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RELIGIOUS LIBERTY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

ISSUES RELATING TO RELIGIOUS LIBERTY PROTECTION, AND FOCUSING ON THE CONSTITUTIONALITY OF A RELIGIOUS PROTECTION MEASURE

JUNE 23, AND SEPTEMBER 9, 1999

Serial No. J–106–35

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
67–066 CC WASHINGTON : 2000

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RELIGIOUS LIBERTY

WEDNESDAY, JUNE 23, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 11:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Grassley, Specter, Leahy, Kennedy, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. We are happy to welcome you all out to our religious liberty hearing today. Good morning, we welcome all of you here, good to see you. We are pleased to have seven impressive witnesses, whom I shall introduce in short order.

As we begin this hearing, it is worth pondering just why America is, worldwide, the most successful multi-faith country in all recorded history. The answer is to be found, I submit, in both components of the phrase "religious liberty."

Surely, it is because of our country's and our Constitution's zealous protection of liberty that so many religions have flourished and that so many faiths have worshipped on our soil. But liberty without the type of virtue instilled by religion is a ship with all sail and no rudder.

Our country has achieved its greatness because, with its respectful distance from our private lives, our Government has allowed all of its citizens to answer for themselves, and without interference, those questions that are most fundamental to humankind. And it is in the way that religion informs our answers to these questions that we not only survive, but thrive as human beings; that we not only endure those difficulties that at some point invariably affect each of our lives, but are able to achieve a sense of character, to gain a recognition of the good, and to enrich our lives by contemplating that which is divine.

Today's witnesses are, I believe, all familiar with the bill that I sponsored last year which has been largely duplicated by a bill being considered today by the House Judiciary Committee. While some of our discussion today may overlap into the specifics of a particular legislative approach, I want to emphasize that the focus of this hearing will be on the larger issues involved, on those reasons that underscore the need for Federal action to protect the ex-

ercise of religious liberty, more than it will be about any singular bill that has been drafted to accomplish that objective.

That said, let me emphatically state my view that some legislative effort is needed, in tandem with the jurisprudential protections recognized by the Supreme Court, to uphold the right of religious freedom guaranteed by the Free Exercise Clause of the Constitution. While I believe it would be preferable for the Court to return to its previous solicitude for religious liberty claims, until it does, this Congress must do what it can to protect religious freedom, in cooperation with the Court.

And while it seems odd that we would need legislation to protect the first freedom guaranteed by the Bill of Rights, when faced with this second-best situation we must do our best to ensure that in our communities Bible study will not be zoned out of believers' own homes, to ensure that Americans' places of worship will not be zoned out of their neighborhoods, and ultimately to ensure that the Founders' free exercise guarantee will demand that government have a good reason before it prohibits a religious practice.

The legislative framework I advocated last year, and which will be the basis for the efforts this Congress, will, among other things, establish the rule of strict scrutiny review for rules that burden religious practice in interstate commerce or in federally-funded programs. Such protection is necessary not because there are systematic programs against certain sects now as there had been earlier in our history. Hostility to religious freedom encroaches subtly, extending its domain through the reaches of blind bureaucracies of the regulatory state.

Rule-bound, and often hypersensitive to the charge of assisting religion, government agencies all around us cling to the creed that, "rules are rules," and pay no heed to the damage that might be inflicted on the individual in the process. Such an extension of arbitrary rules into every corner of our lives cannot coexist with the infinite variety of religious experiences we enjoy and cultivate in our land of America.

This morning, we are going to hear from a small cross-section of the exceptionally broad range of religious and civil liberties groups that see a need for Federal legislation protecting religious liberty. So I, in particular, look forward to this discussion. The freedom to practice one's religion is the most fundamental of rights, and the discussion we are having about protecting that right is one we need to have here in Congress and across the Nation.

So I am very pleased to have our witnesses who are with us today. Each can provide a particular point of view, and we are grateful to have all of you here and we welcome you.

First, we will hear from Mr. Steven McFarland, of the Christian Legal Society. Mr. McFarland is the Director of the Society's Center for Law and Religious Freedom, which is dedicated to defending the religious liberty of people of all faiths, and which has pursued this objective in the courts, legislatures and governmental agencies throughout the Nation since its founding in 1975. We are happy to have you here.

Mr. MCFARLAND. Thank you.

The CHAIRMAN. Second, we will hear from Mr. Nathan Diament, who is the Director of the Institute for Public Affairs of the Union

of Orthodox Jewish Congregations of America, where he develops and coordinates public policy research and initiatives on behalf of the traditional Jewish community. We are surely happy to have you here as well.

Mr. DIAMENT. Good morning.

The CHAIRMAN. Third will be Mr. Manuel Miranda, an attorney recently with the law firm of White and Case, who now serves as President of the Cardinal Newman Society for Catholic Higher Education, an organization committed to the stewardship of the Catholic higher education tradition. We are grateful to have you.

Fourth will be Mr. Elliot Mincberg, no stranger to this committee. Mr. Mincberg serves as Vice President and Legal Director of People for the American Way, a non-partisan citizens organization with over 300,000 members vitally concerned with promoting and protecting religious liberty. We are happy to have you here, Elliot.

Mr. MINCBERG. Thank you, Mr. Chairman.

The CHAIRMAN. Fifth will be Mr. Michael P. Farris, a prominent lawyer who is the founder and President of the Home School Legal Defense Association, an organization with some 60,000 member families. He does a good job in that area and we are happy to have you here, Mike.

Mr. FARRIS. Thank you, Senator.

The CHAIRMAN. Sixth, we will hear from Mr. Christopher Anders, who is Legislative Counsel for the American Civil Liberty Union's Washington National Office, and whose expertise covers a broad array of civil rights matters. Good to have you with us.

Mr. ANDERS. Good morning.

The CHAIRMAN. And, finally, we will hear from Representative Scott Hochburg, who is serving his fourth term in the Texas Legislature representing constituents in the Houston area. Representative Hochburg was instrumental in securing the recent passage of a bill in Texas that provides at a State level the types of protections sought by any Federal religious freedom liberty protection measure. So we are very grateful to have you here, Representative Hochburg, as well.

Mr. HOCHBURG. Thank you, Mr. Chairman.

The CHAIRMAN. Now, I am between two committees. One is this one, and I take tremendous interest in this, but I also am due to ask questions in the Finance Committee on the direct benefit part of the Medicare package. So I will have to slip out for a few minutes, but I will be right back.

Why don't we begin with you, Mr. McFarland, and we will go right across the table, and we will just go through all of the statements before we have any questions.

PANEL CONSISTING OF STEVEN T. McFARLAND, CENTER FOR LAW AND RELIGIOUS FREEDOM, CHRISTIAN LEGAL SOCIETY, ANNANDALE, VA; NATHAN J. DIAMENT, DIRECTOR, INSTITUTE FOR PUBLIC AFFAIRS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WASHINGTON, DC; MANUEL A. MIRANDA, PRESIDENT, CARDINAL NEWMAN SOCIETY FOR CATHOLIC HIGHER EDUCATION, WASHINGTON, DC; ELLIOT M. MINCBERG, VICE PRESIDENT AND LEGAL DIRECTOR, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC; MICHAEL P. FARRIS, PRESIDENT, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, PURCELLVILLE, VA; CHRISTOPHER E. ANDERS, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, DC; AND SCOTT HOCHBURG, TEXAS STATE REPRESENTATIVE, HOUSTON, TX

STATEMENT OF STEVEN T. McFARLAND

Mr. MCFARLAND. Thank you, Mr. Chairman. Mr. Chairman, I want to thank you for your prime sponsorship of the 1993 Religious Freedom Restoration Act and your leadership on this matter in this Congress as well.

The Christian Legal Society's 4,000 members urge this committee to use all of its constitutional powers, all of its powers, including the Commerce Clause, to restore the highest level of protection for our first freedom. I would like to make four points very briefly.

Number one, religious practice in this practice does need Federal statutory protection. Second, Congress should use every constitutional power to restrict government interference with religious exercise. Third, Congress must protect all persons and avoid the temptation to add carve-outs or to exclude any particular claims on the basis of sincere religious faith. And, fourth, this committee should resist the temptation to strip protection from the most politically powerless, including prisoners and inmates.

First, the need, Mr. Chairman, is real and it is growing. You are no stranger, as you mentioned in your opening statement, to the disturbing trend across the country in infringing and excessive government interference with the sincerely held religious practice. Churches can be and are being zoned out of cities because of their social service ministries to the destitute. My written testimony discusses a lawsuit in which we are co-counsel in St. Petersburg, FL, to that effect.

Parents and students in public schools have very little leverage today with school officials when they object to religiously objectionable assignments or assemblies in public school. And even the sanctity of the confessional is being assaulted. We represented recently a clergyman sentenced to jail for refusing to betray the confidences of an individual who allegedly confessed his implication in some criminal activity.

So the need is growing and is more than anecdotal. There has been much testimony before both this committee as well as the five or six hearings before the House Judiciary Subcommittee on the Constitution about the needs in the land use area, and I won't belabor that.

Let me move to the second point that Congress should use all of its powers to protect religious liberty. We share the concern 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, and that is why we strongly support legislation such as the Religious Liberty Protection Act because it uses every power to restrict and retract Federal and State and local authority to burden religious exercise.

The commerce power is not a figment of judicial activism. It is expressly granted to Congress. Yes, it has been abused in the past, but it has also been wielded for good. Much of our Federal civil rights laws are based upon the Commerce Clause, and so we would urge the committee to use this express constitutional authority for an equally laudable purpose, and that is to restrain and not extend governmental interference with our most important freedom.

Our third point is that there should be no carve-outs in whatever this committee considers in the way of legislation. No claims, no classes of people should be categorically excluded from the protection of strict scrutiny. You will be hearing from the ACLU's representative, and that organization wishes to amend the bill that was moved about an hour ago by the House Judiciary Committee to the floor so that that bill could not be invoked by many believers against anti-discrimination law.

We believe that religious freedom is a civil right, arguably the foundational and preeminent one upon which all others depend. The first freedom includes not only practices inside the house of worship. As you are well aware and as is true for millions of Americans, they don't leave religion at the door, to their office, at their factory punch clock, or at the school house gate. Religious free exercise is not confined to one's Sabbath, one's home, or one's house of worship.

So, consequently, free exercise will occasionally conflict with the interests of third parties. And we believe a principled bill from this committee would apply the same test to all religious practices substantially burdened by government and leave to the courts a case-by-case application, without exceptions, qualifiers or disclaimers.

And, finally, let me just reiterate something that I know is close to the chairman's heart in his leadership against and resisting in 1993 the attempt to add a prisoner exemption from the 1993 RFRA. Any legislation that this committee proffers should avoid the temptation, we would urge, to carve out protection from certain politically powerless groups, including most notably prison inmates.

The chairman is well aware of statistics from the Justice Fellowship, the branch of prison fellowship, Chuck Colson's ministry. While there are frivolous inmate claims, only 1/10 of 1 percent of all of the prisoner litigation brought during the 3½ years of RFRA were based upon or contained any claim or reference to the Religious Freedom Restoration Act. So carving out prison inmates will not appreciably diminish frivolous prisoner litigation.

But let me just close with reading a portion of a letter——

The CHAIRMAN. We also had a prison litigation reform bill that we put through as well.

Mr. MCFARLAND. Yes.

The CHAIRMAN. And that has cut back on a lot of those types of cases. I mean, that is really a phony argument on their part, it seems to me.

Mr. MCFARLAND. That is right, and that was a very wise maneuver. If the problem is frivolous prisoner litigation, then the answer is to address the whole problem, not single out a single type of claim.

The CHAIRMAN. And the Prisoner Litigation Reform Act has cut it down dramatically, since they realize there is a price to be paid for frivolous litigation.

Mr. MCFARLAND. That is right.

The CHAIRMAN. And very little of that involves religious freedom.

Mr. MCFARLAND. Very little.

The CHAIRMAN. And that is your point.

Mr. MCFARLAND. Yes.

The CHAIRMAN. That is a pretty important point because we got into the biggest battle on the floor and you would think that the whole world was coming to an end because we wanted to protect prisoners so that they can be religious. It seems to me if we are going to make a difference in people's lives, we ought to be trying to get them to be religious, or at least give them the opportunity to change their lives and have some moral purpose to their lives. But my gosh, some of these arguments that they make are just, I think, ridiculous.

Go ahead. I am sorry to interrupt you.

Mr. MCFARLAND. No, no, Mr. Chairman. I couldn't agree with you more and you have said it better than I was going to.

The CHAIRMAN. Well, that is a new twist here. Go ahead.

Mr. MCFARLAND. I was just going to close with a letter that we received yesterday from Justice Fellowship, from an inmate by the name of Melanie Perkins. She is incarcerated at the Florida correctional institution in Lowell, FL. And while we have not had an opportunity, having just received it yesterday, to investigate the merits of the claim, nevertheless I am assured by Justice Fellowship that this is not atypical of the type of correspondence that they receive at Justice Fellowship.

This inmate writes, "I had all of my religious, spiritual and recovery materials and books taken from me, saying these reading materials were contraband. Of course, they are not contraband and I received all of my books through the authorized institution mail from ministries and recovery centers, or I received these books from right here out of the chapel library in the prison. This problem has occurred numerous times here at this institution. It really has hurt me in my heart for this prison to take religious books, bibles and recovery books from me and others. I am a reborn-again Christian of 7 months now, and my Bible and other religious books have been my guide and direction to transform myself and my life. I know this time is the most crucial time of my life, and I have spent every moment of it learning God's will for me. I pray you and the Religious Liberty Protection Act may be able to help me receive my books back. This prison has not even given me the option to send my books home. This prison is in violation of several rules and laws, I am sure, to keep me from my books. Yet, praise God, they cannot take God from me, for he is within my soul living. I pray you hear and understand my prayer here and that God's will is for you to help me. Melanie Perkins." The letter is dated March of this year.

For these reasons, Mr. Chairman, we would urge this committee to expeditiously consider Federal statutory protection for our first freedom, without carve-outs for civil rights or any other genre of claims, without carve-outs for any class of citizens, including inmates, and with the strictest and highest level of scrutiny the Constitution permits.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. McFarland.

[The prepared statement of Mr. McFarland follows:]

PREPARED STATEMENT OF STEVEN T. MCFARLAND

Executive Summary

The Christian Legal Society (CLS)[1] urges this committee to use *every* power conferred upon the Congress by the U.S. Constitution To restore the highest legal protection to religious liberty.

The need is real and growing. Churches can be and are being zoned out of cities because of their social service ministries to the destitute. Parents and students in public schools have little leverage with school officials when they object to religiously-objectionable assignments or assemblies, Even the sanctity of the confessional is being assaulted, and clergy sentenced to jail for refusing to betray the confidences of those who confess sins or seek their private spiritual counsel.

We cannot afford half-measures (as Michael Farris' proposes) that fail to use all of Congress' authority to remedy the problem. Neither can religious citizens settle for a bill that is inadequate in both its scope of coverage and its strength of protection.

The "Religious Liberty Protection Act" (H.R. 1691) is being sent to the House floor today by the House Judiciary Committee. The 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.

Testimony

1. THE NEED FOR STATUTORY RELIEF

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 His 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 announced that the Refuge was not a shining example of what the Christian church should be. In fact, the City proclaimed 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 decreed 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.

[1] *Disclosure:* The Christian Legal Society has not received any federal grant, contract or subcontract in the current or preceding two fiscal years. CLS represents only itself at this hearing.

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 its 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 would require the City of St. Petersberg 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). 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).

This case will probably decide the Refuge's future. RLPA can keep alive 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 parents right to direct the upbringing of his child is protected by the Constitution.

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 $1,000.

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 the RLPA 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.)* [2]

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 even when you made them under conditions of strictest 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

[2] 137 Wash. 2d 774.975 P. 2d 1020 (1999).

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, on May 6 the state supreme court 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" or RELA). While Christian Legal Society shares most of its goals, Mr. Farris' proposal 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-questionable 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.[3] 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 1997, 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

RLPA 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. But Mr. Farris' RELA would confer no protection on 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 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 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).

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[3] These 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).

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. On March 28 of last year, the Constitution Subcommittee of this Committee heard extensive evidence of such widespread discrimination across the U.S., from mainline Protestant to small minority faiths.

But it would be difficult to prove the existence of widespread hostility or *intentional* discrimination in zoning regulation 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, Mr. Farris' 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—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.

4. RLPA MUST PROTECT ALL PERSONS, WITHOUT CARVE-OUTS OR EXCLUDED CLAIMS

According to the testimony of Mr. Chris Anders before the House Judiciary Subcommittee On The Constitution on May 12, 1999, the American Civil Liberties Union agrees that the Supreme Court's 1990 decision in *Employment Division* v. *Smith* left the Free Exercise Clause virtually toothless in all but the rarest of cases. Yet Mr. Anders admitted under questioning by Rep. Jerrold Nadler that the ACLU would rather leave religious believers statutorily defenseless than enact a RLPA that would apply to all claims and all Americans. Specifically, ACLU wants the Congress to amend the RLPA so that it could not be invoked by many believers against an antidiscrimination law. Call it by any other name if you will—but this would be a carveout, a repudiation of the bedrock principles of "inalienable rights" and equal protection of the laws.

For the following reasons, Christian Legal Society would vigorously oppose RLPA if it were to include any such exclusion of a class of religious practices or claims.

4.1 Free religious exercise should not always *be subordinated to other civil rights*

The first freedom protected by the Framers in our Bill of Rights is religious freedom, including protection from government prohibition on "the free *exercise*" of religion. Religious freedom is a "civil right" arguably the foundational and preeminent one upon which all others depend. If a government will not accommodate a citizen's fulfillment of his or her obligation to God, then no other human right is safe from that government.

This First Freedom includes practices inside houses of worship. But it also encompasses the living out of one's beliefs in the marketplace of ideas, of jobs, of housing. Those who support a civil rights carveout amendment to RLPA either do not understand the comprehensive nature of most religious devotion or else they dangerously overweigh the government's constitutional authority to burden it.

The ACLU's proposed civil rights carveout presupposes that the First Amendment's Religion Clauses protect little more than religious *beliefs,* and only if such beliefs do not infect the policies and practices of its adherents outside their houses of worship. But, as millions of religious Americans know, they do not leave their religion at the door to their office, at the factory punch clock, or at the schoolhouse gate. And among religious Americans are landlords whose consciences do not allow them to rent their private property for sinful purposes. They also include employers who want to work with people who share their most important values and priorities, including religious ones. Religious "free *exercise*" is not confined to one's Sabbath, home or house of worship.

Consequently, free exercise of religion will conflict with the interests of third parties who want employment at the believer's private workplace or want to rent the believer's private property.

As a matter of principle, should the First Freedom always prevail over anti-discrimination law? No. Society's interest in eradicating private racial discrimination will continue to trump claims that one's religion compels racist practices.

But neither should the opposite extreme be legislated: that certain civil rights *always* outweigh the believer's interest in religious exercise. A principled RLPA would apply the same test to all religious practices substantially burdened by government, and leave to the courts a case-by-case application of that uniform test. The explicit and prominent constitutional regard for free exercise of religion admits of no exceptions, qualifiers or disclaimers. At a minimum, Congress should follow the First Amendment's lead and let all government interests be tested, and rise or fall on their own importance relative to our First Freedom.

4.2 As a political matter, carveouts will fracture RLPA's coalition, spawn other exceptions, and infect state legislation as well

The Coalition For The Free Exercise Of Religion, an extraordinary coalition of some 80 organizations that drafted RLPA, supports a "clean" bill, a RLPA free of any kind of carveouts, exceptions or second class treatment for particular religious claims or claimants. That support is based on principle, as described in section 4.1, *supra.*

But the RLPA Coalition also resists any carveouts for a very practical reason: 80 groups could never agree on what to carveout. The coalition is held together by one magnetic commitment: we all agree that *every sincere religious practice* will be, entitled to the protection of strict scrutiny.

If RLPA is amended so that it could not be raised as a defense to. e.g., discrimination law, then the Coalition's magnetism will have been lost. Coalition members would spin off under the centrifugal force of their self-interest. Each of us would have our own wish-list of what religions, religious practices, and government interests should he winners and losers. At the end of this political powerplay, RLPA would only protect the politically-correct and -powerful religious practices; minority faiths would be left in the carveout pile, and religious freedom as a universal right in America would be a thing of the past.

Christian Legal Society serves with the AntiDefamation League as co-chair of the Coalition's campaign to enact religious freedom legislation in the states. In the two years since *City of Boerne* v. *Flores,* we have been successful in passing "clean" RFRA's in Florida, Alabama, Illinois, Arizona and South Carolina.

But several weeks ago the Texas Legislature enacted a "dirty" RFRA. Rep. Scott Hochberg pushed it through the Texas House with a civil rights carveout. Not surprisingly, having breached the principle of "protection for all, without exceptions," Rep. Hochberg could hardly object to the Senate's version, which contained carveouts for incarcerated persons and a special provision on regulation of land use by religious groups. One carveout begat another. And thus shall it be if Congress opens the Pandora's Box of stripping RLPA's protection from disfavored religious

practices and believers. Not only will the federal RLPA collapse upon itself due to carveouts, but many *state legislatures* will be tempted to follow Congress' example, leaving a patchwork of laws in which religious liberty protection varies from one state to the next.

For these reasons, the 80 organizations of the RLPA Coalition, ranging from People For The American Way to the Southern Baptist Convention, oppose any exemptions and urge this Committee to pass a "clean" RLPA.

4.3 RLPA must protect all persons, including the incarcerated

Perhaps the most tempting class of persons to carve out of RLPA's protection would be those in prison, jail or detention awaiting adjudication. They cannot vote, cannot contribute to campaigns, and have no lobbyists.

Of the eight states that have enacted state RFRA's, only Texas has given in to that temptation. Its law says that *any* excuse a prison warden gives for burdening an inmate's religion is rebuttably presumed to be in furtherance of a compelling government interest. So prison officials can confiscate a Bible or serve only non-Kosher meals and yet the Texas inmate gets no relief from the Texas RFRA—unless the inmate (probably undereducated and without a lawyer) can rebut the warden's pretextual justification.

Prisoner litigation includes a lot of frivolous claims. But religious claims account for a tiny fraction of them. According to Justice Fellowship, during the three and one-half years that the federal Religious Freedom Restoration Act of 1993 was in effect, 99.9 percent of reported prisoner cases were nonreligious in nature, only .12 of one percent (277) of reported prisoner civil cases even mentioned RFRA. So carving out prison inmates from RLPA will not appreciably diminish frivolous prisoner litigation.

In addition, some inmates have been unjustifiably deprived of their "inalienable" right to religious freedom. For example, see the attached handwritten letter received by Prison Fellowship recently from an inmate named Melanie Perkins in the state prison in Lowell, Florida. Having received this letter only yesterday, CLS has not yet had an opportunity to investigate the letter's allegations. But Prison Fellowship tells us that it is typical of the letters they receive from across the country about conditions in state prisons. (The Federal Bureau Of Prisons continues to be subject to the 1993 RFRA, and finds it quite workable in the nation's second largest prison system, See attached letter to Rev. O. Thomas from BOP General Counsel, dated Nov. 6, 1998.)

Finally, not only do prisoner carveouts violate bedrock principles of human rights. fracture the RLPA coalition and inexorably lead to carveouts against other powerless classes, but they also frustrate society's penological interests. Religion changes prisoners, cutting their recidivism rate by two-thirds, according to Prison Fellowship. So it makes good policy to include inmates as beneficiaries of RLPA. If their religious practice threatens the health, safety or security of anyone in the prison, it will (and should) yield under RLPA to those interests of the warden. But some prisoner religious claims (probably a small minority) should prevail, but only if RLPA contains no carveouts * * * even for "least of these my brethren." (Gospel of Matthew 25:40). The Religious Liberty Protection Act 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 considering the views of the Christian Legal Society in this most important matter.

To Inside Journal
Prison Fellowship

March 4, 1999

R.E Religious Liberty Protection Act (HB2370) (Religious Materials)

Yes, first of all I would like to introduce myself. My name is inmate Melanie P. Perkins #0-275056 I'm incarcerated at Florida Correctional Institution, I receive the Inside Journal through the Chapel Library here. I enjoy reading the articles and all the information you published and it is all inspiring. I pray for all who are involved.

I read one particular article that I feel was God sent to a problem that I have which has saddened me deeply. I pray you can give me more insight on this. The article spoke of the Religious Liberty Protection Act. As I'm sure you are aware of the fact that they (prison) read all mail so I am going to keep my problem brief.

I have a situation that occurred recently, where I had all of my religious, spiritual and recovery materials and books were taken from me, saying these reading materials were contraband. Of course they are not contraband and I received all of my books through the authorized institution mail, from ministries and recovering centers, or I received those books from right here out of the Chapel Library. This problem has occurred numerous times

(2)

here at this institution, yet I know God has chosen me to serve Him by letting others know of this problem. So I am reaching out to whoever may help us in this matter. (Us, refering to inmates)

It really has hurt me in my heart for this prison to take religious books, bibles, and recovery books from me and others. I am a reborn again Christian of 7 months now and my bible and other religious books have been my guide and direction to transform myself and my life. I know this time is the most crucial time of my life, and I have spent every moment of it learning Gods will for me.

I pray you and the Religious Liberty Protection Act may be able to help me receive my books back. This prison has not even given me the option to send my books home. This prison is in violation of several rules and laws I'm sure, to keep me from my books. Yet, praise God, they can not take God from me, for he is within my soul liveing. I pray you hear and understand my prayer here and that God's will is for you to help me. If you can send me the address to the Religious Liberty Protection Act, and forward this letter to them, or to whomever may be able to help me, I would be forever grateful. I do pray to hear from you soon and God bless all of you who serve God in helping prisoners like me.

My full address is on back. Thank you for your time

TOTAL P.02

U.S. Department of Justice

Federal Bureau of Prisons

Washington, DC 20534

November 6, 1998

The Reverend Oliver Thomas, Esq.
National Counsel of Churches
Co-Chair, Coalition For The Free Exercise of Religion
200 Maryland Ave., N.E.
Washington, D.C. 20002

Dear Reverend Thomas:

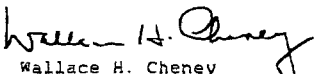
This is in response to your correspondence to Attorney General Janet Reno dated September 18, 1998. Your letter requested that the Federal Bureau of Prisons summarize the impact the Religious Freedom Restoration Act (RFRA) has had upon the Federal Bureau of Prisons.

As you are aware, the Department of Justice strongly supported passage of RFRA in 1993 and opposed an exemption for corrections. The Department has also vigorously defended RFRA against challenges since its passage and continues to do so regarding its application to the federal government.

Since the passage of RFRA, the Bureau of Prisons has successfully defended approximately seventy-five lawsuits involving various religious issues. Although compliance with the additional requirements of RFRA certainly places limited additional administrative burdens on Bureau of Prisons staff, these burdens have been manageable. Through training, Bureau staff have been able to carefully consider all religious requests under the framework established by RFRA.

The Bureau of Prisons will continue to support the mandates of the Religious Freedom Restoration Act.

Sincerely,



Wallace H. Cheney
Assistant Director/General Counsel

cc: Rev. Brent Walker, Esq.
Steven McFarland, Esq.
Michael Lieberman, Esq.

The CHAIRMAN. Senator Thurmond would like to make a statement and then I think Senator Kennedy may want to make one.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. I am going to have to leave for another appointment and so I appreciate your allowing me to make this statement at this time.

Mr. Chairman, today the Judiciary Committee is considering the important issue of religious liberty and whether additional legal protections are needed to protect the free exercise of religion in America.

One of the founding principles of our Nation involves the freedom to worship. This is clear from the Free Exercise Clause of the First Amendment of the Constitution. However, like other constitutional provisions, the free exercise of religion is not absolute. It does not provide individuals unlimited rights. It must be balanced against the interests and needs of society in various circumstances. The courts have always been tasked with determining the extent of and limitations on religious liberty under the First Amendment.

When considering the exercise of religion, government interests are especially significant outside of general civilian life. For example, in the military and in the prison context, government interests are paramount. The desires and interests of the individual must be subordinate to those of the institutions in areas such as these.

As recently reported in the Washington Post, Army soldiers who consider themselves to be members of the Church of Wicca are carrying out their ceremonies at Fort Hood in Texas. The Wiccas practice witchcraft. At Ford Hood, they are permitted to build fires on Army property and perform their rituals involving fire, hooded robes, and 9-inch daggers. An Army chaplain is even present.

I do not dispute that individuals may believe what they wish, and they can practice their religion in private life. However, limits can and should be placed on the exercise of those views, especially in the military. I do not believe that the armed forces should accommodate the practice of witchcraft at military facilities. The same applies to the practices of other groups, such as satanists and cultists.

For the sake of the honor, prestige and respect of our military, there should be no obligation to permit such activity. This is an example of going too far to accommodate the practice of one's views in the name of religion. Similar problems can arise from allowing members of the Native American Church to use peyote while in military service.

Under the *Goldman* v. *Weinberger* standard established by the Supreme Court, the courts deferred to the professional judgment of the military regarding the military's need to foster discipline, unity and respect in its accommodation of religious practices. Under this standard, it is clear that the military could severely limit or prevent practices such as witchcraft if it wished. It is less clear exactly what limits the military can impose under the Religious Freedom Restoration Act, to the extent that it is constitutional as applied to the Federal Government.

A similar problem exists in the prison context. The safe and secure operation of prisons is an extremely difficult and complex task. This is especially true as inmate populations rise and prisons must operate with very limited resources.

In *Turner* and *O'Lone,* the Supreme Court established a reasonable standard for evaluating religious freedom claims in prison. Similar to the balancing it considered for the military, the Court adopted a standard that balanced the needs of inmates and the institution. Then the Religious Freedom Restoration Act imposed a very difficult burden on correctional officials when prisoners made demands that they claimed were based on their religious faith. Although RFRA was held unconstitutional as applied to the States, the Religious Liberty Protection Act would again upset the balance if it becomes law.

In prison, inmates have used religion as a cover to organize prison uprisings, get drugs into prison, promote gang activity, and interfere in important prison health regulations. Additional legal protections for religion will make it much harder for corrections officials to control these abuses of religious rights.

Moreover, even if a prisoner's claim fails, it costs the prison much time and money to defend, especially under the compelling interest legal standard which makes it much harder to get cases dismissed before trial. RFRA not only gave inmates more of an excuse to sue, it also gave them the opportunity to win more often.

Not all prisoners abuse the law. Indeed, it is clear that religion benefits prisoners. It helps rehabilitate them and makes them less likely to commit crime after they are released. However, we cannot allow inmates to use laws such as this to create rights and privileges that can undermine the operation of prisons. I am pleased that we have in the record testimony from Glenn Goord, the Commissioner of the New York State Department of Corrections, explaining the problems he encountered in applying RFRA in New York before it was held unconstitutional.

Religious liberty is an extremely important right of Americans. However, as we consider legislation that provides safeguards greater than constitutional standards, especially in the area of neutral, generally applicable laws, we must be mindful of all the potential implications. We must be very careful to consider the unintended consequences of legislation, and this hearing is important for the committee to discuss these complex issues.

Mr. Chairman, thank you very much.

Senator GRASSLEY [presiding]. Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman. I want to thank Senator Hatch for holding these hearings today. Protecting religious liberty for all citizens is a matter of great importance to the Senate and the country, and I welcome the opportunity to work with Senator Hatch on this issue.

Today's hearing is another step in our effort to develop legislation that respects the Supreme Court's authority to interpret the meaning of the Constitution, while doing all we can in Congress to protect individuals against blatant religious bigotry, and also

against inadvertent but harmful acts that burden their free exercise of religion.

The challenge of drafting effective legislation to protect religious liberties has become more complex because of the new constraints on Congress under the Supreme Court's 1997 decision in *City of Boerne* v. *Flores.* But the overriding need for such protection remains intact. In many communities across the country, laws that are neutral on their face continue to impinge arbitrarily on religion and place people of faith in the difficult and untenable position of choosing, in the words of Justice Souter, "between God and government."

Our goal in enacting religious liberty legislation is to reach a reasonable and constitutionally-sound balance between respecting the compelling interests of government and protecting the ability of people to freely exercise their religion. While we consider ways to strengthen the religious liberties of all Americans, we must also be careful not to undermine existing laws carefully designed to protect other important civil rights and civil liberties. Our efforts to strengthen religious liberty should not become a setback in the Nation's ongoing struggle to provide equal opportunity and equal justice for all our citizens. I look forward to the testimony of today's witnesses and to their insights on this important and difficult issue.

Thank you, Senator Grassley.

Senator GRASSLEY. Mr. Diament.

STATEMENT OF NATHAN J. DIAMENT

Mr. DIAMENT. Thank you, Senator Grassley, for the opportunity to address this committee on an issue of critical importance to the American people, religious liberty.

I am Nathan Diament and I am privileged to serve as the Director of the Institute for Public Affairs, the non-partisan public policy research and advocacy arm of the Union or Orthodox Jewish Congregations of America. The UOJCA, which has just entered its second century of serving the traditional American Jewish community, is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 affiliated congregations nationwide and their many members.

On behalf of the Union and its membership, I am here today to say that we are deeply appreciative of the historically unprecedented level of religious freedom that we have enjoyed in these United States. But I am also here to say that we are deeply concerned that in recent years the scope of this cherished freedom has been diminished.

Before continuing, I would be remiss if I did not deviate for a moment from my prepared remarks to note that I enjoy the privilege of sitting before a congressional committee to speak about the issue of religious liberty while currently in the country of Iran, 13 Jews have been imprisoned by that nation's government because that country does not respect religious liberty. And I would be remiss and it would be inconsistent with my conscience to not take this opportunity in the context of a discussion about religious liberty to appeal to you members of the United States Senate to work with

your colleagues to see if you can secure the freedom of these Jewish prisoners of conscience in Iran. Thank you.

This distinguished committee has examined the challenges to religious liberty in previous hearings. I well remember the day almost 2 years ago this week, I believe, on which I stood in a room in this building with Senator Hatch and with Senator Kennedy the day the Supreme Court handed down its opinion in the *Boerne* case. On that day, Senator Hatch, Senator Kennedy and others expressed their commitment and passion for repairing the breach and the blow to religious liberty that had been committed on that day by the U.S. Supreme Court.

This committee is familiar with the Supreme Court's decisions in *Employment Division* v. *Smith* and the *City of Boerne* case, and it has heard preeminent legal scholars discuss those decisions, as well as legislative options for redressing the harm they have caused to religious liberty in the United States. What I hope to share with you in my brief statement is the traditional Jewish community's perspective on this issue and the need for legislation addressing it. I will do with one illustrative example, land use regulation and its abuse.

Orthodox and traditional Jews can often be found living in geographically concentrated communities. This phenomenon flows from a simple religious fact. Traditional Jewish law prohibits driving to the synagogue on the Sabbath. This restriction, combined with the fact that there are portions of the Sabbath prayer service that may only be said with a quorum in the synagogue, not by an individual in his or her home, makes living within walking distance of a synagogue a religious necessity.

In recent decades, Orthodox Jewish communities throughout the United States have been flourishing. Long-existing communities are growing and new communities are being developed. This wonderful trend often requires the expansion of older synagogues or the construction of new ones. Expansion or construction often requires permits, variances, or waivers from local zoning boards. Thus, the flourishing of traditional Jewish communities has given rise to another more unfortunate trend, the use of land use regulations and zoning boards to discriminate against these religious communities.

While we, of course, recognize that land use regulation is an important State interest and religious institutions, like other public institutions, must be sensitive to them and cannot automatically override them, it is clearly the case that zoning rules are being used in inappropriate and religious discriminatory ways.

As recently as June 11, the Forward, a national Jewish weekly newspaper, reported but one example of this disturbing activity. The Westchester, NY, community of New Rochelle now has a growing, even burgeoning Orthodox Jewish community. The members of the Orthodox synagogue are homeowners who pay their taxes and contribute to the community in all the typical ways. The community has outgrown its current synagogue and is seeking to build a larger one on a plot of land that is, of necessity, in the same neighborhood as its current structure. And it is the zoning board that has become the method of choice for those who seek to thwart the

growth of the Orthodox community in New Rochelle. An article from that newspaper is attached to my testimony.

But this is but one of many instances of this unacceptable abuse of land use regulation. In the last session of Congress, this committee heard an extensive report of the refusal of the Los Angeles Zoning Board to allow elderly Jews to establish a place of worship in the Hancock Park section of that city.

In Miami, FL, a group of Orthodox Jews have been refused a permit to rent a hotel conference room for weekly Sabbath services, even though the very same hotel room can be rented for a myriad of other functions such as weddings and conventions and the like. In the Cleveland, OH, suburb of Beechwood, the Orthodox community's desire to construct a new synagogue was also blocked at that zoning board. The pattern is familiar and it must be put to an end.

Legislation reinstating the requirement that a general law of neutral applicability, such as land use regulation, must serve a compelling State interest via the least restrictive means before it can burden the free exercise of religion is the best means of thwarting those who would restrict religious liberty, and restoring to religious liberty the level of protection and priority it deserves in this country.

There are other issues of concern to the Orthodox Jewish community that such legislation would address and I would be happy to elaborate them for you throughout the course of this hearing. Permit me, then, to make two closing observations.

Religious liberty was established as America's first freedom by our Founders when they chose to make it the first topic addressed by the First Amendment to our Constitution. Two years ago when the Supreme Court struck its most recent blow to this freedom in the *Boerne* case, the Justices issued another ruling, relying upon another part of the First Amendment, the Free Speech Clause, when they struck down most of the Communications Decency Act, legislation that was designed to address another issue of concern to our community, obscenity on the Internet.

It seems that the Justices missed the irony that they could read the same opening clause of the First Amendment that "Congress shall make no law," shared by the Free Exercise Clause and the Free Speech Clause, in such opposite ways in a matter of days. That week, the Court gave Internet pornographers a greater stake in the First Amendment than it gave people of faith. This is, to say the least, deeply troubling.

Finally, a thought about the very essence of liberty. In America, the concept of liberty, applied to a wide array of human activities, is perhaps the foundation stone of our society. We should be ever mindful that the very notion of liberty springs from religion's foundation stone, the Bible. Enshrined in our Nation's birthplace on the Liberty Bell is a biblical verse—"* * * proclaim liberty throughout the land to all its inhabitants * * *" Religion gave America the blessing of liberty. It is time for America to restore liberty to religion.

Thank you very much.

[The prepared statement of Mr. Diament follows:]

PREPARED STATEMENT OF NATHAN J. DIAMENT

Thank you, Mr. Chairman, for the opportunity to address this Committee on an issue of critical importance to the American people—religious liberty. I am Nathan Diament and I am privileged to serve as the director of the Institute for Public Affairs, the non-partisan public policy research and advocacy arm of the Union of Orthodox Jewish Congregations of America. The UOJCA, which has just entered its second century of serving the traditional Jewish community, is the largest Orthodox Jewish umbrella organization in the United States representing nearly 1,000 affiliated congregations nationwide and their many members. On behalf of the Union of Orthodox Jewish Congregations and its membership, I am here today to say that we are deeply appreciative of the historically unprecedented level of religious freedom that we have enjoyed in these United States. But I am also here to say that we are deeply concerned that in recent years the scope of this cherished freedom has been diminished.

This distinguished Committee has examined the challenges to religious liberty in previous hearings. Chairman Hatch, you have been a leader in the fight to protect religious liberty in America for much of your career and I well recall standing in the room with you—two years ago this week (?)—the day the Supreme Court rendered its decision striking down the Religious Freedom Restoration Act in the *City of Boerne* case. Your passion and commitment to religious liberty, a commitment similarly shared and displayed that day by Senator Kennedy, was clear. Sadly, it is now two years later and we are still working to repair the damage that has been done to our "first freedom." Congress must act to restore religious liberty to its venerable position in this session.

This Committee is familiar with the Supreme Court's decisions in *Employment Division* v. *Smith,* 474 U.S. 872 (1990), and *City of Boerne* v. *Texas,* 117 S.Ct. 2157 (1997) and has heard preeminent legal scholars discuss those decisions as well as legislative options for redressing the harm they have caused to religious liberty in the United States. What I hope to share with you in my brief statement is the traditional Jewish community's perspective on this issue and the need for legislation addressing it. I will do so with one illustrative example—land use regulation and its abuse.

Orthodox and traditional Jews can often be found living in geographically concentrated communities. This phenomenon flows from a simple religious fact—traditional Jewish law prohibits driving to the synagogue on the sabbath. This restriction, combined with the fact that there are portions of the sabbath prayer service that may only be said with a quorum in the synagogue—not by an individual in his or her home—makes living within walking distance of a synagogue a religious necessity. In recent decades, Orthodox Jewish communities throughout the United States have been flourishing. Long existing communities are growing and new communities are being developed. This wonderful trend often requires the expansion of older synagogues or the construction of new ones. Expansion or construction often requires permits, variances or waivers from zoning boards. Thus, the flourishing of traditional Jewish communities has given rise to another, more unfortunate trend, the use of land use regulations and zoning boards to discriminate against religious communities.

