle. The principle in this case, I think, is clear. It is the same principle that was at stake several years ago, when you passed the Religious Freedom Restoration Act. The Congress needs to do something to restore the protections for the nation's first liberty. The politics are also clear. While the vast majority of your constituents will support your action on this legislation should you chose to co-sponsor or support it, you will face noisy opposition from the right and the left. But the choice is yours, and we would urge you to lay aside the political questions and support this important piece of legislation. Thank you, Mr. Chairman and members of the committee.

[The prepared statement of Mr. Thomas follows:]

PREPARED STATEMENT OF OLIVER S. THOMAS, SPECIAL COUNSEL FOR RELIGIOUS AND CIVIL LIBERTIES, NATIONAL COUNCIL OF CHURCHES

I am Oliver Thomas, Special Counsel for Religious and Civil Liberties of the National Council of Churches of Christ in the USA (NCC). My VITA is attached.

The NCC is the nation's oldest and largest ecumenical body with 35 Anglican, Orthodox and Protestant member communions that have an aggregate membership in excess of 53 million. Obviously, we do not speak for all of those Christians. We do speak for our General Assembly which numbers in the hundreds and includes key representatives of each member communion.

Since its inception 50 years ago, the NCC has been an advocate of religious liberty for all persons. Not just for Christians. Not just for Judeo-Christians. For all.

For that reason, we have opposed efforts by government to promote as well as to inhibit religion. The last time I appeared before this committee, I testified against a proposed amendment to alter the Constitution's No Establishment Clause.

At the same time, the NCC has vigorously maintained the right of citizens to exercise their religion free from undue interference by the government. It is the diminishment of that right that brings me here today.

Since the Supreme Court's infamous 1990 decision, *Employment Division v. Smith*, the hallowed right to exercise one's faith—the nation's first freedom—has been moved to the back of the constitutional bus. Maybe off the bus altogether. What once was a fundamental right equal to freedom of speech and the press, is now largely a matter of legislative grace.

Other institutions of government have responded admirably to the Supreme Court's pinched understanding of the rights of conscience. Lower courts have found exceptions to the *Smith* rule using so-called hybrid claims and other constitutional provisions such as the speech clause. State courts—such as those in Massachusetts, Michigan, Maine and Wisconsin—have used their own constitutions to protect religious exercise. State legislatures in Connecticut, Rhode Island, Florida and Illinois have passed statutes, and one state—Alabama—used a ballot initiative to amend its own constitution.

As encouraging as these developments are, they leave our nation with a patch work of protection. A constitutional safety net shot full of holes. You may not fall through, but again you might.

Such an arrangement cannot stand. This body—the Congress of the United States—must come to our aid. God bless you, you did it once. You passed a broad-based, universally applied statute that brought America together. It was a statute that Mr. Hyde and Mr. Frank could support. A statute that not a single member of the House of Representatives voted against!

The coalition that assisted you in the drafting and grass-roots support of the bill included Beverly LaRaye's Concerned Women for America and Norman Lear's People for the American Way. Lou Sheldon's Traditional Values Coalition and the Anti-Defamation League. Chairing that coalition was one of the grandest experiences of my life.

But, the Supreme Court struck it down. Such a broad-based regulation of state and local government exceeds Congress' authority under the 14th Amendment, said the Court.

For almost two years, the Coalition for the Free Exercise of Religion has been working with this subcommittee, consulting with leading scholars and working with the Justice Department until at long last, we have a statute we believe can pass constitutional muster.

And, then, the politics changed.

On the right, my friend Mike Farris and a small but energetic group of followers have decided that the Commerce Clause should not be used to protect religious liberty. Never mind that it's been used to protect everything else. And so, they will lobby you aggressively to strip out those provisions that would protect missionary agencies, church publishing houses, theological seminaries and most likely the parent denominations of thousands of local congregations spread across America.

On the left, my colleagues at the American Civil Liberties Union have decided that the Religious Liberty Protection Act (RLPA) poses a threat to gay rights. Let me make clear that the NCC is a strong supporter of civil rights for all persons including gays and lesbians. We are unapologetic about our support of the Employment Non-Discrimination Act. There is nothing *Christian* about discrimination.

But RLPA does *not* threaten civil rights. The compelling interest test contained in RLPA is the same test we all supported in the Religious Freedom Restoration Act. There is nothing new here. What's more, not a single reported case has held that landlords or employers can avoid a gay rights law by protesting on the grounds of religion.

Here are the facts. The *only* time a religious objection has been used successfully to challenge a civil rights law pertains to marital status. That's because states have undermined their claim of a compelling interest by doing precisely what they tell religious people they can't do—discriminate against the unmarried. As long as states deny dormitory space, death benefits and the like to the unmarried for "secular" reasons, they can expect to lose cases against those who wish to engage in the same type of discrimination for religious reasons.

Religious liberty *is* a civil right. Shame on us if we refuse to protect it because some people exercise their religion in a way that we don't happen to agree with.

I have discussed the political opposition on the right and the left. All that remains is Marci Hamilton. Professor Hamilton has made a cottage industry out of opposing religious liberty legislation both here and in the states. She says RLPA goes too far. That's interesting. I have in my possession a letter and a law review article in which Professor Hamilton argues that the compelling interest test contained in RLPA doesn't go far enough! She argues instead for a "manifest danger" standard which would protect religious exercise in all but a handful of cases.

Now which Marci Hamilton are you going to believe? The objective, disinterested scholar who wrote the article in the Ohio State Law Journal or the attorney who

was hired to represent the City of Boeme in its crusade against the Religious Freedom Restoration Act?

Like you, I am an elected official. I chair my local board of education. My experience confirms what opinion polls suggest—that people are sick and tired of public officials who care more about politics than principle. The principle is clear. The free exercise of religion has been and continues to be a corner stone of American democracy. A free pulpit is at least as important as a free press. If the Supreme Court won't provide that protection, you must.

The politics are also clear. While the vast majority of your constituents will approve of what you are doing, you will face noisy opposition from both the right and the left.

The choice is yours. I urge you to put politics aside and pass this bill.

Mr. CANADY. Thank you, Mr. Thomas.
Reverend Malloy.

STATEMENT OF REVEREND C.J. MALLOY, JR., FIRST BAPTIST CHURCH OF GEORGETOWN

Mr. MALLOY. Thank you, Mr. Chairman. I am C.J. Malloy, Jr., pastor of the historic and the best church in the world, located in Georgetown, Washington, D.C. I am of African descent. My foreparents were transported to what we claim now as the land of the brave and home of the free. God ordained me to do this admirable task. And since Jesus is my royal brother, I firmly believe that I too have been anointed to preach the good news to the poor. As one of the versions of the Bible States, to set at liberty the oppressed. I am pleased to be a witness in this assembly today.

My journey over nearly 40 years in the ministry has brought me in contact with organizations like the National Council of Churches and the Baptist Joint Committee, where I once served. These two groups represent all that I espouse—the principle of religious liberty. We should, no we must, preserve and protect religious liberty. If there is not a compelling reason for hindering religious liberty, it should not be suppressed.

As a lad, I pledged allegiance to the flag of the United States of America and then proclaimed proudly, with liberty and justice for all. Honorable members of the committee, we have come too far to be shackled by laws that put us at the back of the line. I am so grateful for this Congress because now the Supreme Court has failed us in this area that we need to protect. It declined to shield us from government intrusion, so now it is up to you. Will you reinstate this tradition? Will you say once again that our first freedom, the freedom to seek the answers to life's most fundamental questions, should not be overridden by the need for conformity and bureaucratic efficiency?

I do not understand the legal jargon and sophisticated wrangling of bills, but I do know what it means to have the wall of separation and also the security of protection. Jesus said on an occasion, give to Caesar that which is Caesar's, but give to God that which is GOD's. Thus, I urge you to reclaim one of the most fundamental principles of our nation. Because if the current disregard for the free and full practice of religion continues, in time it will wrench a distinctive birthright from the fabric of this country. In time, we will all be more conformer than seeker. Religion could suffer no more serious blow, so I urge you to support the Religious Liberty Protection Act, and I pray that God will bless you all. Thank you, sir, and because I have a religious service with my congregation

immediately after this gathering here, I pray and beg your indulgence that I might be excused. I will not have a chance to respond to any questions. But I thank you for the high privilege.

[The prepared statement of Reverend Malloy follows:]

PREPARED STATEMENT OF REVEREND C.J. MALLOY, JR., FIRST BAPTIST CHURCH OF
GEORGETOWN

I am C.J. Malloy, Jr., pastor of the historic First Baptist Church, Georgetown, in Washington, DC. I am of African descent. My foreparents were transported to what we claim now as the land of the brave and home of the free. GOD ordained me and since JESUS is my royal brother, I firmly believe that I too have been anointed to preach the good news to the poor and as one of the versions of the Bible states: to set at liberty the oppressed. I am pleased to be a witness in this assembly today.

My journey over nearly 40 years in the ministry has brought me in contact with organizations like the National Council of Churches and the Baptist Joint Committee where I once served. These two groups represent all that I espouse—the principle of religious liberty. We should, no we must preserve and protect religious liberty. If there is not a compelling reason for hindering religious liberty, it should not be suppressed.

As a lad, I pledged allegiance to the flag of the USA, and then proclaimed proudly, "with liberty and justice for all." Honorable members of the committee, we have come too far to be shackled by laws that put us at the back of the line. I am so grateful for this Congress because now the Supreme Court has failed us in this area that we need to protect. It declined to shield us from government intrusion. So now it is up to you. Will you reinstate this tradition? Will you say once again that our first freedom, the freedom to seek the answers to life's most fundamental questions, should not be overridden by the need for conformity and bureaucratic efficiency?

I do not understand the legal jargon and sophisticated wrangling of bills, but I do know what it means to have the wall of separation and also the security of protection. JESUS said on an occasion, "give to Caesar that which is Caesar's, but give to GOD that which is GOD's." Thus I urge you to reclaim one of the most fundamental principles of our nation. Because if the current disregard for the free and full practice of religion continues, in time it will wrench a distinctive birthright from the fabric of this country. In time, we will all be more conformer than seeker. Religion could suffer no more serious blow. I urge you to support the Religious Liberty Protection Act. GOD bless you all.

Mr. CANADY. Well, we would certainly afford that religious accommodation to you. We would be delighted to do that. And thank you for being here today.

Mr. MALLOY. Thank you, sir.

Mr. CANADY. Thank you.

Mr. Jacob.

STATEMENT OF BRADLEY JACOB, PROVOST AND DEAN OF
THE COLLEGE, PATRICK HENRY COLLEGE

Mr. JACOB. Thank you, Mr. Chairman, members of the committee. I will ask you to indulge my nervousness this afternoon. I have never spoken to a body of Congress before, and did not know I was doing it today until less than an hour ago. Mr. Farris sends his great regrets that he had a family commitment and that because of the timing of this hearing, he was simply unable to remain for his allotted time. I will do my best to pinch hit.