While we, of course, recognize that land use regulation is an important state interest and religious institutions, like other public institutions, must be sensitive to them and cannot automatically override them, it is clearly the case that zoning rules are being used in inappropriate and religiously discriminatory ways.

As recently as June 11, *The Forward,* a national Jewish weekly newspaper, reported but one example of this disturbing activity.[1] The Westchester, New York community of New Rochelle now has a growing Orthodox Jewish community. The members of the Orthodox synagogue are homeowners who pay their taxes and contribute to the community in all the usual ways. The community has outgrown its synagogue and is seeking to build a larger one on a plot that is, of necessity, in the same neighborhood as its current structure. And it is the zoning board that has become the method of choice for those who seek to thwart the growth of the Orthodox community in New Rochelle.

But this is but one of many instances of this unacceptable abuse of land use regulations. In the last session of congress, this Committee heard an extensive report of the refusal of the Los Angeles zoning board to allow elderly Jews to establish a place of worship in the Hancock Park section of that City.[2] In Miami, Florida, a group of Orthodox Jews have been refused a permit to rent a hotel conference room

[1] *New Rochelle Synagogue Spat Heats Up,* The Forward, June 11, 1999 (copy attached).
[2] See *One Zoning Law, Two Outcomes,* Los Angeles Times, November 11, 1997.

for weekly sabbath services even though the very same hotel room can be rented for a myriad of other functions. In the Cleveland, Ohio suburb of Beechwood, the Orthodox community's desire to construct a new synagogue was also blocked at the zoning board. The pattern is familiar and must be put to an end.

Legislation reinstating the requirement that a general law of neutral applicability must serve a compelling state interest via the least restrictive means before it can burden the free exercise of religion is the best means of thwarting those who would restrict religious liberty and restoring to religious liberty the level of protection and priority it deserves in this country.

There are other issues of concern to the Orthodox Jewish community that such legislation would address and I would be happy to elaborate them for you throughout the course of this hearing. Permit me, then, to make two closing observations.

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Finally, a thought about the very essence of liberty. In America, the concept of liberty—applied to a wide array of human activities—is, perhaps, the foundation stone of our society. We should be ever mindful of the fact that the American essence of liberty springs from religion's foundation stone—the Bible. Enshrined in our nation's birthplace on the liberty bell is a *biblical verse*: "* * * proclaim liberty throughout the land to all its inhabitants * * *" (Leviticus 25:10). Religion gave America the blessing of liberty; may America restore the full flowering of liberty to religion.

New Rochelle Synagogue Spat Heats Up

Orthodox, Liberal Jewish Neighbors Face Off at Raucous Meeting

By URIEL HEILMAN
SPECIAL CORRESPONDENT

NEW ROCHELLE, N.Y. — The dispute here over an Orthodox congregation's plan to erect a new synagogue is heating up after a raucous three-hour zoning board meeting drew more than 200 people.

There is no end in sight for the dispute that has pitted members of the synagogue, the Young Israel of New Rochelle, against city residents who say the proposed new house of prayer will be used as a catering facility that will bring traffic, commercialization and environmental decay to the neighborhood. Synagogue officials say they have chosen the least intrusive parcel of land for the new building and that the zoning variances they are requesting will not upset the residential or environmental balance of the neighborhood. They deny claims that the synagogue will become a catering hall.

The intensity and breadth of the opposition to the planned structure has prompted some Young Israel members to raise charges of anti-Orthodoxy in this Westchester County city. Many city residents have responded angrily, accusing the local Orthodox community of branding them anti-Semites merely to silence the opposition to the proposed building. Others are suggesting that the ill-will in the neighborhood stems from the perception among Orthodox Jews that they deserve to get whatever they want — in this case variances even one zoning board member is calling "extreme." For their part, members of the Orthodox congregation say the mayor and City Council have been less than helpful in the decade-and-a-half-long effort to build a new synagogue, and at least two congregants are now saying they plan to change that by running for City Council in November.

"The civil issues have reinforced my idea that we're not well represented here," said one of those candidates, Gerald Ziering, a past president of the Young Israel, "but there's a whole host of other issues. I'm running for council so that I can be an advocate for the north end of town."

Mr. Ziering, who has lived in the city for 19 years and once served as president of his local neighborhood association, said he decided to run after being approached by some local representatives of the Republican Party, which has only one delegate on the six-member City Council. A longtime Democrat, Mr. Ziering quickly changed his registration to Republican.

Mr. Ziering was among the hundreds of people who turned out for last week's zoning board meeting, filling to capacity the City Council chamber here on a hot and humid night when the air conditioning failed to work. The meeting originally had been scheduled for May 4 but was postponed when hordes of supporters and opponents showed up that day, overwhelming the zoning board and prompting its members to call a special session to accommodate the crowd.

Community members say the high turnout on both dates was prompted by the circulation in late April of a leaflet in mailboxes all over the city warning that the new synagogue would bring "rats," "traffic" and "creeping commercialization" to the neighborhood. Many called the leaflet anti-Semitic or anti-Orthodox. The president of the Young Israel, Meyer Koplow, suggested that the mention of rodents actually was a thinly veiled reference to members of the Orthodox synagogue. "The flyer was most unsettling," he said.

At times last week's hearing seemed more a trial than a zoning board meeting. The synagogue brought along its own court stenographer and took more than two hours to present its case, calling upon lawyers, an architect, the synagogue's rabbi, the synagogue's president and local real-estate experts to offer testimony. The audience listened as diagram after diagram was hoisted on stage, detailing the plans for construction. The opposition, handicapped by the late hour and the growing impatience of a perspiring crowd, limited its case to an hour. Opponents presented environmental experts, lawyers, community activists and a local historian in stating its case.

The synagogue's rabbi said that overcrowding at the congregation's current building has brought a "physical and spiritual crisis" upon his membership. One opponent of the proposed construction of the new synagogue warned that the new building will upset the environmental balance of a nearby property and may disrupt the "American woodcock in its breeding ritual." One zoning board member cautioned that "residential areas and catering facilities cannot coexist peacefully."

Members of the crowd occasionally broke into applause, prompting reprimands from the zoning board chairman for their fervor. At one point, a visibly agitated man who was not scheduled to speak ran up to the lectern and seized the microphone, waving a copy of the Forward newspaper in his hand. He began shouting about how the charges detailed in an article in the May 7 edition of the Forward — which reported on allegations made by Young Israel congregants about an undercurrent of anti-Semitism or anti-Orthodoxy harbored by the opposition — were untrue.

In recent years, New Rochelle's three Orthodox synagogues — none of which are within walking distance of any other — have experienced tremendous growth, while the city's Conservative synagogue has grown only modestly and the Reform temple hasn't grown at all. One of the Orthodox congregations, the Young Israel of Scarsdale, expanded its building about three years ago but experienced no communal opposition when it requested zoning variances, according to its rabbi.

But the congregation of the Young Israel of New Rochelle, which hopes to abandon its current structure for a new location about a block away, has been stymied at every turn. In 1993, the synagogue purchased the parcel of land on which it plans to build the synagogue with the hope of buying the city-owned property behind it for a parking lot. But when the city opted not to sell the three-and-a-half-acre parcel, which some local residents said contained wetlands, the synagogue was left without a parking plan. The synagogue was rebuffed when it approached the church across the street for parking and by the country club next door when Young Israel offered to bankroll a two-level parking garage on the country club's property in exchange for the use of the garage's lower level.

Now synagogue officials are requesting a zoning variance that would allow them to circumvent a rule requiring 122 parking spaces for the building — a move many nearby residents vehemently oppose. Synagogue officials say the new building would not bring increased traffic since the city can prohibit parking on nearby streets and its members do not drive to synagogue on the Sabbath and holidays.

One opponent of the synagogue's plans, who would identify himself only as Peter, conceded that the opposition's environmental and historic concerns were not legitimate. "The wetlands discussion is a means to an end" of blocking construction, he said. Neighbors are most worried that the synagogue will turn into a "full-scale catering facility," Peter said.

Synagogue officials have tried to allay these fears by pledging to hold catered events only when the synagogue is able to secure valet parking. Two nearby facilities have agreed to rent parking space to the synagogue on such occasions.

Peter, a member of the Reform temple, said he is still not satisfied. "My concern is that the identity of the neighborhood would change when you put a full-scale catering facility in," he said. "There's [also] a rumor going around that they're going to lease the old shul to a chasidic group to use as a school."

Synagogue officials deny that charge and say that such rumors point to an undercurrent of anti-Orthodoxy behind the opposition.

"It's been a bitter pill for us to swallow," Mr. Koplow said at the zoning board meeting. "We simply don't have a facility that can accommodate the congregation. We were attracted to New Rochelle for the tolerance, diversity and physical beauty of this city. Now we've been at this project [to build a new synagogue] for 15 years. We are simply out of options."

When Mr. Koplow asked the synagogue members present at the meeting to stand, about three-quarters of the people in the room rose to their feet.

The chairman of the zoning board, David Abrahams, said it would be months before his board even voted on the plan. The next step is a study to assess the environmental impact of the proposed plan, he said.

Even after the meeting ended late last Thursday night, the parking lot around City Hall here was filled with people discussing the fine points of the synagogue's plans. Generally, however, the groups of supporters and opponents did not mix — a sign, perhaps, that both sides in the dispute have given up trying to reach a compromise.

Senator GRASSLEY. Mr. Miranda, would you hold? Senator Feingold would make a statement at this point.

Senator FEINGOLD. Thank you, Mr. Chairman. Let me first ask consent to put the ranking member, Senator Leahy's, statement in the record.

Senator GRASSLEY. So ordered.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

Mr. Chairman, the right to practice any religion of our choice—or no religion at all—is one of the cornerstones of our Constitutional liberties, protected by the Free Exercise Clause of the First Amendment.

No law or ordinance that denies or restricts that right should be taken lightly. That is why I sponsored the Religious Freedom Restoration Act ("RFRA") and supported its passage. That is why I continue to support the basic goal of the Religious Liberty Protection Act ("RLPA"), to ensure the highest level of legal protection for the free exercise of religion.

I recognize that the RLPA, as introduced last year, was very similar in language and approach to the RFRA provisions that the Court found unconstitutional in 1997. We must therefore proceed carefully to ensure that the RLPA passes constitutional muster, and work diligently to develop the legislative record that the Supreme Court found wanting during its review of our prior efforts with the RFRA.

We must also ensure that any statute we consider does not undermine the efforts of states and localities to administer their civil rights laws. The protection of religious liberty should not come at the expense of civil rights, nor is this necessary. Just a few weeks ago, Texas enacted a version of the RLPA statute that explicitly preserves local civil rights laws. I understand that the amendment to add a civil rights provision to the Texas statute was carried jointly by leaders of both parties. The way that Texas chose to address this issue is instructive, and I am pleased that we will be hearing more about it today from the Democratic sponsor of the Texas statute, Rep. Scott Hochberg.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I want to thank you for having this hearing. The topic this morning is at the very heart of the freedoms guaranteed to each of us by the Constitution, the right to practice religion free of governmental intrusion. This country has a legacy of religious liberty that is unparalleled and that we in the Congress have a special duty to respect.

I voted for the original Religious Freedom Restoration Act in 1993 because I thought that the Supreme Court made a mistake in 1990 in the *Smith* case, in effect, reducing the level of protection against government intrusion that religious expression in this country receives from the courts. And I too was disappointed that the Court struck down the Religious Freedom Restoration Act. I think it is important for the Congress to revisit this issue and see if it is possible to protect religious freedom in a way that the Court will view as an appropriate exercise of congressional power.

At the same time, we need to work carefully in this area, and I know this hearing is a reflection of that. I understand that significant concerns have been raised about the effect of a new Federal law to protect religious freedom on existing State and local civil rights laws. As someone who is a strong supporter of civil rights and of federalism as well, I want to be sure before voting for a statute that is intended to protect religious freedom that it doesn't undermine other freedoms.

In this regard, I want to compliment the chairman and his staff for inviting a well-balanced panel to discuss these issues. These are very complicated legal issues and they deserve a searching examination before we act. I understand the chairman has not yet introduced a bill this year, which I think is an indication of his willingness to keep an open mind and work with all affected groups and with Senators on both sides to try to reach a genuine consensus.

I want to say also, as the ranking minority member of the Constitution Subcommittee, I am eager to work to try to resolve these difficult questions and try to come to some agreement that can have the kind of wide support that we experienced last time and that will also be held constitutional.

I thank the Chair very much.

Senator GRASSLEY. Thank you, Senator Feingold.

Now, to Mr. Miranda.

STATEMENT OF MANUEL A. MIRANDA

Mr. MIRANDA. Mr. Chairman, distinguished Senators, my name is Manuel Miranda. I am President of the Cardinal Newman Society for Catholic Higher Education, with offices in Fairfax, VA. Our membership organization has worked for the past 6 years on a variety of issues facing Catholic-affiliated colleges and universities, of which there are 235 in the United States.

I am proud to offer my support for the Religious Liberty Protection Act. As a naturalized American from a family that has emigrated across the Atlantic no less than five times in three generations, I fully understand the nature of my participation today as a distinct privilege.

It is providential that we should hold this hearing in the week which marks the 225th anniversary of the return of John Carroll to American shores, after a prolonged stay in Europe where he went to obtain a religious education that he was barred from obtaining in America. John Carroll, the brother of Daniel Carroll, the only Catholic at the Constitutional Convention, and the cousin of Charles Carroll, the only Catholic signer of the Declaration of Independence, was America's first Catholic bishop and, as founder of Georgetown University and other schools and colleges, the foundation stone of the contributions made by Catholic higher education to the American Republic for over 200 years.

I use Bishop Carroll's America as a point of reference because we know that Catholics in America, in 1789, numbered little more than 1 percent of the population. Today, Catholics number 70 million, the largest religious minority in the United States. Ironically, those principles of religious freedom embedded in America's Constitution have been a reason for the flourishing of our faith and the faiths of others. But, sadly, our current application of the First Amendment is now perhaps the greatest threat to the flourishing of faith since earlier times of persecution, a word which I use intentionally and advisedly, as I will explain.

Time does not permit me to draw further attention to the long association that Catholics in this land have to the issues before us today, or the very active role we played in ensuring that the religious toleration first practiced in America by the Catholic majority in Maryland be reflected in America's founding charters. I will

briefly, however, draw attention to the language of the old Maryland Toleration Act, which is most closely linked to the language of the Establishment and Free Exercise Clauses of the First Amendment.

In 1649, the Maryland Assembly, which incidentally appears to have had a Jewish member as early as 1641, passed the Maryland Toleration Act of Religious Toleration, intended to deal with possible intolerance among Christians. It provided that no person shall be, "in any way troubled, molested, or discountenanced for or in respect of his or her religion, nor in the free exercise thereof." With this gender-neutral language, Marylanders achieved the separation of church and state which their experience had suggested to be wise and that would later be grafted onto the U.S. Constitution.

In my opinion, their language of 1649 was better than that of the First Amendment, in that it places an emphasis on religious liberty and free exercise rather than the overly broad interpretation we have given in recent times to the Establishment Clause. The Maryland example also reminds us how appropriate it is, in the apparent absence of any other constitutional enabling clause, for Congress to utilize the Commerce Clause to promote religious liberty and the First Amendment's Free Exercise Clause.

Today, we understand religious persecution as one type of thing, marked by our experiences in this century of genocide and barbed wire. But for the most part, for Catholics and other sects fleeing England, persecution was felt in plainly economic ways. Roman Catholics were made to pay fines and penalties for their religious convictions, incurred cost and expense not applicable to the Anglican majority, were not allowed access to education or the benefits of education, were limited in the use and rights of their property, could not build chapels freely, and could not hold offices of public trust.

English Catholics could not pray safely in public places or be seen in their religious devotion, so much so that even on the voyage to Maryland Catholics were warned by their Catholic benefactor, Lord Baltimore, not to practice their faith in public aboard ship lest they offend the few Protestant co-travelers. Nor could Catholics count on the financial support of the State on equal terms as non–Catholics, or on the equal protection of the law.

Most of these forms of persecution are not so different than the impediments on religious liberty we experience today. The principal distinction appears to be that such discrimination is carried out in what appears to many to be the establishment of a secular state hostile to religion rather than establishment of the Church of England, neither of which were intended by the Framers or the Founding Fathers who placed their trust in God.

I venture to say that a Maryland Catholic of 1649 deposited here today would easily recognize current state actions discriminating against people of faith as persecution, though we may be too patriotic or in denial to use the word as plainly. Such restriction on religious exercise is caused by the oppressive extension of the Establishment Clause and will not be cured by the Religious Liberty Protection Act alone. It is too painfully absurd that we live in a country that accepts and widely televises high school prayer after a tragedy, but not before.

Second, religious liberty has been eroded by a failure to sufficiently protect and defend the Free Exercise Clause against encroaching laws. This, I hope, can be cured in part by this Act. I must state, however, that the House bill, in my opinion, does not go far enough in restoring a proper balance between the Free Exercise Clause and the Establishment Clause. Chiefly, I regret that it does not include language protecting against laws which would, without a compelling state interest, require action inconsistent with religious tenets.

The House bill fails to deal with the hostility to religion reflected in educational funding conditions, especially and ironically in Maryland and other States that now fund some religiously affiliated colleges, while not others which are determined to be too religious.

In Washington State, financial aid funds paid directly to students cannot now be used by them at 11 Catholic and other religious colleges because, according to the ACLU and the Washington courts, "indirectly benefit" religious colleges, while in New York State, schools such as Jesuit-run Fordham University have long had to deny their Catholic identity, removing crucifixes from classrooms, for example, so as to get financial support—a repugnant result, particularly in the Christian context.

As Justice Clarence Thomas recently wrote in his solitary dissent in *Columbia Union College* v. *Clark,* it is time to, "reaffirm that the Constitution requires neutrality not hostility toward religion." But the Religious Liberty Protection Act is a positive step and one which I hope will borrow some energy away from the emotional trigger issues and direct some serious attention to those solutions that might restore those civilizing agents which for two centuries successfully lighted the American way.

In addition to the direct effects which state action has on the free exercise of religion, I am also concerned with the indirect but no less intrusive effect that such legislation has in causing internal conflict and division among members of the church and their leadership. This has been especially painful in the area of Catholic higher education, where State and Federal funding have been used as a foil for much mischief. Such intrusive legislation and the factiousness which it causes among people of faith was surely not intended by the Framers when they affirmed separation of church and state.

In 1783, before our present Constitution was written, Benjamin Franklin assured Vatican ambassadors in Paris that the American Congress in Philadelphia, "should not in any case intervene in the ecclesiastical affairs of any sect or any religion established in America." Mr. Franklin was not a lawyer, but he no doubt meant to say "directly or indirectly."

The specter of state intrusion, directly and indirectly, is especially felt by the Catholic Church, which holds teaching on issues of justice and morality and education at all levels as having an especially important place in its religious exercise and Christian mission. This year, Catholics are engaged in a year-long discussion on the course of Catholic higher education. Benjamin Franklin would be horrified at how much consideration Catholic leaders are having

to give to whether the State will allow them to assert their religious identity freely and without interference or penalty.

I believe Congress has a long-awaited role to play in restoring religious liberty, and the Religious Liberty Protection Act suggests that we may be turning in the correct direction, even if against the tide of popular opinion, for our children's sake.

Thank you very much.

Senator KENNEDY [presiding]. Thank you very much.

[The prepared statement of Mr. Miranda follows:]

PREPARED STATEMENT OF MANUEL A. MIRANDA

Mr. Chairman, distinguished Senators, my name is Manuel Miranda, I am President of the Cardinal Newman Society for Catholic Higher Education, with offices in Fairfax, Virginia. Our membership organization has worked for the past six years on a variety of issues facing Catholic-affiliated colleges and universities, of which there are 235 in the United States. I am proud as a citizen to have this opportunity to offer my thoughts and support for the Religious Liberty Protection Act. As a naturalized American from a family that has crossed the Atlantic no less than five times in three generations in search of a better and safer life, I fully understand the nature of my participation today as a distinct privilege.

It is providential that we should hold this hearing on this day which, almost to the day, marks the 225th anniversary of the return of John Carroll to American shores after a prolonged stay in Europe where he went to obtain a religious education that he was barred from obtaining in America. John Carroll was the brother of Daniel Carroll, the only Catholic at the Constitutional Convention, and he was the cousin of Charles Carroll, the only Catholic signer of the Declaration of Independence. It was John Carroll who would be, with a little help from his friend Benjamin Franklin, America's first Catholic bishop and, as founder of Georgetown University and other schools and colleges, the foundation stone of the contributions made by Catholic higher education to the American republic for over 200 years.

I use Bishop Carroll's America as a point of reference because we know that Catholics in America in 1789 numbered little more than 1 percent of the population. Today Catholics number nearly 70 million, the largest religious minority in the United States. Ironically, those principles of religious freedom embedded in America's Constitution have been a reason for the flourishing of our faith and the faiths of others, but sadly our current application of the First Amendment is perhaps the greatest threat to that flourishing since earlier times of "persecution"—a word which I use intentionally and advisedly, as I will explain.

Time does not permit me to draw further attention to the long association that Catholics in this land have to the issues before us today, or the very active role we played in ensuring that the religious toleration and separation of church and state, first practiced in America by the Catholic majority in Maryland, be reflected in America's founding charters. I will briefly, however, draw attention to the language of the old Maryland Toleration Act which is most closely linked to the language of the Establishment and Free Exercise clauses of the First Amendment than any other source.

In 1649, the Maryland Assembly, which incidentally appears to have had a Jewish member as early as 1641, passed the Maryland Act of Religious Toleration, intended to deal with possible intolerance among Christians. It provided that no person shall be ". . . *in any way troubled, molested, or discountenanced for or in respect of his or her religion, nor in the free exercise thereof* . . ." With this language, Marylanders achieved the separation of church and state which their experience had suggested to be wise, and that would later be grafted onto the U.S. Constitution. In my opinion, their language of 1649 was better than that of the First Amendment in that it places an emphasis on religious liberty and free exercise rather than the overly-broad interpretation we have given in recent times to the Establishment Clause.

The Maryland Act also reminds us how appropriate it is, in the apparent absence of any other constitutional enabling clause, for Congress to utilize the Commerce Clause to promote religious liberty and the First Amendment's Free Exercise clause.

Today we understand religious persecution as one type of thing, marked by our experiences in this century of genocide and barbed wire. But for the most part, for Catholics and other sects fleeing England, persecution was felt in plainly economic ways. Roman Catholics were made to pay fines and penalties for their religious convictions, incurred cost and expense not applicable to the Protestant majority, were not allowed access to education or the benefits of education, were limited in the use

and rights of their property, could not build chapels freely, and could not hold offices of public trust. English Catholics could not pray safely in public places or be seen in their religious devotion. So much so, that even on the voyage to Maryland, Catholics were warned by their Catholic benefactor, Lord Baltimore, not to practice their faith in public aboard ship lest they provoke their few Protestant co-travelers. Nor could Catholics count on the financial support of the state on equal terms as non-Catholics, or on the equal protection of the law.

Most of these forms of persecution are not so different than the impediments on religious liberty we experience today. The principal distinction appears to be that such discrimination is carried out in what appears to many to be the establishment of a secular state hostile to religion, rather than establishment of the Church of England, neither of which were intended by the framers or the founding fathers who placed their trust in God.

I venture to say, that a Maryland Catholic of 1649 deposited here today would easily recognize current state actions discriminating against people of faith as "persecution" though we may be too patriotic, or in denial, to use that word as plainly.

Such restriction on religious exercise is caused first by the oppressive extension of the Establishment Clause, and will not be cured by the Religious Liberty Protection Act alone. It is too painfully absurd that we live in a country that accepts and widely televises high school prayer after a tragedy, but not before. Secondly, religious liberty has been eroded by a failure to sufficiently protect and defend the Free Exercise Clause against encroaching laws. This I hope can be cured, in part, by this Act.

I must state, however, that the House Bill, in my opinion, does not go far enough in restoring a proper balance between the Free Exercise Clause and the Establishment Clause, and chiefly I regret that it does not include language protecting against laws which would, without a compelling state interest, require action inconsistent with religious tenets. The House Bill fails also to deal with the hostility to religion reflected in educational funding conditions, especially and ironically in Maryland and other states that now fund some religiously affiliated colleges while not others which are determined to be *too* religious.

In Washington State financial aid funds paid directly to students cannot now be used by them at 11 Catholic and other religious colleges because, according to the ACLU and the Washington courts, they *"indirectly benefit"* religious colleges. While in New York State, schools such as Jesuit-run Fordham University have long had *to deny* their Catholic identity, removing Crucifixes from classrooms, for example, so as to get state financial support—a repugnant result, especially in the Christian context. As Justice Clarence Thomas recently wrote in his solitary dissent in *Columbia Union College* v. *Clarke,* it is time to *"reaffirm that the Constitution requires neutrality not hostility toward religion."*

But the Religious Liberty Protection Act is a positive step and one which I hope will borrow some energy away from emotional trigger issues and direct some serious attention to those solutions that might restore those civilizing agents which for two centuries successfully lighted the American way.

In addition to the direct effects which state action has on the free exercise of religion, I am also concerned with the indirect, but no less intrusive effect that such legislation has in causing internal conflict and division among members of the church and their leadership. This has been especially painful in the area of Catholic higher education, where state and federal funding have been used as a foil for much mischief. Such intrusive legislation and the factiousness which it causes among people of faith was surely not intended by the framers when they affirmed separation of church and state.

In 1783, before our present Constitution was written, Benjamin Franklin assured Vatican ambassadors in Paris that the American Congress (in Philadelphia) *"should not in any case, intervene in the ecclesiastical affairs of any sect or any religion established in America."* Mr. Franklin was not a lawyer, but he no doubt meant to say *"directly or indirectly.*

The specter of state intrusion, directly and indirectly, is especially felt by the Catholic Church which holds teaching on issues of justice and morality, and education at all levels, as having an especially important place in its religious exercise and Christian mission. This year Catholics are engaged in a year-long discussion on the course of Catholic higher education. Benjamin Franklin would be horrified at how much consideration Catholic leaders are having to give to whether the state will allow them to assert their religious identity freely, and without interference or penalty.

I believe Congress has a long-awaited role to play in restoring religious liberty and the Religious Liberty Protection Act suggests that we may be turning in the correct direction, even if against the tide of popular culture—for our children's sake.

Thank you very much.

Senator KENNEDY. Mr. Mincberg.

STATEMENT OF ELLIOT M. MINCBERG

Mr. MINCBERG. Thank you very much, Senator Kennedy. I want to thank you as well as Chairman Hatch for holding these hearings and for your concern that we have seen over, I can't even count how many years, for the issue of religious liberty.

Religious liberty, as the Senators on this committee know, has two critical components to it. Religious liberty includes both the right of individuals to the free exercise of their religion, and the right to be free from improper government coercion or promotion of religious activity, otherwise known as the Establishment Clause.

The principle of religious liberty and true government neutrality toward religion is protected both by the Free Exercise Clause and by the Establishment Clause, and we see threats to both that are poised on the horizon today. That is why these hearings could not come at a better time.

With respect to the subject of religion and the subject of religious neutrality, it is important to point out that sometimes true neutrality toward religion may mean that religion needs to be treated a little bit differently. On the Establishment Clause side, for example, take a look at the Equal Access Act, which Chairman Hatch was very involved in sponsoring in the early 1980's.

The Equal Access Act says that if a middle or high school permits a non-curriculum-related chess club to meet, it also has to permit a religious or political club to meet. But the Act also says very specifically that even though a paid teacher can sponsor the chess club, that teachers can be present in a religious club meeting only in a non-participatory capacity. Why? Because that prevents the perception or reality of government promotion to sponsorship of sectarian religious activity that would violate religious liberty. It, in fact, preserves true neutrality, even if religion is treated a little bit differently.

On the free exercise side of the coin, similarly, religion sometimes has to be treated a little bit differently to produce true neutrality. We know this from the pre-*Smith* free exercise jurisprudence that if you had a facially-neutral law that nonetheless had a substantial negative impact on religious practice, a religious adherent might be entitled to an exemption that a non-religious adherent would not.

For example, a community could decide that it was totally dry, but someone wanted to use wine with communion, the government would have to have a very good reason, as you put it before, Senator Hatch, before that neutral law could be applied in a way that would harm religious liberty.

Unfortunately, the Supreme Court, as we all know, deviated from that rule of true neutrality in the *Employment Division* v. *Smith* case. And as has been discussed before and I won't repeat, the Court compounded that error in *Flores* by, in fact, overturning the Religious Freedom Restoration Act.

Fortunately, even without further action by Congress, *Boerne* has not been the last word in terms of protecting the free exercise of religion. First of all, a number of States have made clear that the

substantial burden compelling interest test does apply as a matter of State law, either by interpreting their State constitutions or by passing State legislation. This, I think, underlines the point made by Senator Hatch before that the Government in this country is by no means systematically hostile to religion even though there is still a need for these protections.

In addition, particularly since the *Boerne* decision, lower Federal courts have utilized the compelling interest rest to protect religious free exercise in some cases. The best recent example was in the Third Circuit Court of Appeals in a case out of New Jersey where a police department had a health exemption to a "no beards" rule, but wouldn't enact a religious exemption.

And the Third Circuit Court said there that under those circumstances where you have a facially-neutral rule and you have some exemptions, you have got to have a compelling interest before you can deny religious exemptions. We think that is a very positive development toward protecting religious liberty that I think this committee should take cognizance of.

Nonetheless, we do believe that religious free exercise continues to be substantially and unnecessarily burdened in some instances around the country by facially-neutral laws. As the record before Congress reflects, this is a particular problem in the land use area. I won't repeat some of the very poignant examples given by some of my colleagues today. As a result of that, People for the American Way has continued to support the Religious Liberty Protection Act.

I should point out that all that Act would do would be to restore in some instances the compelling interest test. It doesn't change the outcome of cases. My colleague, Mr. Farris, and I disagreed substantially in the *Hawkins County* case, which we considered an example of censorship. He considered it an example of burden on the free exercise of religion. Prior to the *Smith* decision—that decision came out our way, as a matter of fact, and we have no reason to believe that RLPA would change that one iota, but it does restore the important compelling interest standard.

Now, we also recognize, as several members have pointed out today, that some members have expressed reservations about how RLPA would affect civil rights. PFAW shares some of these concerns. We believe, however, that the courts would not and should not accept religious belief or exercise as a basis for an RLPA-created exemption from civil rights laws, and I elaborate more on this in my written testimony. I won't elaborate on it now. We hope that as the legislative process concerning this continues, civil rights and other concerns can be resolved, and we look forward to working with you, Senator Hatch, and all to try to accomplish this objective.

But, finally, I want to note a different threat to religious liberty that has recently arisen unfortunately during this Congress. The House of Representatives has recently approved the so-called Ten Commandments amendment to its juvenile justice bill. That amendment will purport to authorize public display of the Ten Commandments as a religious act, as well as captive-audience prayer and religious expression by teachers, by principals, by drill sergeants, by any other individual on public property.

This provision, in our view, threatens religious liberty for all. In our public schools, where truly voluntary prayer and religious ex-

pression is already permitted, it would turn religion into a source of conflict and division. We urge the members of this committee and the Senate to stand firm against this provision, as well as to continue to explore very seriously the important issues that are presented by the Free Exercise Clause.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Mincberg.

[The prepared statement of Mr. Mincberg follows:]

PREPARED STATEMENT OF ELLIOT M. MINCBERG

Thank you very much for inviting me to testify before this Committee today on the important subject of protecting religious liberty and its exercise. I am vice-president and legal director of People For the American Way, a non-partisan citizens' organization with over 300,000 members vitally concerned with protecting and promoting religious liberty. This includes both the right of individuals to the free exercise of their religion and the right to be free from improper government coercion or promotion of religious activity. I have been extensively involved in litigation and legislation relating to these issues, and have advised parents, teachers, religious leaders, school districts, and religious organizations on these subjects, including serving on the Committee on Religious Liberty of the National Council of Churches.

The principle of religious liberty and government neutrality towards religion is enshrined in the First Amendment's twin guarantees against government interference with the free exercise of religion and against government establishment of religion. Sometimes, however, true neutrality means that religion must be treated a little differently. For example, with respect to Establishment Clause values, consider the Equal Access Act, passed by Congress in 1984. Under the Act, if a middle or high school permits a chess club or a political club unrelated to the curriculum to meet, it must also permit a religious club to meet. But even though a paid public school teacher could be asked to guide and participate substantively in the activities of a chess club, the Act specifically provides that teachers or other school employees can be present at a religious club meeting "only in a nonparticipatory capacity." 20 U.S.C. 4071(c)(3). That avoids the perception or reality of government promotion or sponsorship of sectarian religious activity that would violate religious liberty. It preserves true neutrality even though religion may be treated a little differently than non-religious activities.

Similarly, on the Free Exercise Clause side of the coin, religion is also sometimes treated a little differently to ensure true neutrality. Congress has recognized that principle in providing for an exemption for religious institutions from the anti-discrimination provisions of Title VII of the 1964 Civil Rights Act, an exemption upheld by the Supreme Court. This principle was also recognized by free exercise jurisprudence prior to 1990. As the Supreme Court had held, where a government practice or law imposed a substantial burden on the free exercise of religion, even if the law or practice was neutral on its face, it could not be applied to religious free exercise unless it was necessary to do so in order to promote a compelling government interest. For example, a town could decide to prohibit the consumption of alcohol, but would need to prove a compelling interest in order to apply that prohibition to a church that used wine in conjunction with communion.

Unfortunately, the Supreme Court changed that rule in its 1990 decision in the *Employment Division* v. *Smith* case. After *Smith,* a government rule substantially burdening free exercise can be challenged under the First Amendment only if it can be shown that it specifically targets religion. Facially neutral laws that substantially burden religion, like the Prohibition hypothetical I just mentioned, cannot be challenged under the Free Exercise Clause. A virtually unanimous Congress, backed by President Clinton and by religious and civil liberties advocates across the spectrum, sought to restore the compelling interest rule as a matter of statutory law through the Religious Freedom Restoration Act (RFRA) in 1993. But in 1997, in *City of Boerne* v. *Flores,* the Supreme Court ruled that Congress did not have the power to enact RFRA as applied to state and local governments.

Fortunately, even without further action by Congress, *Boerne* has not been the last word in terms of protecting the free exercise of religion. First, a number of states have made clear that the substantial burden/compelling interest test applies to religious exercise as a matter of state law, either through state-level RFRA legislation or through state court decisions interpreting state constitutions. This development helps demonstrate that the government in this country is by no means system-

atically hostile to or discriminatory against religion, although there clearly is a need for protection of religious liberty.

In addition, particularly since the *Boerne* decision, lower federal courts have utilized the compelling interest test to protect religious free exercise in cases involving facially neutral rules where the government improperly refuses to provide religious exemptions where non-religious exemptions are permitted. For example, in the recent case of *Fraternal Order of Police* v. *Newark,* 170 F.3d 359 (3rd Cir. 1999), the court ruled that the police department was constitutionally obligated to accommodate police officers who wanted an exemption from the department's "no facial hair" rule for religious reasons, since the department had agreed to accommodate officers seeking an exemption for health reasons. This is based on a principle recognized even in *Employment Division* v. *Smith* itself: when the government has provided for a system of exemptions from a burdensome facially neutral rule on non-religious grounds, "it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith,* 494 U.S. at 884. Decisions like *Newark* offer real potential for helping protect religious free exercise.

Nevertheless, we believe that religious free exercise continues to be substantially and unnecessarily burdened in some instances around the country by facially neutral laws and practices. As the record before Congress reflects, this is most serious in the area of zoning and land use regulation. It is because of these problems, and the importance to religious liberty of ensuring protection of religious free exercise against substantial and unnecessary burdens by government, that PFAW has continued to support the Religious Liberty Protection Act (RLPA).

In my testimony before this Committee last year, I discussed the constitutional bases for RLPA under the Commerce Clause, the Spending Clause, and Section 5 of the Fourteenth Amendment, so I will not repeat that testimony today. We recognize that as RLPA has been considered in the House this year, some members of Congress have expressed reservations, including the issue of how RLPA would affect civil rights laws. As an organization that actively works to defend the civil rights of all Americans, PFAW shares some of these concerns. As an organization that has also been involved in helping to draft and support RLPA, we believe that the courts would not and should not accept religious belief or exercise as a basis for an RLPA-created exemption from civil rights laws. The Supreme Court has already ruled, for example, that government has a compelling interest in preventing race and sex discrimination. In the California *Smith* case, *Smith* v. *Fair Employment and Housing Commission,* 12 Cal. 4th 1143 (1996), the state supreme court appropriately rejected a RFRA defense to a law banning housing discrimination on the basis of marital status. Courts that appear to have accepted such claims have based their decisions on federal or state constitutional provisions, which would remain in effect regardless of RLPA. Nonetheless, we hope that as the legislative process concerning RLPA continues, civil rights and other concerns can be resolved, and we hope to work with all involved to help accomplish this objective.

Finally, it is important to note a different threat to religious liberty that has recently arisen during this Congress. The House of Representatives has recently approved the so-called "Ten Commandments" amendment to its juvenile justice bill. That amendment would purport to authorize public display of the Ten Commandments as a religious act, as well as "captive audience" prayer and religious expression by teachers, principals, drill sergeants, and any other individual on public property. This provision threatens religious liberty for all. In our public schools, where truly voluntary prayer and religious expression is already permitted, it would turn religion into a source of conflict and division. We urge the members of this Committee and the Senate to stand firm against this provision.

Thank you again for the opportunity to testify today, and we look forward to continuing to work with Chairman Hatch and Senator Kennedy and their colleagues on a truly bipartisan basis to seek to protect religious liberty in the future.

The CHAIRMAN. Mr. Farris, we will take your testimony at this time.

STATEMENT OF MICHAEL P. FARRIS

Mr. FARRIS. Mr. Chairman, thank you so much for holding this hearing and for inviting me to participate. It has been convened today to consider the state of religious liberty and whether or not it requires corrective action.

I have been an attorney for 23 years, and about 19 of those years I have been engaged in constitutional litigation primarily in the

area of religious liberty. And I want to attempt to do three things today: first, outline instances where people have been inappropriately, at least in my judgment, denied religious liberty, and the examples I will use will be exclusively from cases I have personally handled; second, address underlying reasons that I believe that such denials are occurring in our society; and, third, suggest some general ideas for finding a solution.

The first case I will refer to occurred in Oak Harbor, WA, where a mother had her son removed from her custody and placed in foster care solely because of a dispute over church attendance. The 13-year-old boy was willing to attend church on Sunday morning, but the family had a practice of attending on Sunday morning, Sunday evening and Wednesday evening. The superior court judge ruled that church once a week was enough for any 13-year-old boy, and placed the boy in foster care.

A different high school student in Mead, WA, was assigned to read a book full of what she and her family believed to be attacks on her religious beliefs. I will cut to the most offensive of them, a scene where a character proclaims, "I'm going to blow the ass off of Jesus Christ, that long-legged white son-of-a"—and I will omit the rest of the statement. Cassie Grove refused to read that book, and after a serious debate with her teacher was allowed an alternative book. But the price of the alternative was to be stood in front of the class and be ridiculed by the teacher.

The Ninth Circuit Court of Appeals found no free exercise violation in this act of ridicule of Cassie Grove, and it denied her family's claim that the disparagement of Jesus Christ violated the principle of religious neutrality that is demanded by the Establishment Clause. The Supreme Court denied cert in that case.

About a dozen students were expelled in the case that Mr. Mincberg mentioned, in the Hawkins County, TN, schools for refusing to read textbooks which the school district stipulated violated the religious convictions of the students and their parents. The Sixth Circuit held that it was not a violation of the Free Exercise Clause to condition attendance at the public schools upon a child's willingness to be coerced to read religiously offensive material.

I will skip over some others that are in my written testimony and just note this. The important thing about each of these cases is that they arose prior to the *Smith* decision. All of these cases were decided under the test of strict judicial scrutiny, using the compelling interest, least restrictive means rubric that was in place prior to *Smith*.

In a conversation I had with Mike McConnell, a professor at the University of Utah, he said in another context—we were talking about parents' rights at the time, but he said when it comes right down to it, the Government can make its interests seem pretty darn compelling whenever it wants to. And I frankly have grown less than enamored with the compelling interest test.

In my judgment, although religious liberty shouldn't be an absolute right, it should be pretty darn close to an absolute right. And the Government's ability to overcome religious liberty needs a better protector than the compelling interest test has proven to be over time. We lose far, far too many cases, and I think the basic reason is that the compelling interest test is a balancing test. And

all balancing tests that are active in the current Supreme Court docket, at least in this relevant area, are basically an opportunity for the judges to substitute their opinions for the opinions of parents, in the case of how often you go to church in Oak Harbor, WA, and other people. And the ability to use balancing tests as a pretensive and objective law, I think, is frankly dangerous to our liberty.

There is a second reason, I think, that we face these kinds of problems, and that is one that I think, in my opinion at least, particularly affects conservative religious people these days. Conservative religious people, at least from my vantage point, includes born-again and fundamental Evangelicals, Catholics who are serious about their faith, Orthodox Jews, and other socially conservative faiths, such as the LDS Church.

An example of this bigotry was reported in the Washington Post on May 21 of this year. Mark Earley, the Attorney General of Virginia, requested a court to review certain government bonds which were sought by Regent University, which on the political side I don't really particular agree with, Regent seeking such bonds.

But listen to what Barry Lynn from Americans United for Separation of Church and State said, "Regent University is not just a school with a historical religious affiliation. This is a fundamentalist school. There is no way Virginia can drop over $50 million at this school's collection plate. We will not let that happen."

It should not matter that this school is fundamentalist. If Americans United was standing for a principle of equal treatment for all, religious and non-religious alike, I would understand that. The ACLU takes a principled stand, and even though I disagree with them about 90 percent of the time, I admire their consistency on principles they profess. But this kind of antipathy and bigotry that finds its way against conservative religious people these days, I think, needs to be addressed as bigotry for what it is.

What would we say if someone took the position of, well, it is not just a historically religious college, it is a Jewish college, therefore it shouldn't get any funding? We would call that bigotry, and the members of this Senate would stand up and condemn it for what it is, and I would urge you to do that. No legislation is needed. Just simply stand up and condemn it.

Very quickly, on the issue of carve-outs, I oppose all carve-outs to religious liberty, including financial carve-outs, which is exactly what the Commerce Clause approach will do. It protects in a favorable way the rich over the poor, the big over the small, the institution over the individual. I believe that religious liberty needs to be for everybody, for every faith, every individual, no matter how rich, how poor, no matter how Jewish, no matter how fundamentalist. No matter who you are or where you are or what faith you profess, everyone should have full religious liberty.

Thank you.

The CHAIRMAN. Thank you, Mr. Farris.

[The prepared statement of Mr. Farris follows:]

PREPARED STATEMENT OF MICHAEL P. FARRIS

Mr. Chairman and members of the Committee.

This hearing has been convened to consider whether the state of religious liberty in this nation requires corrective action. I have been an attorney for 23 years and

have been engaged primarily in constitutional litigation, specifically religious liberty litigation, for at least 19 of those 23 years.

My testimony today will endeavor to do three things:

1. outline instances where people have been inappropriately (in my judgment) been denied religious liberty. The examples I use come exclusively from cases that I have personally handled;
2. address the underlying reasons that such denials occur in our society; and
3. suggest some general ideas for finding a solution.

A mother in Oak Harbor, Washington, had her son removed from her custody and placed in foster care solely because of a dispute about church attendance. The 13 year-old boy only was willing to attend church on Sunday morning. The family attended church on Sunday morning, Sunday evening, and Wednesday night. The Superior Court judge ruled that church once a week was enough for a 13 year-old and placed the boy in foster care.

A high school student in Mead, Washington was assigned to read a book full of what she and her family believed to be attacks on her religious beliefs. One character talked of a preacher who would "throw his Bible in the privy" in order to pursue an illicit sexual relationship. The main character, a teen-age boy who was designed to relate to the reader, concluded the book by saying he had enough church for a while in his life. And many other minor disparaging remarks about religion in general and Christianity specifically were found in this book. But the most offensive thing was a scene where a character proclaims, "I'm going to blow the a** off of Jesus Christ, that long-legged white son-of-a-b****."

Cassie Grove refused to read the book and after a serious debate was allowed an alternative book. But the price of this alternative was to be stood in front of the class and be ridiculed by her teacher. The Ninth Circuit Court of Appeals found no free exercise violation in this active ridicule of Cassie Grove and it denied her family's claim that the use of this disparaging attack on Jesus Christ violated the principle of religious neutrality demanded by the Establishment Clause. The Supreme Court denied certiorari. *Caroline Grove* v. *Mead School District No. 354,* 474 US 826, 88 L Ed 2d 70 (1985).

About a dozen students were expelled from the schools of Hawkins County, Tennessee for refusing to read textbooks which the school district stipulated violated the religious convictions of the students and their parents. The Sixth Circuit Court of Appeals held that it was not a violation of the Free Exercise Clause to condition attendance in a public school upon a child's willingness to be coerced to read religiously offensive material. *Mozert* v. *Hawkins County Public Schools,* 579 F.Supp. 1051 (E.D. Tenn. 1984), 582 F.Supp. 201, (E.D. Tenn. 1984), 765 F.2d 75 (6th Cir. 1985), 647 F.Supp. 1194, (E.D. Tenn. 1986), 827 F.2d 1058 (6th Cir. 1987), *cert. denied,* 98 L.Ed.2d 993 (1988).

For a number of years it was illegal to home school one's children in North Dakota except in circumstances that only permitted about 2 percent of families to qualified. The law limited home schooling to currently certified teachers even though there was no evidence that teacher's certification was necessary to achieve good academic results in home education. When one of the 98 percent of the families appeared before the Supreme Court of North Dakota arguing that the law violated their free exercise of religion, the prosecutor defended the constitutionality of the requirement arguing that teacher's certification was necessary to protect important state interests. The interests he identified were: (1) the need for children to learn lessons from bullies on the playground; and (2) the need for children to have examination screenings in school. I pointed out to the court that one would hope that certified teachers were not bullies on playgrounds so it was difficult to see the relevance of this justification for the intrusion into religious liberty. I also pointed out that it was quite ironic to suggest that certified teachers in home schools could be justified by the need for exams when the mother in the case at bar was a registered nurse and the father was one of North Dakota's very few physicians who specialized in eye surgeries. Despite the lack of any evidence for a better justification for this rule, the Supreme Court of North Dakota denied the family's request for a free exercise based exemption from this law of general applicability. *State* v. *Patzer,* 382 N.W.2d 631 (N.D. 1986).

The important thing to note about each of these cases is that they arose prior to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990). All were decided under the test of strict judicial scrutiny using the compelling interest, least restrictive means rubric that was in place prior to Smith.

Constitutional scholar Michael McConnell, now a professor at the University of Utah, and I once had a conversation about the validity of the compelling interest

standard in the context of parental rights legislation. He said, "When it comes right down to it, the government can make its interest seem pretty dam compelling whenever it wants to." I would agree with that but add this: The government can do a pretty lousy job of providing evidence and argument to demonstrate a compelling governmental interest, but it rarely matters—the pro-government anti-religious bias of the courts is so strong that it seldom matters.

There are two underlying problems that result in the growing denial of religious freedom that you will hear about today and as you study this issue. The first problem is the use of judicial balancing tests. Balancing tests have an appearance of being a rule of law, but in practice are little more than mechanisms whereby judges substitute their personal opinions for the opinions of others. The instance in Oak Harbor is perhaps the best example, where a judge substituted his opinion on church attendance for that of the child's parents.

The compelling government interest test is a balancing test. It is better than some other balancing tests, but has not proven to be an ideal tool for protecting religious liberty. The balance has been struck far-too-often, in my opinion, in favor of the government. The First amendment deserves better.

There is a second reason that I believe we face these kinds of problems. There is a pervasive anti-religious bigotry that has a grip on important components of the societal elites. This bigotry is especially strong in the entertainment industry-although there are political forces who clearly capitalize on this fear and hatred of religious people. From my perspective the groups which receive the brunt of these attacks are born again evangelical and fundamental Christians, Catholics who are serious about their faith, and other socially conservative faiths such as the LDS church.

An example of this bigotry was reported in the Washington Post on May 21, 1999. Virginia's Attorney General, Mark Earley, requested court review of certain government bonds which were sought by Regent University. (As an aside let me say that I will host a ground breaking ceremony for a new college in Virginia this Friday. Patrick Henry College will not seek this kind of bond or any other form of government aid. I do not believe that direct government aid for religious institutions is wise.) But listen to what Barry Lynn from Americans United for Separation of Church and State said: "[Regent University] is not just a school with a historical religious affiliation. This is a fundamentalist school * * *. There's no way Virginia can drop over $50 million in the school's collection plate; we will not let that happen."

It should not matter that the school is fundamentalist. If Americans United was standing for a principle of equal treatment of all—religious and non-religious alike—I would understand. The ACLU takes such a principled stand and even though I disagree with that organization at least 90 percent of the time, I admire their consistency on the principles they profess. But statements that strongly suggest antipathy for a particular kind of religion evidence only bigotry not a stand on principle.

People for the American Way came into existence to oppose the organized participation by fundamentalist and evangelical Christians in the political sphere. They publish a report called Religious Right Watch. What would we call a group that came into existence to oppose Jews or Episcopalians or Lutherans who had organized politically? What would we call a group that published a report called Jewish Watch or some similar name? We would call such people religious bigots and we would treat them like David Duke or other social pariahs who advocate positions that are similar inappropriate in a civilized society.

I strongly believe that this kind of religious bigotry which holds sway among the self-proclaimed elites lies at the heart of much of the denial of religious freedom we see in our country.

I suggest two things.

First, is a non-legislative suggestion. I do not believe we ever ought to pass a law to outlaw or control religiously bigoted words or attitudes. Those who want to deride fundamentalist Christians, for example, ought to have the absolute freedom to do so. My request would be to ask you good Senators from both parties to simply use your public presence to marginalize such actions and statements. When someone says that they are going to oppose government funding for a religious school especially because it is a fundamentalist school, then I would ask you to stand up and publicly denounce that as bigotry. Do what you would do if David Duke stood up and attacked a Jewish college's right to participate in a government program, not on constitutional grounds alone, but because it was a Jewish school.

If we want to improve the lot of religious litigants in courtrooms, we need to improve the lot of religious people in the way they are discussed in society at large. You are a part of that public discussion and I urge you to use your speeches and writings to stand up whenever anyone in this country is disparaged for their faith.

The second thing I would urge you to do is to refrain from enacting legislation which fails to provide universal religious freedom protection for all.

In 23 years I have represented Jews, Black Muslims, Catholics, Mormons, Baptists, Pentecostals, and Protestants of every stripe. I have represented rich and poor, young and old, black and white. I am convinced that if religious freedom is denied to any group, in the long run no group is safe from the heavy hand of government.

The House has before it a bill called the Religious Liberty Protection Act which has as its principle feature a provision that protects the free exercise of those who can demonstrate a nexus to interstate commerce. The proponents of this feature admit that it is not a universal provision and not every claimant will be able to meet this test. The lines that are drawn with the pen of the Commerce Clause are financial lines. This will favor rich over poor, big over small, the institution over the individual. Those who need judicial protection the least are the big, the rich, and the institutional. Those who need judicial protection the most are the small, the poor, and the individual.

I urge you to consider solutions that include everyone and exclude no one-whether the lines which are drawn are denominational or commercial. Religious freedom must be for all or no one is truly safe.

The only other thing I would suggest for a solution is this: Craft a provision that works more like Fourth Amendment jurisprudence than the last thirty years of First Amendment jurisprudence. For the last five years I have been doing an increasing amount of Fourth Amendment work as social workers and police officers invade home schooling homes without warrants, probable cause, or exigent circumstances. I have become a great admirer of the historical jurisprudence of the Fourth Amendment. By comparison to the balancing tests in the First Amendment area, the Fourth Amendment is far more objective and far more dependable in actually protecting freedom. We don't need any more laws or tests which allow judges to substitute their views for the views of parents, religious individuals, legislators, or Congress. Even though the compelling interest test is better than minimal judicial scrutiny—at least on paper—we can and should and must do better. Free exercise cannot be absolute, but it should come reasonably close. And whatever lines are drawn, they should never exclude people on the basis that they are too fundamentalist, or too Jewish, or too poor, or too small. Religious freedom must be for everyone or no one is truly safe.

The CHAIRMAN. Mr. Anders.

STATEMENT OF CHRISTOPHER E. ANDERS

Mr. ANDERS. Mr. Chairman and members of the committee, the American Civil Liberties Union greatly appreciates the opportunity to present this testimony on the importance of ensuring that any Federal legislation enhancing the protection of religious exercise will not cause any unintended harm to State and local civil rights laws. Such properly drafted legislation would be consistent with the longstanding practice of the Congress in refraining from undermining or preempting State and local civil rights laws that may be more protective of civil rights than Federal law.

The ACLU historically supports legislation providing stronger protection of religious exercise, even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn a Federal statutory shield for religious exercise into a sword against State and local civil rights laws. Thus, the ACLU regrets that we must ask the committee to refrain from passing any religious liberty legislation unless it will have no adverse consequences on the hard-won civil rights laws enacted and enforced by State and local governments.

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. In fact, we were founding members of the coalition that supported the Religious Freedom

Restoration Act in 1993 and the Religious Freedom Protection Act, RLPA, during most of the last Congress.

However, we are no longer part of the coalition supporting RLPA, as introduced in the House, because we could not ignore the potentially severe consequences that it may have on State and local civil rights laws. Although we believe that courts should find civil rights laws compelling and uniform enforcement of the 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 the landlords owned so many investment properties that they were outside the State law's 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 Ninth Circuit recently decided a claim by landlords that compliance with the local civil rights law protecting persons from discrimination based on marital status burdened the landlord's 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 defendants in similar civil rights 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.

An improperly drafted Federal statute could 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 itself could find their protections under State or local laws eroded by Federal law. The enactment of an unamended RLPA would represent a sharp break from a long congressional tradition of exercising restraint to avoid passing any law that would undermine State or local civil rights laws.

In fact, Mr. Chairman, you and other members of this committee have had an important role in encouraging States to develop their own civil rights laws by publicly applauding the civil rights successes of many States. However, if Federal legislation such as an unamended RLPA becomes law, an applicant for a job or housing may have no State law protection against having to answer such invasive questions 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 a Federal religious liberty statute's poten-

tial effect on State and local 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.

As Texas State Representative Hochburg will testify, Governor Bush signed into law only 2 weeks ago a State RFRA that protects Texas' civil rights laws. On the House side, Congressman Nadler offered today an amendment that would provide similar protection as an amendment to RLPA.

The ACLU very much appreciates your willingness to consider these concerns as you draft legislation. We believe that 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 members of the committee to resolve this problem.

Thank you once again for the opportunity to present our concerns.

The CHAIRMAN. Thank you, Mr. Anders.

[The prepared statement of Mr. Anders follows:]

PREPARED STATEMENT OF CHRISTOPHER E. ANDERS

I. INTRODUCTION

Mr. Chairman and members of the Committee, the American Civil Liberties Union greatly appreciates the opportunity to present this testimony on the importance of ensuring that any federal legislation enhancing the protection of religious exercise will not cause any unintended harm to the enforcement of state and local civil rights laws. Such properly drafted legislation would be consistent with the long-standing practice of the Congress in refraining from undermining or preempting state and local civil rights laws that may be more protective of civil rights than federal law.

The ACLU historically supports legislation providing stronger protection of religious exercise—even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn a federal statutory shield for religious exercise into a sword against state and local civil rights laws.

Thus, the ACLU regrets that we have no choice but to ask the Committee to refrain from passing any religious liberty legislation unless it will have no adverse consequences on the hard-won civil rights laws enacted and enforced by state and local governments. 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 the Religious Freedom Restoration Act in 1993, and the Religious Liberty Protection Act ("RLPA") during most of the last Congress.

However, we are no longer part of the coalition supporting RLPA, as introduced in the House, because we could not ignore the potentially severe consequences that it may have on state and local civil rights laws. 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.

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 of the landlords owned 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 applied a strict scrutiny standard of review to a local civil rights law in deciding a claim by landlords that compliance with that 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 defendants in similar civil rights cases 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.

An improperly drafted federal statute could 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 itself, could find their protections under state or local laws eroded by federal law.

The enactment of an unamended RLPA would represent a sharp break from a long Congressional tradition of exercising restraint to avoid passing any law that would undermine state or local civil rights laws. In fact, Mr. Chairman, you and other members of this Committee have had an important role in encouraging states to develop their own civil rights laws by publicly applauding the civil rights successes of many states.

However, if federal legislation such as an unamended 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 a federal religious liberty statute's potential effect on state and local 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. As Texas State Representative Scott Hochberg will testify, Texas Governor George W. Bush signed into law—only two weeks ago—a state RFRA that protects Texas' civil rights laws. On the House side, the ACLU and many other groups are supporting a civil rights amendment to RLPA offered by Congressman Nadler that will have a similar result.

The ACLU very much appreciates your willingness to consider these concerns as you draft legislation. We believe that 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 members of the Committee to resolve this problem. Thank you once again for this opportunity to present our concerns.

II. SCOPE OF THE POTENTIAL PROBLEM

The House of Representatives is presently considering H.R. 1691, the Religious Liberty Protection Act of 1999 ("RLPA"), which would provide extensive federal statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1990 Supreme Court decision that lowered the standard of review for religious exercise claims. H.R. 1691 is similar to legislation considered last year by both houses of Congress. H.R. 1691 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, H.R. 1691 does not have any provision specifically addressing its potential effect on state and local civil rights laws.

The scope of the potential civil rights problem raised by such 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.[1] 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 H.R. 1691 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 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).[2]

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[1] In 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.

[2] In *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

Continued

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon* v. *Smith,* 494 U.S. 872 (1990), 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. The City of Los Angeles filed an *amicus* brief in the Ninth Circuit Smith case, stating its concern that a religious liberty defense could undermine enforcement of its municipal law protecting persons against discrimination based on HIV status.

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 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

H.R. 1691 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 federal RLPA 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?

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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).

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 H.R. 1691 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. Under the pre-*Smith* Free Exercise Clause jurisprudence which H.R. 1691 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 in 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.[3] 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., Thomas,* 165 F.3d at 717 (a municipality did not have a compelling interest

[3] In *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.

in eradicating discrimination based on marital status); *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 H.R. 1691 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 an 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 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., Thomas,* 165 F.3d at 716–17 (citing state statutes providing less favorable benefits to unmarried couples than to married couples); *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.);[4] *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

[4] 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* v. *FEHC,* 913 P.2d at 929.

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. Several courts have held that uniform application of anti-discrimination laws is the least restrictive means available. *See, e.g., 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 be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected class"). However, the Massachusetts Supreme Court remanded that question when it 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.

Persons using a religious liberty defense to a civil rights claim have argued that uniform application of civil rights laws cannot be the least restrictive means if the civil rights statute in question contains exemptions for religious organizations and small landlords or employers. Those defendants have argued that a less restrictive means is available, namely, granting an exemption to persons who hold sincere religious beliefs. For example, one court found that "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." *Desilets,* 636 N.E.2d at 240. Similarly, the Ninth Circuit cited the state's "'underenforcement' of its purported interest in eradicating marital status discrimination," as expressed in statutory exemptions within the state fair housing law, as evidence that the state's interest was not compelling. *Thomas,* 165 F.3d at 717. However, another court 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. The split on how to apply the least restrictive means part of the strict scrutiny test is particularly important when most state and local civil rights laws have numerous exemptions.

IV. CONCLUSION

The ACLU urges the Committee, as it addresses the problem of increasing protection for religious exercise against neutral state and local laws, to avoid unintentional harm to the enforcement of state and local civil rights laws. Without careful drafting, a federal religious liberty statute could provide a new federal defense against 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 any religious liberty legislation without ensuring that it will not deprive persons of their civil rights under state and local laws.

The CHAIRMAN. Representative Hochburg.

STATEMENT OF REPRESENTATIVE SCOTT HOCHBURG

Representative HOCHBURG. Thank you, Mr. Chairman. I appreciate your leadership on this issue and I appreciate the opportunity to share some thoughts with you today.

As Chris mentioned, 2 weeks ago Governor George Bush signed the Texas Religious Freedom Restoration Act into law. I was privileged to work with Governor Bush as the House author of this important bill, and I am proud of the bill because I truly believe it strengthens religious freedom in Texas without weakening other fundamental individual rights. I would ask that in crafting your legislation that you not preempt what we have carefully worked out as a bipartisan effort in Texas.

Long before I ever heard of the *Smith* case or your Federal RFRA, I knew how hard it was for individuals to assert their First Amendment religious freedoms against the bureaucracy. I fought battles for a long time with our prison system over allowing Jewish prisoners to practice their faith, and I found I actually had to pass a law before I could be sure that judges would not repeat the incident that occurred in a Houston courtroom where an Orthodox Jewish man was required to remove his skull cap before he could testify, in direct conflict with his religious practice.

So when the American Jewish Committee and the Anti–Defamation League, on whose local boards I serve, put the State Religious Freedom Restoration Act on their legislative agendas, I was eager to become the lead sponsor. And I was certainly encouraged by the early and strong support of Governor Bush, who announced just before the opening of our legislative session that Texas RFRA would be one of his legislative priorities as well.

Of course, as you well know, and as this panel reflects, no bill is a simple bill. Early on, it became apparent to me that the model RFRA language left open the possibility that the Act could be used to get around Texas civil rights laws. That concern was first raised to me by AJC and the later by ADL, two groups that had initially brought me the legislation and two groups with long histories of defending civil rights internationally.

Clearly, the intended purpose of this bill was not to weaken civil rights laws. When Governor Bush and others talked about the need for RFRA, he cited examples, including the skull cap situation, where RFRA could be used to help protect a person's religious practice from government interference. None of the examples were about giving any individual the right to deny any other person's

equal protection rights, even under the guise of religion, nor were civil rights cases amongst those cited by constitutional experts that we heard from when they explained the need for RFRA to our committees.

The Texas Constitution is very clear about the primacy of civil rights. The third and fourth sections of our bill of rights in the Texas Constitution guarantee equal protection under the law. The next three sections protect religion and guarantee freedom of worship. So, clearly, our framers saw those fundamental rights as being on the same plain.

I wanted to pass a strong RFRA in Texas, but I didn't want to use RFRA to rewrite Texas civil rights laws. The good news is it was possible to solve this problem with some careful drafting. Now, some of the RFRA coalition members argued that to completely move civil rights out from under RFRA might imply that a religious organization could not use religion as a criteria in hiring, an exemption that is included in our State labor code and also in Federal law, as you know.

So we worked to craft language to apply RFRA to the special circumstances of religious organizations, while continuing to leave the task of balancing religious and equal protection rights to the courts. The language we agreed to was unanimously adopted in a bipartisan amendment on the House floor and remained intact in the bill as it was signed by the governor.

The RFRA coalition in Texas endorsed the civil rights language and strongly supported the bill, from the Texas Freedom Network on the left, to the Liberty Legal Institute on the right. I must tell you, however, that one or two conservative groups in this very broad coalition objected and went so far as to ask Governor Bush to veto the bill. He chose not to do so. Those particular groups said they had hoped to use RFRA to do exactly what others had feared, to seek to override in court various civil rights laws that they had not been able to override legislatively.

Mr. Chairman, I urge you to adopt a strong law to reinforce what we have done in Texas. But in so doing, I would ask that you follow the wisdom of our legislature and our governor and include language to protect State civil rights laws. I offer whatever assistance I can be in this effort. This is too important a bill to be lost as a result of a fear of weakening civil rights, but likewise national and State civil rights policies are too important to be weakened as an unintended by-product of a bill with the noble purpose of strengthening religious rights.

Thank you again for your consideration, for your time and your hard work.

The CHAIRMAN. Well, thank you, Representative Hochburg.

[The prepared statement of Representative Hochburg follows:]

PREPARED STATEMENT OF REPRESENTATIVE SCOTT HOCHBURG

Mr. Chairman and Members of the Committee, I appreciate the opportunity to share some thoughts with you today.

Two weeks ago, Governor George W. Bush signed the Texas Religious Freedom Restoration Act (Texas RFRA) into law. I was privileged to work with Gov. Bush as the House author of this important bill. And I'm proud of the bill, because I believe it strengthens religious freedom in Texas without weakening other fundamental individual rights.

Long before I ever heard of the Smith case or the federal RFRA, I knew how hard it was for individuals to assert their first amendment religious freedoms against the bureaucracy. I've fought battles with our prison system over allowing Jewish prisoners to practice their faith. And I found I had to pass a law before I could be sure that judges would not repeat the incident that occurred in a Houston courtroom, where an Orthodox Jewish man was required to remove his skullcap, in direct conflict with his religious practice, before he could testify.

So when the American Jewish Committee and the Anti-Defamation League, on whose local boards I serve, put the state Religious Freedom Restoration Act on their legislative agendas, I was eager to become the lead sponsor. And I was certainly encouraged by the early and strong support of Gov. Bush, who announced just before the opening of our legislative session that Texas RFRA would be one of his legislative priorities as well.

Of course you know that no bill is a simple bill. Early on, I saw that the model RFRA language left open a possibility that the act could be used to get around Texas' civil rights laws. That concern was first raised. to me by the AJC, and then later by the ADL, the two groups that had initially brought me the legislation, and two groups with long histories of defending civil rights internationally.

Clearly, the intended purpose of this bill was not to weaken civil rights laws. When Gov. Bush talked about the need for RFRA, he cited examples, including the skullcap situation, where RFRA could be used to help protect a person's religious practice from government interference. None of the examples were about giving any individual the right to deny another person's equal protection rights.

The Texas Constitution is very clear about the primacy of civil rights. The third and fourth sections of our Bill of Rights guarantee equal protection under the law. The next three sections protect religion and guarantee freedom of worship. So, clearly, our framers saw these fundamental rights as being on the same plane.

I wanted to pass a strong RFRA in Texas, but not one that would rewrite Texas civil rights laws. So I added language clarifying that the act neither expanded nor reduced a person's civil rights under any other law. That language drew no objection initially. But later, some RFRA coalition members argued that to completely move civil rights out from under RFRA might imply that even a religious organization could not use religion as a criteria in hiring—an exemption that is included in our state labor code as well as in federal law.

So coalition members helped craft language to apply RFRA to the special circumstances of religious organizations, while continuing to leave the task of balancing religious and equal protection rights to the courts. That language was unanimously adopted in a bipartisan amendment on the House floor, and remained intact in the bill as it was signed by Gov. Bush.

The RFRA coalition in Texas endorsed the civil rights language and strongly supported the bill, from the Texas Freedom Network on the left to the Liberty Legal Institute on the right. I must tell you, however, that one or two conservative groups in this very broad coalition objected and went so far as to ask Gov. Bush to veto the bill. He chose not to do so. Those particular groups said that they had hoped to use RFRA to do exactly what others had feared—to seek to override, in court, various civil rights laws that they had not been able to override legislatively.

I urge you to adopt a strong law to reinforce what we have done in Texas. But in so doing, I would also ask that you follow the wisdom of our governor and our legislature and include language to protect state civil rights laws.

I offer whatever assistance I can be to help develop and refine the language of this bill so that those goals are met.

This is too important a bill to be lost as a result of a fear of weakening civil rights. But likewise, national and state civil rights policies are too important to be weakened as an unintended by-product of a bill with the noble purpose of strengthening religious rights.

Thank you again for your consideration, your time and your hard work.

The CHAIRMAN. Let me just go to the first four——

Senator LEAHY. Mr. Chairman, I was going to note that I have put a statement in the record and I am going to have to leave for an appropriations meeting. But I did especially want to hear Representative Hochburg's testimony because the carve-out is an area that I am most interested in, and how we do that with a balance between the laws in your State, my State, Texas and others, how we make sure we do not repeal them.

So thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator. Like everything else around here, it is the art of the doable, and I think it is very important that we advance religious freedom, regardless. I was bitterly disappointed in the Supreme Court's decision in *Boerne,* no question about it. I thought it was a lousy decision, but it is there and we want to find some way of advancing the cause of religious freedom. And I think all of your testimonies here today have been helpful in helping to understand that a little bit better.

Let me just take Mr. McFarland, Mr. Diament, Mr. Miranda and Mr. Mincberg, and let me ask you these questions. In the *City of Boerne* opinion, the Supreme Court stated with respect to the hearing record on the Religious Freedom Restoration Act that, "The history of persecution in this country detailed in the hearings on RFRA mentions no episodes occurring in the past 40 years."

Now, I would like to know how you react to that statement, and could you each take a few moments and give us a few specific examples of problems encountered by believers or of religious liberties put at risk without this legislation? We will start with you, Mr. McFarland, and go right across.

Mr. MCFARLAND. Well, Mr. Chairman, to be honest, I would not use the term "persecution" to be applied to this Nation at the close of this century. Certainly, there has been persecution in the past, but I think it demeans the term when Christians are being crucified and enslaved in the Sudan, when Jews are being arrested and imprisoned without due process in Iran, when Chinese Christian churches are being torched in Indonesia, to talk about persecution here in the United States.

However, that does not mean that there is nothing for the Congress to do to shore up meaningful protection against religious discrimination, and there are certainly instances of that. Of course, time only permits one or two examples, but an example would be the case in which we are representing a church in St. Petersburg, FL, called the Refuge. Its ministry in downtown St. Petersburg is to street kids, to HIV-positive individuals, to drug addicts, to the homeless.

And when St. Petersburg got their Major League Baseball franchise, the Devil Rays, they decided to, "clean up" the downtown CBD, and the first thing they wanted to do is get off the streets those unsightly characters that would hang around the Refuge. And so they decided, cleverly, they could not just boot them out, but they said, well, it looks like your parishioners are more like patients, and so you are now dubbed a social service agency. We don't allow social service agencies in this zone, so you are out of here. And so we are wading our way through years of litigation trying to allow a social service ministry by the church to continue. The creativity of zoning officials to manipulate decisions in this area against religious land use are amazing and apparently full of energy.

Another example. We just finished arguing in March before the Washington Supreme Court on behalf of Pastor Rich Hamlin, of Tacoma, WA. Pastor Hamlin was requested to come to the home of an individual who was greatly distraught. His 3-month-old child had just died. He counseled with him. He had a confidential confession, received confession from the individual.

And the prosecutor, rather than resorting to good police work, decided to depose, and indeed compel Reverend Hamlin to betray the confidences of the accused, Mr. Martin, in open court. He refused to do that and he was found in contempt of court. He was sentenced to jail in Pierce County, and we argued successfully before the Washington Court of Appeals and the State supreme court that this simply was a violation of not only the statutory priest-penitent privilege, but also the State constitution.

What was said, Mr. Chairman, is we couldn't invoke any Federal law. We had to use the very questionable hybrid doctrine that was left to us by Justice Scalia in the *Smith* case to have any kind of an argument to make under Federal law. That should not be, neither should the Refuge have to depend upon its political power in city hall simply to continue to minister to the least of these my brethren, as Jesus said.

So those are just two examples that I hope are responsive to your question.

The CHAIRMAN. Thank you.

Mr. Diament.

Mr. DIAMENT. Senator, two of the three zoning land use cases that I recited in my testimony are current. The struggle right now in New Rochelle, in Westchester County, NY, by an Orthodox synagogue to expand to a larger facility is ongoing. And the controversy in Miami Beach, where a group of Orthodox Jews are seeking to rent a hotel room to have weekly services—that has been denied and that is ongoing.

The incident that I mentioned in Cleveland, OH, where again an Orthodox community was seeking to expand and build a new synagogue facility—that just occurred last year. That is only with regard to the land use area. Other examples that come to mind which occurred, I would say, within the last 5 years include, in New Jersey, an Orthodox attorney was killed in a tragic Amtrak train derailment, and this was at the time when RFRA was on the books and had not yet been struck down.

But the example is illustrative, in that the coroner was insisting that an autopsy be performed, and from a traditional Jewish perspective autopsies are problematic, to say the least. And it was clear that the information that the coroner was seeking could have been obtained through an MRI and CAT scan procedures, which are non-invasive procedures.

Only by virtue of the fact that RFRA was then on the books, and the family had to go so far as to threaten a lawsuit on the basis of RFRA, did the coroner finally come around and say, OK, we will try to do with the MRI and the CAT scan, and things worked out. Today, with RFRA having been declared unconstitutional and nothing replaced it yet, that kind of issue would be clearly problematic.

Similarly, within the last 5 years, in South Carolina there was an issue with regard to the schools having banned wearing hats in school and an Orthodox Jewish boy wished to wear his skull cap to school, and that generated some considerable controversy. In Illinois, within the last few years the Illinois Athletic Association was requiring ball players to play bare-headed in the little league—the hats might fly off—as a safety matter or what have you. And that is a case that actually was litigated to the Seventh Circuit when

an Orthodox school wanted to play in the little league, and they said the skull caps could be attached with clips or bobby pins. And the Seventh Circuit said, OK, you have to explore that as an option. The fact that that kind of thing had to be litigated to a court of appeals in the United States is quite remarkable.

Those are just a few examples of recent cases, and there are many more, unfortunately.

The CHAIRMAN. Thank you.

Mr. Miranda.

Mr. MIRANDA. Senator, when you stepped out a minute ago, I used the word "persecution," but I did so advisedly, suggesting that an English Catholic who came to this country in 1649 might have identified some of the things which occur in this country today as persecution. It was the use of their word.

I, too, would be hesitant to use "persecution" in the way it has been traditionally used, given what is happening to Christians in the Sudan and in so many other places to people of all faiths. But it is nevertheless discrimination. I deal mostly with religious institutions rather than persons, natural persons, and in the case of universities and colleges that speak about their faith and that contribute to the pluralism of the country with the perspective of their faith, there have been laws, such as, for example, the public accommodations law, which here in the District of Columbia is called the human rights law.

But it is a public accommodations law which, on the basis of the fact that you provide public accommodations and are otherwise engaged in the stream of business, you have to provide certain equal benefits. And Catholic universities have been engaged in very expensive and painful litigation to basically preserve their right to run their universities and colleges as they see fit according to their religious convictions.

Perhaps, today, under the *Smith* hybrid situation, they might have argued freedom of expression to protect their rights. That wasn't in place when these litigations were pursued. But it shouldn't be the case that you have to argue freedom of expression; you should simply be able to argue the Free Exercise Clause in the First Amendment.

The CHAIRMAN. Thank you.

Mr. Mincberg.

Mr. MINCBERG. Mr. Chairman, I shared your dismay at what the Court said in *Boerne* about the record that all of us worked to build in the case of RFRA. But I do think that we have all to a certain extent take the Court's words to heart and have built an even more impressive record this time around with respect to difficulties with respect to religious liberty.

Land use is certainly the one that there has been an enormous amount of devotion of effort to, and I would note for the record that since the decision in *Boerne* there have been studies, one by the LDS Church and one, I think, by the Presbyterian Church, that have documented on a systematic basis difficulties that religious organizations and individuals have had with respect to land use. I think it is already in the Senate record, but if it is not, we would certainly love to put those studies there.

With respect to what Mr. Diament mentioned, his example with respect to religious conflict and autopsy is more than a hypothetical because prior to RFRA, there were, in fact, two cases, one involving an Orthodox Jew, one involving a Hmong Asian, who felt quite violated from a religious perspective from having to have autopsies conducted on family members who had died in tragic accidents, even though there were alternatives. And in both those cases, prior to RFRA, the courts quite unfortunately had to rule that those religious individuals had absolutely no alternative and had to undergo what was for them a very painful experience as a result of the lack of protection for religious liberty.

I would not agree with Mr. Miranda that the DC Human Rights Act constitutes an example of something that causes the same sorts of difficulties. But I think it is very clear that there are both on an individual basis and a more systematic basis plenty of examples that document the need for some protection, particularly in the land use area, with respect to religious free exercise.

The CHAIRMAN. Thank you. I have a lot of other questions, but I am going to submit them in writing. But I want to ask one question to all of you, and we will start with you, Mr. Hochburg, if we can. Let me just move to a consideration of civil rights protections in the context of a religious liberty measure.

Now, would each of you provide me with your thoughts on whether such a civil rights protection must be explicitly included in any religious liberties measure or not? And if you wish, you might reference here the specific bill I sponsored last year or the current House bill, if you are familiar with it. But I would like to have your thoughts on it. Some of you have said you are not for any carve-outs and I just want to know what you all think about it.

We will start with you, Mr. Hochburg and go across this way.

Mr. HOCHBURG. Thank you, Mr. Chairman. This was an important part of the measure in Texas because of, first of all, from a political standpoint the concerns by a number of members that RFRA would be used in Texas in a manner that we had testimony it would be used, which was directly to attack civil rights laws. As I mentioned to you, at least from the Texas standpoint our constitution is very clear about the importance of both sets of liberties, and the testimony that we had taken and the cases that you have just heard about, the sort of day-to-day, incidental, unintended impacts of various facially-neutral laws that go against religious practice.

We never turned our attention to dealing with one individual's ability to impose their religious beliefs over and above somebody else's civil rights. I would think, as Chris said before, that courts would find a compelling interest in the enforcement of civil rights laws. But I frankly could not offer that kind of assurance to many of the members of my legislature who believed very strongly that that provision was necessary. So I think that is why it was vital for us to put the provision in in Texas.

We were very careful to deal with the concerns of religious organizations. The first concern I heard was that under RFRA, with civil rights language in it, Baylor University could be required to hire a Jewish president. Well, that was never our intent. So we

went in and very carefully marked out and almost carved back in the needs of religious institutions to function in a religious manner. And, again, we patterned our language after labor code issues and after employment issues.

So I believe that it is necessary. I believe it has to be carefully crafted because it in itself could be overly broad if we are not careful. And given the testimony that I have heard and the concerns that I have heard raised, and given the Texas law that we have, to the extent that you are attempting to pass a law which reaches down to the States, I would hope that there would be a provision that would not override what we have already done.

The CHAIRMAN. Thank you.

Mr. Anders.

Mr. ANDERS. We believe that it is extremely important that there be an explicit provision put into the legislation as it goes forward. And our concern is that when RFRA passed in 1993, there was only one case on the books in this kind of cluster of cases that we are seeing in the housing area, and that was actually a plurality decision from the Minnesota Supreme Court.

And I think our belief at that time was that that was just an outlier case and that we wouldn't be seeing a lot of cases where people would be using their religion to defeat someone else's civil rights, and that if those kinds of cases were brought, the courts would find that the States had compelling interest in enforcing their civil rights laws, in that those are narrowly tailored.

But as it turns out, those courts since RFRA passed, using similar State laws, are split, and so we have the Ninth Circuit, the Massachusetts Supreme Court and a plurality of the Minnesota Supreme Court all really putting State civil rights laws at risk under similar State provisions, or with the Ninth Circuit with their hybrid theory.

Now, California and Alaska have—those supreme courts have gone the other way and are protecting State and local civil rights laws from these claims. But both of those States are in the Ninth Circuit, so in those places they can have access to a Federal claim where they don't have access to a State claim under their State law.

I guess we should add that it really is very rare to have any Federal defense to a State civil rights claim. It would be highly unusual, and this is what, without an explicit provision, we would end up with, with civil rights defendants in State courts defending against State claims having access to a new Federal defense.

And I guess just to kind of sum up, our belief is that this has been kind of a political box that has been created by the coalition's view that there should be no exceptions whatsoever for anything. And that political box is that you have to choose between protecting religious exercise and protecting State and local civil rights laws. We believe that the approach that Texas took or the approach that Congressman Nadler is suggesting in the House are ways to get out of that box, but we certainly would be happy to work with you and your staff on finding other ways to do that.

The CHAIRMAN. Thank you. I appreciate it.

Mr. Farris.

Mr. FARRIS. We talked with our friends who run an independent home school organization in Texas about their view of the legislation that Representative Hochburg has talked about because, frankly, the issues that are confrontational between religion and civil rights are about homosexuality and marital discrimination. That is it. I mean, any other civil rights application is so rare as to be simply inapplicable. Those are the issues where religion and civil rights come in conflict.

The reason that many of the conservatives supported the Texas compromise is there are no gay rights laws in Texas, is what they told us, and so there is no realistic threat there are going to be any gay rights laws in Texas. And the problem is where you have situations like the case I observed being litigated in the early 1970's in San Francisco, where a Presbyterian church fired a member of their staff, who was the organist of the church, who was a professing, practicing homosexual. And the church has a doctrinal stand against that. I think that churches and religious people should be able to stand to their moral code, and I would strongly oppose any carve-outs for any reason whatsoever. I think religion should be robust and free.

The CHAIRMAN. Mr. Mincberg.

Mr. MINCBERG. Mr. Chairman, as I said in my testimony, regardless of whether there is a specific provision, we believe that the courts wouldn't and shouldn't accept religious belief or practice as a basis for an RLPA-created exemption from civil rights laws.

In the California *Smith* case, which is the closest case to this where RFRA itself was considered, the California Supreme Court rejected a RFRA-type defense from the civil rights laws there. Mr. Anders is right that there have been cases that have gone the other way, but those cases have all been decided under State constitutions or the Federal Constitution, which RLPA wouldn't affect. With the Ninth Circuit, there is nothing that can be done other than what we hope will occur, which is a reconsideration of that decision by the full Ninth Circuit or, if necessary, by the Supreme Court.