As I speak today, I will probably be using the word "we" a few times. And I want to try to give you a little sense of who "we" are. I am speaking as Mr. Farris' pinch hitter. I am speaking, I believe, representing the views of a sizeable group of people—Buzz and I could argue about how big the group is—but a group of people who would largely fall under the heading of religious conservatives, although that may not fit across the board. These are people who believe very firmly in the principle of religious freedom, who are com-

mitted to advancing religious freedom, but who also believe very firmly in other constitutional principles, including the principle of federalism and limited central government.

And that is what motivates our position on this particular piece of legislation. We are not, in any way, trying to derail the effort to protect religious liberty. We are greatly, greatly in support of that work. We appreciate the work that the chairman and others have done. You would not know, but the years that I was CEO of the Christian Legal Society, from 1991 to 1993, were the years that Religious Freedom Restoration Act was passing through the Congress. My colleague, Mr. McFarland, and I worked on that bill side by side. Mr. Farris, in his capacity at HSLDA, was committed to that fight. He was the chairman of the initial drafting committee for RFRA. We have put in the time. We have committed ourselves to this fight, and our concerns are not seeking exceptions. We are not trying to remove any kinds of religious practice from the reach of this bill.

We have only one concern about RLPA, and that has to do with the issue of federalism. It has to do with the reach of the national government into the lives of ordinary citizens. This is an effort on our part to promote a view of the Constitution, and of the Federal power, that is consistent with the views of the Founders, consistent with the way our Constitution was written, consistent with the intent of the first amendment and later the 14th amendment, when it was written. We seek to encourage not only the first amendment's religious freedom principles, but also the Commerce Clause to be correctly understood in that light.

The Commerce Clause has been used in this century as the greatest tool of expansion of national legislative power over the lives of ordinary citizens in ways that the Founders would have never dreamed of, and which would have appalled them. This is what we oppose.

We oppose it not so much as a constitutional claim. I cannot tell you what the Supreme Court will do with RLPA if Congress enacts it. Will they find that it exceeds the *Lopez* standard and is unconstitutional and strike it down? Perhaps. Will they uphold it as valid use of the commerce power? I do not think anyone here can give an absolute guarantee as to what the Supreme Court would do with the bill. But we oppose it as a matter of policy, and we ask you to oppose that use of the commerce power as a matter of policy, because we believe that not only in this case, but across the board, Congress should be using the restraint to allow interstate commerce to mean interstate commerce; and to use that power to regulate the interstate transport of goods and those things that the commerce power addresses.

If Congress wishes to regulate areas in which it does not have constitutional authority, there is an amendment process, which can be used to give Congress that power. This is where we are coming from. It is a policy issue, which causes us to stand against this bill in principle. This is a good bill in its intent, but one which uses the power of Congress, we believe, in a bad way. RLPA is very, very different from RFRA.

RFRA was a bill based on section 5 of the 14th amendment. Section 5 of the 14th amendment, where it applies, only gives Con-

gress the power to regulate the activities of State and local government. That is all. It is purely an enforcement power to regulate State and local government on whatever substantive areas may fall under the reach of the 14th amendment. The Commerce power, where it applies, gives Congress authority directly over the lives of private citizens. So any area of human existence that falls under the commerce power is subject not only to regulation to stop State government from acting, but subject to the potential, direct legislation of Congress in the lives of private citizens. This is the concern that motivates us.

This particular bill, we will agree, is only directed at limiting State and local government, and advancing religious freedom. That is what it intends to do, but each area which the Congress touches can be touched in a way that is for good and for bad. And if Congress has the power to regulate a small local church, a home school, some kind of local ministry because people have litigated cases and managed to establish a connection with interstate commerce, then Congress has the power to go in next year or the year after, or the year after that, and enact other direct regulation of those activities under that same commerce power.

I know I have overrun my time. Let me just quickly mention there is attached to Mr. Farris' written testimony a very rough beginning draft of some of our own legislative proposals, which we would believe would affirm what substance is left in free exercise under the *Smith* decision, build on that base, and expand it in a way that would truly protect free exercise for all Americans without expanding Congress' power under the Commerce Clause. Our goal at this point is simply to deal with the Commerce Clause issue and to seek to include some of those broader substantive protections—if you will, a big theory of religious freedom rather than religious freedom tied to a theory of big government. That is our goal.

If we can move in that direction, if we can find support among you to consider such changes, we would be delighted to enthusiastically stand with those who support the cause of religious freedom and are fighting for this bill.

[The prepared statement of Mr. Farris follows:]

PREPARED STATEMENT OF MICHAEL P. FARRIS

Mr. Chairman and members of the Committee.

I thank you for the opportunity to testify on this very significant issue of religious liberty. And while we disagreed on this legislation last session, I want to make it very clear that I admire and fully support Mr. Canady and others in their commitment to the protection of religious liberty. We have disagreed about means to an end and that is all.

Home School Legal Defense Association and many other organizations continue to oppose the Religious Liberty Protection Act insofar as it employs the power of Congress under the Commerce Clause as the mechanism to protect religious liberty.

We all agree that the decisions of the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and *City of Boerne v. Flores*, 138 L.Ed.2d 624 (1997) view the free exercise of religion in a way that grants far too little protection. We tried to enact as civil rights legislation a big theory of religious freedom in the Religious Freedom Restoration Act of 1993. As you know, I was a committed advocate in that fight.

Now in the wake of the *Boerne* decision, RLPA searches for a new theory of Congressional power to impose the RFRA standard for religious liberty in as many cases as possible. The key issue in RLPA is not whether to adopt a big theory of religious liberty, rather it is whether we should wrap religion inside a theory of big government.

It is our studied and solemn position that the marriage of commerce and religion is ill-advised and dangerous. There are two reasons we think this is so.

First, the Commerce Clause provision of RLPA creates two classes of religious exercise. Those whose religious exercise has been burdened by government in a manner that materially affects interstate commerce are within the ambit of this aspect of the bill. Those whose religious exercise has little or no commercial component are outside the ambit of this aspect of this provision.

The money changers in the temple would fall within the zone of protection of the Commerce Clause provision. But the widow who came to the temple to give a single mite would not be protected.

Although well-intentioned, the Commerce Clause provision results in an unprincipled division that is drawn exclusively on the amount of commerce and breadth. We place a subjective tool into the hands of judges and tell them to determine cases for religious people along financial lines. I would suggest that is unAmerican to prefer the rich over the poor, to prefer the big over the small, to prefer the megachurch over the humble congregation, or to prefer the religious institution over the religious individual.

The second principle reason for our opposition to the Commerce Clause provision in RLPA is the long-term danger it poses to religious people and institutions.

By way of contrast, the RFRA was based on the 14th Amendment's provisions in section 5 which gives Congress power over state governments. The Commerce Clause has been construed to give Congress power over both governments and private companies and individuals.

The Employment Non-Discrimination Act, for example, is proposed legislation which would employ Commerce Clause power to extend gay rights protection over both government and private businesses.

If we embrace the notion that the Commerce Clause gives Congress power over religion, not only can Congress order governments to treat religious people in a certain way, later on it can order churches to conform their practices to congressional standards. If Congress has Commerce Clause power to order state governments to not discriminate against churches under RLPA, then Congress also has Commerce Clause power to order churches to not discriminate against homosexuals.

Specifically for home schoolers, if this bill has any application for us, it would be under the Commerce Clause provision. If Congress has the power to order state governments to treat religious home schoolers in a certain fashion, then later on Congress could order home schoolers to meet teachers' certification standards or teach only from textbooks that U.S. Department of Education has approved.

We think the limiting language in Section 5(f) recognizes but does not solve this problem. If a church has proved that the government's burden on its activities is substantially connected to interstate commerce under RLPA, it will be unlikely to persuade any court that its activities are not connected to interstate commerce in a future case brought under legislation such as ENDA. Or, if a Catholic or Baptist church succeeds in invoking the Commerce Clause provisions of RLPA in one case, it will be unable to prove that the Commerce Clause does not extend to the issue of whether that church is justified in refusing to hire women pastors under existing federal law banning gender discrimination in employment.

Section 5(f) does not grant religious institutions the right to be a chameleon. Either our activities affect interstate commerce or they do not. When there is a body of case law which holds that burdens on churches' activities affect interstate commerce, that case law will have precedential effect in cases brought under other laws.

These are arguments we made last year with the support of thousands and thousands of grassroots citizens. We anticipate similar support this year.

But, unlike last year, we have drafted what we believe is an alternative to the Commerce Clause portion of RLPA. We have attached copies of this alternate legislation to my testimony and have distributed it to the members of the Committee in advance. Keep in mind that this legislation is at the discussion draft stage.

We would be very open to a discussion whereby the principle provisions of our draft, which we call the Religious Exercise and Liberty Act (REAL Act), are substituted for just the Commerce Clause portions of RLPA.

RLPA embraces a theory of big government.

REAL Act embraces a big theory of religious freedom.

RLPA continues the war with the Supreme Court over the use of the compelling interest test in a broad category of cases.

REAL Act accepts the Supreme Court's premises and rulings, and puts meat on the remaining bones in a way that materially broadens the practical protection for religious people and organizations.

RLPA continues and expands the ability of judges to use vague legal tests to impose their personal predilections under the guise of legal analysis. Specifically, the subjective balancing mechanism of compelling interest-least restrictive means, is compounded by the use of the Commerce Clause analysis which allows judges to subjectively weigh the degree to which the burden on a religious practice affects interstate commerce.

REAL Act creates a zone of absolute protection for religious belief that is consistent with Supreme Court doctrine and which avoids the needs for any kind of subjective analysis in these critical zones.

I am very encouraged by Section 3 of RLPA, which relies on the Free Exercise Clause. Despite the Supreme Court's ruling in *Smith*, there is still a lot of liberty left in the First Amendment. Section 3 of RLPA identifies land use as a specific area where the First Amendment still applies. We would add specific protections for several other remaining categories of religious liberty, especially the absolute right to believe.

The Supreme Court has identified 'hybrid rights,' in which a person exercises another recognized constitutional right for religious reasons. The Michigan Supreme Court upheld the hybrid right of religious home schoolers, and struck down a law which required every teacher to be certified. Hybrid rights can and should be protected under the First Amendment.

The Supreme has limited First Amendment protections for "facially neutral, generally applicable laws," but many—possibly most—laws have exceptions and exemptions. Congress still has power under the First and Fourteenth Amendments to provide federal religious liberty protections for people affected by these kinds of laws.

Consider the important issue of the impact of these alternatives on a claim against a church brought under a local gay rights ordinance for a refusal to hire a minister because of his sexual orientation. Under REAL Act, the church would win—period. This is not a mere prediction. This would be the unambiguous result from provisions of this version. Under RLPA, the result is uncertain. It would depend on how the courts weigh and balance the competing interests. While it is possible to make guesses (and I think a fair guess is that a church is likely to win such a case at this stage in our national history, while I would also guess that the church's ability to win would deteriorate over time given the trends in societal thought), it is not possible to say with absolute certainty who would win such a case.

Accordingly, if your goal is to protect churches from such claims, then it seems that REAL Act is your best choice. If your goal is to protect homosexual activists in such cases, you should oppose either version. But, if your goal is to leave the matter to the highly subjective discretion of federal and state courts and to achieve mixed results, then you should support RLPA.

It is our view that what this nation needs is a big theory of religious freedom, not a theory of big government. In the final analysis, one of the greatest dangers to religious freedom, and to all freedom, is big government.

A Bill

To protect the free exercise of religion.

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 Exercise and Liberty Act of 1999."

SECTION 2. CONGRESSIONAL FINDINGS, PURPOSES, AND CONSTITUTIONAL AUTHORITY.

(a) **Findings — The Congress finds that:**

- (1) The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution.
- (2) The United States Supreme Court has defined several broad areas of free exercise law which are governed by the First and Fourteenth Amendments to the Constitution; including:
 - a) an absolute right to the freedom of belief;
 - b) a right to free exercise in conjunction with other recognized constitutional rights ("hybrid rights");
 - c) a right to include exemptions for religious liberty in governmental systems which provide for individualized exemptions or exceptions for other reasons; and
 - d) protection from government discrimination against religiously-motivated persons and practices.
- (3) Government officials can accommodate the free exercise of most religious practices without disrupting the orderly administration of the laws.
- (4) Religious believers have a right to object to specific conduct on religious grounds, even where discrimination on the basis of status is prohibited by law.

(b) **Purposes — The purposes of this Act are:**

- (1) to provide federal, state, and local government officials with clear and uniform guidance regarding the protection of the federal civil rights of religious believers;
- (2) to prevent any government interference with the absolute right to form, hold, and inculcate religious beliefs;
- (3) to protect religious believers from government discrimination against religious persons and practices;
- (4) to ensure that any governmental system that permits individualized exemptions and exceptions also accommodates the free exercise of religion;
- (5) to guarantee that the religiously motivated exercise of other constitutionally protected rights is properly protected; and
- (6) to protect the right of religious believers to object to specific conduct on religious grounds, even where discrimination on the basis of status is prohibited.

(c) **Constitutional Authority** — The specific constitutional powers authorizing this Act are:

- (1) **In General** — This Act is necessary to secure the blessings of liberty to ourselves and our posterity and is enacted pursuant to the enumerated powers listed below.
- (2) **Federal government** — As applied to federal government, this Act is authorized by the Due Process Clause of the Fifth Amendment and Congress' plenary power to make all laws which are necessary and proper for carrying into execution the powers enumerated in Article I of the United States Constitution, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.
- (3) **State and local governments** — As applied to state and local governments, this Act is authorized by Congress' power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment. Each provision of section 4 of this Act identifies and protects specific categories of religious liberty which the United States Supreme Court has ruled to be protected by the First and Fourteenth Amendments to the United States Constitution.

SECTION 3. DEFINITIONS.

(a) **As used in this Act—**

- (1) **DEMONSTRATES** — The term "demonstrates" means meets the burdens of going forward with evidence and of persuasion.
- (2) **GOVERNMENT** — The term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State.
- (3) **PERSONS** — The term "person" means one or more individuals, corporations, or unincorporated associations.
- (4) **RELIGIOUS ASSOCIATION** — The term "religious association" means any voluntary association that exists to teach religious truth, conduct religious worship, or fulfill religious obligations. Religious associations include, but are not limited to, all associations that require members or adherents to subscribe to a statement of faith.
- (5) **RELIGIOUS EDUCATION** — The term "religious education" means any instruction, including instruction in academic subjects, which could not be paid for with government funds because of the strictures of the Establishment Clause or a similar state constitutional provision. Religious education includes education that is provided by religiously-motivated persons who teach without pay, including but not limited to parents, volunteers, and members of religious orders who take a vow of poverty. Religious education shall include both institutional schools and home schools no matter how classified by state law.
- (6) **RELIGIOUS EXERCISE** — The term "religious exercise" means an act or refusal to act that is substantially motivated by a sincere religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief.
- (7) **SPIRITUAL AUTHORITY** — The term "spiritual authority" means the authority to define or teach religious truth, render judgment on religious matters, provide pastoral counseling, or prescribe or proscribe conduct for religious reasons.

SECTION 4. RELIGIOUS EXERCISE AND LIBERTY PROTECTED FROM GOVERNMENT

(a) **The right to believe** — Government shall honor and protect a religious person's absolute right to believe. The right to believe encompasses the right to form, hold, and inculcate beliefs. Accordingly:

- (1) No government shall regulate the selection or employment of persons exercising spiritual authority within a religious association.
- (2) No government shall regulate the selection or employment of teachers in religious education.
- (3) No government shall regulate or review the curriculum in religious education.

(b) **Hybrid rights** — Government shall honor and protect the rights of the free exercise of religion whenever such exercise is made in conjunction with the exercise of any other legally recognized right in the following manner.

- (1) No government shall burden any constitutionally protected activity operating in conjunction with religious exercise unless the government demonstrates that the burden is the least restrictive means of achieving a compelling governmental interest.
- (2) Persons who have been deprived of one or more rights by a court of competent jurisdiction must demonstrate that the government has burdened the religiously motivated exercise of some other legally recognized right.
- (3) The freedom of association of a religious association includes:
- (4) the freedom to build or modify structures for the purpose of religious worship, instruction, or ministry; and
- (5) to select the employees of a religious association, including employees who do not exercise spiritual authority.

(c) **Laws that are not generally applicable** — Government shall honor and protect the right of the free exercise of religion when it is burdened by a law that is not a law of general applicability in the following manner.

- (1) A governmental rule, program, policy, or practice is not generally applicable if it permits exceptions, exemptions, or variances for any reason.
- (2) Religious believers may propose less restrictive alternatives to laws that are not generally applicable, and governments shall permit religious believers to select such alternatives unless the government demonstrates that the alternative would prevent the government from achieving a compelling interest.
- (3) Any governmental rule, program, policy, or practice that permits exemptions for medical reasons shall be presumed to also permit exemptions for religious reasons.

(d) **Laws that are not facially neutral** — Government shall honor and protect the right of the free exercise of religion when it is burdened by a law that is not facially neutral in the following manner.

- (1) A law is not facially neutral if it categorizes religious persons, practices, or structures. This includes, but is not limited to, zoning or land use laws that categorize places of religious worship or education.
- (2) Any designation of a religious site or structure as a landmark or historical site is not facially neutral. This includes any governmental designation of individual sites or structures pursuant to a law that does not by its terms refer to religious

persons, practices, or structures.

(3) Places of religious worship or education shall be deemed to be similarly situated to government buildings.

(e) Laws that discriminate against religion — Government shall ensure that religious believers enjoy the equal protection of the laws.

(1) A governmental rule, program, policy, or practice discriminates against religion if it distinguishes between persons or practices in a way that places a disparate burden upon religious exercise.

(2) Governments must demonstrate that any such distinction is necessary to achieve a compelling interest.

(3) Governments must demonstrate that the distinction is narrowly drawn to achieve that interest.

(f) Laws that affect the use of private property — Government shall not require any person to use that person's private property to facilitate religiously offensive conduct.

(1) No person shall be required to allow his or her private property to be used for any activity which that person reasonably believes will facilitate conduct to which that person objects on religious grounds.

(2) No law that prohibits discrimination in public accommodation on the basis of status shall be presumed to prohibit religiously motivated discrimination on the basis of conduct.

(3) The term private property, as used in this subsection, does not apply to property that is taken from a person by a valid exercise of the government's taxing or taking power.

(g) Judicial Relief — A person whose religious exercise has been burdened by a government in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government. Standing to assert a claim or defense under this section in federal courts shall be governed by the general rules of standing under article III of the Constitution.

SECTION 5. APPLICATION TO CERTAIN INSTITUTIONS.

(a) Prisons — Prison officials shall honor and protect the free exercise of religion as specified in the preceding section. In particular:

(1) Prisoners claiming a hybrid right must demonstrate that they retain a legally recognized right in addition to the free exercise of religion.

(2) Government shall treat religiously motivated requests for special diets, clothing, or schedules similarly to medically motivated requests.

(3) Government shall not burden religious ministry to prison inmates by persons other than prison inmates beyond reasonable regulation of time, place, and manner.

(4) 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).

(b) Public Schools — Public school officials shall honor and protect the free exercise of religion as specified in the preceding section. In particular:

(1) Students claiming a religiously-motivated hybrid right (such as the right to freedom of expression) must demonstrate that students may generally exercise the claimed hybrid right on school premises during school hours.

(2) A parent's right to direct the education of the parent's child does not include the right to direct the education of other children.

(3) Parents may opt their children out of any religiously offensive public school class or assignment if the parent provides a reasonable alternative assignment without requiring substantial effort or expense by the public school.

(4) The absolute right to form, hold, and inculcate one's own beliefs does not include the right of public school personnel to proselytize public school students in the scope of their employment.

SECTION 6. ATTORNEYS FEES.

(a) Judicial Proceedings — Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "section X of the Religious Exercise and Liberty Act of 1999," before "or title VI of the Civil Rights Act of 1964."

SECTION 7. AMENDMENTS TO THE 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 subdivision of such an entity";

(2) In paragraph (2), by striking "term" and all that follows through "includes" and inserting "term 'covered entity means' 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 sincere 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."

SECTION 8. CONFORMING AMENDMENTS.

(a) Administrative Proceedings — Section 504(b)(1)(C) of title 5, United States Code, as amended in section 103, is further amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ","; and

(3) by inserting "(iv) the Religious Exercise and Liberty Act of 1999;" after clause (iii).

(b) Section 3(b) of Public Law 95-341 (commonly known as the "American Indian Religious Freedom Act") (42 U.S.C. 1996a(b)) is amended —

(1) in the last sentence of paragraph (4), by striking "section 3" and all that follows and inserting "section X of the Religious Exercise and Liberty Act of 1999.;"

(2) in paragraph (6), by striking "Subject to" and all that follows through "this section" and inserting "Subject to section X of the Religious Exercise and Liberty Act of 1999.;"

(3) in paragraph (7), by striking "Subject to" and all that follows through "this section" and inserting "Subject to section X of the Religious Exercise and Liberty Act of 1999."

SECTION 9. APPLICABILITY.

- (a) **In General** — This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
- (b) **Rule of Construction** — Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.
- (c) **Establishment Clause Unaffected** — Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the 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.
- (d) **Sovereign Immunity** — 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 4, including a civil action for money damages. The United States shall not be immune from a civil action for a violation of the Free Exercise Clause under section 4, including a civil action for money damages.
- (e) **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 on religious exercise.

Mr. CANADY. Thank you, Mr. Jacob.
Professor Hamilton.