Despite that, we do appreciate and understand the concerns raised by Mr. Anders and by Representative Hochburg. We hope that as the legislative process concerning RLPA continues that civil rights and other concerns can be resolved in a way that is satisfactory to all parties. And we look forward very much to working with you, Mr. Chairman, and others to help accomplish that objective.

The CHAIRMAN. Thank you.

Mr. Miranda.

Mr. MIRANDA. Mr. Chairman, I am familiar with the Texas legislation and I support it, provided it continues to hold the language which provides an exemption for religious institutions, which I believe—and perhaps the Representative would correct me if I am wrong—would treat and handle the situation that Mr. Farris mentioned of a parish or a church or a religious school that would have to hire someone who perhaps advocates a position contrary to their religious convictions. With that exception within the carve-out, I think that it makes sense.

In the Catholic education field, we often hear that if you decided to attend a school like Georgetown University, which is Catholic,

or Yeshiva, which is Jewish, you should expect certain things. You should expect to see, in the case of a Catholic university, crucifixes in the classrooms; in the case of Yeshiva, other demonstrations of Jewish faith.

I come to my position because I think when you enter the stream of commerce as an individual, you should expect certain things to occur. In this case, when you are putting out apartments for rent or you are otherwise engaging and taking the benefits of society, you have to accommodate certain things.

It is already the case that if those laws exist, whether in Texas or anywhere else, they have already undergone the scrutiny of the political process. And notwithstanding the Religious Liberty Protection Act, they would still have to show a compelling State interest. So I think that we are sufficiently protected, but I do recommend the Texas wording as it was carved out.

The CHAIRMAN. That is interesting to me; very good.

Mr. Diament.

Mr. DIAMENT. Yes, Senator. To some degree, I would concur in what my colleagues on the panel have said, but in a slightly different way. There are carve-outs and there are carve-outs, and one that doesn't consider religious institutions, as all the previous speakers have said, I think we would find totally unacceptable and inconsistent with what has gone before. Title VII of the Federal law makes special solicitude for religious institutions and the like, but it is not just religious institutions.

Even Mr. Nadler, who has offered an amendment to try to get at this issue in the House, has also contemplated tracking the exceptions in the Fair Housing Act which relate to landlords of small, two-family homes or three-family home kinds of contexts which is carved out in the Fair Housing Act, and small businesses where you have people working in a very small, close-knit environment.

But even that approach, while certainly more acceptable than no consideration for religious individuals or institutions, is also imperfect. First of all, Mr. Nadler's amendment, in particular—and I assume you will be studying it closely—doesn't perfectly track the privileges that title VII has afforded religious institutions.

But, second, there is a more fundamental philosophical problem. We are not creating religious liberty from whole cloth; we are not writing the First Amendment for the first time. The Free Exercise Clause is out there, and we have said that on a fundamental level our understanding of religious liberty in this country has taken a wrong turn. And we don't understand what the Supreme Court is doing, and it is time for Congress to try again to address this issue and to restore religious liberty to its rightful prominence.

And if that is the case, if religious liberty is indeed going to be our first freedom, then I think we have to really mean it and we have to really go as far as we can in that regard and say that on a fundamental level, it has a priority above and beyond many other societal interests, and stand firm on that ground.

Mr. MCFARLAND. Mr. Chairman, the Christian Legal Society will have to vigorously oppose any bill that has a carve-out in it, for several reasons. The first is it violates the principle that our fundamental right, indeed our first freedom, should not always categorically lose or yield to any genre of claimed government inter-

ests. The civil rights laws will do just fine in the balancing process of the compelling interest test. The idea that our first freedom should be categorically subordinated to any claim, whether it is civil rights, whether it would be the interests of wardens against inmates, is simply a fundamental violation of principle.

The second reason that we would oppose such a carve-out is the simple fact that one carve-out leads to another. As you are well aware, when the Reid amendment was proffered in 1993, the coalition heard that, boy, we just aren't going to be able to pass RFRA unless we yield to inmates, and let's just protect 98 percent of Americans and let the prisoners fend for themselves. And as a matter of principle, we opposed that. You did, and we are very grateful for your leadership in that regard. And you will remember we beat them, and then you wisely went back to the PLRA and passed that to deal with the prisoner litigation problem.

But now in contrast is the Texas bill, which we urged the governor to veto even though it would have protected by far most Texans because one carve-out leads to another. When Mr. Hochburg put in his civil rights carve-out, he was hardly in a position to object when Senator Sibley put in a carve-out for prison inmates and for land use claims. So all three are in that bill and they will infect other State legislatures. In our coalition's efforts to pass clean State RFRA's, they will now trumpet the fact that, well, George W. gave in for three different exemptions, so you certainly need to do that here in Utah or in Washington State. We simply can't afford that kind of compromise, and that is why all 80 organizations of this coalition urge a clean bill, no carve-outs, no exemptions.

The CHAIRMAN. This has really been interesting to me. You guys have all done a very good job, in my opinion, in expressing your particular points of view.

Mr. Farris, let me just ask you a question that I would like to ask you because I have watched your career and I admire you, as you know. It seems to me much of your concern is with the constitutional grounding of any religious liberty protection measure that is passed. Are you opposed to the use of the spending power or the Commerce Clause power, or both, and if you are, for what reason?

Mr. FARRIS. We are opposed to the Commerce Clause power being used to protect religious liberty because we believe that drawing a nexus between a burden on religious liberty and a necessity to show interstate commerce connection creates a jurisdiction over churches, over religious institutions, over religious individuals, over home schoolers on the basis that we spend money. And if that is the basis for gaining jurisdiction over us, today it is for a benign purpose, for a good purpose, a purpose that we agree with.

But, tomorrow, the legislation that will be introduced to regulate home schoolers at the Federal level will be used—the Commerce Clause will be used as the basis for that and we will have 15 years of litigation experience under RLPA where we have gone out and proved, yes, home schoolers are engaging in interstate commerce. And so our ability to object to that future regulatory bill will be undercut by our use of this bill. So we, on the basis of principle, refuse to engage in a wedding between faith and commerce. We believe that it is a dangerous wedding.

The CHAIRMAN. A principled position, but as I read the Court's jurisprudence, and focus particularly on the Supreme Court's 1995 decision, the *Lopez* decision, which, as you know, struck down the Gun–Free School Zones Act, it becomes clear that there are very real limits to what the Congress can do under the Commerce Clause. Now, doesn't this fact respond to your concern that a religious liberty protection passed under that section will extend too broadly into our private lives?

Mr. FARRIS. Mr. Chairman, if I could——

The CHAIRMAN. Well, let me just add this. And if so, and if your concern then is that a bill passed under the Commerce Clause will be under-inclusive, what is wrong with such a bill that is at the very least a good start at protecting religious liberty?

Mr. FARRIS. Two responses, quickly. One, under inclusion, if there was a next step planned and a method for helping the poor and the weak and the powerless and the individual, then I can see a gradual step. But nobody can tell me what the next step is, and so because it is more or less all we can do, I think it is an unprincipled move in that respect because it is under-inclusive of those who absolutely need the protection the most.

The second comment I would make about the Commerce Clause is I don't see how the use of the Commerce Clause, when you are only regulating State government, is going to survive a different branch of Commerce Clause jurisdiction, *New York* v. *United States* being the 1992 example of that, where they have said basically, if you are only regulating State government with the Commerce Clause, you can't do it. You have got to regulate all employers, and if you catch State government as an employer in the context of regulating all employers, you can do that. But if you are only regulating State government, the Commerce Clause cannot be used in that fashion.

The Supreme Court granted cert on May 17 of this year in a case called *Condon* v. *Reno,* a Fourth Circuit decision. If *Condon* is upheld, there is no way on this Earth that the Commerce Clause provision of RLPA will be held to be constitutional.

The CHAIRMAN. Well, this has been interesting to us. We would appreciate any additional written comments you would care to provide the committee. I would like to get this done this year because, like I say, I was bitterly disappointed with the Supreme Court's decision on our prior bill. And although it wasn't a total loss, it seemed like one to me. So we would like to resolve this.

And as you can see, this is not the same coalition that we had together on the Religious Freedom Restoration Act. We are going to have to work hard to try and resolve some of the differences. So we need all of your help to do that, so I would appreciate any additional information you would care to submit in writing. And, of course, I would be glad to chat with you anytime.

This is an important bill, this is an important effort, and we are going to need everybody working together to get this done because it is a crying shame that we still have a lot of religious persecution in this country. And I don't care what the Supreme Court says; it is persecution and it is not right. And to the extent that we resolve that, I think you folks will have played a significant, very precedential role. So I really appreciate it.

Well, with that, I think we will submit any further questions in writing. We will keep the record open until the end of the day for more questions from others who may not have been able to be here today and we hope that you will answer them as quickly as you can.

Thank you all for coming, and we will adjourn until further notice.

[Whereupon, at 12:44 p.m., the committee was adjourned.]

PROTECTING RELIGIOUS LIBERTY

THURSDAY, SEPTEMBER 9, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:52 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Ashcroft, Leahy, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Good morning. I apologize for the delay, but one of the most important things we do around here is vote, so we just had to do that.

Good morning, and welcome to today's hearing on religious liberty protection. We are pleased to have four impressive witnesses, whom I shall introduce in short order.

As we begin, I want to point that in recent months Congress has focused on how to combat societal ills the likes of which we have never before witnessed. I speak of school shootings and other types of juvenile violence, hate crimes that appear unprecedented in their unique types of viciousness, and other conduct which can only be described as soulless.

Frequently, Congress's well-intentioned responses have been met with protests that moral behavior cannot be legislated, and that these societal problems are ones for which a change in culture will provide the only antidote. My own response to that question is unequivocal. Even if problems require solutions that extend in part beyond Congress's jurisdiction, Congress must nonetheless do all it can to stem these forms of viciousness.

But before us today is a measure which truly does have the power to shape our country's moral conscience in a way that other legislation cannot match. As Lord Bacon recognized more than 350 years ago, religion is the "chief bond of human society."

Today's religious liberty measure would permit our citizenry to engage in an unburdened exercise of religious faith that might reinvigorate our citizens throughout the country's sense of humanity. And it is precisely such a sense of humanity that is the surest means to disarm a violent high school student or hate crime assailant from that vicious temperament that destroys instead of respecting life.

Today's hearing is the second one this year that I have held on this most important matter, which is a top priority for me during

this legislative session. I believe as much because this debate forces a fundamental reexamination of no less a question than why America, despite such problems as I have just referred to, is the most successful multi-faith country in all recorded history. The answer is to be found, I submit, in both components of the phrase "religious liberty."

Surely, it is because of our Constitution's zealous protection of liberty that so many religions have flourished and so many faiths have worshipped on our soil. But liberty without the type of virtue instilled by religion is a ship that is all sail and no rudder.

Our country has achieved its greatness because, with its respectful distance from our private lives, our Government has allowed all its citizens to answer for themselves and without interference those questions that are most fundamental to humankind. And it is in the way that religion informs our answers to these questions that we not only survive, but thrive as human beings, that we not only endure those difficulties that are at some point invariably affecting each of our lives, but are able to achieve a sense of character, to gain a recognition of the good, and to enrich our lives by contemplating that which is divine.

In the first hearing I held on religious liberty, we heard testimony from seven witnesses who brought a broad array of policy perspectives to the question of the need for a religious liberty protection measure. Today's witnesses will instead focus on the constitutionality of a religious protection measure.

Today's witnesses are all familiar with the bill that I sponsored last year, which has been largely duplicated by a bill passed by the House this summer. And so we shall use that bill as a basis for our discussion today on how we can best guarantee the constitutionality of any religious liberty protection measure we pass into law.

Indeed, this point bears repeating. It would be utterly futile to pass a measure that aggressively protects religious exercise, but is thereafter invalidated by the courts as unconstitutional. This is particularly true given the history that precedes us in this matter.

Here we stand in the fall of 1999 endeavoring to respond to an unfortunate decision of the Supreme Court handed down in the 1990 *Employment Division* v. *Smith* case. And we have gone through this exercise once before with the passage in 1993 of the Religious Freedom Restoration Act, only to watch the Supreme Court strike down that effort in 1997 with its decision in the *City of Boerne* case.

I therefore believe that the obligation is firmly upon the Senate to act not only expeditiously, but with painstaking clarity to ensure that the action we take rests on the most solid of constitutional footing, and to best guarantee that our work constitutes the last word in our legislative effort to protect religious liberties.

Of course, though I believe it would be preferable for the Court to return to its previous solicitude for religious liberty claims, until it does this Congress must do what it can to protect religious freedom in cooperation with the Court.

By doing our best, we help ensure that in our communities Bible study will not be zoned out of believers' own homes, that Americans' places of worship will not be zoned out of their neighbor-

hoods, and ultimately that the Framers' free exercise guarantee will demand that government have a compelling reason before it prohibits any religious practice.

The legislative framework I advocated last year, which forms the basis of the efforts of this Congress, will, among other things, establish the rule of strict scrutiny review for rules that burden religious practice in interstate commerce, in federally funded programs, and in land use matters.

Consequently, in areas within Congress's authority to legislate as a matter of Federal statutory right, it will be impermissible to substantially burden religious practice except for the most compelling of reasons. Such protection is necessary not because there is systematic oppression to certain sects now, as there has been in the earlier part of our history. No. Hostility to religious freedom encroaches subtly, extending its domain through the reaches of blind bureaucracies of the regulatory state.

Rule-bound, and often hypersensitive to the charge of assisting religion, government agencies all around us cling to the creed that, "rules are rules," and pay no heed to the damage that might be inflicted on the individual in the process.

Witness the recent decision by a Mississippi school district to prohibit a Jewish youth from openly wearing at school a Star of David his grandmother had given him. Though that decision was ultimately reversed following the commencement of litigation, it is unconscionable that any high school student must first become a litigant in order to worship freely even if some school board, as incredible as it sounds, prohibits the display of a Star of David on the ground that this sacred symbol of the Jewish faith resembles a gang insignia.

Such an extension of arbitrary rules into every corner of our lives is fundamentally incompatible with the infinite variety of religious experiences we enjoy and cultivate in America. The freedom to practice one's religion is, in my opinion, one of the most fundamental of rights. And the discussion we are having about protecting that right is one we need to have here in Congress and across the Nation.

So this morning we will hear from four legal scholars and practitioners at the top of their field, and I certainly, for one, will look forward to that discussion.

We will now turn to Senator Leahy, our Democratic leader.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you very much, Mr. Chairman. As I mentioned before, like so many of our members on both sides of the aisle, I am juggling three different committee meetings. But I did want to make a statement here, and I am pleased you are having this hearing. In fact, this is our second hearing on religious liberty and the Religious Liberty Protection Act, or RLPA.

As I remarked in our first hearing, we have to proceed cautiously. We have got to have thorough hearings and thoughtful treatment before we make another attempt to respond to the Supreme Court's decision in the *Smith* case. There, the Court struck down our last effort, the Religious Freedom Restoration Act, or

RFRA, in part because it said the legislative record was inadequate.

I have been critical of the Supreme Court's disrespectful treatment of the Congress as a sort of least-favored administrative agency. It is interesting for those who concern themselves about activist judges that the Supreme Court in this and in the recent patent cases and others is about as activist a Supreme Court as I have ever seen. And I would be sure, realizing that a majority of the Supreme Court is represented by the majority party in this body, that we will soon hear from others on the other side of the aisle about the activist U.S. Supreme Court.

Be that as it may, they do show their attitude toward the Congress, but that is the way it is. The Constitution is what they say it will be, and I think unless we want to be back here 3 years from now debating the very same issues, we should work diligently to develop the legislative record that the Court said was wanting.

So we will focus on some of the constitutional questions raised by RLPA. These are serious and difficult questions; they deserve our careful consideration. The bill makes very aggressive use of Congress's commerce and spending authority. It also relies on Congress's 14th Amendment enforcement power, which proved to be an ineffective basis for the Religious Freedom Restoration Act.

The Department of Justice has suggested there may be ways to amend the bill to make it less vulnerable to constitutional challenge, and I welcome any suggestion by the Department and by today's distinguished witnesses on how we can best ensure against another setback in the Supreme Court.

Aside from the constitutional concerns raised by the bill, there are a number of practical considerations that require our attention. Like the RFRA, the RLPA is sweeping in its scope. It is difficult to predict all the ways in which the bill could be asserted in litigation. I know the Chairman and I could put our heads together and try to think of all the different ways. I doubt if we could, or all our superb staff on both sides of the aisle could. But we can at least learn from the Court's brief experience with the RFRA while that statute was in effect.

For example, I will use my own State of Vermont. A father used RFRA to avoid having to pay child support. The father was a member of the Northeast Kingdom Community Church. This church requires members to pool income and forbids support for family members who live outside of a closed religious community. He was found in contempt of court for failure to comply with a court order to pay child support.

But the Vermont Supreme Court, based on its understanding of the legislation we had passed, dismissed the contempt citation. There was no way then for the State to enforce the order for support. In another case, in the same year, the RFRA was used to force a public school district to permit Sikh elementary school children to carry sharp ceremonial knives to school with them each day. That is *Cheema* v. *Thompson.*

The Children's Defense Fund, the National Network for Youth, the Child Welfare League of America, the American Academy of Pediatrics, and other children's organizations oppose RLPA. They point out child neglect, including medical neglect, is often justified

on religious grounds. We should be careful before we approve legislation that would undermine the ability of State and local communities to protect children.

We should also be careful not to undermine the efforts of States and localities to administer their civil rights laws. We heard some testimony about this issue at our last hearing, including testimony from Texas Representative Scott Hochberg about how his State was able to craft a statute that protected religious liberty without sacrificing civil rights.

I think a vast majority of Americans want to protect religious liberties, but they also want to protect civil rights. We want to make sure in a democracy we do the proper balancing act. We have received a letter signed, I believe, by 10 civil rights organizations expressing their concerns about the bill's impact on anti-discrimination protections, and urging the committee to hold a hearing on this issue.

So we need more hearings, we need to do more work. We have not begun to examine all the ways in which this legislation could cause unintended harm. The former Republican Governor of California, Pete Wilson, vetoed a State version of the bill last year, based in part on concerns that the bill would be used by criminal defendants to raise religious objections to drug laws, or to seek to justify domestic violence based on purported religious beliefs that wives have to be submissive to husbands. A Maryland bill failed in the Maryland General Assembly in 1998 and 1999 based on concerns that it would endanger the public's health, safety and welfare.

So, again, the bottom line is everybody on this committee cherishes religious liberty. We have different religions represented here. Each one of us wants our religious rights protected. We also want to protect our civil rights. I supported the RFRA in 1993. I think everybody, Mr. Chairman, who is on this committee who was a member at that time did, too. It has always been a bipartisan effort. But we want to make sure that we do it right so we don't pass legislation raising a lot of questions in the States and have it thrown out by the Supreme Court again.

So I thank you, Mr. Chairman, for having this hearing.

The CHAIRMAN. Thank you, Senator Leahy.

I understand that the ranking member of the Constitution Subcommittee would like to make a short statement, so we will allow that in this case.

Senator FEINGOLD. Thank you very much, Mr. Chairman, for holding this hearing. I was pleased to——

Senator LEAHY. Mr. Chairman, would the Senator from Wisconsin withhold just a moment?

Senator FEINGOLD. Sure.

Senator LEAHY. I know Senator Kennedy, who has been a leader in this effort for a long time, also has conflicts in his committee. And I would ask that his statement, and actually the statements of any Senators on either side of the aisle be included in the record.

The CHAIRMAN. Without objection, we will do that.

Senator LEAHY. Thank you.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR EDWARD KENNEDY

I commend Chairman Hatch for scheduling this additional hearing on the issue of protecting religious liberty.

Two years ago, the Supreme Court struck down the Religious Freedom Restoration Act, which had been passed by Congress with overwhelming bipartisan support. Since then, many of us have worked together to meet the court's objectives and prepare needed legislation to protect religious liberties. Our goal in such legislation is to reach an effective and constitutionally sound approach to protect the ability of people to freely exercise their religion. Today's hearing will provide the Committee with valuable insight on how best to achieve that goal.

I also hope that before the Committee takes final action on this legislation, we will hear from those—especially the NAACP Legal Defense Fund, the National Fair Housing Council, the National Women's Law Center and the Human Rights Campaign. Their concerns and desire to be heard by this Committee are expressed in a letter they sent this week to the Chairman and the Ranking Member.

In our efforts to strengthen the religious liberties of all Americans, we must be careful not to do so in ways that undermine existing laws to protect other important civil rights and civil liberties. Action by Congress to protect religious liberty should not be a setback for the nation's ongoing commitment to provide equal opportunity and equal justice for all our citizens.

I look forward to the testimony of today's witnesses, and to their insights on these important and difficult issues.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman, and I was pleased to be able to support the original legislation. I very much hope that I will be able to do it again, and I am grateful for the statements of both the Chairman and the Ranking Member about the great importance of caution in making sure that this bill would actually be constitutional.

As the Senate considers how to protect the right to practice religion free of government intrusion, it is essential that the Senate work carefully and thoroughly. The House considered and passed the Religious Liberty Protection Act in July, but it appears that the House bill may be potentially much more far-reaching and broader than originally contemplated, and could then have unintended consequences.

As we know, the Supreme Court has already created certain challenges to the Congress in enacting this law again. In addition, however, many advocates concerned with the rights of women and children and civil rights in general recently have changed their position on the House bill, and now many believe the bill is dangerously broad.

The ACLU, an organization that was one of the original supporters of a religious freedom law, has withdrawn from the coalition supporting this legislation. The ACLU fears that a new law to protect religious freedom could trump existing State and local civil rights laws. And the ACLU is now joined by other civil rights organizations, including the NAACP Legal Defense and Education Fund. As a strong defender of civil rights and of federalism, I would like to be sure before voting for a statute that is intended to protect religious freedom that it, of course, doesn't undermine other freedoms.

In addition, some have raised concerns about the effect of a religious freedom law on existing protections for children and women. Without necessarily endorsing that view, I want to point out that there is concern that the House bill in its current form could be

used as a tool to justify child and spousal abuse. Some say an attacker could argue that his religious beliefs allow him to physically abuse his children or wife. And all of us, of course, want to be sure that our efforts to protect religious freedom would not in any way undermine State criminal laws and the other important protections for women and children that I think we all support.

Mr. Chairman, our country's legacy of religious liberty is so fundamental that it existed even before it was memorialized in the Constitution. The Pilgrims braved crossing the Atlantic Ocean precisely because they were fleeing religious persecution and sought the free exercise of their religious beliefs.

But just as the Pilgrims established that religious freedom would be forever cherished in this Nation, Abraham Lincoln, Susan B. Anthony, Martin Luther King, Jr. and numerous other Americans fought to establish civil rights as a pillar of our great democracy.

So as you say, Mr. Chairman, these are very complicated legal issues and they deserve a searching examination before we act. I believe even more hearings are needed because the Senate has yet to have a full hearing of these important issues. The ACLU touched on the civil rights issue at the June hearing, and there may be hopefully some discussion of these issues today.

But of the numerous organizations and scholars the Senate has called to testify on religious freedom so far, the issue of the bill's effect on the rights of children and women has not yet been explored at all. The Senate has not yet heard from a single children's group or women's rights group. So, Mr. Chairman, I respectfully request that this committee hold additional hearings that will fully examine and address the effect of a religious freedom law on civil rights, children's rights and women's rights.

We have the committee process to ensure that the Senate carefully and thoroughly considers all the facts surrounding pending legislation, and I hope the committee process will be used in full here. It is especially important that it be used here when we have such a difficult and complex constitutional issue to work through.

This committee should fully execute its fact-finding function through hearings and then proceed to a markup of potential religious freedom legislation before a religious freedom bill goes to the full Senate. I understand that the House bill, Mr. Chairman, has been held at the desk rather than referred to the committee. I will strongly object to the Senate considering this bill before the committee does its job, and I hope, Mr. Chairman, that you will act to protect the committee's role in the legislative process within your party leadership.

Mr. Chairman, I do sincerely thank you for your hard work on the issue. I agree with you, in view of the importance of it, and I look forward to additional substantive hearings about the likely effect of this legislation. I thank you for your courtesy in letting me make an opening statement.

The CHAIRMAN. Thank you, Senator.

We will now turn to our witnesses. I am very pleased to welcome the four members of our panel. First, we will hear from Professor Douglas Laycock, who teaches at the University of Texas School of Law.

Please come and take your seats.

Professor Laycock has studied and lectured extensively on matters involving religion and constitutional law, and has produced an impressive body of scholarship on these subjects. He has represented religious and secular civil liberties organizations in various seminal cases that have reached the U.S. Supreme Court.

Second will be Professor Chai Feldblum, who is a professor at Georgetown University Law Center, as well as the founder and director of the Federal Legislative Clinic. She has testified in legislative hearings on RLPA and, prior to teaching, played an instrumental role in the negotiating and drafting of the Americans With Disabilities Act.

Third will be Professor Jay Bybee, who is currently teaching constitutional law and other subjects at the William S. Boyd School of Law at the University of Nevada, Las Vegas. His testimony should be particularly illuminating since Professor Bybee believed RFRA to be an unconstitutional exercise of the 14th Amendment by Congress and filed a brief to that effect before the U.S. Supreme Court in the *City of Boerne* case. However, Professor Bybee also holds the position that the current House-passed RLPA bill properly invokes the 14th Amendment and has cured the constitutional defects suffered by RFRA.

Fourth, we will hear from Mr. Gene Schaerr, a law partner at the firm of Sidley and Austin. Mr. Schaerr is the co-chair of his firm's Religious Institutions Practice Group and was involved in the litigation involving the constitutionality of the Religious Freedom Restoration Act.

So we will turn to you, Professor Laycock, and then go right across the table.

Senator FEINGOLD. Mr. Chairman, excuse me. I just would like to ask unanimous consent to have seven items of testimony and letters included in the record, if I could.

The CHAIRMAN. Without objection, we will put them in.

Senator FEINGOLD. Thank you very much.

[The information referred to appears in the appendix:]

The CHAIRMAN. Professor Laycock.

PANEL CONSISTING OF DOUGLAS LAYCOCK, ALICE McKEAN YOUNG REGENTS CHAIR IN LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TX; CHAI R. FELDBLUM, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC; JAY S. BYBEE, PROFESSOR OF LAW, UNIVERSITY OF NEVADA, LAS VEGAS, LAS VEGAS, NV; AND GENE C. SCHAERR, CO-CHAIR, RELIGIOUS INSTITUTIONS PRACTICE GROUP, SIDLEY AND AUSTIN, WASHINGTON, DC

STATEMENT OF DOUGLAS LAYCOCK

Mr. LAYCOCK. Thank you, Mr. Chairman. The challenge before the Congress is how to protect religious liberty consistent with the Supreme Court's understanding of its powers and the Supreme Court's limitation of the section 5 enforcement power in the *City of Boerne* case. And the bill that this committee considered in the last Congress and a similar version that the House has passed in this Congress does what it can, invoking different powers to reach

what those powers can reach, and let me briefly speak to each of them.

There is a Spending Clause power in Congress to attach conditions when it distributes money to State and local governments. There is a long history of using that power to protect individual liberty and civil rights, and the Spending Clause provisions in the earlier Senate bill and the current House bill are based on Title VI of the Civil Rights Act of 1964 which prohibits race discrimination, on the education amendments which prohibit sex discrimination in federally-assisted higher education, and similar provisions about disability and a whole range of individual rights matters.

The Federal interest here is simply that the intended beneficiaries of a Federal program should not be excluded from the program because of their religious practice and should not be forced to surrender their religious practice as a condition of participating and benefitting in the federally-assisted program, and that Federal funds should not be used unnecessarily to impose burdens on religious exercise. It doesn't reach lots of things, but it reaches those programs that are federally-assisted and it is a familiar use of Federal power.

The Commerce Clause provisions would protect religious liberty and require a compelling interest for burdens on religious liberty in cases where the burden or the removal of the burden would affect interstate or foreign commerce. And that formulation is designed to fit squarely into *United States* v. *Lopez* and the subsequent cases interpreting *United States* v. *Lopez,* in which the courts say if the claimant shows in each individual case an effect on commerce, an effect on a commercial transaction, then the courts will infer that in the aggregate all similar commercial transactions have a substantial effect on commerce.

And this has been applied in the religion context in a Supreme Court case in 1997, *Camps Newfound/Owatonna* v. *Town of Harrison.* The Court said that that particular church camp had a relatively insignificant effect on commerce, but it had some effect, and all church camps in the aggregate were presumed to have a substantial effect.

They took a case just this year, *United States* v. *Ray,* for arson of church property. That church property was used in an activity that affected interstate commerce. Some of it had bought in interstate commerce. It was a relatively de minimis effect, but in the aggregate all churches buying their property for religious uses could have a substantial effect on commerce, and that is the theory of the Commerce Clause sections.

The Enforcement Clause sections are in two parts. The critical part is about State land use regulations. This committee and the House Subcommittee on the Constitution have assembled a massive record of individualized decisionmaking that burdens churches in land use regulation, discrimination against churches as compared to places of secular assembly, of discrimination against minority churches as compared to large, mainstream churches.

The Jewish community is 2 percent of the national population, but they are 20 percent of the reported church land use cases. There is a clear pattern here of the sort the Supreme Court said is required in the *Boerne* case, and the land use provisions would

codify the Supreme Court's First Amendment rules as they apply to land use, largely tracking the standards in the Supreme Court cases themselves. They are justified both because they so closely track the Supreme Court standard, would make it more visible and easier to enforce, and because of the very strong record of a pattern of discrimination that has been developed in both Houses.

I believe that this bill is consistent with the federalism limitations that have been emphasized by the Court in recent cases. This is not a bill to regulate the States. This is a bill to deregulate the exercise of religion. The congressional policy is to burden religion as little as possible. That is implemented through RFRA against the Federal Government, through a variety of statutes affecting the private sector, title VII, the Church Arson Act, and others.

And this bill would implement it in areas where Congress could regulate, but States continue to regulate, by preempting State legislation that is inconsistent with the Federal policy. It is very parallel to other recent bills that preempt State regulation inconsistent with a Federal policy of deregulation. The Internet Tax Freedom Act, passed just last year, says no State may enact any of the following taxes, and lists the prohibited taxes, on transactions that Congress wanted to protect.

The Airline Deregulation Act has a preemption section very much like the substantive provisions in RFRA which identifies a category of activity that is not to be regulated, and says no State can enact any law that burdens these activities. It does not require the States to administer a Federal regulatory program. It does not impose any affirmative duty on any State officer. It does not conscript State officials. It says, States, choose your own policies, choose your own means. There is only one means that is off limits. You cannot substantially burden religious exercise without a compelling reason.

You can change the policy, you can have an exemption and enforce the policy with respect to everybody else. Often, these cases can be worked by negotiation so the policy is fully accommodated and the religious exercise is also accommodated. All those options are left to the States. But just as States cannot discriminate on the basis of race or refuse to make provisions for the handicapped, States cannot refuse to take account of the burdens their regulation imposes on religious liberty.

I believe that this is carefully crafted to fit within the recent Supreme Court cases. We can't guarantee the Supreme Court will change the rules at some point in the future, but I am fairly confident this is constitutional under existing Supreme Court case law.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Professor.

[The prepared statement of Mr. Laycock follows:]

PREPARED STATEMENT OF DOUGLAS LAYCOCK

Summary

Thank you for the opportunity to testify in support of new legislation to protect religious liberty. 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 regret the length and detail in my written statement, but many remarkable charges have been made against religious liberty legislation, and it takes longer to responsibly answer such charges than it takes to make them. I have provided a detailed, point-by-point response. But I will begin with a more readable summary.

In 1993, Congress by overwhelming margins passed the Religious Freedom Restoration Act to protect the religious liberty of the American people. The Supreme Court held that that Act exceeded Congress's power to enforce the Fourteenth Amendment. The need for such protection continues unabated, and is now better documented than in 1993.

Congress has power to protect religious liberty within the scope of Congress's general power to regulate. One way to exercise this power is the proposed Religious Liberty Protection Act, H.R. 1691, as passed by the House in this Congress. Of course the Senate may amend that bill, or even start over, but the House RLPA provides a specific model for concrete analysis. The House RLPA is based on the Spending Clause, the Commerce Clause, and in carefully targeted provisions, on the Enforcement Clause of the Fourteenth Amendment. In my judgment, the House bill is constitutional under existing law.

Section 2 of the House bill tracks the substantive language of RFRA, providing that government shall not substantially burden a person's religious exercise without compelling reasons, and applies that standard to cases within the spending power and the commerce power.

Spending Clause. 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); *see South Dakota* v. *Dole,* 483 U.S. 203 (1987). 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.

Commerce Clause. The Commerce Clause provision requires proof of a jurisdictional element in each case—that the burden on religious exercise, or removal of that burden, will affect interstate or foreign commerce. The courts assume that if such a jurisdictional element is proved in each case, the aggregate of all such effects in individual cases will be a substantial effect on commerce. *United States* v. *Lopez,* 514 U.S. 549, 556, 558 (1995) (expressly preserving the aggregation rule); *Camps Newfound/Owatanna* v. *Town of Harrison,* 520 U.S. 564 (1997) (holding that Commerce Clause protects a small church camp from discriminatory taxation); *United States* v. *Rea,* 169 F.3d 1111 (8th Cir. 1999) (affirming conviction for arson of church property used in an activity that affected commerce).

Enforcement Clause. Section 3(a) of the House bill shifts the burden of persuasion in cases where the claimant shows a prima facie violation of the Free Exercise Clause. 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.

The land use regulation sections of the House bill enforce the Free Exercise and Free Speech Clauses, as interpreted by the Supreme Court, in the land use context. These provisions are constitutional if Congress has "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). These provisions satisfy the standard as a matter of law, because they track the legal standards in Supreme Court opinions, codifying those standards for easier enforceability.

These provisions also satisfy the standard as a matter of fact, because this Committee and the House Subcommittee on the Constitution have compiled a massive record of individualized assessment of land use plans, of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.

Remedies. The remedies provisions of the House bill track RFRA. The bill is expressly subject to the Prison Litigation Reform Act.

Rules of Construction. The rules of construction in sections 5 and 6 of the House bill ensure that the bill is not misinterpreted to authorize new restrictions on religious liberty, and that the bill is neutral on all issues of government funding for religious activities. They confirm the broad discretion of state and local governments in deciding how to eliminate burdens on religious exercise, and they provide that proof that a burden on religious exercise affects commerce for purposes of the House

RLPA bill raises no inference about Congressional intent in enacting other legislation under the Commerce Clause.

RFRA Amendments. Section 7 of the House bill amends RFRA to delete all references to the states, leaving RFRA in effect only as to the United States.

Definitions. Section 8 of the House bill contains definitions. The definition of religious exercise incorporates the First Amendment, with two clarifications that have been the subject of litigation. A religious practice need not be compulsory or central to be protected, and the use or conversion of real property for religious exercise shall itself be considered religious exercise.

Establishment Clause. Broad-based protection for religious liberty does not violate the Establishment Clause. Regulatory exemptions for religious exercise are constitutional if they lift a government imposed burden on religious exercise. *Board of Education* v. *Grumet,* 512 U.S. 687, 705 (1994); *Corporation of the Presiding Bishop* v. *Amos,* 483 U.S. 327, 335–36 (1987).

Federalism. The House bill is consistent with constitutional protections for federalism. The bill does not attempt to override state sovereign immunity, so it is unaffected by the three sovereign immunity cases decided this past June. One of those cases, *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank,* 119 S.Ct. 2199 (1999), emphasized that prophylactic legislation under the Enforcement Clause must be a proportionate response to a pattern of constitutional violations. *Id.* at 2210. It was undisputed that there was no such pattern in *Florida Prepaid,* where the bill's supporters had identified only eight claims against states in a century. *Id.* at 2207. This holding is irrelevant to the massive record of probable constitutional violations in church land-use regulation.

The House bill does not violate *Printz* v. *United States,* 521 U.S. 898 (1997). It 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. *Printz* and other recent federalism cases necessarily continue to recognize Congressional power to make "compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz,* 521 U.S. at 925–26; *see New York* v. *United States,* 505 U.S. 144, 167 (1992); *Federal Energy Regulatory Commission* v. *Mississippi,* 456 U.S. 742, 765 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 291 (1981).

It follows that the House bill does not single the states out for regulation that is not generally applicable. It is not a bill to regulate the states; it is a bill to deregulate religion. Like other deregulation bills, it pre-empts state law that would impose regulation inconsistent with the federal policy of deregulation. The House bill is parallel to the Internet Tax Freedom Act, 112 Stat. 2681–719 (1998), and to the pre-emption section of the Airline Deregulation Act, 49 U.S.C. § 41713(b) (1994).

Civil Rights. A civil rights exception to the House bill would be both unnecessary and unwise. A civil rights exception is unnecessary, because most civil rights claims satisfy the compelling interest test. *Bob Jones University* v. *United States,* 461 U.S. 574, 604 (1983); *Board of Directors* v. *Rotary Club,* 481 U.S. 537, 549 (1987); *Roberts* v. *United States Jaycees,* 468 U.S. 609, 623–29 (1984). A civil rights exception is unwise, because it would eliminate religious liberty arguments in those few cases in which religious liberty should prevail over other civil rights claims, or should at least get a fair hearing. For example, a civil rights exception would mean that religious organization would have no RLPA defense when their statement of faith for officers or voting members is challenged as religious discrimination. *See Hsu* v. *Roslyn Union Free School District No. 3,* 85 F.3d 839 (2d Cir. 1996). The House bill provides for case by case balancing under the substantial burden and compelling interest tests; a civil rights exception would be a blunderbuss in which civil rights other than religious liberty always prevail without regard to context or the weight of competing interests.

Detailed Statement

Other witnesses have addressed the need for religious liberty legislation, 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. Under that standard, the protection for religious

liberty accorded to all citizens is in some ways less than the protection accorded to prisoners prior to *Employment Division* v. *Smith,* 494 U.S. 872 (1990). In *Samett* v. *Sullivan,* the district court recently said that 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 is generally applicable.

Witnesses and lobbyists who are opposed to further legislation on religious liberty are implicitly defending that standard. Make them defend it explicitly. Make them explain why Americans should have less legal protection for religious liberty than that formerly accorded prisoners, why government should be able to burden religious practices with no reason and no standard of justification, and why religion should be regulated to the same extent as everything else in our pervasively regulated society. 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.

The House 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 the House RLPA bill 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 bur-

dens 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 government's 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 "[]related 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 the House 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 Davis* v. *Monroe County Board of Education,* 119 S.Ct. 1661 (1999); *Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60 (1992); *Cannon* v. *University of Chicago,* 441 U.S. 677 (1978)), and of course the Equal Access Act (see *Board of Education* v. *Mergens,* 496 U.S. 226 (1990).

The rule of construction in § 5(c) provides that the House bill 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 the House 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

[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 winch the statute would be unconstitutional as applied.

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. Religious liberty legislation need not change the existing scope of protection in the private sector.

II. THE COMMERCE CLAUSE PROVISIONS

Section 2(a)(2) of the House bill 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 the House Subcommittee on the Constitution (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. The religious exercise of individuals will sometimes be protected by the bill, as when religious exercise requires the use of property of a kind that is bought and sold in commerce and used in substantial quantities for religious purposes, or when an individual is denied an occupational license or a driver's license because of a religious practice.

Substantial burdens on religious exercise prevent or deter or raise the price of religious exercise. On standard economic models, such burdens reduce the quantity of religious exercise and therefore the quantity of commerce dependent on 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 ac-

[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 11 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").

commodation 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).

United States v. *Lopez,* 514 U.S. 549 (1995), does not invalidate the House bill. *Lopez* 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. The House bill does have such a jurisdictional element. In every case under the commerce clause section of the House 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 interpretation of *Lopez,* both in the Supreme Court and the lower courts. *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. *Lopez* reaffirms 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 Supreme Court recently held, after *Lopez,* that a religious organization affects commerce, is subject to the aggregation rule, and is protected by the dormant commerce clause. "[A]lthough the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of non-profit entities as a class are unquestionably significant." *Camps Newfound/Owatonna* v. *Town of Harrison,* 520 U.S. 564 (1997), citing *Lopez* and *Wickard* v. *Filburn,* 317 U.S. 111, 127–28 (1942), for the aggregation rule. The dissents were based on the view that Maine could legitimately subsidize local charities, and on disagreements about the scope of the dormant commerce clause. No Justice suggested that religious or not-for-profit corporations do not affect commerce.[3]

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] neither 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.

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

[3] The Court has also applied regulatory statutes based on the Commerce clause to religiously affiliated not-for-profit organizations. *Tony & Susan Alamo Foundation* v. *Secretary of Labor,* 471 U.S. 290 (1985); *NLRB* v. *Yeshiva University,* 444 U.S. 672, 681 n. 11 (1980) (noting that "Congress appears to have agreed that non-profit institutions 'affect commerce' under modern economic conditions.").