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

Ms. HAMILTON. Thank you, Mr. Chairman, for your kind invitation to testify today. I would like to start very briefly to bring us back to fundamentals. And that is with remembering James Madison and what he had to say about religion. His view was that there ought to be a balance of power in the society; that there should not be religious supremacy. He voted against any number of special privileges for religion and has been referred to as one who was an infidel. I view him as someone who truly understood what the Constitution stands for, and I think that the bill we are considering today is an example of a Congress with good intentions, but intent on giving religion supreme authority.

In my conversations around the country with many people and many congregations, both Jewish and Protestant and Catholic, it has been my impression that the people that I have spoken to do not think there is something wrong with religious liberty in the United States. In fact, when I explain to them RLPA and strict scrutiny, they are in shock. They cannot believe that this would be a standard one would apply to every single government decision. And I, of course, agree with them.

The testimony regarding whether this is a good law can be found by listening to people who deal with these kinds of laws all the time—groups that Congress has never asked to testify on either a RFRA or a RLPA—the municipal attorneys, the attorneys general. These individuals have never been asked to testify, and they could tell you exactly how these laws operate.

This is obviously, as Representative Frank said, another attempt to overturn *Smith*. I won't belabor you with the quotes from *Boerne v. Flores*. You know it. I know it. You cannot overturn *Smith*. That is not Congress' role, and to the extent that the bill is an attempt to do that, as the hearing has made absolutely clear over and over again, you have Separation of Powers problems, and you have a fundamental attempt to amend the Constitution without ratification procedures under article 5. These points are not in my written testimony. But the hearing today makes it clear that that continues to be the motivation behind the RLPA. We should be absolutely clear on what we are talking about today.

The question today is when religious individuals and institutions should be permitted to break the law that no one else is permitted to break, solely because of their religious affiliation. We are not talking about the enforcement of constitutional rights. This is not where the Free Exercise Clause lies, and I will be the only one today to say this, but I happen to believe that *Smith* and *Boerne* were rightly decided. They are not worthy of being overturned. They actually reflect the Framers' perspective on religion.

This body is being asked to make a policy decision to favor religion over all other interests in the society in a vast majority of arenas that you will never get to investigate because of the blunderbuss approach of the bill. We are not talking about religious belief, just conduct.

Liberty is a zero-sum game. If you give more power to religion to break the laws, you are going to harm those who have been intended to be protected by those very same laws. It is just a reality. So if this bill is passed in its current form, you will be making decisions in a vast array of arenas that religion trumps other important social interests.

Now, there are times when accommodation of a religious practice is perfectly appropriate, and it is consistent with the public good, and I support those exemptions when they are passed constitutionally. But this approach short circuits the appropriate inquiry.

What the Supreme Court has told us is that this body should be considering two things when it is thinking about exemptions: one, is there an unacceptable burden on religious conduct; and secondly, will the accommodation serve the public's interest as a whole. Those were the two issues that were considered after *Smith* was decided.

The decision that is in so much trouble here, *Smith*, was followed by this body and over 30 States passing laws in which the legislatures determined that a minority religion, the Native American Church, would get exemption for the use of peyote. The post-*Smith* history itself gives us a grand example of exactly what the court had in mind.

The Constitution does not mandate accommodation, but the legislature, in its exercise of its powers for the polity could consider whether or not peyote exemptions are consistent with the public's interest. The answer by this body (and by many States) was that peyote exemptions do not harm the public good, and it is an appropriate exemption. One would hope that if the issue had been heroin, the exemptions would not have been given.

The Court has said that accommodation issues belong to this body, which makes the hard policy choices, and that you have that responsibility. That is where it belongs. If there are significant, meaningful burdens on religion, you should have hearings about those burdens and consider whether or not an exemption is in the interest of the public good.

I will not reiterate my arguments against the constitutionality of RLPA. They are in my written testimony. None of the grounds on which this bill is premised are sufficient. It also violates the Establishment Clause.

Let me close by saying that I continue to be unpersuaded of the need for RLPA. I have gone to the various States considering RFRAs. I have testified to this body on RLPA before. Where is the problem? *Smith* was followed by peyote exemptions. The story of *Boerne* is the most illustrative of all, which is a land use case.

In the city of Boerne, the officials and the church were negotiating because the church wanted to demolish the entirety of the church in a historical presentation district. RFRA is passed. The church immediately goes to litigation. They litigate for 3 years. They spent hundreds of thousand of dollars, on both sides. At the end of that 3 years, the Court declares that RLPA is unconstitutional. RFRA cannot be used as a wedge in this particular relationship. RFRA leaves the picture.

Seven weeks later, there is a negotiated agreement between the church and the city to build the building that is being built right now. You do not need this bill. It is not necessary. Thank you.

[The prepared statement of Ms. Hamilton follows:]

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

Thank you, Mr. Chairman, for inviting me to speak today on this important topic. I am a Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional law, especially church-state issues. I also served as 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 six years to writing, testifying, lecturing, and litigating on the Religious Freedom Restoration Act and similar religious liberty legislation in the states. For the record, I am a religious believer.

INTRODUCTION

The question this bill addresses is the following: *When is a government restrained from enforcing neutral, generally applicable laws that have been violated by religious individuals and institutions?* This bill is an unvarnished request from religious lobbyists to permit religious individuals and institutions to break a wide variety of laws. H.R.1691 forces governments to permit religious individuals and institutions to break the law unless the government can prove that it has a compelling interest and employed the least restrictive means to reach that interest, the highest level of scrutiny known in constitutional law.

Because the bill originates from religious entities, its focus is on providing as much protection for religious conduct that violates the law as is humanly imaginable. The more appropriate focus for this body, as a legislature representing the entirety of the polity, is to ask which laws religious individuals and institutions may violate.

Here are some choices for Congress. These are a few of the laws with which religious entities and institutions have come into conflict:

1. *Child abuse, endangerment, and neglect laws*, including laws that require medical treatment to prevent death or permanent disability.

2. *Civil rights laws*, including fair housing laws.¹
3. *Domestic violence laws*.
4. *Prison regulations*.
5. *Land use laws*:
 - a. On- and off-street parking, especially in residential neighborhoods.
 - b. Lot and building size regulations, especially in circumstances where the religious institution wishes to build a “megachurch” or construct several buildings in one location, including movie theaters, coffee houses, fitness centers, gymnasiums, schools, and child or senior day care centers.
 - c. Health and safety code regulations, including fire prevention and occupant capacity in residential and child care facilities.
 - d. Zoning regulations.
 - e. Historical and cultural preservation.
6. *Public school order and safety regulations*, including weapons bans.
7. *Fiduciary duty laws* applicable in cases of clergy misconduct (typically for abuse of children or impaired adults).
8. *Child custody and support laws*.
9. *Anti-polygamy laws*.

In sum, HR 1691 asks Congress to make simultaneous policy judgments regarding a vast array of crucial federal and state legal schemes.

RLPA is a blank check for religion. It took the ACLU approximately five years to fathom that RFRA (and now RLPA) is a threat to the civil rights laws. What other hidden agendas lie in this across-the-board preference for religion? For example, there are religions that hope to run day care centers without having to satisfy the onerous health and safety regulations under which secular day care centers operate. RLPA will make that easier. Others hope to operate soup kitchens or hold worship services in residential neighborhoods without having to abide by certain zoning and land use regulations.

The Constitution counsels against handing power blindly to any social entity, even religion. See generally Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 NEXUS: A J. OF OPINION 33, 34–36 (1997). Instead of RLPA, Congress would do far better to focus on individual arenas within which actual and substantial burdens on religious conduct exist and where accommodation is likely to be consistent with the public good. By concentrating on those specific instances, Congress could investigate whether such exemptions are consistent with the public good and therefore fulfill its constitutional duty to serve the entire polity.

CONSTITUTIONAL DEFECTS

The Religious Liberty Protection Act of 1999 is *ultra vires*. It ostensibly rests on three powers of Congress: the Commerce Clause Power, the Spending Power, and Section 5 of the Fourteenth Amendment. Instead, it attempts to stretch each of these powers beyond their proper boundaries.

1. *RLPA Is Not a Valid Exercise of Congress's Commerce Power.*

The test to be applied in Commerce Clause cases is two-fold. First, the courts must ask whether the law regulates activities that “substantially affect” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Second, the courts must consider the inherent limits of federalism on the exercise of the Commerce Clause. The Constitution “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.” 514 U.S. at 566.

Prong One: Substantially Affects Commerce. RLPA would subject state and local government actions to strict scrutiny whenever a “substantial burden on the person’s religious exercise affects” commerce. See Sec. 2(a)(2). There are two problems with RLPA’s formulation. In *Lopez*, the Court explicitly rejected the simple “affects” test and embraced the requirement that the subject of the law must “substantially affect” interstate commerce. 514 U. S. at 559. RLPA is not limited to activities that *substantially* affect interstate commerce and therefore exceeds Congress’s power under the Commerce Clause.

¹ Letters written to both the California and the Texas legislatures indicate that one of the primary objectives of the Christian Legal Society in supporting such legislation is to permit members to trump the fair housing laws and to discriminate against homosexuals.

Second, the connection between religious practices and interstate commerce is tenuous at best. It should go without saying that the vast majority of religious conduct has nothing to do with commerce. Hair length, the decision to wear a particular religious symbol, the wearing of yarmulkes, the laying on of hands, or the construction of a sweat lodge are actions that do not have substantial impact on interstate commerce.

Prong Two: Federalism. Congress may not employ its Commerce Clause power in a way that would “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” 514 U.S. at 567. This bill would seem to intervene in every situation where a local or state government attempts to enforce its generally applicable, neutral laws that incidentally substantially burden religious conduct. This is a new federalization of local autonomy.

This bill is not about regulating commerce, but rather is a handout for religion. It is a bald-faced attempt to transform a subject matter of the First Amendment (the free exercise of religion), which is a limitation on the Congress, into an enumerated power.

2. *RLPA Is Not a Valid Exercise of Congress’s Spending Power.*

RLPA applies to every arena that receives any federal financial assistance. The only way for state and local governments to avoid RLPA’s burdens is for them to forego all federal financial assistance.

Under *South Dakota v. Dole*, 483 U.S. 203 (1987), a federal law is a valid exercise of Congress’s power under the Spending Clause if there is a nexus between the spending and the condition attached to the spending. See 483 U.S. at 207 (“[C]onditions on federal grants might be illegitimate if they are unrelated to ‘the federal interest in particular national projects or programs.’”). The condition attached to spending under RLPA is that the government or governmental entity receiving federal financial assistance will subject itself to suits (including the cost of attorneys’ fees, see Sec. 4(b)) whenever its generally applicable, neutral laws substantially burden any religious claimant’s conduct within the context of any state or local program that receives any federal funds.

The only way to avoid such liability under RLPA is to refuse the federal financial assistance. On the current state of the record, Congress has not begun to ask what the nexus is between its national interest in any spending and burdens on religious conduct. Neither House of Congress has even attempted to survey the vast sweep of spending programs implicated by this bill. Where the constitutional basis for congressional action is not “visible to the naked eye” and Congress provides no “particularized findings” to support the law, the courts invalidate the law rather than provide the factual predicate that they are ill-equipped to provide. See, e.g., *Lopez*, 514 U.S. at 563.