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 to infer that the aggregate effect on commerce is substantial.

It would be a mistake to require proof of a substantial effect on commerce in every case. *Lopez* does not require that each individual case substantially effect commerce, and it is not workable to require each claimant to prove the substantial aggregate effect of all similar transactions as an element of his individual case. The constitutional solution is for the substantial aggregate effect to be inferred from the proof of a jurisdictional element that shows some effect on commerce in each case. The Gun Free Schools Zone Act was unconstitutional because it dispensed with that step; the prosecution asked the court to assume a substantial aggregate effect on commerce without proof of even one specific transaction that had been affected.

There will likely be cases in which the effect on commerce cannot be proved even in the individual case, 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 the House RLPA 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 the current House 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 House 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 of the House bill 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,* 521 U.S. 507 (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 evi-

dence 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 must have religious exception if it has a medical 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;[4] 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.*

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

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." The House 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 standard in the bill and the legal standard in the Supreme Court's interpretation of the Constitution. The point of this section is not to change the Supreme Court's standard, but to codify that standard in the land use context in a place and form that will be visible and understandable to regulators and trial judges.

Second, and independently, the *Boerne* test for constitutionality is satisfied factually. This Committee and the House Subcommittee on the Constitution in this Congress and the previous one have assembled a massive factual record on land use regulation of churches. I believe this factual record is ample to support § 3(b) as legislation to enforce the Fourteenth Amendment.

Some of this testimony is statistical—surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal. Some of it is sworn statements by individuals or representatives of organizations with wide experience in the field who said that the anecdotes are representative—that similar problems recur frequently. This evidence is cumulative and mutually reinforcing; it is greater than the sum of its parts. It demonstrates that land use regulation is a substantial burden on religious liberty.

A study conducted at Brigham Young University shows that small religious groups, including Jews, small Christian denominations, and nondenominational churches, are vastly overrepresented in reported church zoning cases.[5] Religious groups accounting for only 9 percent of the population account for 50 percent of the reported litigation involving location of churches, and 34 percent of the reported litigation involving accessory uses at existing churches. These small groups plus unaffiliated and nondenominational churches account for 69 percent of the reported location cases and 51 percent of the reported accessory use cases. Jews account for only 2 percent of the population, but 20 percent of the reported location cases and 17 percent of the reported accessory use cases.

These small faiths are forced to litigate far more often, which results from their having less ability to resolve their land use problems politically. Land use authorities are less sympathetic to their needs and react less favorably to their claims. Yet once they get to court, these small faiths win their cases at about the same rate as larger churches. It is not that small churches bring weak cases, but that small churches are more likely to be unlawfully denied land use permits.

The overrepresentation of small faiths is greater in location cases, where the issue is whether there can be a church on a particular site, than in accessory use cases, where the issue is whether one of the church's activities is permitted in an existing church. The explanation for this difference is that land use authorities often have a narrow idea of what a church is and does. Churches that confine their activities to the zoning board's understanding of a basic worship service are treated differently from churches that do anything more than that. This difference in treatment can be understood as discrimination based on the scope of the religious mission, or simply as a governmental restriction on the scope of religious missions. Accessory use cases bring more mainstream churches into court, but even there, the small faiths are significantly overrepresented.

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[5] *See The need for Federal Protection of Religious Freedom and Boerne* v. *Flores, II: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong. (forthcoming) [hereinafter *March 1998 House Hearing*] (statement of Von Keetch, Partner, Kirton & McConke, <http://www.house.gov/judiciary/222358.htm>) (reporting the study); see also *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong. (1998) [hereinafter *June 1998 House Hearing*] (forthcoming) (statement of Prof. W. Cole Durham, Brigham Young Univ., <http://www.house.gov/judiciary/durham.htm>) (summarizing the study); *Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 106th Cong. (1999) (forthcoming) [hereinafter *1999 House Hearing*] (statement of Von Keetch, <http://www.house.gov/judiciary/keet0512.htm>) (again reporting the study).

In considering the significance of discrimination against small faiths, keep in mind that there is no majority religion in the United States, and that adherents of different faiths are distributed quite unevenly across the nation. Every faith is a small faith somewhere and may be the subject of discrimination somewhere. Faiths that are small nationally are just small in more places.

A second piece of survey evidence was provided by the Presbyterian Church (U.S.A.), the largest Presbyterian body in the United States. Late in 1997, it surveyed its congregations about land use issues. This survey uncovers the unreported cases of a mainline denomination, and it greatly informs our understanding of the Brigham Young study of reported cases. These data are attached at the end of this statement.

The Presbyterians surveyed their 11,328 congregations and received 9,603 responses. Twenty-three percent of those responding, or 2,194 congregations, had needed a land use permit since January 1, 1992. All further percentages are percentages of these 2,194 congregations that needed a land use permit.

The Presbyterians are a well-connected, mainline denomination if anybody is. Even so, 10 percent of their congregations reported significant conflict with government or neighbors over the land use permit, and 8 percent reported that government imposed conditions that increased the cost of the project by more than 10 percent. Some congregations may have reported both significant conflict and a cost increase of more than 10 percent; at least 15 percent, and perhaps as many as 18 percent, reported one or the other.

These data mean that between 325 and 400 Presbyterian congregations, or sixty to eighty per year over the last five years, experienced significant difficulty in getting a land use permit. In twenty-eight of these cases, or more than five per year, the permit was refused or the project was abandoned because the church expected the permit to be refused. Yet the Brigham Young study reveals only five reported cases involving Presbyterian churches. We know that reported cases are the tip of the iceberg; this comparison gives some sense of how enormous is the iceberg and how tiny is the reported tip.

Another window on the volume of unreported cases comes from zoning attorney John Mauck, who estimates that 30 percent of the cases in the Chicago Board of Zoning Appeals involve churches.[6] Of course churches are no where near 30 percent of the land uses in the city, or even of the nonresidential land uses in the city. In Mr. Mauck's experience, churches are so overrepresented because they are more likely than secular uses to be subject to the requirement of a special use permit, and because authorities are less likely to grant the permit when it is required.

One percent of responding Presbyterian congregations reported that "a clear rule that applied only to churches forbade what we wanted to do." These rules would seem to be in clear prima facie violation of the Free Exercise Clause as interpreted in *Employment Division* v. *Smith.* Ten percent reported that "a clear rule that applied only to churches permitted what we wanted to do." This tends to confirm what no one disputes—that some communities accommodate the needs of churches. Land use discrimination against churches is widespread but not universal.

There is also evidence of discrimination in the zoning codes themselves. John Mauck described a survey of twenty-nine zoning codes from suburban Chicago. In twelve of these codes, there was no place where a church could locate as of right without a special use permit.[7] In ten more, churches could locate as of right only in residential neighborhoods, which is generally impractical. A right to locate a church in built-up residential neighborhoods is illusory for all but the tiniest congregations. Unless your congregation can meet in a single house, the only way to build a church in a residential area is to buy several adjacent lots and tear down the houses. But several adjacent lots never come on the market at the same time, and if they did, any church pursuing this strategy would likely provoke an angry reaction from the neighborhood. It is only in commercial zones that significant tracts of land are bought and sold with any frequency. To exclude new churches from commercial zones goes far to exclude them from the city.

Counting only the total exclusions and the confinement to residential zones, twenty-two of these twenty-nine suburbs effectively excluded churches except on special use permit, which means that zoning authorities hold a discretionary power to say yes or no. These individualized decisions are made under standards that are often

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[6] Conversation with John Mauck in Washington, D.C., on June 16, 1998. This estimate is based on regular review of the Board's posted docket sheet.

[7] *June 1998 House Hearing, supra* note 5 (Compilation of Zoning Provisions Affecting Churches in 29 Suburbs of Northern Cook County by John W. Mauck [as] of 7–10–98 Based Upon 1995 Published Standards, attached to statement of John Mauck, partner, Mauck, Bellande, Baker O'Connell, <http://www.house.gov/judiciary/mauck.pdf>.

vague, discretionary, or subjective. "The zoning board did not have to give a specific reason. They can say it is not in the general welfare, or they can say that you are taking property off the tax rolls."[8] Forest Hills, Tennessee denied a permit to the Mormons on the ground that a temple would not be "in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City;"[9] the judge concluded that the real reason for excluding all new churches was "essentially aesthetic, to maintain a 'suburban estate character' of the City." Churches can be excluded from residential zones because they generate too much traffic,[10] and from commercial zones because they don't generate enough traffic.[11] Every use of land adds traffic, so the real question is how much traffic is too much.[12] Except at the extremes, that question is as subjective as "aesthetics" or "the general welfare."

Typical proposed projects do not pose cases at the extremes. Every land use imposes some cost on its neighbors, so there is always *some* reason to say no. But of course, authorities do not always say no; most urban land is eventually developed. So there is a very wide range of proposed projects that impose some costs but not more than the city is willing to accept if it welcomes the use. And in this very broad range, subjective judgments about questions of degree can be consciously or unconsciously distorted by other factors, including how the neighbors or the authorities feel about the proposed use and the proposed occupant. In the free speech context, we would call this standardless licensing, and it would be unconstitutional.[13]

These individualized and often standardless systems of regulation are occasionally administered by officials who are hostile to religion, and are often administered in a community climate of suspicion or hostility toward religious intensity. In a 1993 Gallup Poll, 45 percent of Americans admitted to "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86 percent admitted to mostly or very unfavorable opinions of "members of religious cults or sects."[14] In 1989, 30 percent of Americans said they would not like to have "religious fundamentalists" as neighbors, and 62 percent said they would not like to have "members of minority religious sects or cults" as neighbors.[15] A desire not to have members of a minority sect as neighbors is closely related to a desire not to have the minority sect's church as a neighbor. Churches and believers often encounter such attitudes among persons

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[8] *See June 1998 House Hearing, supra* note 5 (oral testimony of John Mauck).

[9] *Keetch Statement, supra* note 5 (describing *Corporation of the Presiding Bishop* v. *Board of Comn'rs,* No. 95–1135 (Chancery Ct. Davidson County, Tenn., Jan. 27, 1998).

[10] *See Christian Gospel Church, Inc.* v. *City of San Francisco,* 896 F.2d 1221, 1224 (9th Cir. 1990) (zoning "protects the zones' inhabitants from problems of traffic, noise and litter"); *State* v. *Cameron,* 445 A.2d 75, 80 (N.J. Super. 1982) (collecting cases on traffic problems associated with churches), *rev'd on other grounds,* 498 A.2d 1217 (N.J. 1985). Permits denied for flimsy traffic reasons are sometimes granted on judicial review, especially in states where churches are a protected use, and sometimes even where they are not. See *Kali Bari Temple* v. *Board of Adjustment,* 638 A.2d 839 (N.J. Sup'r 1994) (ordering permit for occasional Hindu worship services, in home of clergyman (situated on 7.24 acres!), finding little traffic impact); *Grace Community Church* v. *Planning & Zoning Comm'n,* 615 A.2d 1092, 1103–04 (Conn. Sup'r 1992) (collecting cases); *Lucas Valley Homeowners Ass'n, Inc.* v. *County of Marin,* 284 Cal. Rptr. 427, 441–42 (Cal. App. 1991) (approving permit for synagogue, find that traffic impact would not be great enough to justify withholding permit).

[11] *See Cornerstone Bible Church* v. *City of Hastings,* 948 F.2d 464, 467 (8th Cir. 1991) (quoting city council resolution justifying exclusion of churches on ground that "no business or retail contribution or activity is generated"); *International Church of the Foursquare Gospel* v. *City of Chicago Heights,* 955 F. Supp. 878, 881 (N.D. Ill. 1996) (distinguishing church from permitted uses "which will encourage shopper traffic in the area during shopping hours"); *City of Chicago Heights* v. *Living Word Outreach Full Gospel Church and Ministries, Inc.,* 707 N.E.2d 53, 59 (Ill. App. 1999) ("The city submitted evidence that its zoning plan [excluding churches from commercial zones] was designed to invigorate the commercial corridor to regenerate declining revenues and create a strong tax base."), *appeal allowed,*—N.E.2d—(Ill., June 2, 1999).

[12] *Family Christian Fellowship* v. *Winnebago County,* 503 N.E.2d 367, 372 (Ill. App. 1986) ("While traffic is a factor in zoning cases, ordinarily it is not accorded much weight because traffic is a problem in most areas and is constantly getting worse.").

[13] *See, e.g., Forsyth County* v. *Nationalist Movement,* 505 U.S. 123, 131 (1992) ("If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." (citations omitted)); *City of Lakewood* v. *Plain Dealer Pub'g Co.,* 486 U.S. 750, 770 (1988) (refusing to presume good faith in administration of vague standards for permits affecting First Amendment rights); *Griffin* v. *City of Lovell,* 303 U.S. 444, 452 (1938) (stating that completely discretionary permit requirement "would restore the system of license and censorship in its baldest form"); *see also* Shelley Ross Saxer, *Zoning Away First Amendment Rights,* 53 Wash. U.J. Urb. & Contemp. L. 1, 63–76 (1998) (arguing that exclusion of churches is a prior restraint).

[14] George Gallup, Jr., *The Gallup Poll: Public Opinion 1993* at 75–76, 78 (1994).

[15] George Gallup Jr., *The Gallup Poll: Public Opinion 1989* at 63, 67 (1990).

in elite positions, and it is reasonable to infer that hostility shared by 45 percent or more of the public is well represented among government officials with discretionary powers. Land use regulators must respond to these attitudes whether or not they share them; land use regulation is intensely local and responsive to the views of community activists. The hostile attitudes are real, not theoretical, and individualized processes under vague standards give such attitudes ample opportunity for expression. If the neighbors or the authorities are not comfortable with a church, or with a particular church, these attitudes inevitably affect such discretionary judgments as the general welfare, the character of the neighborhood, aesthetics, and traffic. Each of these labels can readily be used to disguise a decision made for quite different reasons. And each is almost impossible to prove or disprove.

The suburban Chicago zoning code survey also showed that places of secular assembly are often not subject to the same rules as churches. The details vary, but uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded. Every one of the twenty-nine zoning codes surveyed treated at least one of these uses more favorably than churches; one treated twelve of these uses more favorably; the average was better treatment for about 5.5 such uses. Many business uses are also generally permitted as of right without special use permits.

All these data are mutually reinforcing. Religious biases are widespread in the population. Individualized decision making and discretionary standards provide ample opportunity for any biases to operate. Legislation is necessarily political and discretionary, so any biases that may exist can also operate when the city enacts its zoning code.

We see evidence of discrimination in the places that leave a published record. On the face of the zoning codes, churches are often treated worse than secular meeting places. In the reported cases, small and unfamiliar churches are forced to litigate far more often than large, mainstream churches. These differences are not random. These patterns appear because views about churches distort discretionary decisions under vague and subjective standards. Consciously or unconsciously, land use authorities discriminate against religion and among religions.

Finally, we see that there are many times more unreported church land use conflicts than reported cases. We have no systematic way to study this vast number of unreported conflicts. But the same attitudes, rules, and procedures are at work in the reported and unreported cases. The same individualized processes and discretionary standards apply. The same biases are present in the population. If these factors lead to discrimination against churches and among churches in the visible parts of the process—in the zoning codes and the reported cases—it is reasonable to infer that they also lead to discrimination against churches and among churches in the invisible part of the process, in the vast number of unreported, discretionary decisions on individual permit applications. If 15 to 18 percent of Presbyterian churches are having significant trouble with land use permits, then surely the figure is much higher for Jehovah's Witnesses, Pentecostals, Jews, and other groups more likely to be subject to prejudice.

The evidence based on anecdote and experience supports this inference. John Mauck's written testimony in the House described twenty-one cases of zoning permits denied for apparently illegitimate or discriminatory reasons. Most of these did not even involve new construction. Rather, the cities refused to permit church use of existing buildings—often buildings that had been used as secular places of assembly. Family Christian Center in Rockford, Illinois was not allowed to use a former school building as a church; this decision was ultimately set aside as arbitrary and capricious. *Family Christian Fellowship* v. *County of Winnebago,* 503 N.E.2d 367, 371–73 (Ill. App. 1986) Living Word Outreach Full Gospel Church and Ministries in Chicago Heights, Illinois was not allowed to use a Masonic Temple as a church.[16] Gethsemane Baptist in Northlake, Illinois was not allowed to use a VFW hall as a church. Faith Cathedral Church in Chicago was not allowed to use a funeral parlor, which had a chapel and plentiful parking. Vinyard Church in Chicago was not allowed to use a former theater as a church. Evanston Vinyard Church in Evanston, Illinois was not allowed to use an office building with an auditorium for a church. Cornerstone Community Church in Chicago Heights was not allowed to use a former department store as a church. A flower shop, a former branch bank, and a

[16] *See City of Chicago Heights* v. *Living Word Outreach Full Gospel Church and Ministries, Inc.,* 707 N.E.2d 53 (Ill. App. 1999), *appeal allowed,*—N.E.2d—(Ill., June 2, 1999); In this case, the trial judge had held that denial of the special use permit was arbitrary and capricious.

theater were each rezoned as single-parcel manufacturing zones to prevent their being used as a church. Mr. Mauck spends nearly all his time handling such cases in the Chicago area, and he gets calls about such cases from all over the country.

Marc Stern described five more examples in his House testimony.[17] A Long Island beach community excluded a synagogue because it would bring traffic on Friday nights, but an astute judge noted that it would bring no more traffic than the large secular parties that were already common in the community on Friday nights. Unfortunately, many judges are not so astute. Stern described an Ohio case where Jewish leaders wholly satisfied the land use officials, but their project was disapproved in a referendum. He described a case in Clifton, New Jersey, in which an abandoned building sat empty for years, but when a church tried to move in, officials suddenly decided they wanted an art theater at the site.

In Forest Hills, Tennessee, four large churches sat on or near the intersection of two major arterial roads—one Methodist, one Presbyterian, and two Churches of Christ.[18] One of these churches closed, and the Mormons bought the property. Yet the city refused permission to locate a Mormon temple on the site, citing its desire to have no more churches in the community, and a state trial judge upheld that exclusion. *Corporation of the Presiding Bishop* v. *Board of Commissioners,* No. 95–1135 (Chancery Ct. Davidson County, Tenn., Jan. 27, 1998).

The Forest Hills case also illustrates the tactic, visible only on the ground and not on the face of the codes, of authorizing churches to locate as of right in all those places, and only those places, where an existing church is already located. The code shows multiple sites for churches, but in fact all new churches are totally excluded. All three of the existing churches were properly zoned; the fourth church had been properly zoned before the Mormons bought it. Mr. Mauck described the use of this technique in Northwood, Illinois.

The case of Morning Star Christian Church in Rolling Hills Estates, California, illustrates this technique 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 consisted 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 locate 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 the House bill. It also violates the Constitution, but obviously the Constitution is not sufficiently explicit for the city council to understand.

Rabbi Chaim Rubin described how the City of Los Angeles refused to let fifty elderly Jews meet for prayer in a house in the Hancock Park neighborhood, an area of some six square miles, because Hancock Park had no place of worship and the City did not want to create a precedent for one.[19] That is, the City's express reason

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[17] *See March 1998 House Hearing, supra* note 5 (statement of Marc D. Stern, American Jewish Congress).

[18] *Keetch Statement, supra* note 5.

[19] *See The Need for Federal Protection of Religious Freedom and Boerne* v. *Flores, I, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong. (1998) (forthcoming) [hereinafter *February 1998 House Hearing*] (statement of Rabbi Chaim Ba-

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for excluding a place of worship was that it wanted to exclude places of worship! Yet the City permitted other places of assembly in Hancock Park, including schools, recreational uses, and embassy parties. Whittier Law School was just down the street from Rabbi Rubin's shul. Eighty-four thousand cars passed the building every day, and hundreds of law students came and went to both the day school and the night school. But we are supposed to believe that fifty Jews arriving on foot once a week would irrevocably change the neighborhood.

These conflicts over Jews meeting for prayer are common.[20] Orthodox Jews must live within walking distance of a synagogue or shul, because they cannot use motorized vehicles on the Sabbath. Thus, a community that excludes synagogues and shuls effectively excludes Orthodox Jews from living in the community at all. Attorney Bruce Shoulson testified in the House to a pattern of such exclusion in northern New Jersey, where he has handled more than thirty such cases.[21] Land use authorities often refuse permits for Orthodox synagogues because they do not have as many parking spaces as the city requires for the number of seats.[22] This is pretextual, because on the Sabbath when the seats are occupied, the people cannot arrive by car. Cheltenham Township, Pennsylvania, carried this to the lengths of insisting on the required parking spaces, refusing to count leased spaces off-site, and then, when synagogue offered to construct the parking spaces and let them sit empty, denying the permit on the ground that cars for that much parking would aggravate traffic problems. *Orthodox Minyan* v. *Cheltenham Township Zoning Hearing Board,* 552 A.2d 772, 773 (Pa. Com. 1989).

Sometimes, religious hostility is openly expressed in the zoning process. Most chillingly, Shoulson described a hearing in which "an objector turned to the people in the audience wearing skull caps and said 'Hitler should have killed more of you.'" In another New Jersey community, the board invited testimony on the effect that substantial Orthodox Jewish populations had had on other communities. Anti-Semitic views were openly expressed in the campaign for the Ohio referendum voting down the Jewish proposal that had received land use approval.[23] Residents created the Village of Airmont, New York, for the openly stated purpose of using the zoning power to exclude Orthodox Jews. *See LeBlanc-Sternberg* v. *Fletcher,* 67 F.3d 412, 418–19, 431 (2d Cir. 1995) (quoting statements such as "the only reason we formed this village is to keep those Jews from Williamsburg out of here").

In the *Family Christian Center* case, a neighbor said, outside the hearing process, "Let's keep these God damned Pentecostals out of here."[24] The judge in that case said from the bench that "We don't want twelve-story prayer towers in Rockford," apparently because there was a twelve-story prayer tower at Oral Roberts University in Oklahoma, and the Illinois church in the case had a loose affiliation with the University, although that was not in the record and the judge had to have learned it outside of court. The church had not applied to build anything, let alone a twelve-story tower; it wanted to use an existing school for worship purposes.

Churches often have an ethnic as well as a religious identity, and permits are denied in whole or in part for reasons of racial discrimination. John Mauck testified to a case in which the mayor told the city manager to deny the permit because "We don't want Spics in this town."[25] The city manager who disclosed this statement was fired. In the *Faith Cathedral* case, in which the city refused permission to use a funeral chapel as a church, the funeral chapel was one-hundred feet west of Western Avenue, and thus on the white side of the main racial boundary in south Chicago. Amazing Grace Church, another black church that located in the same neighborhood, was met first with racial slurs and thrown eggs, and then with charges of zoning violations. In the *Living Word Outreach* case, in which the city refused permission to use a Masonic temple as a church, the Masons had been white and

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ruch Rubin, Congregation Etz Chaim, Los Angeles, California, <http://www.house.gov/judiciary/22382.htm>).

[20] *See id.* (citing information from national conference of Agudath Israel); *LeBlanc-Sternberg* v. *Fletcher,* 67 F.3d 412 (2d Cir. 1995) (finding violation of fair housing act by village incorporated for purpose of excluding Orthodox Jews); *Grosz* v. *City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983) (upholding exclusion of prayer services from rabbi's residence); *Orthodox Minyan* v. *Cheltenham Township Zoning Hearing Board,* 552 A.2d 772 (Pa. Com. 1989) (reversing denial of special use permit for conversion of residence to Orthodox synagogue).

[21] *See Religious Liberty Protection Act of 1998, Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong. (forthcoming) [hereinafter cited as *July 1998 House Hearing*) (statement of Bruce D. Shoulson. attorney, <http://www.house.gov/judiciary/222494.htm>).

[22] *See id.; Stern Statement, supra* note 17.

[23] *Stern Statement, supra* note 17.

[24] *Mauck Statement, supra* note 7, at 1.

[25] *June 1998 House Hearing, supra* note 7 (oral testimony of John Mauck).

the church members were black. Mauck also had reason to suspect racial motivations in several other cases involving black and Korean churches.[26]

Wayne, New Jersey denied a permit to a black church after one official opposed the permit on the ground that the city would soon look like Patterson, a predominantly African-American city nearby.[27] Clifton, New Jersey denied permits for a black mosque four times, offering parking concerns as the reason, then approved a white church nearby that raised the very same parking issues, In the other Clifton case, in which officials suddenly decided they wanted an art theater, the church that sought to move in had a multi-racial congregation.

Discrimination is difficult to prove in any individual case.[28] Supreme Court precedent is skeptical of attempts to prove bad motive, even when Supreme Court doctrine requires the attempt.[29] Sometimes the Court says that "otherwise valid" laws—including laws that are valid because they further a "legitimate purpose" unrelated to suppression of a constitutional right—are valid even if enacted with actual motive to violate that constitutional right.[30] Even if some unsophisticated citizen or commissioner blurts out an unambiguously bigoted motive, courts are often reluctant to attribute the collective decision to that motive.[31] Trial judges are reluctant to find that local officials acted for improper motives, and often fail to so find even in egregious cases in which appellate courts find clear error.[32]

Even the bare fact of unequal treatment, without regard to motive, can be difficult to litigate in land use cases, and the same judicial deference sometimes appears even in easy cases.[33] No two pieces of land are identical, and in the context of deference to local authority, different zoning outcomes can be attributed to minor dif-

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[26] *Mauck Statement, supra* note 7, at 2, 3, 5 (describing Ira Iglesia de la Biblia Abierta, Christ Center, Pipe Stream Morning Star Retreat, and Korean Central Covenant Church); *Mauck Oral Testimony, supra* note 25 (providing further details about Christ Center).

[27] *Stern Statement, supra* note 17. Mr. Stern identified the city in each of these cases in a conversation on June 22, 1999.

[28] *See Keetch Statement, supra* note 5; *Stern Statement, supra* note 17; *Mauck Statement, supra* note 7.

[29] *See Village of Arlington Heights* v. *Metropolitan Community Dev. Corp.,* 429 U.S. 252, 268 n. 17 (1977) (holding that proof of equal protection violation requires proof of actual governmental motive, but noting that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of the other branches of governmental).

[30] *See City of Renton* v. *Playtime Theatres, Inc.,* 475 U.S. 41, 47–48 (1986) (holding that zoning ordinance confining adult theaters to less than five percent of city, in which no land was for sale or lease, furthered purpose unrelated to suppression of communication, and refusing to inquire into city's actual motive); *Palmer* v. *Thompson,* 403 U.S. 217, 224–26 (1971) (refusing to inquire into reasons why Jackson, Mississippi, closed its public swimming pools in wake of order to desegregate them); *United States* v. *O'Brien,* 391 U.S. 367, 383–86 (1967) (holding that law against burning draft cards furthered purpose unrelated to suppression of communication, and refusing to inquire into actual Congressional purpose).

[31] *See Scott-Harris* v. *City of Fall River,* 134 F.3d 427, 436–38 (1st Cir. 1997) (collecting conflicting cases), *rev'd in part, on other grounds, sub nom. Bogan* v. *Scott-Harris,* 118 S.Ct. 966 (1998); *compare Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 269 (1977) (noting that opponents of low income housing who spoke at public hearings "might have been motivated by opposition to minority groups," but affirming district court's refusal to infer that officials shared that motive); *with LeBlanc-Sternberg* v. *Fletcher,* 67 F.3d 412, 419 (2d Cir. 1995) (inferring official motive to exclude Orthodox Jews, in part from public statements to that effect by members of private organization that led campaign to create new village and that supplied the new village's public officials); *compare Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 540–42 (1993) (Kennedy, J., joined by Stevens, J.) (relying on clear statements of hostility to plaintiff church by citizens, public employees, and members of city council); *with id.* at 558–59 (Scalia, J., joined by Rehnquist, C.J.) (refusing to join that part of Kennedy's opinion, on ground that motive is irrelevant); *cf United States* v. *O'Brien,* 391 U.S. 367, 385–86 (1967) (after holding motive irrelevant, considering motive in dictum and refusing to infer Congressional motive from express statements of the only Senator and only two Representatives to speak to the issue, or from more subtle statements in committee reports).

[32] *See Hunter* v. *Underwood,* 471 U.S. 222, 224–31 (1985) (unanimously finding that openly stated motive to disenfranchise blacks accounted for voting eligibility rules in Alabama Constitution of 1901, affirming court of appeals, which had reversed district court which had refused to find racial motive); *LeBlanc-Sternberg* v. *Fletcher,* 67 F.3d 412, 417–24, 429–31 (2d Cir. 1995) (finding egregious evidence of motive to exclude Orthodox Jews, and reinstating jury verdict that district judge had set aside).

[33] *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993) (unanimously concluding that ordinances burdening religion were neither neutral nor generally applicable, and "fall well below the minimum standard necessary to protect First Amendment rights," although district judge and court of appeals had unanimously upheld ordinances and no circuit judge requested vote on rehearing en banc); *id.* at 558 (Scalia, J., concurring) ("I agree with most of the invalidating factors set forth in part II of the Court's opinion"); *id.* at 559 (Souter, J., concurring) (ordinances were "aimed at suppressing religious belief or practice"); *id.* at 577 (Blackmun, J., concurring) (ordinances were "explicitly directed at petitioners' religious practice").

ferences in legitimate zoning factors instead of the obvious but illegitimate difference in race or religion. Subjective criteria aggravate this problem, enabling officials to describe almost any zoning result in terms of a reason that is neutral and legitimate on its face.

In a pending Michigan case, the township denied a permit to a black church, despite the contrary recommendation of the township's independent land-use consultant, and even though the township had approved five white churches that had drawn similar objections from neighbors. *Fountain Church of God* v. *Charter Township,* 40 F.Supp.2d 899, 901 (E.D. Mich. 1999). The township's stated reason for refusing the black church was that its proposed use was not "harmonious and in accordance with the objectives and regulations of the ordinance." The court held that this was a legitimate nondiscriminatory reason, and that the church lost unless it hired "an expert to compare *in detail* the sites of the five churches that were granted a conditional use permit with the subject property and the proposed use." *Id.* (emphasis in original). The township carried its burden with a vague slogan; the church was required to offer a detailed expert study. The township opposed the decision to allow the church time to hire such an expert. The trial judge seemed to think he was going to great lengths to be fair.

I have summarized the House hearing record at some length, because the Senate must make its own judgment, but it need not invite all the same witnesses to return and tell their stories. The combined House and Senate 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.*[34]

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 to 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 also report what I know about one more case, which has not yet entered the public record. It is an important example, not only because it again illustrates the dangers of discretionary land use regulation, but also because it illustrates how religious liberty legislation 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 uses than it is. The city simply says that churches in the industrial zone are inconsistent with its plan. The mayor testified to the Texas House Committee on State Affairs that after RFRA was held unconstitutional, the church withdrew its challenge to the city's zoning and decided to await enactment of a Texas RFRA. Both the mayor and the church expected a state or federal RFRA to make the difference.

The other essential fact about this case is that the church is the Metropolitan Community 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

[34] *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).

beginning, this is not a bill about left or right. Every American with any beliefs about religion needs religious liberty legislation.

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, and states and their state-wide instrumentalities are immune from any claim for damages or other retrospective relief. The House bill does *not* exercise Congressional power to override state sovereign immunity in legislation to enforce the Fourteenth Amendment; an override of immunity requires a clear statement of intent to override immunity, and the House bill has no such clear statement.

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 percent. 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, had not yet had much opportunity to work when this first-year drop was recorded.

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.[35]

[35] *Benjamin* v. *Jacobson,* 172 F.3d 144 (2d Cir. 1999), *cert. filed* (No. 98–2042); *Tyler* v. *Murphy,* 135 F.3d 594 (8th Cir. 1998); *Hadix* v. *Johnson,* 133 F.3d 940 (6th Cir. 1998), *cert. denied,*

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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, 2,200 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 percent of the inmate caseload, and only .23 percent (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), 521 U.S. 5047 (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. *Harcleroad,* 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,* 521 U.S. 1114 (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 forbad him to take communion.

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

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) provides that nothing in the bill creates any basis for regulating or suing any religious organization not acting under color of law. These two subsections serve the bill's central purpose of protecting religious liberty, and avoid any unintended consequence of reducing religious liberty.

Sections 5(c) and 5(d) keep the House 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 provi-

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118 S.Ct. 2368 (1998); *Dougan* v. *Singletary,* 129 F.3d 1424 (11th Cir. 1997), *cert. denied,* 118 S.Ct. 2375 (1998); *Inmates of Suffolk County Jail* v. *Rouse,* 129 F.3d 649, 657–58 (1st Cir. 1997), *cert. denied,* 118 S.Ct. 2366 (1998); *Gavin* v. *Branstad,* 122 F.3d 1081 (8th Cir. 1997), *cert. denied,* 118 S.Ct. 2374 (1998); *Plyler* v. *Moore,* 100 F.3d 365 (4th Cir. 1996), *cert. denied,* 117 S.Ct. 2460 (1997); *but cf. Taylor* v. *United States,* 143 F.3d 1178 (9th Cir.), *vacated and rehearing en banc granted,* 158 F.3d 1059 (9th Cir. 1998).

sions 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 the House bill, or that removal of such a burden would affect commerce for purposes of the House 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 the House 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 "exercise of religion," the phrase that is used in the First Amendment, and adding 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."

This definition, with the clarifications, 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.[36]

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.[37]

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[36] *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. 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).

[37] *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.*

Continued

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 Courtin *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. RLPA properly disavows any such interpretation.

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

Section 8(3) defines "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 protections not expressly 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 geographical 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).

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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").

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. RLPA would not violate the Establishment Clause.

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

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

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

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

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

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

B. Federalism

RLPA is consistent with general principles of federalism that sometimes limit the powers granted to Congress, including the Supreme Court's three decisions last June. Those decisions have drawn a lot of attention, but really have very little to do with this case.

All three are cases about Congress's power to authorize suits against states. These cases, like all past cases, distinguishes "state immunity from suit" from "the entirely different question of whether substantive provisions of Commerce Clause legislation applied to the States." *College Savings Bank* v. *Florida Prepaid Postsecondary Edu-*

cation Expense Board, 119 S.Ct. 2219, 2228 n.3 (1999). "The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. * * * The State of Maine has not questioned Congress' power to prescribe substantive rules of federal law to which it must comply." *Alden* v. *Maine,* 119 S.Ct. 2240, 2266, 2269 (1999).

RLPA is on the permitted side of this distinction. The House Bill does not authorize suits against states, and the Coalition for the Free Exercise of Religion has abandoned any desire to have Congress override state immunity even in those sections where Congress has power to do so. Congress cannot override state immunity by accident; only an unmistakably clear statement will suffice. Authorizing suits against "governments" is not a sufficiently clear statement to ever be read as authorizing suits against states, as the RFRA cases repeatedly held.[38] The means of enforcing federal law without suing states are summarized in *Alden* v. *Maine,* 119 S.Ct. at 2266–68, and those are the means RLPA will use—suits against state officers and local governments, but not against states.

One of those cases also addressed the scope of Congress's substantive authority to enforce the Fourteenth Amendment, emphasizing *Boerne's* requirement that prophylactic enforcement legislation must be a proportionate response to a pattern of constitutional violations. *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank,* 119 S.Ct. 2199, 2210 (1999). It was undisputed that there was no such pattern in *Florida Prepaid,* where the bill's supporters had identified only eight claims against states in a century, and where the bill's sponsors had stated on the record "we do not have any evidence of massive or widespread violation of patent laws by the States either with or without this State immunity." *Id.* at 2207. If there is anything new here, it is only the holding that the requirement of a pattern applies to statutes overriding sovereign immunity.

The sponsors of religious liberty legislation have been well aware of *Boerne's* pattern requirement, and they have assembled a record of widespread probable violations of constitutional rights in land use cases. They have produced evidence of some four hundred reported cases, evidence that there are many times that number of unreported cases—sixty to eighty cases per year in a single mainline denomination—statistical evidence of substantial discrimination among religions in these cases, and evidence of widespread discrimination on the face of suburban zoning codes. The holding that eight cases per century is not enough is irrelevant to discrimination on the face of the law and scores of cases every year is enough.

RLPA is also consistent with other recent federalism cases, including *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

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[38] *Mack* v. *O'Leary,* 80 F.3d 1175, 1177 (7th Cir. 1996); *Commack Self-Service Kosher Meats Inc.* v. *New York,* 954 F.Supp. 65, 66–70 (E.D.N.Y. 1997); *Gilmore-Bey* v. *Coughlin,* 929 F.Supp. 146, 149–50 (S.D.N.Y. 1996); *Weir* v. *Nix,* 890 F.Supp. 769, 785 (S.D. Iowa 1995); *Woods* v. *Evatt,* 876 F.Supp. 756, 770 n.16 (D.S.C. 1994); *Rust* v. *Clarke,* 851 F.Supp. 377, 381 (D. Neb. 1994).

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 distinguished and left 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 condition continued state involvement in a pre-emptible area on the consideration of federal proposals." *Id.* at 765.

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

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

Some provisions of the statutes in *Hodel* and *FERC* were directed expressly to the states and, in a sense, applied only to the states. Only the state agency could implement or consider the federal policy. But this did not render the statutes invalid for singling out the states for regulation under Article I. *Compare Condon* v. *Reno,* 155 F.3d 453 (4th Cir. 1998), *cert. granted,* 119 S.Ct. 1753 (1999). In *Hodel* and *FERC* (and in RLPA if it is enacted) Congress was pursuing a policy for the appropriate regulation of private conduct, and it required the states to conform to that policy of to vacate the field. This is the classic work of federal pre-emption. Pre-emption of regulation necessarily applies only to state and local governments because private entities have no power to regulate.

If RLPA seems in any way odd, it is because Congress does not want to impose regulatory burdens of its own in place of the pre-empted state regulation. The Congressional policy is that religious exercise not be substantially burdened without compelling reason. This is not a bill to regulate the states, but a bill to deregulate religion.

Pre-emption in support of deregulation is not unique either, and Congress has equal powers of pre-emption whether its own preferred policy is regulation or deregulation. Two recent examples are laws prohibiting state or local taxes on features of electronic commerce that Congress meant to protect. The Internet Tax Freedom Act, 112 Stat. 2681–719 (1998) (reprinted as note to 47 U.S.C.A § 151 (Supp. 1999), provides that "No State or political subdivision thereof shall impose any of the following taxes." It then lists and defines the prohibited taxes, and sets out certain exceptions. It does not impose a federal tax in lieu of the pre-empted state and local taxes; it simply pre-empts state taxes on a set of transactions in interstate commerce. There is a similar provision in § 602 of the Telecommunications Act, 110 Stat. 144 (printed as note to 47 U.S.C.A. § 152 (Supp. 1999), pre-empting local taxes (but not state taxes) on "direct-to-home satellite service."

As Professor Thomas Berg points out in an excellent article on a range of constitutional objections to RFRA and RLPA,[39] the statutes deregulating the transportation industries broadly pre-empted state regulation and substituted only minimal federal

[39] Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation,* 20 UALR L.J. 715, 761–62 (1998).

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 subpart.

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 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.

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 only its 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. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (1994). 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.

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 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 offered 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 has said 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.[40] The least restrictive means test never had the terrible consequences

[40] *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 legiti-

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 horribles 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 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.

A civil rights exception is also unwise, because it would eliminate any RLPA defense in those few cases in which the religious practice should clearly be protected or at least receive an individualized hearing. The clearest example 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

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mate 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.

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 Act does not apply to the college cases. RLPA should be available; a civil rights amendment would make it unavailable.

RLPA is needed in other cases where civil rights laws are overextended or simple religious speech is mischaracterized as religious harassment vulnerable to a civil rights claim. A Pennsylvania court has held that an employer engaged in illegal religious discrimination when he printed religious articles in the company newsletter and printed Bible verses on company checks. *Brown Transport Corp.* v. *Commonwealth,* 578 A.2d 555, 562 (Pa. Commw. Ct. 1990). In Colorado, the civil rights law protects smoking, gambling, collecting pornography, and any other "lawful activity off the premises of the employer during nonworking hours." Colo. Rev. Stat. § 24–34–402.5 (1) (Supp. 1998). It is simply not possible to say, across the board, that any religious liberty claim is subordinate to any other claim that can be brought under a civil rights statute.

A civil rights exception would also invite challenges to familiar 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 by these exceptions.

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. Religious liberty legislation 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 disagreements 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 or RLPA. 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 reli-

> gious 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. The dispute over a civil rights carve out 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 Community Church. Let me describe another case, in which I have just filed a friend of the court brief supporting the religious liberty of a lesbian mother.

In re 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 Community 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 Community 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 RLPA can reach that case, because no commercial transactions depends on the outcome. But the Constitution might reach it, and state law certainly could reach it. The recently enacted Texas Religious Freedom Restoration Act strengthens the mother's case, and a federal bill could reach other cases in other states that are within reach of Congressional power. The point is not that federal religious liberty legislation 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

Religious liberty legislation 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. Broad (but not universal) protection for religious liberty is clearly Congressional power under existing law, and I urge its enactment.