Second, the “financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion’” and therefore exceed Congress’s power under the Spending Clause. 483 U.S. at 211. RLPA is as coercive as it gets. It is mandatory for all those government entities take any federal financial assistance. The states and local governments must choose between taking the funds with the liability or taking no funds. RLPA is unlike the highway bill upheld in *South Dakota v. Dole*, which penalized states who did not set the state’s drinking age to a minimum of 21 only by taking a small percentage of the federal highway funds provided.

3. *RLPA Is Not a Valid Exercise of Congress’s Power to Enforce Constitutional Rights Under Section 5 of the Fourteenth Amendment.*

Section 3(b) of RLPA federalizes local land use in every scenario where the land use authorities engage in “individualized assessments”² and where religious claimants claim burdens on their religion.

Under *Boerne v. Flores*, the Congress may only enforce constitutional rights pursuant to Sec. 4 of the Fourteenth Amendment if there is congruence between the means chosen and the end of preventing constitutional violations. “While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means chosen and the ends to be achieved. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” 117

²The reference to “individualized assessments” is an attempt to piggyback on dictum in the *Smith* case. The Court in *Smith* indicated that individual assessments in unemployment compensation cases might justify strict scrutiny. See 494 U.S. 884. The Court clearly did not mean that all unemployment compensation schemes require strict scrutiny. The *Smith* case itself involved an unemployment compensation claim and the Court did not apply strict scrutiny. What the Court meant by “individualized assessments” and whether the idea can be analogized to the land use arena are open questions.

S. Ct. at 2169. RLPA is a very strong measure addressing an unproven set of constitutional violations.

To prove congruence, two facts need to be widely recognized or established through reliable factfinding (which can be accomplished through general acknowledgment of a fact). First, the states and local governments must have done something unconstitutional or likely unconstitutional to justify the federal intervention in their affairs. See *The Civil Rights Cases*, 109 U.S. 3 (1883), cited in *Flores*, 117 S. Ct. at 2166.

To my knowledge, there is no evidence that the states and local governments have engaged in a pattern of free exercise violations through their land use laws. Religious buildings do tend to conflict with land use regulations, but that does not mean that religious entities' rights under the Free Exercise Clause have been violated. If the laws are applied generally and neutrally, the incidental burden imposed by such laws is not unconstitutional. *Smith*, 494 U.S. 872, 882 (1990).

If there were ever time when state and local governments needed to be permitted to enforce general and neutral land use laws, even if they burden religious institutions, now is the time. Communities are increasingly interested in preserving open space, historical properties, and cultural artifacts. The people seem genuinely devoted to these causes, which have been taken up recently by First Lady Hillary Clinton and Vice President Al Gore. At the same time, religious institutions are turning to ever-larger houses of worship and building complexes. There is an unmistakable development toward all-inclusive services on one religious entity's property. For example, a single congregation may build a building for worship, a movie theater, a coffee house or restaurant, a fitness center, and a child and senior care center on the same property. Religious entities are eager to avoid land use laws with respect to these other buildings as well as their houses of worship. By its terms, RLPA does not appear to be limited to houses of worship and therefore would appear to undermine local control over any building that is constructed by a religious entity.

RLPA's land use provisions take a large leap from existing precedent to micro-manage local land use decisions. They exceed the power of Congress under Section 5 and they violate the Constitution's inherent principles of federalism.

Second, the means chosen must be "responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 117 S. Ct. at 2170. In the absence of proof of unconstitutional behavior, this prong cannot be satisfied.

4. RLPA Violates the Establishment Clause.

According to the Court in *Employment Div. v. Smith*, a "nondiscriminatory religious-practice exemption is permitted." 494 U.S. 872, 890 (1990). See, e.g., *Dep't of Air Force*, Reg. 35-10, para. 2-28 (b)(2) (Apr. 1989) (permitting wearing of religious head covering when military headgear is not authorized and when the religious head covering does not interfere with the function or purpose of required military headgear); see also American Indian Religious Freedom Act, 42 U.S.C. sec. 1996a (1994) (permitting Native American use of peyote during religious ceremonies). RLPA, however, is not a religious-practice exemption. Rather, it is a readjustment of power between church and state intended to force accommodation even when the government deems such an exemption opposed to the general welfare.

There is no case support for the proposition that Congress has the power to provide for or force accommodation in a wide variety of fields simultaneously. Justice Stevens pointed out the Establishment Clause evil in RFRA (and, therefore, RLPA) in his concurrence in *Boerne*. 117 S. Ct. at 2172. Some have tried to make a great deal out of the fact that no other Justice joined Justice Stevens' concurrence. Equally true is the fact that no other Justice mentioned, let alone rejected, Justice Stevens' reasoning. The oral argument before the Court in the *Boerne* case would indicate that a significant number of Justices have sincere concerns regarding the propriety of RFRA (and therefore RLPA) under 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 have relied 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.

In sum, Congress lacks the power to institute this broad-ranging attempt to privilege religion in a vast array of arenas. Even if it held such power, this exercise of congressional power crosses the line from permissible accommodation to the unconstitutional establishment of religion.

Please do not hesitate to let me know if I can provide any further information. Additional information on state and federal religious liberty legislation can be obtained at my website: www.marcihamilton.com

Mr. CANADY. Thank you. Mr. McFarland—our last witness of the day.

STATEMENT OF STEVEN T. MCFARLAND, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM, CHRISTIAN LEGAL SOCIETY

Mr. MCFARLAND. Thank you, Mr. Chairman.

On behalf of the 4,000-member attorneys and law students of the Christian Legal Society, it is a privilege to be here.

I want to make three points at least. Number one, that this bill is sorely needed. I part company with Professor Hamilton on that. Secondly, that Congress must and should use every constitutional power at its disposal, within its constitutional arsenal to preserve our first freedom. And number three, Mr. Farris' proposal that is appended to his testimony and which Mr. Jacob briefly addressed, is not an acceptable substitute.

And then finally, I would like to speak very briefly, if time permits, to some of Professor Hamilton's remarks.

First of all, the need is real and it is growing. As detailed in my written testimony, churches can be and are zoned out of cities. For example, we are representing a Florida church, in St. Petersburg, that is being zoned out of the downtown area, because their ministry to the homeless is now being reclassified as a "social service agency," and therefore, they are zoned out of the central business district.

Parents and students in public schools have too little leverage with school officials when they object to religiously objectionable assignments or assemblies. We are referring to a first circuit case out of Massachusetts. And in another case in which we have been involved in Washington State, even the sanctity of the confessional is being assaulted and clergy have been or are being sentenced to jail for refusing to betray the confidences of those who confess their sins or seek spiritual counsel.

We must secondly use every power that Congress has, including its interstate commerce power. Using the Commerce Clause to restrict State and local government is a good, it is a virtue, and it has been done in the past innumerable times to protect life and liberty. The partial-birth abortion ban, if enacted, certainly was based upon that. Many Federal civil rights laws have too: age discrimination, title II, title VII of the 1964 Civil Rights Act, the list goes on. I refer you to footnote 2, page 8 of Professor Laycock's testimony. And contrary to what Mr. Jacob would indicate and in Mr. Farris's testimony, the RLPA does not make religion into a commercial event. It recognizes that Congress has limited powers. This bill cannot cure all ills, but it can protect many aspects of free exercise. The fact that it can't cure all is simply a recognition of Congress' limited powers, not something infirm about the bill.

Under RLPA courts and officials will have to ask whether the *governmental burden* on free exercise affects commerce, not whether religion is commerce. I think a rope might be a useful analogy. The Congress has access to a strong rope in the Commerce Clause. Some have misused the rope in the past. But the wise response to misuse is not to leave Congress's rope unused, but rather CLS urges the Congress to pick up the Commerce Clause rope and use it constructively to cordon off Government from legislating and acting in ways that substantially burden religious freedom.

Thirdly, Mr. Farris's proposal is definitely not the answer. It would protect way too little religious exercise. It would capitulate to, and indeed codify, the worst religious liberty precedent in the Nation's history in my opinion, the *Smith* case. It would provide anemic protection for public school children and churches with land-use conflicts. It would confer absolute protection, absolute protection for racial discrimination by say the Church of Aryan Nations and other racist groups. And Mr. Farris's proposal is much more likely to be struck as unconstitutional. Other than that, it is a great proposal. [Laughter.]

With respect to Professor Hamilton's brief remarks, she noted in passing she believes that RLPA would violate the Establishment Clause. As I believe the committee is aware, only one Supreme Court Justice has ever shared that opinion, Justice Stevens. It plainly is not prevailing law, thankfully.

The bill, secondly, would not pre-judge outcomes. The only thing, as Rabbi Saperstein stated, the only thing that has kept this coalition together is the fact that we have laid aside our desired outcomes in favor of embracing vigorous legal protection in the form of a uniform standard of review.

Third, we are *not* attempting, and this committee and the sponsors are not attempting, to overturn *Smith*. I have been sitting here, and I haven't seen or heard a clear message to the contrary. Rather, we are trying to remedy widespread hostility or religious discrimination in the land-use area, pursuant to section 5 of the 14th amendment. And, secondly, to restrain Government burdens on free exercise, pursuant to Congress's constitutional authority under the Spending and Commerce Clauses.

So we believe, in conclusion, that Congress should use all of its remedies, all of its tools, that H.R. 1691 employs all of them to restore the strictest legal scrutiny with the broadest coverage in a constitutionally defensible manner. Our religious liberty, the first freedom, deserves nothing less.

On behalf of the members of the Christian Legal Society, thank you, Mr. Chairman, for your sponsorship of this bill and for hearing our unconditional support for its enactment.

[The prepared statement of Mr. McFarland follows:]

PREPARED STATEMENT OF STEVEN T. MCFARLAND, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM, CHRISTIAN LEGAL SOCIETY

Thank you, Mr. Chairman, for affording Christian Legal Society the privilege of sharing with the Subcommittee why we unreservedly support enactment of the Religious Liberty Protection Act (RLPA), H.R. 1691, based on our 25 years of experience in defending religious freedom for all faiths.

1. THE NEED FOR H.R. 1691.

*1.1 Land Use Regulation Of Churches.**The Refuge Pinellas, Inc. v. City of St. Petersburg*

Municipal officials in this Florida city are callously stopping an inner-city church from reaching out to the poor and needy with the love of Jesus Christ.

The Refuge is a mission church in a rundown part of St. Petersburg, Florida. Many of those who attend its worship services are homeless, poor, addicted, mentally ill, or alienated from society. The Refuge seeks to minister to the whole person. Rev. Bruce Wright, the Refuge's pastor, is almost always available to meet with and counsel hurting people. The church feeds the hungry, sponsors counseling for alcoholics and AIDS sufferers, and works with juvenile offenders. It spreads the message of God's grace through music concerts and other outreach activities. The Refuge is doing exactly what Christ calls the Church to do.

But the Refuge is doing too much in the eyes of St. Petersburg zoning officials. At about the same time the City was trying to "clean up" the church's neighborhood before the new Tampa Bay Devil Rays started the major league baseball season at nearby Tropicana Field, the City decided that the Refuge had to go.

The City decreed that the Refuge was not a shining example of what the Christian church should be. In fact, the City announced that the Refuge was not a church at all!

St. Petersburg zoning officials permit "churches" in the Refuge's neighborhood. But "social service agencies" are banned. The City proclaimed that the Refuge is not a "church," but instead a "social service agency." Apparently the City knows best what "church" activities should look like and they don't include reaching out to serve the poor, the needy, and the alienated.

The City ordered the Refuge to leave, to go somewhere else. But there isn't a single zoning district in the entire city where so-called "social service agencies" can locate as a matter of right. Instead, social service agencies have to get permission to set up in one of the three zones in the entire city where social service agencies are permitted. Setting up somewhere else would remove the Refuge from the neighborhood where it's most needed. And few of the church's members have cars.

Other churches in St. Petersburg offer counseling, concerts, Alcoholics Anonymous, and other forms of outreach. But the zoning officials haven't ordered them to uproot. It appears as though the economic poverty of those served by the Refuge makes all the difference in the world.

During his investigation, Development Review Services Manager Robert Jeffrey required Rev. Wright to describe "the clients or patrons you serve." In a September 15, 1997, letter explaining his decision to label the church a "social service agency," Mr. Jeffrey wrote, "the clients who are served by [the Refuge] are more analogous with [a] social service agency." Apparently the legality of Alcoholics Anonymous meetings depends upon whether the participants drink cheap Thunderbird or fine Chardonnay.

With the help of the CLS Center and a local attorney member, the Refuge is trying to get a Florida court to relabel it a "church" and permit it to stay in its present location. But the City continues to resist.

Waxing literary, the City asked in its brief, "what's in a name?". Paraphrasing Shakespeare, the City observes that a rose still smells like a rose regardless of the name by which it is called. And here's where it turns ugly:

[But] if the rose begins to smell like a stink weed, it can still call itself a rose and may look like one, but it is no longer functioning as one, and so it is eventually going to have a negative impact on the rose garden and be weeded out and moved to the weed patch for the sake of all those living around the garden. Such is this case.

(City's Response to Petition for Writ of Certiorari at 3, in *The Refuge Pinellas, Inc. v. City of St. Petersburg*, In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, No. 97-8543-CI-88B).

So there it is. A church that is serious about serving the poor and needy is not a "church." It's a "stink weed" that needs to be "weeded out."

RLPA would avert this travesty. Section 3 of H.R. 1691 would require the City of St. Petersburg to show that forcing The Refuge to move out of town was the least restrictive means of furthering a compelling government interest. Sec. 3(b)(1)(A) [p. 3, line 16—p. 4, l. 3]. The Church would also be able to invoke RLPA's prohibition against zoning authorities that "unreasonably exclude from the jurisdiction" religious institutions. Sec. 3(b)(1)(D) [p. 4, ll. 13-18].

This case will probably decide the Refugee's future. H.R. 1691 can keep alive these kind of ministries to the most needy Americans.

1.2 Respect For Parental Rights And Religious Conscience In Public Schools.

Brown v. Hot, Sexy, And Safer Productions, Inc. (1st Cir. 1995)

The U.S. Court of Appeals For The First Circuit several years ago issued a decision calling into question whether a parent's right to direct the upbringing of his child is protected by the Constitution. 53 F. 3d. 152 (1st Cir. 1995), cert. denied (1996).

On April 8, 1992, the Chelmsford (Massachusetts) High School held two mandatory, school-wide assemblies for ninth through twelfth grades. The school district contracted through the chairperson of the PTO with a performer, Suzi Landolphi, head of "Hot, Sexy, and Safer Productions", to present an AIDS awareness program for \$1000.

According to the Complaint, during her presentation, Ms. Landolphi: "1) told the students that they were going to have a 'group sexual experience, with audience participation'; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as 'erection wear'; 6) referred to being in 'deep shit' after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his 'orgasm face' with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a 'nice butt'; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals." 68 F. 3d at 529.

Before contracting with Ms. Landolphi, the school physician and PTO chairperson had previewed a video showing segments of Ms. Landolphi's performance. School officials, including the school superintendent, were present at the assemblies. They knew in advance what she would say and how she would say it. But no advance notification of the presentation was given to parents, despite a school policy stating that written parental permission was a prerequisite to health classes dealing with human sexuality.

The parents of two students sued on behalf of themselves and their children, alleging that the school district had violated their privacy rights and their substantive due process rights under the First and Fourteenth Amendments, their procedural due process rights under the Fourteenth Amendment, their RFRA rights and their Free Exercise rights under the First Amendment. The district court dismissed under FRCP 12(b)(6), and the First Circuit affirmed.

In its discussion of the substantive protection under the Fourteenth Amendment of the parent's right to rear his children, after discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the First Circuit stated in dictum:

"Nevertheless, the *Meyer* and *Pierce* cases were decided well before the current "right to privacy" jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny. We need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right."

68 F. 3d at 532 (footnote omitted)(emphasis supplied.)

The First Circuit then rejected the plaintiffs' free exercise claim. First, the court questioned "whether the Free Exercise Clause even applies to public education." 68 F. 3d at 536. Second, the court rejected the plaintiffs' claim that their parental rights were protected by the Free Exercise Clause under the "hybrid exception," noted in *Employment Division v. Smith*, for "the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *Smith*, 494 U.S. 872, 881 (1990). The First Circuit stated:

"[A]s we explained, the plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an independently protected constitutional protection."

68 F. 3d at 539.

Virtually all public school districts in the U.S. receive federal funds. So H.R. 1691 would once again level the playing field for parents who, for reasons of religious conscience, wish to have their child "opt out" of objectionable instruction such as this.

1.3 Involuntary Conscriptioⁿ Of Clergy As Government Informers

State v. Martin (In re Hamlin)(Wash. Sup. Ct.)

If you went to your pastor, rabbi or priest for spiritual counsel, and in your conversations with him discussed highly personal matters, would you expect him to keep your discussions confidential? Would you trust a pastor who disclosed your confessions when you gave them in what you thought were conditions of strict confidence? Should a rabbi be jailed simply because he refused to disclose the confessions of a man seeking spiritual guidance and counsel?

Common sense and the tenets of major religious faiths—Protestant, Catholic, and Jewish—all agree: confessions heard by ordained clergy should remain confidential.

But a trial court in Tacoma, Washington answered, "No," a pastor may not maintain that confidentiality if the government wants him to breach it. Incredibly, the court reasoned that the pastor is *obligated* to violate confidentiality and disclose confessions made to him. And worse, if a pastor refuses to disclose the confidential information, he should be sent to jail.

At stake is our right to seek spiritual guidance in private with the candor that only springs from the confidence that it will remain between us, our pastor, and our God.

The Rev. Rich Hamlin is an ordained minister of the Evangelical Reformed Church. He meets with anyone seeking spiritual guidance, both members of his church and non-members. Pastor Hamlin believes that hearing confessions and leading persons in confession are integral parts of his ministry, a "necessary component" of the practice of his religion. Indeed, the most important relationship an individual has is between himself and his God. For many, that relationship is enhanced by discussions of private matters with a minister, leading to repentance, reconciliation, and new resolve to do what is right.

Scott Martin sought spiritual counsel from Pastor Rich Hamlin after the death of Martin's three-month-old son. At the invitation of Martin's mother, the minister met with Mr. Martin at his mother's home, on two occasions at an army hospital, and at the home of a friend. Then Martin surrendered to police, who suspected him of homicide.

Prosecutors charged him with second degree murder in the death of his son. Pastor Hamlin continued to meet with Martin while he was incarcerated in the Pierce County jail after registering as his pastor with jail administrators.

But prosecutors did not stop with jailing Martin. They sought to compel Pastor Hamlin to testify about his conversations with the defendant. A judge agreed and ordered the minister to divulge what admissions Martin may have made in private to the Pastor.

Pastor Hamlin is convinced that Scott Martin only confided in him because he is a minister of the Gospel and because he trusted that it would go no further than the pastor. If Pastor Hamlin were forced to reveal matters communicated to him in confidence, it would betray Martin's trust, undermine Hamlin's office as a pastor, and violate the latter's right to hear confessions and provide spiritual counsel free from state interference. When the pastor refused to testify, the trial court judge held him in contempt of court and ordered him to jail.

Pastor Hamlin took his case to the Washington Court of Appeals. Last July the appeals court reversed the trial court decision, reasoning that "Pastor Hamlin's religion, thus, constrains him to provide confessors with spiritual counsel and the opportunity for redemption. It is a duty that the pastor must fulfill based upon the tenets of his faith." Furthermore, the court held, only the communicant (Martin) could waive the confidentiality of the conversation, not the pastor or priest (Hamlin) who heard the communication.

But the State appealed this decision to the Supreme Court of the State of Washington. On March 23 of this year, a local CLS attorney and I argued to the state's high court on behalf of Pastor Hamlin. Thanks be to God, the state supreme court last Thursday ruled in favor of Pastor Hamlin, based on the state privilege law. But the prosecutor apparently intends to continue pursuing the pastor's testimony (arguing that the confidentiality of the confession may have been waived by the possible presence of the defendant's mother during portions of the counselling). If CLS and its member attorneys charged Reverend Hamlin for their legal defense, he and his church would be bankrupt by now. And he may yet go to jail for contempt.

Pastor Hamlin should not be forced to choose between fulfilling his religious duties as a pastor or serving time in jail. Federal protection is sorely needed. RLPA would extend it to many clergy, regardless of faith.

2. *The Inadequacy And Questionable Constitutionality Of The Alternative*

Michael Farris of the Home School Legal Defense Association has proffered an alternative bill ("Religious Exercise And Liberty Act"). While Christian Legal Society shares its goals most of its goals, RELA does too little for too few Americans, and does it in a way that probably violates the federal Constitution.

2.1 *Unnecessarily Codifying Supreme Court Precedent.*

For the most part, RELA merely codifies what rights religious citizens already have under the Supreme Court's interpretation of the Free Exercise of Religion Clause of the First Amendment: an absolute right to freedom of belief and strict scrutiny of laws that burden a hybrid of Free Exercise combined with some other fundamental right.

This "hybrid rights" theory was concocted by Justice Scalia in dictum in the most universally condemned decision ever announced by the Supreme Court in the religion area, *Employment Division v. Smith* (1990). Why should Congress legitimize this historically-, logically- and constitutionally-baseless theory? For whatever the theory is worth, believers can already invoke it under the First Amendment. Congress will add nothing to it by writing it into the U.S. Code. CLS urges this subcommittee to extend existing protections for our First Freedom, not just codify the limited rights we already have under regrettable precedent.