The CHAIRMAN. Professor Feldblum.

STATEMENT OF CHAI R. FELDBLUM

Ms. FELDBLUM. Thank you, Mr. Chairman and members of the committee. Good morning. My name is Chai Feldblum and I am professor of law at Georgetown University Law Center here in DC.

I have been asked, like my co-panelists, to speak to the question of whether you have the constitutional authority to enact the Religious Liberty Protection Act as drafted and passed by the House this past July. But as I prepared this testimony and I read the statements that have been made in the House, it seems to me that the relevant question for you is not really is RLPA within your constitutional power to enact. You will always find many individuals, including myself, who will tell you that a case can be made for RLPA's constitutionality, and you will find many individuals who will tell you you absolutely do not have the power to enact this law. You don't have any here today, but they definitely testified on the House side. So while that type of testimony is certainly illuminating, I am not sure how instructive it is for you to achieve the goals that a number of you noted in the opening statements.

So the more relevant question, it seems to me, and certainly the more judicious one, is the following: what law can you pass that will have the strongest constitutional basis and still protect the greatest extent of the religious liberty problem. What will have the strongest constitutional basis and still reach the greatest extent of the problem?

The reason this seems the better and more judicious question to me is that if the Supreme Court cases over the last 7 years have taught us anything, it is that there are significant long-term effects when Congress passes a law for which a case can be made, but in which significant questions still remain about that case.

Now, you can decide that you want to push the envelope, that you want to pass the broadest law possible, you want to fix every aspect of the problem that you see, and if the Supreme Court doesn't like it, they will tell you. But, of course, that is exactly the problem. They will tell you, and they will tell you in a way that will bind your power to pass future legislation and that may cast doubt on existing legislation. But you are not passive in this; you are an active player in the dance between the courts and Congress. You decide how broad a law to pass, and therefore how broad a target to set up for the Supreme Court.

So to take the example of protecting religious liberty, I think the committee needs to consider the following questions as a judicious matter. Where does Congress clearly have the power to act, and where are there open questions about Congress' power?

Two, how does RLPA as currently drafted match up to that picture of congressional power? Are there some aspects of RLPA that are more clearly within Congress's power and others that are more within Congress's questionable power?

Three, what is the actual extent of the religious liberty problem that Congress is trying to remedy? Are there some areas where the problem is more acute and others where it is less acute? Will fixing the problem in one area cause other problems? What is the specific extent of the problem?

Given the answers to these three questions, Congress should think about what type of law would fix the greatest amount of the

problem of religious liberty, while still using the strongest basis for Congress's constitutional authority. Crafting this type of law, in my mind, would do three things.

It would ensure that you reach the bulk of the problem that exists. Two, it will ensure that you have crafted a law that has the greatest chance of being sustained by the Supreme Court. And, three, you will have crafted a law that will not cause harm in the long run to other power. So my written testimony basically goes through these three questions and tries to give you my best sense, and here is the nutshell of it at this point.

First, I think a relatively strong case can be made for Congress's section 5 authority under the 14th Amendment with regard to land use. And actually I think Professor Laycock's testimony in both May 1998 and June 1999, you know, makes the best case. I would vote for it if I were on the Supreme Court.

I think that the supporters of RLPA have put forward evidence of comparable discrimination against houses of worship, particularly belonging to small and unpopular religions. And while it is hard to know whether the Supreme Court will agree that the record is the correct evidence that they need to see and whether the rule you have crafted is proportional to that evidence, I think, certainly, a case can be made for that section.

Second, I think there are problems in using the Commerce Clause power to address a whole range of areas that may, in the long run, be found not to meet the *Lopez* requirement of substantial effect on interstate commerce. I agree with Professor Laycock that one can aggregate the effect in order to find an effect on interstate commerce. But you have not solved the problem by putting a jurisdictional element in the bill, like showing an effect on commerce, and then assuming that the courts will infer the aggregation. I don't think that is what is going to happen. I don't think constitutionally you can do that.

The courts will still have to decide whether there is a substantial effect on commerce, and the result will be a series of individual, random RLPA cases analyzing Congress's commerce power. And as Gene Schaerr says in his written testimony, the commerce power is like an accordion, you know, larger or smaller. And therefore the bill as it stands will be constitutional if the bill you write will determine how broad that accordion is. And so if you put a bill out there that addresses a lot of areas that may not be able to withstand that Commerce Clause power, you will end up with a series of cases restricting your Commerce Clause power in the future.

Finally, I think invoking the spending power in a very broad way that Congress does in RLPA sets up a very broad target. There is actually very little case law from the Supreme Court on this, but to the extent we have, in *South Dakota* v. *Dole,* I think you might find some problems with the general welfare prong because of some of the problems about children and women. And I think you might have some problems with the Federal interest prong.

I want to conclude with some very general comments on religious liberty. I spent the first 20 years of my life in a very insular and very orthodox Jewish household and world, and then I spent the next 20 years in this world, a non-religious and secular world. And I think that life experience has given me two senses. One is how

important religious liberty is. There is a sense in which a religious person feels the need to comply with the religious belief that is simply qualitatively different from any other type of belief.

And so, for example, while there might be some Establishment Clause problems that have been raised by the bill, I would want to believe that this is not an Establishment Clause problem to give some extra deference to that religious belief. And I would say from living in the secular world I have found that non-religious people often don't get that, and I think that is why we sometimes see a lack of accommodation and a lack of understanding.

Much as I care about religious liberty, however, I also believe it is critical for Congress to have a clear and accurate sense of the problem it is trying to fix. And then as a matter of judicious policy, I think Congress should craft a law that reaches the bulk of the problems, while remaining within the deep end of its congressional constitutional power.

Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Feldblum follows:]

PREPARED STATEMENT OF CHAI R. FELDBLUM

I. INTRODUCTION

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

I have been asked to speak to the question of whether Congress has the constitutional authority to pass the Religious Liberty Protection Act (RLPA), as drafted and passed by the House of Representatives in June 1999. The problem, of course, is that it is difficult for anyone to give Congress a definitive answer to that question. Professor Douglas Laycock of Texas Law School has testified before the House of Representatives that "[t]he bill is clearly within Congressional power under existing law," and he has systematically laid out his case for that conclusion.[2] By contrast, Professor Marci Hamilton of Cardozo School of Law has testified before the House of Representatives that "Congress lacks the power to institute this broad-ranging attempt to privilege religion in a vast array of arenas," and has also laid out a systematic case for that conclusion.[3]

My sense in reading the testimony from Professors Laycock and Hamilton is that each individual has made a number of valid points regarding Congressional authority and RLPA, but each has also tended to either overstate or understate certain problems with the law. This, of course, is not unusual in legal discourse, where arguments can always be made on each side of an issue.

But it seems to me, then, that Congress perhaps is asking the wrong question when it asks: "is RLPA within Congress' constitutional power?" You will always find many individuals (including, myself) who will say "a case" can be made that RLPA is within Congress' power to enact. But I think the better, and more judicious, question to ask instead is: "What law can Congress pass that will have the *strongest* constitutional basis for its enactment, and will still reach the *greatest* extent of the problem Congress is trying to fix?"

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[1] 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). I am not representing any entity or individual, other than myself, in this testimony, and the views I present here today should not be attributed to any of the Clinic's clients or my personal clients. I also state that I have not received any federal grant, contract, or subcontract during the current or preceding two fiscal years.

[2] Testimony of Douglas Laycock before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Hearing on H.R. 1691, The Religious Liberty Protection Act of 1999, May 12, 1999 (hereinafter the "Laycock testimony".)

[3] Testimony of Marci A. Hamilton before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Hearing on H.R. 1691. The Religious Liberty Protection Act of 1999, May 12, 1999 (hereinafter the "Hamilton testimony".)

This seems to me to be the better question because there are significant long-term ramifications when Congress passes a law for which simply "a case" for constitutionality can be made, but in which significant questions regarding that case remain open. Even the most ardent supporters of RLPA agree the Supreme Court can always modify current constitutional doctrine in a manner that would undermine not only Congress' authority to pass RLPA, but also other pieces of legislation that Congress might seek to pass or that it has already passed. Thus, it behooves Congress to consider not simply whether "a case" may be made for a piece of legislation, but rather, how *strong* that case is and whether that case might provide the Supreme Court with unnecessary opportunities to cut back further on Congressional power.

The series of cases decided by the Supreme Court over the past seven years, beginning with *New York* v. *United States* in 1992, and culminating with the trio of cases decided in June 1999, gives us some sense of how a majority of the Supreme Court might approach questions of Congressional authority and state sovereign immunity.[4] Some might say these cases represent appropriate corrections to a federal legislature that has operated as if there are no limits to its constitutional authority. Others would say these cases represent a cramped view of the extent of that authority. For me, the sole relevant point for today's hearing is that these cases remind us that the Supreme Court is *acutely* attuned to whether Congress has constitutional authority to enact specific pieces of legislation, and that a majority of the Court is not concerned with restricting such authority even if it ultimately means Congress will have a more limited capacity to address issues it believes warrants federal action.

The mood of the Supreme Court may perhaps best be discerned in Justice Scalia's pronouncement in *College Savings,* one of the trio of cases decided in the last day of the 1999 term: "Today, we drop the other shoe: Whatever may remain of our decision in *Parden* [a case dealing with constructive waiver of immunity by a State] is expressly overruled." This is not a Supreme Court that will have difficulty "dropping the other shoe" and limiting Congressional authority in future cases if it believes such a restriction is constitutionally mandated. The question is: what type of opportunities will Congress give to the Supreme Court to drop that other shoe?

Given this legal landscape, I believe the Committee should consider the following questions as it takes up the prospect of passing legislation to protect religious liberty:

(1) Where does Congress *clearly* have power to act, and where are there *open questions* regarding such power? In other words, at what point does Congress venture into an arena where "other shoes" could possibly be dropped by the Supreme Court?

(2) How does RLPA, as currently drafted, *match up* against this picture of Congress' power? In other words, are there some aspects of RLPA that fall more within Congress' clear power and others aspects that fall more within Congress' questionable power?

(3) What is the *actual extent* of the religious liberty problem that Congress is attempting to remedy? Are there some areas where the problem is more acute, and others where it is less acute? Will fixing the problem in one area cause problems in other areas?

(4) Based on the answers to the questions above, what law would fix the *greatest amount* of the problem of religious liberty in this country while still remaining within the *strongest basis* of constitutional authority?

I have no doubt that this more cautious and measured approach to the problem of religious liberty may not reach each and every instance of religious liberty currently encompassed by RLPA. I believe, however, that it is the one most likely to be sustained by the Supreme Court in the long-term—and the one least likely to do harm to Congressional power over that long-term.

II. SOURCES OF CONGRESSIONAL POWER AND RLPA

A. Fourteenth Amendment power

The most powerful source of Congressional authority, at least vis-a-vis the States, continues to be Section 5 of the Fourteenth Amendment ("Section 5 "). The Four-

[4] Some of the major cases dealing either with Congress' constitutional authority or with States' Eleventh Amendment immunity to suit over the past seven years have been: *New York* v. *United States,* 505 U.S. 144 (1992), *U.S.* v. *Lopez,* 514 U.S. 549 (1995), *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996), *Alden* v. *Maine,* 1999 WL 412617 (US), *Printz* v. *United States,* 521 U.S. 898 (1997), *City of Boerne* v. *P.F. Flores,* 117 S.Ct. 2157 (1997), *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board,* 1999 WL 412639 (US), and *Florida* v. *College Savings Bank,* 1999 WL 412723 (US).

teenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of that Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The bounds of Congressional power under Section 5 have been clearly delimited by the Supreme Court, for better or worse, in *City of Boerne* v. *P.F. Flores,* 117 S.Ct. 2157 (1997). The Court held in that case that Congress' power to enforce the Fourteenth Amendment was restricted to enforcing the substance of the Amendment as understood and interpreted by the Supreme Court. As the Court explained, "Congress does not enforce a constitutional right by changing what the right is." 117 S.Ct. at 2164. While the Court granted Congress some latitude in this area, by countenancing "preventive measures" that Congress might take if "many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional," *id.* at 2170, the bar set by *City of Boerne for Congress* to invoke its Section 5 authority is relatively high.

In one of the trio of cases decided this past June, *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank,* 1999 WL 412723 (U.S.), the Supreme Court made clear that it would apply the *City of Boerne* test quite strictly. In that case, the Court concluded that when Congress enacted the Patent Remedy Act, it had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at *7. It noted that Congress had barely considered the availability of state remedies for patent infringement, and that the evidence suggested that most state infringement was innocent or at worst negligent. The Court concluded that "[t]he legislative record thus suggest that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation," and that the provisions of the Act were thus "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at *11 (quoting *City of Boerne.*)

While the bar for invoking Section 5 authority has been set high by the Court, it has also been set relatively clearly. Thus, particularly with regard to a bill such as RLPA, it should be well understood what Congress needs to demonstrate to invoke its Section 5 authority. It must find that there is a likelihood that states and localities are acting in an unconstitutional manner in restricting religious liberty (unconstitutional, as defined by the Supreme Court), and the rules Congress drafts to remedy or prevent such actions must be congruent and proportionate to such actions.

The only section of RLPA in which Congress relies on its Section 5 power is the section establishing, rules regarding land use. While that section displays some coherence problems, its major thrust (beyond what the constitution would already require) is to prohibit the government in land use regulation from imposing a substantial burden on a person's religious exercise, unless the government demonstrates that application of the burden is the least restrictive means of furthering a compelling governmental interest.

Six members of the House Judiciary Committee, who filed dissenting views to the House Judiciary Committee Report, concluded that Congress does not have authority under Section 5 to enact this provision. According to those Members, "[t]he proponents of RLPA have proffered the same sort of legislative record as Congress established in 1993," and the Supreme Court found that record deficient to meet its requirements. (House Report at 34 and n.5.) Similarly, Professor Hamilton asserts "[t]o 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." (Hamilton testimony at 4.)

Despite these assertions, it seems to me the proponents of RLPA have done quite a thorough job in presenting evidence of discriminatory actions engaged in by localities who wish to preclude houses of worship, particularly those belonging to small or unpopular religions, from siting in their neighborhoods. It is difficult to know at this point whether the Supreme Court will find that this evidence sufficiently demonstrates a "widespread and persisting deprivation of constitutional rights," and if so, whether it will find that the rule promulgated by Congress is a congruent and proportional response to such deprivation. But RLPA's record certainly seems different from the record developed in support of RFRA, at least insofar as supporters of RLPA have explained their evidence in a manner that comports with the Supreme Court's requirement of describing likely unconstitutional behavior. Indeed, Professor Laycock's marshaling of that evidence in his testimony of July 1998 (and summarized in his May 1999 testimony), and his argument that such evidence

meets the requirements of invoking Congress' Section 5 authority, is quite compelling.

Beyond the fact that a relatively strong case can probably be made for basing a land use section on Section 5 authority, it is important to note that there is minimal additional harm that can come from invoking such authority and passing such a section. In the area of Section 5 authority, the Supreme Court has already "dropped the shoe." The only question now is whether any particular legislative enactment will fit into that shoe. Moreover, in the area of religious liberty, the Court has already explained what will constitute unconstitutional behavior. Thus, the only questions the Court will need to decide if Congress passes the land use section under its Section 5 authority is whether the evidence demonstrates likely unconstitutional actions, and whether the Congressional rule is proportional to those actions. Based on the record, I believe it would be appropriate for the Court to rule in the affirmative on both those questions.

B. Commerce clause power

For decades, Congress' power under Article 8 of the Constitution "to regulate Commerce * * * among the several States" has been a mainstay of its authority to pass legislation in a range of areas. The Supreme Court's ruling in *U.S.* v. *Lopez,* 514 U.S. 549 (1995), however, sent a shock wave through that foundation and has forced Congress to more carefully evaluate its Commerce Clause power.

The Court in *Lopez* certainly did not characterize its opinion as a shock wave. To the contrary, it presented its opinion as primarily reaffirming past case law and traditional constitutional structure. Thus, the Court set forward three areas that it had always "identified" as areas in which Congress could legislate under its Commerce Clause power. The first two categories of activities were straightforward: Congress could regulate "the use of the channels of interstate commerce," and Congress could "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." 514 U.S. at 558.

A significant part of Congressional legislation, however, would not entail these two categories of activities, but rather the third category identified by the Court: those activities "having a substantial relation to interstate commerce." One of the important aspects of the *Lopez* decision was that the Court stated the regulated activity had to "*substantially* affect" interstate commerce, and not merely "affect" interstate commerce. The Court reaffirmed, however, that economic activity, which may be minimal by itself, could still "substantially affect" interstate commerce if a series of such activities cumulatively would substantially affect commerce. Thus, in *Lopez,* the Court distinguished the Gun-Free School Zone Act, which it noted as having "nothing to do with 'commerce' or any sort of economic enterprise," from the line of cases "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affects interstate commerce." 514 U.S. at 560.

The question, then, is whether the section of RLPA which provides that a government shall not substantially burden a person's religious exercise (unless such burden is the least restrictive means of furthering a compelling government interest) "in any case in which the substantial burden on the person's religious exercise affects, or in which removal of that burden would affect, commerce * * * among the several States," may constitutionally be enacted pursuant to Congress' Commerce Clause power. To Professor Laycock, the language of the bill answers the question itself. As he noted in his testimony to the House Judiciary Committee: "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." (Laycock testimony at 6.) Or, as Professor Laycock has also explained it: "This part of the bill is constitutional by definition: any religious exercise beyond the reach of the Commerce Clause is simply outside the bill." (*Id.* at 4.)

In one respect, Professor Laycock is correct. By placing a jurisdictional element in the bill, Congress may have moved the constitutional question into the statutory construction question. But engaging in that technical move will not shield the law from the ultimate judicial determination of whether the law, as applied, is based on sufficient constitutional authority. While the adjudication of that question may occur in the context of interpreting the statute, it will still necessarily occur. Thus, to the extent Congress should be concerned about Supreme Court review of the laws it passes (a concern I believe Congress should have), adding the jurisdictional element will not protect Congress from that ultimate review.

Let me explain this point in a concrete manner. In any particular case in which a person invokes this section of RLPA, the person will demonstrate that the substantial burden on his or her religious exercise affects interstate commerce, or that

removing the burden would affect interstate commerce. Meeting that test will meet the initial jurisdictional element of the law. But assume the defendant challenges the law as being beyond Congress' Commerce Clause power to enact. At that point, meeting the jurisdictional element will not be sufficient to meet that challenge. Rather, the RLPA claimant or the United States as intervenor must argue that an aggregation of the type of activity engaged in by the claimant *substantially* affects interstate commerce.

It may well be that the courts, in order to avoid interpreting RLPA in a manner that would give rise to a constitutional problem, would require the RLPA claimant to demonstrate, from the outset, that the burden on religion *substantially* affects interstate commerce, rather than simply affects commerce. In such cases, the constitutional question will become subsumed into the statutory construction question. In either event, however, the constitutional threshold of demonstrating a substantial effect on commerce must be met.

Allowing this constitutional question to be adjudged in a series of individual RLPA cases, with varying degrees of connection to commerce, may prove problematic to the future vitality of Congress' Commerce Clause power. Such an adjudication will probably not be problematic in the land use area. Cases concerning construction or renovation of a house of worship might well be viewed as "activities that arise out of or are connected with a commercial transaction" and thus the burden on all houses of worship that are restricted from construction or renovation in particular areas could be viewed in the aggregate to potentially demonstrate a substantial effect on interstate commerce. But based on the record currently before Congress, it would be difficult to characterize many of the other activities intended to be covered by RLPA as arising out of, or connected with, a commercial transaction. Moreover, even if one could discern a commercial transaction in such activities, without evidence that the particular burden at issue has been repeated in several places (in the way that such evidence has apparently been collected with regard to land use and with regard to prison rules), it may be difficult to prove that such burdens, when aggregated, cause a substantial effect on interstate commerce. The end result may be a body of case law establishing, in a range of contexts, the limitations of Congress' Commerce Clause power.

It seems unfortunate to allow Congress' Commerce Clause power to be adjudicated in this random, individualized manner. The better approach would be for Congress to consider now—*prior* to passage of the law—what burdens on religious liberty arise out of, or are connected with, commercial transactions, and what burdens are sufficiently widespread that, when aggregated, they substantially affect interstate commerce. Burdens on certain forms of land use and burdens resulting from prison rules, may fall into this category, as may certain other burdens. The key is for Congress to consider carefully those areas *likely* to justify invocation of Commerce Clause power, and then to invoke that power for *those* areas.

Serious consideration by Congress in this manner can only help to ensure that the law it passes will ultimately be upheld by the Supreme Court. As the Court noted, it will make its own "independent evaluation of constitutionality under the Commerce Clause" apart from any legislative findings that Congress may make. Nevertheless, such findings can be helpful "to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Lopez,* 514 U.S. at 563.

C. Spending clause power

Because Congress has so often relied on its Article I, § 8 Commerce Clause power to pass legislation, rather than its Article I, § 8 Spending Clause power ("to pay the Debts and provide for the * * * general Welfare of the United States"), there are significantly fewer Supreme Court cases construing the limitations of the latter power. Unfortunately, this may mean the area of Spending Clause power is ripe for Supreme Court action,[5] and thus, it behooves Congress to be particularly careful and astute in invoking this power.

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[5] Some commentators have explicitly called for such action. See, e.g., Lynn Baker, *Conditional Federal Spending After Lopez* (95 Colum. L. Rev. 1911):

> The *Lopez* majority has signalled its intent to resume a meaningful constitutional role as guardian of "a healthy balance of power between the States and the Federal Government." [Footnote omitted]. But confirming that the Commerce Clause does not grant Congress plenary regulatory power will not be enough. * * * [P]revailing Spending Clause doctrine appears to vitiate much of the import of *Lopez* and any progeny it may have. Thus, a reexamination of *Dole* should be next on the *Lopez* majority's agenda.

In *South Dakota* v. *Dole,* 483 U.S. 203 (1987), the Supreme Court noted that Congress' spending power had three limitations, none of which were contested in the *Dole* case. First, the exercise of the spending power had to be "in pursuit of 'the general welfare.'" *Id.* at 207. In the *Dole* case, a spending condition encouraging States to lower the drinking age was seen as clearly "designed to serve the general welfare." Second, the condition on the States had to be explicit, so that the States could "'exercise their choices knowingly, cognizant of the consequences of their participation.'" *Id.,* quoting *Pennhurst State School* v. *Halderman.* Again, in *Dole,* the Court found that the condition on the States "could not be more clearly stated by Congress." *Id.* at 208. Finally, the Court observed that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.,* quoting *Massachusetts* v. *United States.* Again, in *Dole,* the Court found this requirement to be met, noting, that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208.

Each of these requirements becomes a bit more complicated to satisfy in the context of justifying RLPA's mandate that states and localities defend every neutral law that may burden religion as the least restrictive means of furthering a compelling government interest. This is not to say that RLPA would not necessarily meet each of these requirements. It is only to say that as the analysis becomes more complicated, opportunities may be created for the Supreme Court to narrow Congress' Spending Clause power. These possible complications mean that Congress might well consider whether there are *specific* forms of religious liberty that are *best* justified as protected under the Spending Clause power—and then use the spending power to protect *those* specific interests.

The complications are as follows. First, the Court has noted that it will generally defer to Congress on the concept of "general welfare." Nevertheless, in any case challenging RLPA on Spending Clause power, one might expect amicus curia briefs from groups representing children, minorities and women, and environmental groups challenging the notion that it is in the "general welfare" to pass a broad-based rule requiring that any governmental action taken to protect the interests of these groups must be limited to the "least restrictive manner" of achieving that interest, when any religious belief is burdened by that governmental action. Indeed, the testimony submitted to this Committee by Professor Barbara Bennett Woodhouse of University of Pennsylvania Law School and Co-Director of the Center for Children's Policy Practice and Research, and Robert J. Bruno, an attorney who has represented Children's Healthcare is a Legal Duty and the American Professional Society on the Abuse of Children, make a compelling case for why the general welfare of children will *not* be advanced by this rule. Similar testimony regarding the fact that such a rule does not advance the general welfare of individuals protected by state and local civil rights laws has been noted by many groups over the past several months. While it seems unlikely to me that the Supreme Court would rule that a Congressional condition on spending was not in the general welfare (given its stated deference to Congress on this issue), how Congress addresses and deals with these specific concerns during the legislative process on RLPA may well affect the Court's determination of whether the rule "is designed to serve the general welfare."

Second, RLPA provides that a government shall not substantially burden a person's religious exercise "in a program or activity, operated by a government, that receives federal financial assistance." Program or activity is defined through a cross-reference to part of section 606 of the Civil Rights Act of 1964.[6] Under this definition, a "program" means "all of the operations" of a department or agency of a State or local government.

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system; * * *

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[6] This cross-reference states the following:

Sec. 606. For the purposes of this title, the term "program or activity" and the term "program" mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; [or]

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

I assume the Court would conclude that this condition is clear enough to the States, even though the condition is not explicit in each of the federal programs that funnel financial assistance to the various state and local program and activities, but rather, is embodied in a general law that subsequently applies to all those programs and activities. A more difficult question may be whether the breadth of federal financial assistance implicated by RLPA makes the "choice" of States to reject both the assistance and the mandate illusory, rather than real. The Court noted in *Dole* that a State's choice to reject both the federal funds and the accompanying federal condition had to be real, and that the Court's decisions had thus "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole,* 483 U.S. at 211 (quoting *Steward Machine Co.* v. *Davis*). Justice Scalia emphasized this point again just this past term in *College Savings Bank,* while refuting an argument made by Justice Breyer. 1999 WL 412639, at *12.

It is probably an open question whether the breadth of financial assistance implicated here makes the choice on the States coercive. RLPA includes a provision that federal funds may not be withdrawn as a remedy for a violation of the Act. (Sec. (c)). But that provision does not seem relevant to the issue at hand. The coercion, if it exists, would lie in the fact that once a State takes any federal financial assistance for any agency, it must then agree to defend all neutral rules in "all of the operations" of that agency which might burden religious exercise under a very strict standard. The coercion is not that federal funds might be withdrawn as a remedy (they won't); it is that it may not be realistic for the State to reject the federal financial assistance in the first place. In any event, this is a question that is made more difficult by the breadth of financial assistance covered by the bill.

The final question is whether the rule imposed by RLPA is related "to the federal interest in particular national projects or programs." Professor Hamilton argues that: "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." (Hamilton testimony at 4.)

Professor Laycock responds, however, with an (initially) appealing argument. He notes that the federal interest here is the same as applies in other major laws where Congress has attached civil rights conditions to its funding. As Laycock puts it, "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." (Laycock testimony at 2). Laycock analogizes this to Congress' interest in Title VI of the Civil Rights Act of 1964, prohibiting race discrimination in any program or activity receiving federal financial assistance, and Title IX of the Education Amendments of 1972, prohibiting sex discrimination in any educational program or activity receiving federal financial assistance. Two other laws Laycock might have mentioned as well are Section 504 of the Rehabilitation Act of 1973, prohibiting disability discrimination in any program or activity receiving federal financial assistance, and Title III of the Age Discrimination Act of 1975, prohibiting age discrimination in employment in any program or activity receiving federal financial assistance.

The problem with Laycock's argument is that it may prove why Congress should be *concerned* about setting up RLPA as a target for a ruling on Spending Clause power, rather than an argument as to why Congress should feel *safe* using its Spending Power in this broad manner. RLPA adopts part of the broad definition of "program or activity" set forth in the Civil Rights Restoration Act of 1987. Let us presume that Congress articulates its interest in establishing this mandate (per Professor Laycock's formulation) as ensuring that when any part of an agency receives federal money, no person who comes into contact with *any* of the operations of that agency should be burdened in his or her religious exercise (unless that burden is the least restrictive means for furthering a compelling government interest).

We already know a majority of the Justices on the Supreme Court does not believe this type of broad rule is necessary to protect religious liberty. They believe, instead, that religion may not be treated unequally by governmental action, and that when governmental accommodations are provided for a range of reasons, but *not* for religious reasons, the government must be put to a strict scrutiny test to justify such denials. But beyond those areas, the Court does not believe religious liberty needs to be further protected—at least as a matter of the Free Exercise Clause.

Although the Supreme Court's view of religious liberty is different from the view embodied in RLPA, the Court cannot challenge Congress' belief that its view of religious liberty represents an important federal interest. But the Court *does* have the power to rule whether the spending, condition is *related* to the federal interest in

particular national projects or programs. Thus, the Court could rule that this interest is related to the *particular* part of the program that receives federal financial assistance, but not to the rest of the program. While this would resurrect, as a practical matter, part of the Supreme Court's decision in *Grove City* v. *Bell* (at least to the extent the condition on spending is based on Spending Clause power, as opposed to Fourteenth Amendment power), one has no reason to presume the Court would not be comfortable with that result.

D. Eleventh Amendment immunity

In numerous laws, Congress has sought to establish a cause of action against the States and to abrogate a State's sovereign immunity to suit. In 1996, in *Seminole Tribe of Fla.* v. *Florida,* 517 U.S. 44 (1996), and just recently again in 1999, in *Alden* v. *Maine,* 1999 WL 412617, the Court has clarified for Congress that it may not abrogate a State's sovereign immunity when Congress acts pursuant to an Article I power, such as the Commerce Clause or the Spending Clause. Thus, when Congress enacts a federal law under those powers, a State may be subject to suit under those laws only when the State has consented to suit. By contrast, when Congress acts pursuant to its Fourteenth Amendment power, it may subject a State to suit because States are presumed to have consented to such derogation of their immunity when they consented to the Fourteenth Amendment.

In *Seminole Tribe,* the Supreme Court announced that Congress could not abrogate a State's sovereign immunity in federal court under Article I powers; in *Alden,* the Court announced that Congress similarly could not abrogate a State's sovereign immunity in state court under Article I powers. But since 1908, the Court has also provided a mechanism by which individuals may obtain relief from certain state actions, by proceeding against state officials for injunctive relief. *Ex parte Young,* 209 U.S. 123 (1908). Under the "*Young* fiction," proceeding against a state official for injunctive relief is not considered as a proceeding against the State itself.

It seems clear that many cases brought under RLPA against state officials for injunctive relief should fall within the *Young* fiction.[7] Any case requesting damages, however, would not come within this exception. It is worth noting, however, that in recent cases, various Justices have expressed some concern with interpreting the *Young* fiction so broadly that it swallows the rule of State immunity. In *Idaho* v. *Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997), five Justices joined the section of Justice Kennedy's opinion which admonished:

> To interpret *Young* to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe,* that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction.

521 U.S. at 270. Only Justice Rehnquist joined Justice Kennedy in the section of the *Coeur d'Alene* opinion that significantly reformulated the situations in which the *Young* fiction would apply. Nevertheless, to the extent the *Young* fiction might be modified by the Court in the future, Congress should again consider being cautious about the range of injunctive relief it establishes in RLPA.

III. RLPA AND THE ESTABLISHMENT CLAUSE

Even assuming that Congress has the constitutional authority under Article I or the Fourteenth Amendment to enact RLPA, it certainly has no authority to enact a law that is unconstitutional. Thus, at least some attention must be paid to the question of whether RLPA is unconstitutional under the Establishment Clause because it so significantly favors religion over other beliefs.

Some commentators on RLPA are adamant that the legislation violates the Establishment Clause. As Professor Hamilton has articulated it:

> 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.

Hamilton testimony at 6.

The Establishment Clause problem with a law that mandates modifications for religion, and for religion only, unless denying those modifications are the least restric-

[7] Cases may be brought against localities and local officials without any concern of Eleventh Amendment immunity.

tive means to achieving a compelling government interest, was articulated briefly, but succinctly, by Justice Stevens, in his concurrence to *City of Boerne*:

> If the historic landmark on the hill in *Boerne* happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This government preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

City of Boerne, 117 S.Ct. at 2171 (Stevens, J., concurring).

I find the Establishment Clause issue troubling. Perhaps because I grew up in a very Orthodox Jewish home, I have a keen sense of how the need to respond to the dictates of *religious* belief *feels qualitatively different* from the need to respond to other beliefs. Thus, it is hard for me to imagine that government should not be allowed to respond to that qualitatively different situation by accommodating religious beliefs in a more preferential manner than other beliefs.

Nevertheless, I do recognize the force of the Establishment Clause issue, given that RLPA quite clearly prefers the force of religious belief over the force of any other belief. For example, assume Susan feels a strong ethical (but not religious) belief that she should feed the hungry. If Susan seeks a conditional use permit from the locality to open a food bank in a particular neighborhood, she might well be denied that permit. The only thing the locality must do in that case is follow its own permit procedures as a matter of due process. By contrast, if Julie has a strong religious belief that she should feed the hungry, and similarly seeks a conditional use permit for herself, or her church group, to open a food bank, the locality must prove that denial of such a permit is the least restrictive means of achieving a compelling government interest.

While obviously this preference for religion may raise Establishment Clause concerns, I continue to believe there must be a way for government to constitutionally accommodate religious beliefs, even when it does not similarly accommodate other beliefs. Moreover, with regard to this constitutional concern, I see no way for Congress to proceed *other* than to pass some law protecting religious liberty, and see how the Supreme Court will respond. It may well be that a more targeted bill will raise fewer Establishment Clause concerns, but at bottom, the challenge will exist whenever government provides religious belief with a preference over other beliefs through a mandated "least restrictive means" test. My hope, however, is that such a law would withstand Establishment Clause scrutiny.

Thank you for giving me the opportunity to testify today on the best way of protecting religious liberty in our country through a law that will be sustained as constitutionally valid. I remain ready to answer any questions Members of the Committee may have.

The CHAIRMAN. Professor Bybee.

STATEMENT OF JAY S. BYBEE

Mr. BYBEE. Thank you, Mr. Chairman. Mr. Chairman, I come before the committee in a rather unusual posture. As you noted in your remarks introducing me, 5 years ago I wrote a law review article based on an extensive study of both the First and 14th Amendments in which I concluded that the Religious Freedom Restoration Act was beyond Congress's section 5 authority.

I also participated before the Supreme Court in the case of *Boerne* v. *Flores,* writing an amicus brief on behalf of the Clarendon Foundation in support of the *City of Boerne.* I believed then and I believe today that the Court correctly decided *Boerne* v. *Flores.* I am in an unusual posture because I believe today that in RLPA, at least as to section 3(b), Congress has answered the challenge of *Boerne.*

In one of the early civil rights acts enacted during Reconstruction, Congress provided a remedy against State officials who vio-

lated constitutional rights. We are very familiar today with the use of section 1983. Section 1983 provides a remedy against State officials who, under color of State law, exercise their authority in a way that denies persons their constitutional rights, provides a damage remedy.

Section 1983 does not prevent State officials from violating constitutional rights. We hope it serves as a deterrent to State officials who would abuse their power in that way. Section 1983 is an appropriate response by Congress to the problem of State officials overstepping their bounds and violating constitutional norms.

But if section 5 means anything, it surely means that Congress may not only respond by creating a remedy, but that Congress may respond by seeking to prevent—that is, to anticipate, based on its experience, violations of the Constitution. It may act to prevent State officials from committing violations before they occur.

The problem with RFRA, in my view—and I think the Supreme Court bore me out on this—was that RFRA prescribed an across-the-board prophylactic. RFRA, in essence, assumed that all State actions burdening religion were violations of the Constitution. The Congress obviously disagreed with the Court. There were deep-held feelings that they disagreed with the Court's decision in *Employment Division* v. *Smith,* but as a measure enforcing the 14th Amendment, RFRA looked very much like the presumption that all State actions burdening religion were actions in violation of the First Amendment. The Court held that that was not a proportional or congruent response to the problem of State action.

In section 3(b) of H.R. 1691, enacted by the House in July of this year, RLPA has adopted what I believe is a measured response to an identified problem. It is measured and thus proportional to an identified problem, which makes it congruent, and I believe that it will satisfy the Court's decision in *Boerne.*

Section 3(b) addresses only a single problem, that of land use regulation. Zoning matters tend to lend themselves to giving voice to religious animus. Here, I am not faulting the States or suggesting that State zoning boards or local zoning boards are deliberately vindictive. Nor am I necessarily suggesting that land use planning is a breeding ground for religious discrimination. It is simply the nature of the act. Property is unique; no two items of property are the same.

Because zoning affects a unique good, it also affects an intimate and personal decision. Zoning matters and land use regulation matters generally regulate some of the most personal and intimate decisions that we make, how we will use our land, where and how we may live, and who will be our neighbors. And thus zoning hearings are a fertile ground to give voice to religious animus. It simply presents an opportunity for local communities to act upon their religious prejudices.

In *Boerne,* the Court acknowledged that there was some record in Congress—that there was some evidence of violation of constitutional rights in zoning matters. But it faulted Congress in those zoning cases as having provided only anecdotal support. I believe that in RLPA, Congress has the opportunity—having identified one specific area to be addressed under its section 5 authority, that it

has the opportunity of creating a record that will withstand Court scrutiny.

And I would urge Congress to either make formal findings or to prepare a record that can stand in the Court demonstrating that in these zoning matters, again, which are opportunities fraught for religious animus, that Congress has indeed addressed a problem that is worthy of section 5. Based on proper findings and a proper record, section 3(b) will, in my view, withstand scrutiny under *Boerne*. It is both a congruent and proportional response to the act of religious discrimination.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Professor Bybee.

[The prepared statement of Mr. Bybee follows:]

PREPARED STATEMENT OF JAY S. BYBEE

Mr. Chairman: I am pleased to be here to testify before the Judiciary Committee on the Religious Liberty Protection Act of 1999, H.R. 1691. I am currently Professor of Law at the new William S. Boyd School of Law at the University of Nevada, Las Vegas. I teach and write in the areas of constitutional law, administrative law, and civil procedure. My research interests focus on separation of powers and federalism. I previously taught at the Paul M. Hebert Law Center at Louisiana State University. I also served for five years in the Department of Justice and two years as Associate White House Counsel.

I am here before the Committee in an unusual posture. I publicly opposed the Religious Freedom Restoration Act as an unconstitutional exercise of congressional authority. I did so both in an extensive article in the legal literature [1] and in an amicus brief to the Supreme Court in the case of *Boerne* v. *Flores.*[2] I am pleased today to testify concerning a more measured response by Congress in the Religious Liberty Protection Act. I do not represent and am not affiliated professionally with any organization or group working on behalf of, or opposed to, this legislation. I am before the Committee in my individual capacity as a student of the Constitution.

BOERNE V. FLORES AND THE SOURCES OF CONGRESSIONAL AUTHORITY FOR THE RELIGIOUS LIBERTY PROTECTION ACT

In the Religious Freedom Restoration Act of 1993, Congress declared its intention to overturn the Supreme Court's decision in *Employment Division* v. *Smith*[3] and to impose statutory requirements on all "government," including the states.[4] In his Rose Garden signing ceremony, President Clinton indicated that he too believed that RFRA "reverse[d]" the Supreme Court's decision.[5] The source for Congress' alleged authority to reverse a decision of the U.S. Supreme Court was never clear. Certainly the Constitution does not grant the political branches the power to revise decisions of the Court. Congress claimed its authority to revise the *Smith* opinion and reinstate a "compelling government interest" standard from Section 5 of the Fourteenth Amendment,[6] which grants Congress the "power to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]."

RFRA tested the limits of dicta in a prior decision by the Court, *Katzenbach* v. *Morgan,* which suggested that Congress could "prohibit the enforcement of * * * state law" under Section 5 "[w]ithout regard to whether the judiciary would find [that Section 1 of the Fourteenth Amendment so required]." [7] *Morgan* had been read as approving two different functions under Section 5: First, that Congress possessed a remedial authority to eliminate the case-by-case process of adjudicating constitutional violations.[8] That is, Congress might find that states were systematically vio-

[1] Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act,* 48 Vand. L. Rev. 1539 (1995).

[2] Brief of Clarendon Foundation, *City of Boerne* v. *Flores,* 521 U.S. 507 (1997) (No. 95–2074).

[3] 494 U.S. 872 (1990).

[4] 42 U.S.C. § 2000bb–1(a) (1994).

[5] *Remarks on Signing the Religious Freedom Restoration Act of 1993,* 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993).

[6] *See* S. Rep. No. 11, 103d Cong., 1st Sess. 13–14 (1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993).

[7] 384 U.S. 641, 649 (1966).