RELA also codifies Justice Scalia's reasoning in *Smith*, applying strict scrutiny to laws that are not generally applicable, not facially neutral, or that discriminate against religion.¹ These do little to "move the ball forward" for Americans of faith, for clergy like Reverend Hamlin and for students who wish to avoid obscene school curriculum.

2.2 *Anemic Land Use Protection.*

Mr. Farris' RELA proposal does contain several new advances for religious liberty. Borrowing from RLPA (H.R. 1691), Mr. Farris includes language that would help churches against unreasonable or discriminatory land use regulation.

But RLPA (H.R. 1691) goes significantly farther. Mr. Farris' RELA would only provide treatment equal to that enjoyed by government buildings; RLPA would expressly guarantee that churches be treated at least as well as any nonreligious assembly. RLPA would expressly prohibit zoning officials from discriminating against religious assemblies; RELA would not ban it, but merely require a balancing of the government's interests against the burden on the church. And RLPA would expressly ensure reasonable inclusion of zones for religious schools and assemblies in a jurisdiction, while RELA is silent in this regard.

2.3 *Unconstitutional Prison Reform.*

Mr. Farris proposes to extend "hybrid rights" Free Exercise theory to prison inmates. CLS strongly supports the restoration of religious liberty to all persons, including prisoners. However, the Supreme Court degraded prisoners' Free Exercise protection in 1987, bifurcating them from the rest of society (whose Free Exercise rights they degraded three years later in *Smith*). Then in 1997, the high court struck down the Religious Freedom Restoration Act of 1993 as it applied to state and local law. In *City of Boerne v. Flores*, the court reiterated that it alone is constitutionally empowered to interpret what the Free Exercise clause guarantees.

Therefore, by bestowing far greater protection for prisoners' religious exercise than the Court has interpreted the First Amendment to require, RELA would run afoul of the Constitution's separation of powers, and risk the same fate as befell the 1993 RFRA under *Flores*.

2.4 *Less Protection Of Parent And Student Religious Excusal Rights*

H.R. 1691 would enable parents and their children to "opt out" of public school curriculum that violates religious conscience or parental rights to direct their children's education. RELA would confer no protection to a student's individual religious convictions; the hybrid theory is of no avail to a students unless their parents share their objections.

Moreover, Mr. Farris' RELA denies any opt-out rights unless a parent "provides a reasonable alternative assignment without requiring substantial effort or expense by the public school." In contrast, RLPA (H.R. 1691) would not place the burden on the parents to assess what would be an appropriate alternative to an obscene condom demonstration or to reading a book containing graphic violence, sexual

²These post-Smith theories, as well as the "hybrid rights" theory, have already been invoked successfully without their codification by Congress. See, e.g., *First Covenant Church v. City of Seattle*, 840 P. 2d 174,215-20 (Wash. 1992).

abuse or other inappropriate depictions. Neither would RLPA allow a school district to deny a religious excusal merely by claiming that the parent's alternative would require too much effort or money.

Congress can do much better by religious parents than RELA's anemic "opt out" provision. It can enact RLPA.

2.5 Protection Of Racial Discrimination In The Name of Religion.

RELA would prohibit government from interfering in the employment of teachers or pastors in any respect. This would exempt from antidiscrimination laws those misguided religious assemblies that would discriminate on the basis of race or national origin. For this reason alone, Christian Legal Society cannot support RELA.

In contrast, RLPA (H.R. 1691) would not confer religious exemptions on racist religions, because the Supreme Court has held that government has a compelling interest in eradicating private racial discrimination, an interest that outweighs religious freedom. *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).

2.6 Dubious Constitutionality Under The 14th Amendment

As explained above (para. 2.3, supra), the prisoner provisions in Mr. Farris' RELA would probably violate the federal constitution's separation of legislative from judicial powers.

Equally questionable is the constitutionality of the rest of RELA, with the possible exception of its land use provisions. That is because in its Flores holding in 1997, the Supreme Court held that the Fourteenth Amendment (section 5) only empowered Congress to act in response to "legislation enacted or enforced due to animus or hostility to the burdened religious practices or [] some widespread pattern of religious discrimination in this country." Such a case can only be made with respect to regulation of land use by religious groups. This subcommittee was presented last year with evidence of such widespread discrimination across the U.S.

But it would be difficult to prove the existence of widespread hostility or discrimination against religion, e.g., application of antidiscrimination laws against churches when they hire their preachers or select their Sunday School volunteers, or against religious schools when they hire their classroom teachers. Neither would it be easy to prove nationwide problems with government regulation of religious education (at least not yet). Without such proof, RELA would likely exceed Congress' power under the Fourteenth Amendment and be struck, just as the high court did to the RFRA in Flores.

3. Congress Should Use All Of Its Powers To Protect Religious Liberty

Christian Legal Society shares the concerns of many that the federal government should not be permitted to expand and extend its regulatory power endlessly at the expense of our First Freedom. That is why CLS strongly supports the Religious Liberty Protection Act (H.R. 1691)—because it uses every power of Congress to restrict and retract federal, state and local government power where it burdens religious exercise.

This suspicion of big government also compels CLS to refrain from endorsing Mr. Farris' RELA. That proposal does too little for religious freedom, because it fails to use Congress' explicit power to regulate interstate commerce.

The Commerce power is not a figment of "judicial activism;" it is expressly granted to Congress. Yes, the power has been abused in the past. But it has also been wielded for good. The Partial Birth Abortion Ban Act would have been based on the Commerce Clause. Many of the nation's federal civil rights laws are too.

And RLPA (H.R. 1691) would use this express constitutional authority for an equally laudable purpose: to restrain (not extend) governmental interference with our most important freedom. It would be a painful irony if the First Freedom named in the First Amendment were the only one not to be protected by federal statute, while the Commerce power is used to promote supposed constitutional rights like abortion that are not enumerated anywhere in the Constitution.

A rope can serve as a useful analogy. The Congress has access to a strong rope. Some have misused ropes in the past (e.g., for lynchings). But the wise response to misuse is not to leave Congress' rope lying unused. Rather CLS urges Congress to pick up its "Commerce Clause rope" and use it constructively—to cordon off government from legislating and acting in ways that substantially burden religious freedom.

CONCLUSION

The Religious Liberty Protection Act (H.R. 1691) would broadly protect religious Americans with the strictest legal standard, one that is time-tested and workable. It would have a much firmer constitutional foundation than RELA. And RLPA

would provide significant (rather than anemic) protection for public schoolchildren and churches facing land use obstacles.

It would not be a cure-all. But RLPA employs all available federal powers to restore the strictest legal scrutiny with the broadest coverage in a constitutionally defensible manner. Our religious liberty—the First Freedom—deserves nothing less.

Thank you, Mr. Chairman, for sponsoring this bill and for considering the views of Christian Legal Society in this most important matter.

Mr. CANADY. Thank you, Mr. McFarland.

Mr. Watt is recognized?

Mr. WATT. Thank you, Mr. Chairman. And I want to again thank you for convening this hearing. It has been a very good and enlightening hearing I think.

I don't think I have met Mr. Jacobs before today, and I suspect that nobody would ever think I was a tool of the religious right, but I confess that there are some things that he is saying that for me require a response having to do with the Commerce Clause. I mean the same questions I have been asking all day without even knowing that anybody was going to take that position.

If you do this without an activist, expansive definition of the Commerce Clause and what it covers, then it seems to me that the bill leaves gaps that are substantial. If you do it with an activist, expansive definition of the Commerce Clause, as a couple of people on the prior panel seem to be suggesting, anything would be covered under the Commerce Clause and the Federal Government, which you are railing against now, most religious bodies and conservatives are railing against now, substantially expands what I think is a reasonable coverage of the Commerce Clause.

So either way you go, you have got some problems it seems to me. You have got either an ineffective bill because you don't have this expansive definition of commerce and this bill then ends up covering only the larger religions that already meet whatever the accepted standard of commerce is now and excludes smaller religions. And if you go the other way, then you have got the other problem. Now maybe I am missing something here. My friend back there is saying, yes, I am missing something.

Mr. MCFARLAND. Well, I would like to respond, Mr. Watt?

Mr. WATT. Okay. I have to get somebody on this panel to answer it. I will let Mr. McFarland answer it if he can.

Mr. MCFARLAND. Okay. We certainly agree that without a commerce section, this leaves gaps. It is questionable whether a bill is worth passing if it does not have a Commerce Clause section, in the opinion of the Christian Legal Society. I guess I wouldn't share your definition of an expansive Commerce Clause because I think *Lopez* has given us some bright line standards and the subsequent—

Mr. WATT. They didn't get the bullets.

Mr. MCFARLAND. Excuse me?

Mr. WATT. Didn't get the bullets. Didn't get the gun.

Mr. MCFARLAND. Well, the Guns in Schools Act did not have the jurisdictional hook that was necessary and that this bill does have. We have learned, this is post-*Lopez*. A number of courts post-*Lopez* have made it very clear that *Lopez* is satisfied this way.

Mr. WATT. So you are saying all that Congress has to do is say this is commerce and that makes it constitutional?

Mr. MCFARLAND. No, no, what Congress has to do is say that the complainant must show that the Government's burden is in or affects interstate commerce. Even a de minimis burden in the aggregate, by repetition, would affect interstate commerce. That was the fatal error in *Lopez*.

Mr. WATT. And if I am an individual who is asserting my religious beliefs and I can't show that, then this bill doesn't cover me?

Mr. MCFARLAND. That is correct.

Mr. THOMAS. That is true.

Mr. MCFARLAND. That is correct.

Mr. WATT. And somewhere along that line, the less I show, the more of a problem I have. The more I show, the more litigation results from this whole process. You have got Professor Hamilton's problem, the endless litigation on this issue for ever and ever and a day.

Mr. MCFARLAND. Whenever you try to restrain government, you are going to run into some litigation but the alternative is you have a lot less litigation today after *Smith* because why? Because the religious claimant loses 95 percent of the time. He doesn't even get past summary judgment. So I don't think that is a positive good. And our first freedom is getting steam rolled regularly and reducing litigation is not the highest virtue. It certainly doesn't trump our first freedom, I hope.

Mr. CANADY. The gentleman's—

Mr. WATT. Mr. Chairman, I don't need additional time I think. I mean I really am trying—everybody and his brother who are friends of mine are on this bill and supportive of this bill. Last term, same problem. I was struggling to get there. And I am trying to struggle to get there now.

Ms. HAMILTON. May I say something?

Mr. CANADY. Could I object?

Mr. WATT. I am having some problems here.

Mr. CANADY. I would just ask that you be guided by your own vote on RFRA. [Laughter.]

Mr. WATT. Let me take my 3 minutes. Mr. Thomas wants to respond and Professor Hamilton wants to respond—

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. WATT. [continuing.] To what I am saying. And by not taking the 3 minutes, I don't want to suggest that I have closed my mind. I have not closed my mind. I am just very troubled by what we are doing here.