[8] *See id.* at 652–53.

lating the Constitution and prohibit those practices without waiting for the courts either to address the violations one-by-one or to amass evidence demonstrating the violations. Second, *Morgan* was read for the proposition that Congress could determine for itself the substantive meaning of the Fourteenth Amendment and then enforce it, even if that meaning departed from the Court's own views.[9]

The first of these powers under *Morgan* should not be questioned. If Section 5 means anything, it surely means that Congress does not need to wait on the judiciary and that, using its unique powers of inquiry, Congress may be proactive. Congress may determine that the states are violating provisions of the Constitution and provide a remedy or a prophylactic measure to address the violations. The Court made clear in *Boerne,* however, that Congress may not assume the second *Morgan* power: Under the guise of enforcing the Fourteenth Amendment, Congress may not legislate in a way that openly departs from the Court on the construction of that amendment, at least when Congress seeks to exercise greater authority than would be afforded it under the Supreme Court's interpretation. Presumably, Congress could disagree with the Court and enforce its own interpretation of the Fourteenth Amendment so long as it believed that the Fourteenth Amendment should be construed more narrowly.

I have some initial observations on Congress' authority to enact the Religious Liberty Protection Act. This Act takes a markedly different path from RFRA. Absent from this legislation is any evidence of Congress' hostility to, the *Smith* decision; gone is the comprehensive scope of RFRA, which the Court called "[s]weeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[10] The Religious Liberty Protection Act is a more temperate, modest response by Congress. Indeed, the scope of the Religious Liberty Protection Act is much narrower than the Religious Freedom Restoration Act. While RFRA applied to all government actions, the Religious Liberty Protection Act only applies to state actions in federally funded programs, actions substantially affecting commerce, and a narrow class of activities involving land use planning. That means that some state activities will simply not be covered by the Act when it is enacted. Furthermore, because the Spending Clause serves as one basis for the Act, states may opt out of federal funding and thereby avoid some regulation under this Act.

The Religious Liberty Protection Act is also a more complex statute. Instead of relying exclusively on Section 5, this Act relies on at least three sources of congressional authority: Section 5, the Spending Clause, and the Commerce Clause. Considered together, these sections do not give the Act the comprehensive coverage that RFRA exercised. Considered separately, each of these sources of authority presents its own constitutional questions. Although I believe that Congress has resolved many of the problems that lead me to oppose RFRA and the Court to strike it down, I also believe that there remain some constitutional obstacles to the Religious Liberty Protection Act in its present form. Some of the questions I wish to raise are practical and easily addressed; some are more conceptual; and one, concerning the Commerce Clause, may prove insurmountable.

II. COMMENTS ON CONGRESSIONAL SOURCES OF AUTHORITY FOR THE RELIGIOUS LIBERTY PROTECTION ACT

A. Section 5 of the Fourteenth Amendment

Congress, as it did in RFRA, relies on its power under Section 5 of the Fourteenth Amendment. That section grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." Unlike RFRA, however, I believe that the Religious Liberty Protection Act takes a measured response under Section 5 to a specific, identified problem. RFRA was breathtaking in its scope. Without findings based on any particular incident or incidents, and openly disagreeing with the Supreme Court's decision in *Smith,* RFRA simply declared that "government shall not substantially burden a person's exercise of religion."[11] The Court found that RFRA imposed burdens on the states that "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause."[12] RFRA, the Court said, was "not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."[13] RFRA was "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or de-

[9] *See id.* at 653–56.
[10] *Boerne,* 521 U.S. at 532.
[11] 42 U.S.C. § 2000bb–1(a).
[12] *Boerne,* 521 U.S. at 534.
[13] *Id.*

signed to prevent, unconstitutional behavior."[14] In my own study I concluded that "[i]n RFRA, Congress has simply willed itself power it cannot possess."[15]

By contrast to RFRA, in Section 3(b) of H.R. 1691, the Religious Liberty Protection Act identifies a single area of concern to be addressed under Section 5: land use regulation. There was some evidence in the record in *Boerne* that Congress had considered religious discrimination in zoning when it enacted RFRA, but the Court thought this evidence largely "anecdotal" and lacking in proof of "some widespread problem of religious discrimination in this country."[16]

In my view, the Act is a substantial improvement over RFRA for two reasons. First, the very fact that Congress has focused on a single area of concern should demonstrate that Congress has surveyed the area of religious discrimination generally and found state treatment of religious institutions in zoning matters deficient. Because the Act specifies a much narrower scope of the problem than RFRA, it suggests that Congress has given careful consideration to religious discrimination and identified a single area requiring remediation.

Land use matters are a uniquely fertile area for religious discrimination because land and land-related projects are unique, and such matters usually turn on the facts of the particular case. Zoning hearings, for example, lend themselves to discriminatory treatment—whether based on religion, race, sex, or some other distinguishing characteristic—precisely because any given zoning case will not easily compare with any other zoning case. Zoning cases are sensitive because they involve deeply personal decisions about what we may do with our property, where we live, and who will be our neighbors. And because zoning cases involve such personal decisions, religious animus is more easily disguised. Congress' response here bears a justification similar to petitions for congressional corrective for race discrimination in public housing or the provision of other public services: There may be evidence that the states have denied the equal protection of the laws in the provision of zoning services to religious persons, religious institutions or projects sought for a religious purpose.

The Act would require states to demonstrate that any substantial burden imposed on religious exercise resulting from land use regulation serves a compelling governmental interest and is the least restrictive alternative. The familiar "compelling government interest" language comes from cases such as *Sherbert* v. *Verner*[17] and *Wisconsin* v. *Yoder*[18] and was the standard required by RFRA.[19] Its presence here might suggest that the Religious Liberty Protection Act is merely a second run at RFRA, that Congress has failed to learn the lessons of *Boerne.* I believe, however, that the Act properly employs the compelling governmental interest test as a prophylactic remedy to identified state discrimination. Congress has already provided a damages remedy against state officials who, under color of state law, deprive persons of their rights under the First and Fourteenth Amendments.[20] The Religious Liberty Protection Act seeks to prevent such deprivations in the first place by demanding that government not only explain its zoning decisions, but justify them under the compelling government interest standard. Given the difficulty in proving discrimination in land use matters, requiring governments to demonstrate a compelling governmental interest is a proportional and congruent response to the problem Congress has identified.

Second, by focusing on a single area, Congress has the opportunity to make specific findings of fact or supply a record in support of Section 3(b). As I understand the record placed before the House of Representatives, there are studies demonstrating that minority religious have consistently suffered discrimination in land use planing or zoning matters. I am generally aware of, but have not examined, those studies in any detail, but studies dedicated to a single problem should go a long way to demonstrating that Congress is indeed enforcing the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

I do have two brief suggestions. First, Congress may wish to strengthen its hand by making specific findings in the Act in support of Section 3. This would help demonstrate that Section 3(b) is indeed " [r]emedial legislation under § 5 [and] * * * 'adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against.'"[21] Second, Section 3(b)(1)(B)–(D) address discrimination

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[14] *Id.* at 532.
[15] Bybee, *supra* note 1, at 1633.
[16] *Boerne,* 521 U.S. at 531.
[17] 374 U.S. 398, 402–03 (1963).
[18] 406 U.S. 205, 215 (1972).
[19] 42 U.S.C. §§ 2000bb(b)(1), 2000bb–1(b).
[20] 42 U.S.C. § 1983.
[21] *Boerne,* 521 U.S. at 532 (quoting Civil Rights Case, 109 U.S. 3, 13 (1883)).

against "religious assemblies or institutions." Subsection (B) requires that states treat religious institutions on "equal terms" with non-religious institutions; subsection (C) prohibits states from "discriminat[ing] against" any institution on the basis of religion; and subsection (D) forbids states from "unreasonably exclud[ing]" religious institutions. Each of these subsections uses the language of equality, language that seems consistent with the Court's *Smith* decision and subsequent decisions such as *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah.*[22] Subsection 3(b)(1)(A), however, prohibits states from substantially burdening a "person's religious exercise" unless the government demonstrates a compelling governmental interest and that government has adopted the "least restrictive means." In *Boerne,* the Court called attention to this same language in RFRA. It stated that the "least restrictive means" language was "not used in the pre-*Smith* jurisprudence," and the Court pointed to this as further evidence that RFRA was broader than appropriate "if [its] goal [was] to prevent and remedy constitutional violations."[23] In her dissent in *Boerne,* Justice O'Connor wrote that prior to *Smith,* the Court had "required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest."[24] Whether, as a practical matter, we can tell the difference between a compelling government interest that uses the least restrictive means and a compelling government interest that uses a narrowly tailored means is irrelevant here. Congress has the opportunity to eliminate some friction between its legislation and the Court. I would thus recommend that Congress substitute the Court's preferred language and use the "narrowly tailored" formula.

B. The Spending Clause

In Section 2(a) of the Act, Congress has made compliance with the Act a condition of receipt of federal funds. This provision broadens the scope of the Religious Liberty Protection Act well beyond its scope under Congress' Section 5 authority in Section 3(b), although, as I previously noted, this portion of the Act reaches only programs receiving federal funds, and states may avoid regulation by refusing federal funding. In general, the Supreme Court has long held that Congress may employ its spending power in behalf of the "general Welfare of the United States"[25] and that the "general Welfare" is not defined or limited to Congress' enumerated powers.[26] Except as prohibited by some other provision of the Constitution, Congress may place conditions on the use of federal monies.[27] The Court has also suggested that "conditions * * * [may] be illegitimate if they are unrelated to the federal interest in a particular national project or program."[28] Congress, for example, apparently may not condition receipt of federal funds on a state agreeing to relocate its state capital to another City.[29] The textual foundation for this limitation is not entirely clear, but that is apparently what the Court has in mind. This Act does not approach that level of intrusiveness.

Moreover, Congress' has not made the most aggressive use of its conditional spending power. The coercive potential in the conditional spending power is Congress' ability to take federal funding from state programs that refuse or fail to conform to federal conditions. Yet Section 2(c) specifically states that withdrawal of federal funds is not authorized as a remedy for violations of the Act. Thus the Act expressly withdraws from the federal arsenal the most potent use of its conditional spending power.

I have one area of conceptual concern that I will mention briefly here. Aside from not imposing some theoretical, but undefined, conditions on federal spending, Congress may not impose conditions that would cause others to violate the Constitution. For example, Congress may not require the states, as a condition of receiving federal funds, to adopt a scheme that would deny its citizens due process or violate their free speech rights.[30] Nor may Congress itself violate the Constitution in the imposition of the conditions. In Section 2(a)(1), Congress prohibits states from substantially burdening a person's religious exercise in a government program or activity receiving federal financial. assistance "even if the burden results from a rule of

[22] 508 U.S. 520 (1993) (striking down a city ordinance barring the ritual slaughter of animals).
[23] *Boerne,* 521 U.S. at 535.
[24] *Id.* at 546 (O'Connor, J., dissenting) (citing cases).
[25] U.S. Const. art. I, § 8, cl. 1.
[26] *See Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937); *United States* v. *Butler,* 297 U.S. 1 (1936).
[27] *New York* v. *United States,* 505 U.S. 144 (1992); *South Dakota* v. *Dole,* 483 U.S. 203 (1987).
[28] *Dole,* 483 U.S. at 207–08 (quotation marks and citation omitted).
[29] *Id.* at 215 (O'Connor, J., dissenting).
[30] *See FCC* v. *League of Women Voters,* 468 U.S. 364 (1984) (invaliding a federal statute that required nonprofit radio and TV stations, as a condition of receiving federal funds, to refrain from editorializing).

general applicability." This last phrase, of course, departs from the Free Exercise Clause as explained by the Court in *Smith.* In light of *Boerne,* this section cannot be said to enforce the First Amendment because it requires more than the First Amendment demands. That fact, in and of itself, would not be troublesome; Congress routinely demands conduct of state and private fund recipients that the Constitution does not demand of them.

Might the First Amendment itself restrict Congress' power to demand that the states treat religion more solicitously than required by the First and Fourteenth Amendments? In this regard, I do not believe that the Act runs afoul of the Establishment Clause *per se* because it requires religious exemptions. The Court has not only insisted that such exemptions may be demanded by the Constitution,[31] but has approved statutory exemptions[32] and invited further statutory exemptions.[33] While the strictest of separationists may view the Act as a violation of the Establishment Clause,[34] that view seems at odds with the Court's recent, more inclusive approach to the Establishment Clause.[35]

Beyond the Establishment Clause, some scholars have suggested that the First Amendment, considered as a whole, is "jurisdictional." That is, the First Amendment places the *subject matter* of religion beyond the power of Congress.[36] Scholars have pointed out that the First Amendment begins with the words "Congress shall make no law * * *," which is in form an inverted Necessary and Proper Clause,[37] as evidence that the framers meant that Congress did not possess "a shadow of right * * * to intermeddle with religion."[38] Quite recently, both Justice Thomas and Justice Stevens have observed that the First Amendment places a whole category of laws beyond the reach of Congress.[39] In contrast to laws in which Congress has exempted religion from a broader regulatory scheme,[40] or provided that religion may be included in a regulatory scheme on an equal basis,[41] the Religious Liberty Protection Act is a law dedicated wholesale to the subject of religious rights. We simply have not seen federal legislation devoted as conspicuously to the subject of religion.

The Court has not yet adopted this view of the role of the First Amendment, although its decision in *Smith* may have moved the Court in that direction. Accordingly, while there is no direct authority for the proposition that the First Amendment constrains this use of Congress' spending authority, there is some risk here. We have never tested the relationship between the Spending Clause and the First Amendment in this way.

C. The Commerce Clause

Finally, I wish to turn to the section I consider most vulnerable. Section 2(a)(2) of the Act covers activities in which government burdens religious exercise that "affect commerce" with foreign nations, among the several states, or with Indian tribes.

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[31] *E.g., Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

[32] *E.g., Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U.S. 327 (1987) (upholding a limited exemption for religious employers under Title VII).

[33] *Smith,* 494 U.S. at 890.

[34] *See, e.g., Boerne,* 521 U.S. at 537 (Stevens, J., concurring) (finding that an exemption, as a "governmental preference for religion * * * is forbidden by the First Amendment").

[35] *See, e.g., Agostini* v. *Felton,* 521 U.S. 203 (1997) (overruling *Aguilar,* v. *Felton,* 473 U.S. 402 (1985)). *See* also In re Young, 141 F.3d 854 (8th Cir.) (upholding RFRA against Establishment Clause challenge), *cert denied,* 119 S. Ct. 43 (1998). But *see Texas Monthly, Inc.* v. *Bullock,* 489 U.S. 1 (1989) (striking down, under the Establishment Clause, a statute exempting magazines and books published by religious faiths from sales tax).

[36] *See, e.g.,* Steven D. Smith, Foreordained Failure: The Quest for Constitutional Principle of Religious Freedom (1995); Steven D. Smith, *The Religion Clauses in Constitutional Scholarship,* 74 Notre Dame L. Rev. 1033 (1999); Bybee, *supra,* note 1; Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and A Power Theory of the First Amendment* (draft in my possession).

[37] *See* Akhil Reed Amar, *Anti-Federalists,* The Federalist Papers, *and the Argument for Big Union,* 16 Harv. J.L. & Pub. Pol'y 111, 115 (1993).

[38] The Debates in the Several State Conventions on the Adopt of the Federal Constitution 330 (Jonathan Elliot, ed. 2d ed. 1888) (statement of James Madison).

[39] *Printz* v. *United States,* 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (referring to the First Amendment as an example of how the Constitution "places whole areas outside the reach of Congress' regulatory authority"); *id.* at 941 (Stevens, J., concurring) ("the First Amendment * * * prohibits the enactment of a category of laws that would otherwise be authorized by Article I").

[40] *See, e.g., Amos,* 483 U.S. 327 (Title VII).

[41] *Board of Educ.* v. *Mergens,* 496 U.S. 226 (1990) (upholding, against Establishment Clause challenge, the Equal Access Act); *Bowen* v. *Kendrick,* 487 U.S. 589 (1988) (upholding, against a facial challenge under the Establishment Clause, the Adolescent Family Life Act, which authorized grants to public and nonpublic organizations, including religiously affiliated organizations).

This language obviously tracks the language of the Commerce Clause, Article I, § 8, cl. 3. I have several observations on this use of the Commerce Clause.

First, in light of *United States* v. *Lopez,*[42] I would strongly urge the Senate to conform the language of Section 2(a)(2) to that decision and substitute the phrase "substantially affects commerce" for "affects commerce."[43] The Court observed in *Lopez* that its "case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause."[44] The Court left us without doubt on this question that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[45] Although Justice Breyer, dissenting in *Lopez,* noted that more than 100 sections of the U.S. Code use the word formula "affecting commerce,"[46] substitution of the correct phrase would eliminate doubt that Congress intended to work within the current limitations on its commerce authority. (For precision, I have used the phrase "substantially affects" throughout my testimony.)

Second, as with the spending condition, Congress has limited the scope of the Act's coverage. Unlike RFRA, the Religious Liberty Protection Act will not apply to all state activities, because not all state activities that may burden religious liberty are activities that substantially affect commerce. Domestic relations and education are two areas, for example, in which states may have policies that may cause friction with religious beliefs or practices, but are areas that may fall outside the scope of the Act because they do not affect substantially commerce.[47]

Here we should note that the Court has also warned us that there are areas where the states have "historically" been sovereign. The Court stated in *Lopez,* that if it had adopted the government's reasoning concerning the Gun-Free School Zones Act of 1990,

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents * * *, it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.[48]

It is not clear from this whether the Court believes that family law, criminal law enforcement and education belong to the states "constitutionally" as well as "historically." In any event, the Court may be slow to recognize an assertion of federal control over areas such as family law and education. That observation does not counsel that Congress should forebear from enacting legislation, but it should serve as a warning that by expressly tying the Religious Liberty Protection Act to the Commerce Clause, the Act may not address areas of religious liberty that may be of immediate concern to members of Congress.

Finally, and most importantly, the Commerce Clause provision raises serious concerns under the Court's federalism jurisprudence. The Supreme Court has long held that Congress and the states share concurrent power to regulate commerce. The states may not regulate areas pre-empted by Congress, matters that require a national rule, or in such a way that the law discriminates against commerce from other states. Subject to those restrictions, the states may regulate a whole host of activities even if those activities substantially affect interstate commerce. Ordinarily, Congress and the states regulate the market activities of private entities such as manufacturing, transportation, agriculture, and the service industries. In the course of congressional regulation of the market, federal laws have occasionally swept within their path state-run entities.[49] When the states complained that Con-

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[42] 514 U.S. 549 (1995).

[43] As revised, Section 2(a)(2) would read: "in any case in which the substantial burden on the person's religious exercise substantially affects, or in which a removal of that substantial burden would substantially affect, commerce with foreign nations, among the several states, or with Indian tribes; * * *."

[44] *Lopez,* 514 U.S. at 559.

[45] *Id.*

[46] *Id.* at 630 (Breyer, J., dissenting).

[47] *Compare, e.g., Lopez,* 514 U.S. at 565–66 (finding that education does not substantially affect commerce) *with id.* at 628–29 (Breyer, J., dissenting) (finding that education does affect commerce).

[48] *Lopez,* 524 U.S. at 564.

[49] Article I, Section 10 may authorize Congress to regulate the states directly with respect to certain matters affecting commerce. U.S. Const. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * *."); cl. 3 (No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with

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gress' power to regulate commerce among the states did not include the power to regulate the states themselves, the Court (through a very tortured line of cases) held that Congress's regulations may reach state entities to the same extent as the regulations reach private entities.[50]

When Congress acts under its commerce authority in an area in which it shares concurrent power with the states, it sometimes pre-empts state regulation. Congress may pre-empt state regulation by stating so expressly; by in fact occupying the field so that there is no room for additional state regulation; or by adopting a law that conflicts with a state law, so that a regulated party must choose between obeying federal law or state law. When Congress pre-empts state law under any of these schemes, it does so by regulating the non-governmental activity directly; it does not command the states not to enact laws, but rather it renders such state laws unenforceable. Once Congress has pre-empted state law, if the state has any obligation to follow federal law, it is because the state itself participates in the activity regulated by federal law. In such cases, the federal government regulates the state as a participant in the interstate market and not as a market regulator. The federal government regulates the state as a polluter, the state as a transportation provider, or the state as an employer on the same terms as it regulates other polluters, transportation providers, or employers.

Congress sometimes gives the states the option of regulating an activity in a particular way, or suffering the consequences of direct federal regulation (and federal pre-emption). In *FERC* v. *Mississippi,*[51] for example, the Public Utility Regulatory Policies Act of 1978 ("PURPA") directed state utility commissions to "consider" adoption of federal regulatory standards. The Court held that "PURPA * * * [was] not invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the states to continue regulating in the area on the condition that they *consider* the suggested federal standards."[52] The consequences of state failure to "consider" and then adopt federal standards was the risk that Congress would adopt comprehensive public utility laws and regulate the matter itself. PURPA did not mandate state regulation according to federal standards (although it surely provided a powerful incentive to the states); it did not regulate states either as market regulators or as market participants.

In *New York* v. *United States*[53] and *Printz* v. *United States,*[54] the Court held that Congress had attempted to regulate the states as regulators and held the legislation unconstitutional. In *New York,* the Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required New York to regulate nuclear waste within the state according to certain requirements *or* to take title to the waste. The Court held that the take title provision "crossed the line distinguishing encouragement from coercion" and regulated the "states as states."[55] In *Printz,* the Court struck a provision of the Brady Act that required local law enforcement officials to aid in the enforcement of the federal handgun licensing scheme. The Court "conclude[d] categorically * * *: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'"[56]

Section 2(a)(2) pushes the boundaries of the Supreme Court's recent cases in this area. We might characterize Section 2(a)(2) as pre-empting all state laws insofar as they burden religious exercise and the burden substantially affects commerce. That argument has some appeal in theory, but if so, it is an extraordinary use of Congress' commerce authority. In the past, Congress has pre-empted state regulation in a particular area—navigable waterways, air pollution, strip mining, or auto safety. The Religious Liberty Protection Act, by contrast, pre-empts state activities across the board, but only where those activities burden religion and the burdens substantially affect commerce. This use of pre-emption is thus fundamentally unlike any other congressional act pre-empting state regulation of which I am aware.

Furthermore, Section 2(a)(2) looks very much like an act regulating the states as states. Section 2(a)(2)—unlike, say, the Fair Labor Standards Act—does not apply

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another State * * *."). These instances provide specific circumstances authorizing Congress to deal with the states as states in matters regarding commerce.

[50] *See, e.g., Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) (holding that a state-operated transit system was subject to the Fair Labor Standards Act on the same terms as all other businesses covered by the act); *United Transportation Union* v. *Long Island Railroad Co.,* 455 U.S. 678 (1982) (applying the Railway Labor Act to a state-owned railroad).

[51] 456 U.S. 742 (1982).

[52] *Id.* at 765.

[53] 505 U.S. 144 (1992).

[54] 521 U.S. 898 (1997).

[55] 505 U.S. at 175.

[56] 521 U.S. 898, 933 (1997) (quoting *New York,* 505 U.S. at 188).

to private entities whose burdens on religious exercise may also substantially affect commerce. The Act, for example, could have prescribed a rule requiring employers to accommodate their employees' religious exercises or demonstrate a compelling reason why not. As I read *Garcia,* that use of Congress' commerce authority would apply to the states as employers. But the Act does not do that. Instead, it singles out the states for a special rule, and then regulates the states both as market participants and as market regulators. Section 2(a)(2) will govern state relationships with their employees and their citizens; and given the options available in Section 5(e) of the Act, it will affect state legislation, state administration, and state judicial proceedings.

Although I am inclined to believe that this section of the Act exceeds Congress' authority under the Commerce Clause, the matter is not free from all doubt in my mind. As the Committee is surely aware, this has been a sensitive area for the Court, and the Court has been closely divided on matters of federalism. Section 2(2)(a) is likely to supply ample grounds for litigation over this Act.

Thank you. I appreciate having had the opportunity to provide the Committee with my views, and I would be pleased to address (orally or in writing) any questions the Committee might have.

The CHAIRMAN. We will take your testimony now, Mr. Schaerr. We have a vote coming up, but we will certainly take your testimony.

STATEMENT OF GENE C. SCHAERR

Mr. SCHAERR. Thank you, Mr. Chairman. During the past 5 years, I have had the privilege of representing the chairman and a number of Senators and Congressmen in your efforts to defend RFRA in court, including the Supreme Court in the *Boerne* case.

Fortunately, we have done quite well in defending it as applied to the Federal Government. And I noticed in Justice Scalia's recent opinion in June, in the *Florida Prepaid* case, that even he appears to acknowledge that RFRA is valid as applied to the Federal Government. And the appellate courts that have ruled on that issue have gone that way as well.

Unfortunately, as we all know, we have been less successful in defending RFRA as applied to State and local governments, thanks to the efforts of Professor Bybee and other eminent scholars acting in complete good faith. But it is because of the *Boerne* decision that RLPA is sorely needed, and I believe RLPA does exactly what Professor Feldblum said that Congress should do, and that is pass legislation that protects the maximum amount of religious freedom that Congress fairly has the power to protect. I think RLPA does exactly that, and let me explain why.

First, there appears to be a consensus at least on this panel that to the extent RLPA relies on section 5 that it is within Congress's power. Six years ago when my late partner, Rex Lee, and I were preparing testimony on RFRA, I think it was clear to everybody that that use of section 5 would be at least controversial to some members of the Supreme Court, and that proved to be the case.

But I think the panelists and most legal scholars who have looked at the question seem to agree that RLPA resolves the problems that were identified there. There also seems to be a wide, though not complete consensus that RLPA is consistent with the Establishment Clause. The contrary argument got only one vote in the *Boerne* case. And there also seems to be general, although not complete consensus that RLPA does not violate general separation of powers principles.

So let me address the issues where there does seem to be some disagreement, and I think the answer to just about all of the concerns that have been raised is that most of RLPA's central provisions are either expressly or by implication tied to the Supreme Court's own interpretation of the Constitution or other laws. This is perhaps most obvious in section 3(a), which simply provides a remedy for government action recognized by the Supreme Court to violate the Free Exercise Clause.

So, like an accordion, this provision could bring within its sweep more or fewer government decisions, depending on the Supreme Court's interpretation of the Free Exercise Clause. Now, the same thing is true of section 2(a)(2), which imposes the strict scrutiny test on government decisions that affect interstate or foreign commerce. This provision would also bring within its sweep more or fewer government decisions, depending on the courts' interpretation of Congress's Article I commerce power, and there would thus be no occasion for the court to ever invalidate that provision.

Now, unlike Professor Feldblum, I have no problem at all placing in the courts' hands the task of deciding how far RLPA extends based on the sweep of Congress's commerce power. Courts do that all the time and I don't think it creates a constitutional crisis for a court simply to say, even based on constitutional considerations, that a particular act of Congress simply does not extend as far as some person or other would like it to extend.

I also do not read the *Lopez* decision to require that the burden at issue in any application of the statute has to substantially affect commerce. According to the *Lopez* decision itself, it is enough that the religious burdens that are addressed in the statute as a whole within the aggregate have a substantial effect on commerce.

Another accordion-like provision in RLPA is section 4(a) which provides for appropriate relief against the government. That provision leaves it to the court to decide what kind of relief can appropriately be attained against the particular government that is being sued, and it therefore minimizes the risk that this provision would be struck down on 11th Amendment grounds or State sovereign immunity grounds.

The Act is also accordion-like in its approach to other federalism issues. For example, it does not clearly specify whether it would apply to such core functions of State governments as determining who the State's high officials will be and how much they will be paid. And under the Supreme Court's approach to dealing with these issues, the Court says that if Congress wants to intrude into core functions of a State government, Congress has to make that clear and explicit in the statute.

Therefore, that leaves it to the court to decide in a particular case whether a proposed application of RLPA would extend that far and therefore intrude too far into State functions. The same is true of claims that a particular application of RLPA might commandeer State governments in some way. If the Supreme Court believes that a particular proposed application would have that problem, it can simply say as it did in the case of *Ashcroft* v. *Gregory* that it is not going to interpret the statute to do that because of constitutional concerns.

The Court did the same thing in the famous case of *New York* v. *United States,* where it actually upheld a couple of provisions of the nuclear waste law based on a somewhat narrow reading of the statute that was designed to avoid constitutional problems. And I think this same approach would cure any problems that the Supreme Court might conceivably find in RLPA's use of the spending power.

Now, I really don't think that provision is that controversial, but in the event that the Supreme Court thought that a particular application of that was somehow problematic, it would be a simple matter for the Court to say, as it did in the *Ashcroft* case and in the *New York* case, that it is simply going to construe the statute somewhat more narrowly than the proponent would like. And once again, that would avoid any need for the Court to hold the statute unconstitutional. It would simply be an interpretation of the statute.

As I pointed out in my testimony, another factor that I think will be helpful in defending RLPA before the U.S. Supreme Court and the other courts around the country is that it is in a lot of other respects which I won't detail right now—it is well within what Congress could do. It does not attempt to go to the very limit of Congress's power. In my view, it stays well within what Professor Feldblum called the deep water or the clear channels of Congress's power. And so for those reasons, I believe it is constitutional. I believe it makes sense for Congress to go ahead and pass this bill and put the accordion in the hands of public officials.

[The prepared statement of Mr. Schaerr follows:]

PREPARED STATEMENT OF GENE C. SCHAERR

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

I am a lawyer in private practice with the international law firm of Sidley & Austin, where I serve as co-chair of the firm's Religious Institutions Practice Group. While the views expressed here are mine alone, much of my practice is devoted to representing religious institutions and individuals, either in lawsuits or in disputes with government agencies.

During the past five years, I have also had the privilege of representing a number of Senators and Congressmen in your efforts to defend the Religious Freedom Restoration Act (or "RFRA") in court, including the Supreme Court in the *Flores* case. Fortunately, we have done quite well in defending RFRA as it applies to the federal government. Unfortunately, as everyone here well knows, we have been less successful in defending it as applied to state and local governments. And that is why a Religious Liberty Protection Act is sorely needed.

Today I would like to respond first to a major concern that has been expressed in some circles: that the proposal passed this Spring by the House—or the version introduced last year in the Senate—will be futile because the Supreme Court is likely to strike it down on federalism-related grounds, just as the Court invalidated the state portion of RFRA. As I will explain in a moment, I believe that concern is misguided. I will also briefly explain why, as one who is solicitous of states' interests, I believe the Act is an appropriate use of federal power, and why I believe it will provide significant protection for religious freedom.

I. WILL THE ACT BE UPHELD?

The principal constitutional arguments against RLPA have been ably refuted by Professor Laycock, Professor Michael McConnell, Professor Thomas Berg, and others, and I will not repeat all their analyses here. But let me emphasize a few of the key reasons why I believe those arguments will not be adopted by the Supreme Court.

A. Ample justification for invoking section 5

First, in my view, both the House version and the earlier Senate version comply with the Supreme Court's recent teachings about the scope of Section 5. Six years ago, when my late partner Rex Lee and I were working with Committee staff on RFRA, it was clear to everyone that the use of Section 5 in that statute would, at a minimum, be controversial with at least some members of the Supreme Court. And it was those very concerns that gave rise to the *Flores* decision.

This legislation, in my view, amply addresses those concerns. In *Flores,* and again just a few months ago in the *Florida Prepaid* case,[1] the Court explicitly recognized that Congress *has* the power under Section 5 to enforce the protections of the Fourteenth Amendment through substantive or even "preventive" legislation where two conditions are satisfied: (1) "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional"; and (2) there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[2] In my view, RLPA easily passes muster under that test.

The only provision that expressly relies upon Section 5 as a source of congressional authority is Section 3 of the House bill. Section 3(a) of that provision takes the Supreme Court's views on the scope of the Free Exercise Clause as a given, and then simply makes it easier to *enforce* whatever free exercise rights the Court is willing to recognize. That provision is based on a finding—and an ample record—that burden-shifting measures are necessary to enable individuals and religious institutions to vindicate their constitutional rights as recognized by the Supreme Court. In that respect, Section 3(a) resembles other burden-shifting mechanisms that courts routinely apply when adjudicating disputes brought under many of our existing civil rights laws.[3] Accordingly, I do not think anyone can plausibly argue that this provision exceeds Congress's authority under Section 5 of the Fourteenth Amendment.

Most of Section 3(b)—the land-use provision—likewise does not go beyond what the Supreme Court has recognized as violations of the Free Exercise Clause. The only part of that provision that arguably goes beyond that is Section 3(b)(1)(A), which imposes a "least restrictive alternative" test on land-use decisions that substantially burden religion. But because Section 2 also imposes that standard in cases that have an affect on commerce, I think it unlikely that anyone would ever need to invoke Section 3(b)(1)(A).

Even it that provision were invoked in some unusual case, I believe it could be justified under Section 5. Land-use regulation is usually administered through highly individualized processes, not through generally applicable rules, and for that reason fall outside the rule of *Employment Division* v. *Smith.*[4] As a matter of First Amendment law, they are therefore still subject to the narrow tailoring interest test articulated in *Flores* and *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah,*[5] to the extent they burden religion.

And even where land-use regulation is administered through general rules, as the legislative record shows, there is strong evidence that these land-use decision making has been widely abused to the detriment of religion. Indeed, it would appear that land-use regulation in general is repeatedly being used throughout the United States to discriminate against religious minorities, denying them houses of worship in communities where they—and perhaps religion in general—are unpopular. This type of discrimination is clearly unconstitutional, but is often extremely difficult to detect and prevent.

This documented, widespread abuse, combined with the difficulty of proving a constitutional violation in particular cases, justifies the imposition of a standard—in

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[1] *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank,* 119 S.Ct. 2199, 2202–11 (1999).

[2] *City of Boerne* v. *Flores,* 521 U.S. 507, 519, 532 (1997).

[3] *See, e.g.,* 42 U.S.C. § 2000e–2(k)(1)(A)(i) (1994) (providing that once a Title VII plaintiff demonstrates that a particular employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, the burden of production shifts, requiring the defendant to demonstrate that the allegedly discriminatory practice is job-related and consistent with business necessity); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) (explaining that once a Title VII plaintiff makes a prima facie showing of discrimination, the burden shifts to the defendant to articulate some "legitimate, nondiscriminatory reason for the employee's rejection"); *see also Batson* v. *Kentucky,* 476 U.S. 79, 97 (1986) ("Once the defendant makes a prima facie showing [that the prosecution exercised its peremptory challenges in a racially discriminatory manner], the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.").

[4] 494 U.S. 872 (1990).

[5] 508 U.S. 520 (1993).

this limited area of governmental decision making—that is a little more rigorous than the "narrow tailoring" standard that the Supreme Court would currently apply to specific cases in which a constitutional violation has occurred. This I think is the justification for using a "least restrictive alternative" standard in Section 3(b), rather than a narrow tailoring standard. That remedy, though somewhat beyond the constitutional minimum, should satisfy the *Flores* criteria because it (a) is limited to a discrete problem area as to which Congress can (and presumably will) make well-supported findings, and (b) is "proportional" to and congruent with the constitutional injury documented in the record.

B. Uncontroversial use of the spending power

To the extent the Act relies upon Congress's spending power, it does so in a way that is similarly uncontroversial. Congress has frequently attached conditions to the use of federal funds to ensure that such funds are not used in a manner that undermines the interests of the United States or the rights of its citizens. For example, under Title VI of the Civil Rights Act of 1964, Congress has long required that state participants in federal programs not engage in racial discrimination,[6] and no one could seriously question the validity of that requirement under the Spending Clause.

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

It is also far easier to defend than the law that was *upheld* in *South Dakota* v. *Dole,*[7] and which permitted the Secretary of Transportation to withhold all highway funds from states in which minors could purchase alcohol. There, the federal government essentially forced the states to take action that was entirely separate from operating federally funded programs as a condition of participating in those programs, which would be like forcing the states to enact religious-freedom legislation as a condition of participating in Medicaid. Here, by contrast, the spending condition—respecting religious freedom as defined by Congress—applies only on a program-by-program basis, and does not require the state to take any external action.[8]

C. Commerce and other key provisions tied to Supreme Court's constitutional interpretations

Another reason I believe RLPA will ultimately be upheld is that many of its central provisions are tied to the Supreme Court's own interpretation of the Constitution. I already mentioned section 3(a), which would simply expand or contract if the Supreme Court's interpretation of the Free Exercise Clause expands or contracts in the future.

The same is true of Section 2, which imposes the compelling interest test on government decisions "affecting" interstate or foreign commerce. This provision depends on the Supreme Court's view of the extent of Congress's power to regulate such commerce. Like an accordion, it could bring within its sweep more or fewer government decisions as the Supreme Court's interpretation of the commerce power expands or contracts. But I think it most unlikely that the provision itself could be invalidated as *exceeding* Congress's commerce power.

The same is also true of the relief the Act provides against state and local governments. Section 4(a) provides that a person who establishes a violation of the Act can obtain "appropriate relief against a government." That of course leaves it to the Court to decide what kind of relief can appropriately be obtained against a particular government being sued.

D. Avoidance of "commandeering"

Equally important, the Act carefully avoids "commandeering" the states, which is of course *verboten* under the Supreme Court's recent decisions in *New York* v. *United States*[9] and *Printz* v. *United States.*[10] For example, Section 2(d) expressly gives a state or local government great latitude in choosing a remedy for a violation of the statute. The government may not only change or abandon the policy that results in a burden on religion; it may also leave the policy in place but grant religious exemptions—or do anything else that eliminates the religious burden.

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[6] *See* 42 U.S.C. § 2000d *et seq.* (1994).

[7] 483 U.S. 203 (1987).

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

[9] 505 U.S. 144 (1992).

[10] 521 U.S. 898 (1997).

Unlike the statutes struck down in *New York* and *Printz,* moreover, this proposal does not force state or local governments to go out of their way to implement and manage a federally mandated regulatory scheme.[11] All the proposal does is *preempt* governmental action that violates the provisions of the statute. Beyond that, it imposes no affirmative obligations on the States. It is thus indistinguishable from a host of other laws preempting state and local governmental action.[12]

To be sure, the statute does operate directly and exclusively on state and local governments and their officials. But that has never been thought a sufficient basis for invalidating legislation. Indeed, one of the main purposes of the commerce power granted to Congress in Article I was to provide a way to prohibit the states, as states, from interfering with interstate commerce. And the Supreme Court has upheld numerous statutes—under commerce power as well as the spending power and Section 5—that operated directly on the states.[13]

In any event, when combined with RFRA, RLPA would simply become part of a broader system of protection applicable to *all* governments, federal, state, and local. So the states cannot complain that they are being singled out for special treatment.

E. No establishment clause violation

Because RLPA is narrower than RFRA, the Establishment Clause argument against the Act is even weaker than the Establishment Clause argument that garnered only one vote in *Flores.* The Supreme Court has repeatedly upheld laws that exempt religious beliefs and practices from generally applicable rules against Establishment Clause claims.[14] That is all RLPA does. And the Court has never remotely suggested that preserving religious freedom in more than one area of public policy at the same time is an "establishment of religion," whereas doing the same thing on a statute-by-statute basis is perfectly acceptable.

Thus, those who contend that RLPA violates the Establishment Clause do so on the basis of a theory that has never been accepted by the Supreme Court. I do not find the theory at all convincing as an original matter. But in all events, it does not, in my view, represent a serious litigation risk.

F. No separation-of-powers violation

Finally, the separation-of-powers attack on the Act is also weaker than a similar argument that was made in *Flores.* That argument got *no* votes there. It was also rejected by the Eighth Circuit in *Christians* v. *Crystal Evangelical Free Church,*[15] in which the Chairman appeared as an amicus, and the Supreme Court declined to review that decision.

To be sure, Justice Kennedy's majority opinion in *Flores* discussed separation-of-powers principles, but only in the context of explaining and justifying the Court's interpretation of Section 5.[16] The Court did not suggest, much less hold, that RFRA violated the constitutional separation of powers in addition to being beyond Congress's Section 5 authority.[17]

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[11] *Printz* invalidated specific affirmative duties imposed upon state officials to participate in the implementation of a federal program of handgun regulation. 521 U.S. at 935. The Court there held that Congress "cannot compel the States to enact or enforce a federal regulatory program," nor can it "circumvent that prohibition by conscripting the State's officers directly." Id.

The unconstitutional provision in the statute at issue in *New York* was a "take title" provision requiring States to either regulate according to Congress's instructions or accept ownership of waste generated within their borders. 505 U.S. at 174–75. The Court concluded that "[e]ither type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." Id. at 175.

[12] *Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U.S. 528, 555 (1985) (Fair Labor Standards Act); *EEOC* v. *Wyoming,* 460 U.S. 226 (1983) (Age Discrimination in Employment Act); *Transportation Union* v. *Long Island R. Co.,* 455 U.S. 678, 687–88 (1982) (application of Railway Labor Act to state-owned railroad company); see also *FERC* v. *Mississippi,* 456 U.S. 742, 764 (1982) (holding Public Utility Regulatory Policies Act of 1978 did not unconstitutionally command state regulation of electric energy); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 288 (1981) (holding Surface Mining Control and Reclamation Act of 1977 did not unconstitutionally command state regulation of surface mining).