Mr. THOMAS. It is not all we wish you could do. I mean we wish the court had upheld RFRA, but we believe that the requirement that you have to hook it directly to a Spending Clause, a Commerce Clause, or the land-use questions provides as much protection as you can constitutionally provide. It is true there will be some religious claimants who will suffer. But as you pointed out, Mr. Watt, to I guess it was Professor Sager, religion—and this is where I differ with Professor Hamilton, for whom I have a great deal of respect—religion is different from equal protection. As the Congressman pointed out, religious freedom and freedom of the press and freedom of speech and association are spelled out in a particular special way, and what we are asking for is not that religion always wins, but that we at least have to go through the balancing of in-

terests so that religion can win unless there is a good reason for it not to.

So I agree that it is an inadequate, an incomplete solution. But I fear we will penalize the good because it is not the best. I think it is all we can do, Congressman, and we deeply hope you will join us and be a cosponsor of the bill.

Mr. WATT. Professor Hamilton, you will get the last word on this from my perspective, from my perspective.

Ms. HAMILTON. I just want to point out the language of the bill, which will invite more litigation than it might otherwise because it refers in the Commerce Clause section to any effect on interstate commerce. The Court said in *Lopez* that there must be proof of *substantial* effect on interstate commerce. So in my view, the gap between effect and substantial effect invites a great deal of frivolous litigation.

Mr. WATT. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Watt. We will now go to the gentleman from New York?

Mr. NADLER. Thank you, Mr. Chairman. Professor Hamilton, first of all let me extend a special welcome. I have the privilege of having two professors from my district here today, both on the opposite side of the issue from me I think. [Laughter.]

From what you are saying about the Commerce Clause, if we applied or if the court applied the criteria that you are saying it should apply to the Commerce Clause, how would the Voting Rights Act of 1965, the Civil Rights Act of 1964, the public accommodation section of that Act and the Americans with Disabilities Act, were they within the power of Congress to pass under your conception of the Commerce Clause?

Ms. HAMILTON. The Commerce Clause taken together with section 5 would explain the Voting Rights Acts. It is my view that good portions of the Americans with Disabilities Act are in fact unconstitutional. I have said as much in the fourth circuit.

Mr. NADLER. And the public accommodations sections of the Civil Rights Act?

Ms. HAMILTON. No, I think that passes muster. I think that is a very different set of considerations. But we have to be careful here. In *Lopez*, the Court carved out a new standard. It has been clearly moving in a more conservative trend toward more limitations on Federal power. And one of those limitations is that Congress can only legislate under the Commerce Clause if that which is being regulated substantially affects commerce. RLPA is in the face of the Court just as RFRA was in the sense that in *Lopez*, the Court explicitly rejected a simple effects test and endorsed a *substantial* effects test.

Mr. NADLER. So the public accommodations section of the 1964 Civil Rights Act as it affects a local diner under the current interpretation might not pass muster?

Ms. HAMILTON. That probably would pass muster under *Wickard v. Filburn*, under which you can aggregate activities to show substantial effect. But you have to be careful. *Wickard* as the reason that this. What the court said and held in *Lopez* is that there are instances—and it was a great shock to the vast majority of lawyers—there are instances where you have of activities that do not

affect interstate commerce. That involved guns. The dissent by Justice Breyer was endless about the effect of guns on interstate commerce. There are many, many, if not most examples of religious conduct, that clearly don't affect interstate commerce. The decision to wear a yarmulke does not affect interstate commerce. The decision to wear beads in your hair. The decision to have long hair. The decision to wear a cross. These things are purely personal. The notion that they then affect interstate commerce and substantially affect it treats *Lopez* as a nullity.

Mr. NADLER. Could you comment on that, Rev. Thomas?

Mr. THOMAS. Yes, Mr. Nadler. They don't all affect commerce, some of these illustrations she gave. But the Orthodox Jewish boy who needs to wear the yarmulke to his public school where they allow no caps or head coverings at all is going to be protected under the Spending Clause. That is why you have a three title bill. And I will also say this, religious liberty is not a zero sum game. I take issue with Professor Hamilton on this. Why does it infringe upon my right as a Christian in a public school if a Jewish boy can wear a yarmulke? Why does it infringe upon my rights as a Baptist in a dry county in Mississippi if my Roman Catholic neighbor can observe the mass? I do not accept the notion that accommodating Americans when we can infringes upon the rights of the rest of us.

Mr. NADLER. But I think most of us would agree with that. The question is do we have the power under the Commerce and Spending Clauses to legislate that?

Mr. THOMAS. Yes, I think you do and two cases—

Mr. NADLER. Are you comfortable with Professor Hamilton's opinion of the limitations with the implication of the Civil Rights Act, for instance, of the Commerce Clause?

Mr. THOMAS. Professor Hamilton has just acknowledged that under her view, the Americans with Disabilities Act is suspect.

Mr. NADLER. Or large parts of it.

Mr. THOMAS. Large parts of it. I would say that it depends on how you read *Lopez*. If you read *Lopez* as Professor Hamilton does, then it is hard to argue with her. But if the only two Federal courts of appeals decisions that have happened since *Lopez* are right, then Congress can do this as long as you show—put it on the plaintiff to show a real connection to interstate commerce, then it is a permissible exercise of your power. But will the court do that? Nobody knows.

Mr. NADLER. Thank you. Mr. McFarland, I want to ask you on a different subject. Getting back to our previous questioning, I was questioning the ACLU representative earlier today, but I must say the concerns expressed by the ACLU are obviously not completely hypothetical. Members of your organization have brought and intend to continue to bring cases on behalf of landlords and employers asserting a free exercise right to discriminate on the basis of sexual orientation or marital status, is that correct?

Mr. MCFARLAND. Correct.

Mr. NADLER. All right, thank you on that. Let me just give Mr. Thomas the last question.

Mr. THOMAS. I am sorry, Mr. Nadler, I am about to miss a plane, but I will certainly answer a question.

Mr. NADLER. Well, let me just ask you very quickly.

Mr. THOMAS. I can answer a question.

Mr. NADLER. I will ask Mr. McFarland the same question instead. Thank you.

Mr. THOMAS. Okay.

Mr. NADLER. Get your plane.

Mr. THOMAS. You want to ask me first and I will lead.

Mr. NADLER. With strict scrutiny—

Mr. THOMAS. Yes, sir.

Mr. NADLER. [continuing]. We heard that strict scrutiny would lead to a lot of frivolous litigation, but if we had strict scrutiny, doesn't that mean that most cases are won informally before you get to court and prevents the filing of most of the cases?

Mr. THOMAS. Absolutely. The fact of the matter is we already have strict scrutiny under the Speech Clause, under the Press Clause, the anomaly is we don't have it under the Free Exercise Clause any more. And it does not create more litigation. The fact is Professor Hamilton doesn't represent all these churches and religious folk like I do. We have 53 million Christians in the member communions of the National Council of Churches. If you have some protection in the law, you usually get accommodation at the local level. We also won a lot of cases in the lower courts. Right now, there is no real motivation for a bureaucrat to sit down and talk to you. Although I will acknowledge that some cities do. She says that Boerne, Texas did. I don't contest that. Some cities will do it anyway, but there is nothing there to make them do it.

Mr. NADLER. And religious rights ought not be the gift of someone, they ought to be—

Mr. THOMAS. Right. They are as important as any other civil right that we have, and we should not sacrifice that because of a few potential fears.

Mr. NADLER. Thank you very much. And with that, I will yield back the balance of my non-existent time. [Laughter.]

Mr. CANADY. I thank the gentleman for yielding back. I am just going to thank the witnesses on this panel for their participation and make a couple of observations. One point has been made that this is a bill which infringes on the principles of federalism. And I understand the argument about the Commerce Clause and the view that an expansive interpretation of the Commerce Clause is inconsistent with a proper understanding of federalism, but in practical effect, I don't see that this bill has any different implications for federalism than RFRA did. RFRA, the Religious Freedom Restoration Act was an action by the Congress to limit the powers of State and local governments. And so as a practical matter, the impact on federalism seems to be non-existent. And, furthermore, I think it is important to understand that when we talk about commerce, we aren't creating any additional power here under the Commerce Clause. We only utilize such power as we have under the Constitution as the courts interpret it. And there is obviously a dispute and there is some uncertainty about what direction the Supreme Court is going.

Lopez, I think took some people by surprise. It is possible they are going to push further in that direction. I don't think so. I think that is just, and I don't want to oversimplify this, and I have risked doing that by commenting in this context. But I think *Lopez* could

be summed up as an effort to tell Congress to pay a little attention to the fact that we do act on enumerated powers and that we can't just go off doing something without giving some thought to that fact.

Mr. NADLER. If the gentleman will yield?

Mr. CANADY. I will be happy to yield to the gentleman from New York?

Mr. NADLER. Thank you. I am glad the chairman said this, and I wanted to say that I agree with the chairman, and I think that Professor Hamilton raises very interesting questions as to exactly what our powers under the Commerce Clause are and how far they extend or do not extend and the courts will ultimately tell us. But the Reverend Malloy, as I understand the argument, the argument is we shouldn't pass this because it is extending the Commerce Clause into local affairs, extending congressional powers into local affairs—Mr. Jacob, I'm sorry, on behalf of Mr. Farris—it is extending congressional powers to local affairs, but the fact is we are not extending anything. The courts will tell us exactly what our authority is and whatever it is, it is and that is how far it will go.

Mr. JACOB. If I may, Mr. Nadler, we would encourage Congress to take the lead in showing the Supreme Court the restraint that you can use in adopting a narrow view of your powers to intrude in the lives of private citizens. The Congress doesn't have to do everything that the Supreme Court might let it get away with doing.

Mr. NADLER. At the risk of bringing in a different observation in a hearing on religious liberty, you do realize that Members of Congress are not uniformly angels? [Laughter.]

Mr. CANADY. And let me respond to that and then we will conclude this rather long hearing. We are not proposing here to use the commerce power to intrude into the private lives of individuals. We are using the commerce power as a shield to protect religious liberty. That is what this is about. And I understand that people can disagree with what we are attempting to do or the way we are choosing to do it, and I respect that. But it is not accurate to characterize what we are doing—now you may believe that there is some unintended consequence of what we are doing, we might encourage that kind of activity. I think that is stretching it a bit. But it is clear that in this context, the use of the commerce power is to shield people from the over-reaching power of Government. This is a use the power that Congress has under the Commerce Clause, however far it may extend, to protect people from Government at another level. That is the essence of what we were trying to do under the Religious Freedom Restoration Act and that is the essence of what we are trying to do here. We want to afford protections beyond the protections that the Supreme Court has afforded to people for their religious practices and beliefs. And that is why we are having this hearing.

Again, I want to thank all the witnesses on this panel, including those who already have had to leave to for your contribution. You have I think helped us in evaluating the range of issues that we have to deal with in connection with this legislation. We thank you for staying with us all day almost. Thank you very much.

The subcommittee stands adjourned.

[Whereupon, at 6:02 p.m., the subcommittee was adjourned.]

○