[13] *See supra* n. 13.

[14] *E.g., Corporation of the Presiding Bishop* v. *Amos,* 483 U.S. 327 (1987); *Zorach* v. *Clausen,* 343 U.S. 306 (1952); *Walz* v. *Tax Comm'n of New York City,* 397 U.S. 664 (1970).

[15] 141 F.3d 854 (8th Cir. 1998), *cert. denied,* 119 S.Ct. 43 (1998).

[16] 521 U.S. at 515–536.

[17] The argument that the Act violates the "enumerated powers requirement" is frivolous. Of the key operative provisions, Section 2(a)(1) is obviously based on Congress's commerce power under Article I, Sec. 8, cl. 3; Section 2(a)(2) is plainly based on the spending power under Article 1, Sec. 8, cl. 1, & Sec. 9; and Section 3 is expressly based on Section 5 of the Fourteenth Amendment. And the fact that the Act does not identify a specific arena of commerce or spending is

In contrast to RFRA, moreover, the Act does not purport to be a full-blown "restoration" by Congress of the rules applicable to free-exercise claims prior to the Supreme Court's decision in *Employment Division* v. *Smith.*[18] So no one can plausibly claim that Congress in this legislation is somehow trying to second-guess or "overrule" the Court as to the proper interpretation of the Constitution in litigated cases. Nor, for the same reason, can anyone plausibly claim that the act is an effort to "amend the Constitution" without proper ratification procedures.

Rather, by enacting this legislation, Congress is simply taking up the Supreme Court's invitation in *Smith* to resolve issues of religious freedom through the democratic process. In *Smith,* the Court characterized its decision as "leaving [religious] accommodation to the political process," and further stated: "Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[19] That same invitation was reiterated by Justice Scalia, the author of *Smith,* in his concurrence in *Flores*: "The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of [religious accommodation] cases. * * * The historical evidence. * * * does nothing to undermine the conclusion we reached in *Smith*: It shall be the people."[20]

Obviously, there is no guarantee the Supreme Court will uphold RLPA, as limited as it is. However, given this explicit invitation in *Smith* and *Flores* to the people's elected representatives, I believe it is highly unlikely that the Court would fault Congress for having carried out the will of the people within the sphere of Congress's enumerated powers.

II. IS THE ACT A WISE USE OF FEDERAL POWER?

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

A. Limited interference with the interests of state and local governments

First of all, the Act's impact on the States is carefully limited in key ways and, indeed, clearly does not extend to the limits of congressional power. For example, the proposal does not attempt to invoke Congress's power to override the states' immunity from liability under the Eleventh Amendment and sovereign immunity principles. The proposal also does not invoke Congress's power to override the official immunity of *individual* state or local government officials. And Section 2(c) expressly prohibits the federal government from denying or withholding financial assistance as a remedy for violations.

Similarly, the Act does not use the spending power to force states to adopt RLPA's standards for state programs *other* than those that are directly supported by federal funding—something *Dole* seems to say Congress could do. And Section 4(c) greatly reduces the litigation burden on states by subjecting prisoner claims brought under the Act to the Prison Litigation Reform Act of 1995 and subsequent amendments.

In short, the Act does not "push the envelope" of Congressional power. All it does is extend to religious exercise the same types of protections that Congress has traditionally used to protect other values such as non-discrimination. And in many respects it is less of a threat to states than these other statutes.

B. The importance of religious freedom

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

I believe religious freedom is at least as important as those values, for two related reasons.

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irrelevant. The Act's opponents have not cited a single decision suggesting that such a requirement applies.

[18] 494 U.S. 872 (1990).

[19] 494 U.S. at 890.

[20] 521 U.S. at 544 (Scalia, J., concurring).

First, as James Madison and others taught repeatedly, the freedom to form one's own religious or moral beliefs, and then to act on those beliefs, is fundamental to a person's moral development.[21] And moral development is an overriding value in virtually all religious and philosophical belief systems. Thus, for most of us, religious freedom is inherently important, regardless of its impact on the nation as a whole. That was one of the main reasons for adoption of the religion clauses back in 1791.[22]

Second, in adopting the First Amendment, our founding fathers acted on a firm belief that religion, where it is not interfered with by the State, tends to nurture in individuals the very virtues that make for better citizens.[23] I believe they were right, and that religion generally fosters in individuals the values of tolerance, respect, and compassion that Congress often seeks to promote or enforce through legislation.

To be sure, there have been times when religion has been the focus of enormous civil strife. But that has never been because of an excess of religious freedom. If one studies the history of those events, one finds that the strife generally resulted either from an attempt by some to deprive others of the right to believe and practice as they choose, or from the efforts of those to whom religious freedom was denied to acquire that precious freedom. As Madison pointed out, "[t]orrents of blood have been spilt in the old world," not because there was too much religious freedom, by because of what he called "vain attempts of the secular arm to establish uniformity of religion."[24]

In our day, these "torrents of blood" have often been replaced with torrents of litigation that result when governments attempt to impose uniform standards on everyone regardless of religious sensibilities. And this is another reason why RLPA will be valuable: By giving religious people and institutions an additional lever to use in negotiating with public officials over matters that impact religious practices, RLPA, in all likelihood, will eventually lead to more accommodation and compromise, and *less,* not more, litigation over such matters.

For all these reasons, religious freedom is at least important as the other values that Congress has sought to promote in other legislation that impacts the interests of state and local governments at least as much as RLPA. It deserves no less protection.

III. WILL THE ACT ACTUALLY HELP PROTECT RELIGIOUS LIBERTY?

This leads me to the final issue: Given that the Act has been carefully limited to avoid impinging unduly on the states' interests, is it too limited to actually help protect religious liberty? As it now stands, I believe the proposal will have a salutary, discernible impact on religious liberty.

A. Salutary effects

Certainly, each of the three main operative provisions of the Act will materially increase the level of legal protection for religious liberty throughout the nation.

Section 2. First, by reinstating the "compelling interest" test for government decisions falling within Congress's power under the commerce and spending clauses, Section 2 will go some distance toward closing the remaining gap between the level of protection provided for religious freedom prior to *Smith* and the protection that currently exists.

In my law practice, I have seen a number of situations in which this provision would help protect religious liberty. Many states, for example, are slowly but surely abrogating the clergy-penitent privilege under laws that, on their face, are generally applicable.[25] Predictably, this trend has made both clergy and their parishioners much more reluctant to talk with one another about the parishioners' spiritual problems. Although Section 2 of RLPA would not necessarily prevent the abrogation of this privilege in every case, it would at least force legislators and judges to confront the question of whether the state's interest is really strong enough to justify that action, and whether there might not be some other, less intrusive way of achieving the state's objective.

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[21] John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 72–74 (1998) (quoting James Madison).

[22] *Id.*

[23] *See McGowan* v. *Maryland,* 366 U. S. 420, 462 (1961) (Frankfurter, J., concurring) (observing that both state codes and dictates of faith "aim at human good," and "[i]nnumerable civil regulations enforce conduct which harmonizes with religious canons.").

[24] *See* Noonan, *supra,* at 74.

[25] *E.g.,* Ark. Code Ann. § 42–815; Idaho Code § 16–1620; La. Rev. Stat. § 14403(F); Wash Rev. Code § 2644060(3); W. Va. Code §§ 49–6A–2 & 49–6A–7.

As mentioned earlier, Section 2 would likewise help stem the rising tide of personal-injury litigation against churches. Many of these suits allege what amounts to "clergy malpractice," such as a failure to counsel a parishioner properly, or a failure to refer a parishioner to an appropriate professional counselor.[26] And even when such suits are ultimately thrown out—and they often are—they are very expensive to defend. Obviously, when a church or other religious institution has to spend its time and money defending against lawsuits, its ability to pursue its religious mission is curtailed.

Section 2 would not curtail lawsuits directly. But it would make judges think twice before they allow a plaintiff to pursue a tenuous legal claim against a church. And it would give judges an additional legal basis for dismissing frivolous lawsuits at an early stage. And this, of course, would deter the filing of such lawsuits.

This provision of the Act would also help protect churches and other religious institutions from the ever-increasing volume of litigation challenging personnel decisions that are based, in whole or in part, on religious considerations. For example, in some states a Seventh-Day Adventist hospital that fires someone for violating the church's prohibition on extra-marital sex may find itself sued for violation of a state statute barring discrimination on the basis of pregnancy.[27] In others, a Catholic hospital may be sued for discrimination on the basis of religion for choosing an administrator who adheres to Catholic teachings on abortion.[28] Or a Baptist radio station may be sued for preferring employees who are Baptist rather than Buddhist.[29]

Once again, the "compelling interest" standard in Section 2 will not always foreclose such litigation. But it will help weed out frivolous suits, those in which the state's interest is weak, and those in which the state has made no reasonable effort to accommodate religious beliefs.

Exactly how much help Section 2 provides will depend to some extent on how the Supreme Court construes the scope of the commerce power. But even if the Court significantly narrows its interpretation of that power, Section 2 would still likely protect a great deal of religious activity. At a minimum, religion would be protected under federal law to the same extent as other important values such as non-discrimination. And that is perhaps the most anyone can hope for.

Section 3(a). Section 3(a) is equally if not more important to the protection of religious liberty. It will provide a means of redressing a broad range of violations of the Free Exercise Clause that cannot be enforced effectively today because some of the elements of a violation are so difficult to detect and prove. As a litigator, I can tell you that shifting the burden of proof on some of those elements will, by itself, have a powerful, salutary impact on the way in which government bodies respond to actual or potential free-exercise claims.

Consider for example a school district that rents its facilities to private users on weekends, but because of hostility to religion, is considering whether to prevent those facilities from being used for worship services. If the school district knows that an adversely affected religious group would have to prove that the district acted with an anti-religious purpose, they may simply agree to adopt the restriction, keep silent about their motivations, and hope for the best. But if they know *they* will have to prove that they acted for legitimate reasons, they will think twice before adopting the restriction. Or at least their lawyers will so advise them.[30]

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

Much testimony has already been presented on the widespread use of land-use regulation to thwart the efforts of religious institutions to carry out their religious missions. I would refer the Committee in particular to the excellent testimony presented by Mr. Keetch and Professor Durham before the House Judiciary Committee. Let me add just a few additional examples from the landmarking area.

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[26] *Eg., Byrd* v. *Faber,* 565 N.E.2d 584 (Ohio 1991); *Nally* v. *Grace Community Church,* 763 P.2d 948 (Cal. 1988); *Schiffer* v. *Catholic Archdiocese,* 508 N.W.2d 907 (Neb. 1993).

[27] *Arriaga* v. *Loma Linda University,* 10 Cal. App. 4th 1556 (1993).

[28] This would be true, for example, in a state that has a statutory prohibition on religious discrimination, but without no exemption for religious institutions.

[29] *Cf. Lutheran Church—Missouri Synod* v. *FCC,* 141 F.3d 344 (D.C. Cir. 1998) (reversing decision of Federal Communications Commission challenging practice of religious radio station of preferring employees of the same faith).

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

Not so long ago, for example, the City of Boston used landmark regulations to prevent a group of Jesuits from changing the interior design of their chapel. The City even prohibited them from moving the altar and removing a cross.[31]

And in San Francisco, when the Korean United Methodist Church outgrew its current church building, it decided to sell the property and use the proceeds to purchase a larger church. It even found a willing buyer. But the Board of Supervisors, responding to intense local pressure, voted to landmark the Church, despite the finding of the planning commission that there was nothing historically or architecturally significant about the building. As soon as the landmark designation occurred, the buyer backed off. The Church spent its entire building fund, almost $200,000 fighting the designation, until it was vetoed by the Mayor. *See* Letter of Assembly Speaker Willie Brown to Governor Pete Wilson, September 8, 1994, at 5 (attached).

Similarly, the Sacred Heart Catholic Church of San Francisco had a dwindling congregation of 180 members, although the church was built to accommodate 1,300 worshipers. Damaged in the Loma Linda Prieta earthquake, the church faced $5 million in seismic retrofit costs. To make matters worse, as a house of worship it could not qualify for seismic retrofit grants under FEMA. When the Church decided it could not afford the repairs, and would instead replace the building with a smaller chapel, the landmark authority immediately voted to designate Sacred Heart as a landmark. But for the Legislature's passage shortly thereafter of a religious exemption, Sacred Heart would have been forced to divert millions of dollars from its private school program to continually maintain a building that it did not need. *Id.* at 9.

These and other examples led former California Assembly Speaker Willie Brown to conclude several years ago that "it is increasingly common for landmarking to be used not for the purpose of historical preservation, but simply as a tool to thwart a religious community from carrying out its plans." *Id.* RLPA would go a long way to redress that situation, especially in states that have not enacted a landmarking exemption for religious entities.

At the end of the day, I believe a combination of RFRA and RLPA, supplemented by the Supreme Court's existing interpretation of the Free Exercise Clause, will likely cover about 90 percent or more of the religious-liberty problems that were covered by the compelling interest test prior to *Smith.* But without RLPA, a great deal of religious freedom will be irretrievably lost.

B. Alleged negative effects

I also disagree with those who claim that the Act will subtly hurt religious liberty. Preliminarily, it is important to remember that the Act is carefully crafted to avoid any unintended, *adverse* impact on religion. Section 5(e), for example, makes clear that a finding under the Act that a particular religious exercise affects commerce "does not give rise to any inference or presumption that the religious exercise is subject to any other law regulating commerce." Similarly, Section 5(b) precludes any effort to use the Act as a basis for any claims against a religious organization, including a religiously affiliated school or university, whose activities do not rise to the level of "acting under color of law." Under Supreme Court precedent, that is a very difficult showing to make.[32]

I also do not believe the commerce requirement of Section 2 would in any way "cheapen" religion, as some have claimed. That provision does not require a claimant to show that his or her religious exercise *is* a commercial activity. All it requires is that the *burden* on that exercise have some impact on commerce. I think people are smart enough to draw a distinction between actions that are themselves commercial, and burdens on those actions that, in the aggregate, have an *impact* on commerce.

Nor do I think Section 2 would create discrimination in favor of large, mainstream religions and religious groups against smaller or less mainstream groups, as some have claimed. Under Section 2, the burden on a wide range of religious groups could be aggregated in determining whether the commerce requirement has been satisfied. This greatly reduces any advantage large religious groups might otherwise enjoy in establishing an impact on interstate commerce. Accordingly, do not believe the commerce features of the Act will in any way harm religious freedom.

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[31] *Society of Jesus* v. *Boston Landmark Comm'n,* 564 N.E.2d 571 (Mass 1990).

[32] *E.g., NCAA* v. *Tarkaman,* 488 U.S. 179 (1988).

IV. CONCLUSION

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

Gene C. Schaerr is a litigation partner in the Washington office of Sidley & Austin, and serves as co-chair of the firm's Religious Institutions Practice Group. He specializes in civil appellate and writ practice. In that capacity he has briefed and argued numerous appeals in both state and federal systems in such diverse areas as civil rights, constitutional law, antitrust, tax, torts, civil procedure, administrative law, product liability, breach of warranty, breach of contract, and civil rights. He has also had extensive experience in helping clients in high-risk or high-profile cases to prepare, at the trial level, to prevail on appeal. Mr. Schaerr has particular expertise and experience in the representation of religious institutions.

Mr. Schaerr joined Sidley & Austin following clerkships on the U.S. Supreme Court (for Chief Justice Warren Burger and Justice Antonin Scalia) and on the U.S. Court of Appeals for the D.C. Circuit (for then-Judge Kenneth Starr). He also served for two years in the White House as Associate Counsel to the President. In 1985, he received his law degree from Yale University, where he was Editor-in-Chief of the *Yale Journal on Regulation* and Senior Editor of the *Yale Law Journal.* Mr. Schaerr also received his M.Phil., and M.A from Yale in 1986 and 1985, respectively, as well as his B.A with highest honors from Brigham Young University in 1981.

AB 133

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Assembly
California Legislature

WILLIE LEWIS BROWN, JR.
ASSEMBLYMAN, THIRTEENTH DISTRICT
SPEAKER OF THE ASSEMBLY

September 8, 1994

Honorable Pete Wilson
Governor
State Capitol
Sacramento, CA 95814

Dear Governor Wilson:

I respectfully urge you to sign AB 133 into law. AB 133 corrects a grave inequity that unfairly burdens religious congregations throughout the state: the landmarking of houses of worship and other noncommercial religious properties, such as schools and rectories, by a local jurisdiction over the objection of the owner of the property.

This provision is at odds with existing procedures for identifying historical resources at both the state and federal levels, which prohibit a property from even being nominated for listing if the owner of the property objects (See PRC 5024.1(f)(4) re: the state process). AB 133 requires that local landmarking ordinances, which are authorized by state statute, conform to the state and federal practice by requiring the consent of the property owner before a noncommercial religious property can be landmarked.

I decided to carry AB 133 more than a year ago after the San Francisco Interfaith Council, representing a broad array of faiths, came to me for help. In most cases, religious communities are ardent supporters of preserving their houses of worship, which are the most tangible and lasting expression of their religious faith. Indeed, while local landmark ordinances have existed in most cities for less than 30 years, a great many beautiful old religious buildings, some older than the state itself, stand today as a demonstrated record that religious communities are proven preservationists.

More and more often, however, religious congregations are facing very difficult internal decisions about how best to use their limited financial resources to carry out their religious mission. In San Francisco, many congregations face

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very high costs -- often in the millions of dollars -- to seismically retrofit their unreinforced masonry buildings. Some large religious communities -- the Catholic Church is only the most prominent example -- must respond to changing demographics and declining church attendance with wrenching decisions to close some churches and consolidate parishes. Sometimes a congregation's internal decision about how best to fulfill its religious mission requires that its existing house of worship be remodeled or sold.

I think you will agree with me that these sorts of decisions are central to the mission of a religious community, and they should not be made or influenced by government. Yet that is precisely what happens when a local government's decision to landmark a house of worship limits a congregation's ability to fulfill its religious mission. To make matters more difficult, it is increasingly common for landmarking to be used not for the purpose of historical preservation, but simply as a tool to thwart a religious community from carrying out its plans.

I have enclosed photographs and descriptions of circumstances faced by three churches in San Francisco. I hope you will review them; they graphically illustrate the problem AB 133 seeks to address.

I am convinced that the current ability of local governments to landmark houses of worship and other noncommercial religious properties without the consent of the owner violates the First amendment free exercise of religion clause, and a number of cases decided by the California and U.S. Supreme Courts support this position. For example, the California Supreme Court has reaffirmed (Smith v. Commission on Fair Employment and Housing, 3rd Dist., May 26, 1994, Case C007654, 94 C.D.O.S. 3880, 3886) that the state's interference with free exercise of religion must meet a "compelling interest" test, which is generally limited to protection of public health and safety. While historical preservation is certainly a legitimate interest of the state, it is just as certainly not a compelling interest when tested against the state constitution. I have enclosed a letter from Bruce Fein, the eminent constitutional scholar, for further background on the constitutional arguments.

It is worthwhile to note that the constitutional separation of church and state has created the worst of both worlds for many churches faced with unwanted landmarking: on one hand, it has failed to protect congregations from landmarking ordinances that infringe on free exercise of religion; on the other hand, religious properties that have suffered

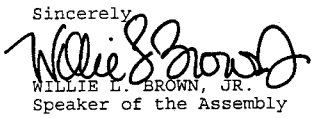
earthquake damage, unlike any other public or private buildings, do not qualify for FEMA seismic retrofit grants -- because of the separation clause.

AB 133 simply tries to restore a level playing field for religious communities. The bill does not affect any properties already landmarked. Nor does it exempt religious properties from landmarking. It conforms the local process to the state and federal processes by requiring owner's consent. In fact, I took late amendments to the bill to increase public accountability by requiring owners of religious properties to explain in public why landmarking will result in substantial hardship.

AB 133 has the support of religious communities throughout the state, including the California Council of Churches, Ecumenical Ministries of Northern California, Council of Religious Leaders of Southern California, California Catholic Conference of Bishops, Congregation Sherith Israel, California Pacific Conference of the United Methodist Church, and the Sierra Pacific Synod of the Evangelical Lutheran Church. I also must note the support of Dr. Albert Shumate, the first president of the San Francisco Landmarks Preservation Board and one of the first presidents of the California Historical Society. He closed his letter of support with the simple statement: "One must remember that people are more important than bricks."

AB 133 tries to restore reason and fairness to a process that, while well-meaning and worthy of support, allows and even encourages a narrow view of preservation which actually infringes on some of our society's most basic rights. For all these reasons, I urge you to sign AB 133 into law.

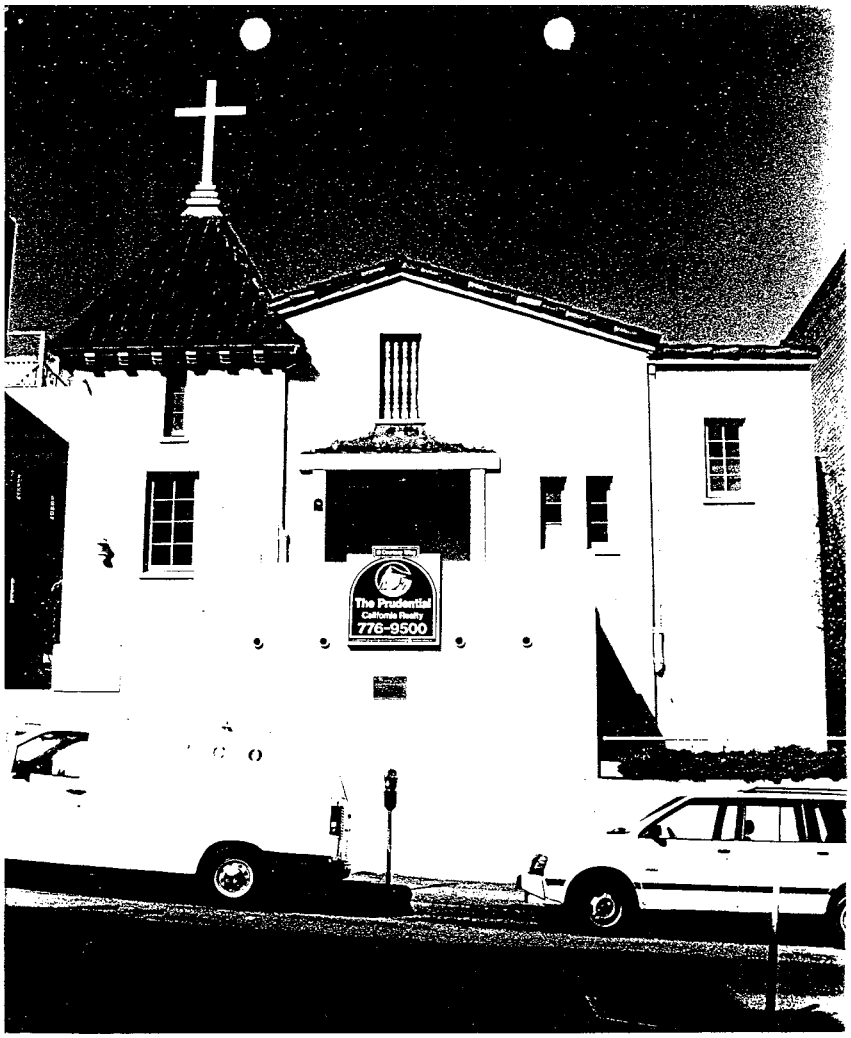
Sincerely,



WILLIE L. BROWN, JR.
Speaker of the Assembly

WLB:pp

Enclosures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THIS IS KOREAN UNITED METHODIST CHURCH IN SAN FRANCISCO.

THE CONGREGATION OF KOREAN UNITED METHODIST HAS OUTGROWN ITS CURRENT CHURCH. THE CONGREGATION VOTED 158-1 TO SELL THE CHURCH AND USE THE PROCEEDS TO BUY A BIGGER CHURCH TO ACCOMMODATE ITS GROWING MEMBERSHIP. IN FACT, THE CHURCH HAD A WILLING BUYER.

THEN THE BOARD OF SUPERVISORS, RESPONDING TO INTENSE LOCAL PRESSURE, VOTED TO LANDMARK THE CHURCH, DESPITE THE FINDING OF THE PLANNING COMMISSION THAT THERE WAS NOTHING HISTORICALLY OR ARCHITECTURALLY SIGNIFICANT ABOUT THE BUILDING. AS YOU CAN SEE, THE BUILDING IS UNEXCEPTIONAL.

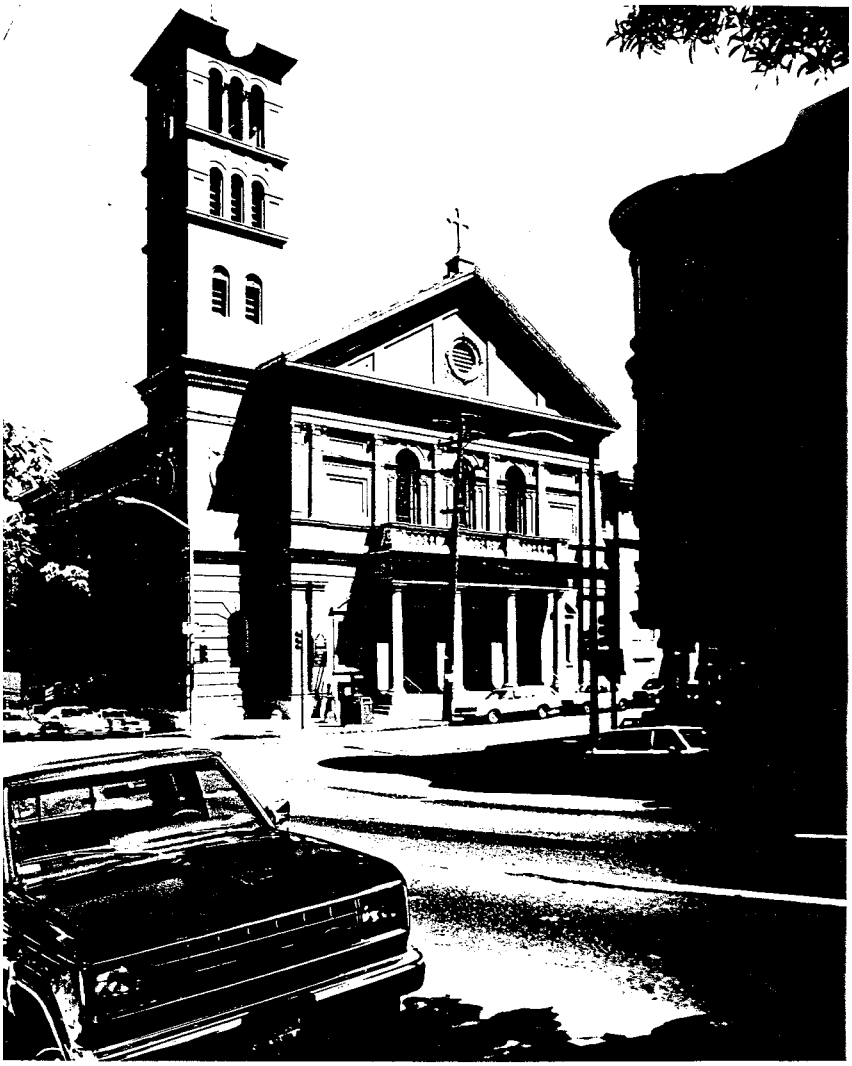
AS SOON AS THE VOTE TO LANDMARK OCCURRED, THE BUYER BACKED OFF. HE COULD NO LONGER USE THE BUILDING FOR HIS INTENDED USE IF IT WAS LANDMARKED. NO NEW BUYER HAS COME FORWARD. THE CONGREGATION SPENT ITS ENTIRE BUILDING FUND, ALMOST $200,000, BEFORE MAYOR JORDAN VETOED THE LANDMARK DESIGNATION. BECAUSE OF CONTINUING PRESSURE TO LANDMARK THE CHURCH, NO NEW BUYER HAS BEEN FOUND.

THIS IS ST. MARKS LUTHERAN CHURCH IN SAN FRANCISCO.

ST. MARKS LUTHERAN IS A LANDMARKED CHURCH WITH A CONGREGATION OF 300. IT IS FACING UP TO $5 MILLION IN SEISMIC RETROFIT COSTS. THE TOWER AND CAMPANILE OF THE STRUCTURE POSE THE GREATEST RISK TO PUBLIC SAFETY AS WELL AS THE GREATEST COST TO REPAIR.

IF THE CHURCH WERE NOT LANDMARKED, THE CONGREGATION COULD REDUCE ITS RETROFIT COSTS SUBSTANTIALLY BY REVISING THE TOWER AND CAMPANILE. BECAUSE THE CHURCH IS LANDMARKED, IT MUST BE RESTORED EXACTLY AS IT APPEARS.

WHY IS THIS SO IMPORTANT TO ST. MARKS LUTHERAN? BECAUSE THE CHURCH ALSO OWNS A RESIDENTIAL TOWER TO PROVIDE HOMES FOR LOW-INCOME SENIORS. IT IS A CENTRAL PART OF THE CONGREGATION'S RELIGIOUS MISSION. IN ORDER TO PAY FOR THE RETROFITTING REQUIRED UNDER LANDMARK STATUS, THE CONGREGATION WILL EITHER HAVE TO SELL THE CHURCH OR SELL THE RESIDENTIAL TOWER. EITHER CHOICE OBVIOUSLY CONSTITUTES FUNDAMENTAL DISRUPTION OF THE CONGREGATION'S FULFILLMENT OF THEIR RELIGIOUS MISSION.



THIS IS THE SACRED HEART CATHOLIC CHURCH OF SAN FRANCISCO.

SACRED HEART WAS ORIGINALLY BUILT FOR 10,000 PARISHIONERS AND CAN HOLD 1,300 WORSHIPERS AT ONE TIME. THE CONGREGATION NOW NUMBERS 180 PEOPLE. THE PARISH CAN BARELY AFFORD TO MAINTAIN THE CHURCH.

DAMAGED IN THE LOMA PRIETA EARTHQUAKE, SACRED HEART FACES AN ESTIMATED $5 MILLION IN SEISMIC RETROFIT COSTS. UNLIKE BUILDINGS OWNED BY GOVERNMENT OR THE COMMERCIAL OR NON-PROFIT SECTORS, CHURCHES DO NOT QUALIFY FOR FEMA RETROFIT GRANTS FROM THE FEDERAL GOVERNMENT.

THE CONGREGATION USES ITS LIMITED FUNDS TO SUBSIDIZE TUITION AT ITS 90% NON-CATHOLIC INNER CITY SCHOOL. WHEN THE CHURCH DECIDED IT MAY BE BETTER TO REPLACE THEIR CURRENT BUILDING WITH A SMALLER CHAPEL AND COMMUNITY CENTER, THE LANDMARKS BOARD IMMEDIATELY VOTED TO LANDMARK. DESPITE DEMONSTRATING THE INABILITY OF THE CONGREGATION TO RETROFIT ITS CURRENT BUILDING ATTEMPTS TO LANDMARK IT WERE STOPPED ONLY BY THE MORATORIUM PASSED LAST YEAR. WITHOUT AB 133, SACRED HEART CHURCH WILL BE LANDMARKED AND BANKRUPT.

The CHAIRMAN. Well, I thank all four of you. We have got another vote and I am afraid I am going to get stuck over there. I had a number of questions to ask all of you, and I think what I will do is keep the record open and allow every member of the committee to submit questions. This is a very important subject to me and I would like to have specific answers, if the four of you will do that for us as quickly as possible because we want to move ahead with this bill.

Let me just ask one question of all of you, and there are so many I have, but just one in particular at this time. The House-passed RLPA bill would establish that land use regulations that substantially burden religious exercise are legal only if they use the least restrictive means of furthering a compelling governmental interest.

Now, I noted with interest that the bill uses this least restrictive means test instead of the narrowly tailored test which is less stringent. Yet, the Court's decision in *City of Boerne* would seem to refute this position for cases that fall within only the bill's land use section and not the Commerce or Spending Clause provisions of the bill.

Now, consider the following sentence from the majority opinion in *City of Boerne,* "In addition, the Act imposes in every case a least restrictive means requirement, a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify, which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations."

So let me ask you in light of that, shouldn't the bill be modified to establish that in those cases falling within only the bill's land use provisions, regulations affecting zoning will be upheld if they constitute a narrowly tailored means of furthering a compelling governmental interest?

Let me start with you, Gene.

Mr. SCHAERR. Mr. Chairman, I don't think that needs to be done because I believe the way the House bill is now written, that particular provision of the land use section in section 3 would probably never be used because virtually every land use decision that would fall within RLPA would also affect commerce and would therefore be within section 2. So I would be surprised if anybody ever invoked that particular section by itself.

The CHAIRMAN. Jay.

Mr. BYBEE. Mr. Chairman, as you correctly pointed out, not only did the majority use that same phrase, but Justice O'Connor used the same phrase, "narrowly tailored," in her dissent in *Boerne.* It seems to me that this may be a point of friction between the Court and Congress. And given the history here, it seems to me that the prudent thing to do would be for Congress to use the same language that the Court has used here to simply avoid friction. Whether it makes any practical difference or not which language we use, I think, is irrelevant. We simply can avoid contention here.

The CHAIRMAN. I see.

Ms. FELDBLUM. I agree that there probably is not much practical difference, and the bigger challenge for you in this section—and I would endorse Mr. Bybee's comment—is to make it clear to the Court that you have the evidence of the likely unconstitutional con-

duct, and that the rule that you are passing is proportional to that. And staying with the least restrictive means and "narrowly tailored," I don't think there is going to be that much of a difference. You have established the record and that is proportional.

Again, this is quite different from a lot of the other sections where you are not going to a targeted area; you are just sort of throwing it out. And there is where you are going to invite the Court coming back and sort of potentially restricting your power.

The CHAIRMAN. Professor Laycock.

Mr. LAYCOCK. I think the only cost of that change is you have to go back to the House. But, in practice, I don't think it makes much difference to real-world litigation whether it is "least restrictive means" or "narrowly tailored." I will say that that sentence in the Court's opinion is simply a mistake, although prior least restricted means cases from the Supreme Court are collected in footnote 40 of my written testimony. But they have said it and whether they are willing to be educated on it remains to be seen. I don't think it is a matter of great substantive difference one way or the other.

The CHAIRMAN. Well, that is the way I feel. But on the other hand, it seems like anything we want to pass in this area seems to have the strictest scrutiny by the Court. And like Mr. Bybee, I kind of think we ought to avoid whatever we can to make sure that we don't get into another word game, because I felt the Religious Freedom Restoration Act was constitutional, naturally. I wouldn't have supported it as strongly as I did if I didn't think that, but we will just have to see what we do here.

But, look, I have got 2 minutes to get over and vote. What we will do is keep the record open. We will submit written questions for you. I would like detailed answers, if you can. This is very important because we would like to move ahead as soon as we can here. I think this has been a particularly enlightening panel and I appreciate all of you being here.

So with that, we will recess until further notice.

[Whereupon, at 11:47 a.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

SEPTEMBER 9, 1999

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR HATCH

A. 14TH AMENDMENT

Question 1. Let's first focus on the land use provision of the bill—which relies largely on section 5 of the 14th Amendment. Under the Supreme Court's decision this June in *Florida Prepaid,* the Court struck as invalid the Patent and Plant Variety Protection Remedy Clarification Act, holding that Congress must justify any invocation of the 14th Amendment by identifying specific conduct transgressing the Amendment's substantive provisions, and tailoring its legislative scheme to remedying or preventing such conduct.

With that preface, do you think the land use provision is adequately tailored to remedy violations by governmental entities of religious persons' constitutional rights? Specifically, I would like your opinion on whether a court might find the bill indiscriminate insofar as it allows any "person" to bring suit under this provision, rather than limiting its reach only to individual domiciles, religious assemblies and institutions.

Answer 1. I think the protection of persons is constitutional and narrowly tailored, and that a change to individual domiciles, religious assemblies, and institutions would make only a very subtle difference. It is true that any person may file a claim under § 3(b)(1) of the House bill, but he must show that a land use regulation of the kind described in § 3(b)(1) substantially burdens his "religious exercise." A building not used for religious exercise is not protected. Secular buildings are excluded, even though they are undoubtedly owned by a person, because regulation of such a building does not burden any personis religious exercise.

The proposed limitation to "religious assemblies and institutions" and "individual domiciles" would in effect state the requirement of religious use a second time. A religious assembly would include any gathering of more than one person for religious purposes, and a religious institution would include any organized religious body. A person in his own home would be protected, as under the House bill, only if he were using the home for religious exercise.

The only case I can imagine that would be excluded by this change is a lone individual engaged in religious exercise in a building other than his own home. Maybe it is safer to exclude that case, but I do not think much turns on it, because I am not aware of any land use case involving that fact pattern. If this change is made, care should be taken to avoid ambiguity in the way this requirement relates to the use of "person" in the statement of the compelling interest test and in the definition of religious exercise.

Question 2. The *Florida Prepaid* decision also draws the distinction between intentional and negligent conduct by a governmental actor, suggesting that the latter type of conduct may not justify Congress's invocation of the 14th Amendment. Do you believe this analysis is limited to the due process analysis undertaken in *Florida Prepaid,* or is it possible that a court might similarly ask whether the zoning abuses reflect a careless—but not intentionally discriminatory—application of zoning laws to religious persons, and therefore do not provide a basis for Congressional action under the 14th Amendment.

Answer 2. The distinction between intentional and negligent conduct in *Florida Prepaid* is a due process holding, based on a settled doctrine that was necessary to

prevent the broad language of the Due Process Clause from being misinterpreted to constitutionalize any tort by a state official. The problem first came to widespread attention in *Parratt* v. *Taylor,* 451 U.S. 527 (1981), in which a prison mail system negligently lost a prisoner's hobby kit, said to be worth $23. The prisoner argued, with impeccable textual logic, that the hobby kit was property, that the state had deprived him of this property, that he had been given no hearing on whether he should be deprived of this property, and thus, that the state had deprived him of property without due process of law. The Court held that a hearing after the fact, on the prisoner's claim for compensation, would satisfy due process, because it was impossible to schedule a hearing in advance of an unforeseen act of negligence. *Hudson* v. *Palmer,* 468 U.S. 517 (1984), extended this rule to deprivations that were intentional from the perspective of a wrongdoing state employee, but that were "random" and "unauthorized" from the perspective of the state.

The Court returned to the issue in *Daniels* v. *Williams,* 474 U.S. 327 (1986) a routine slip-and-fall case that happened to arise in a city jail. The prisoner claimed that a jailer's negligence had caused his fall, that this deprived him of his liberty interest in bodily integrity, and that the jailer would plead sovereign immunity to prevent any post-deprivation remedy as required by *Parratt.* The Court added a second ground to the decision in *Parratt,* holding that negligent deprivations are not the concern of the Due Process Clause.

In *Florida Prepaid,* the Court squarely relied on these earlier due process cases. The Court cited *Parratt* and *Hudson* for the rule that a post-deprivation remedy would satisfy due process, 119 S.Ct. at 2208, and it cited *Daniels* for the rule that negligent deprivations do not require due process, *id.* at 2209. This was entirely a due process holding, and all these cases were far removed from the core concerns of the Due Process Clause.

Of course the Free Exercise Clause potentially presents similar questions about the state of mind with which it is violated. The answers are not in *Florida Prepaid,* but in *Employment Division* v. *Smith,* 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993). The legislative argument for § 3(b) has been developed entirely on the basis of those decisions. When a land use authority substantially burdens a person's religious exercise, the Constitution requires compelling justification of that burden unless the burden results from a neutral and generally applicable law. Intentional discrimination against churches does not exhaust the set of laws that are less than generally applicable. If the land use authority in fact treats religious and secular uses differently, regardless of its motive, the Constitution requires compelling justification. And if the law permits individualized assessments of competing land uses, and the result of such individualized assessment is to substantially burden religious exercise, the Constitution requires compelling justification without regard to motive or intent.

More generally, the Court has never held that governments may defend considered decisions against constitutional attack on the ground that the decision was negligently made. The Court considered and rejected this possibility in *Daniels* v. *Williams,* the due process case relied on in *Florida Prepaid.* The Court said that in a formal state hearing, the constitutionally relevant action would be the "deliberate decision" on the merits of the matter heard, not the state's "hypothetical negligent failure" in the conduct of the hearing. Similarly here: it is the deliberate decision at the end of the state's land use process that potentially violates the Free Exercise Clause, and if the state is in fact treating religious uses worse than secular uses, or if the state is in fact assessing individual land uses and burdening religious uses, it does not matter whether the state was aware of its free exercise violations as it committed them.

B. COMMERCE CLAUSE

Question. The House-passed bill purports to encompass all matters in which a governmental actor's substantial burden on a religious claimant "affects" commerce. Yet the Supreme Court's decision in *Lopez* strenuously holds that a constitutional exercise of the commerce clause must "substantially affect" commerce. Now I suppose the argument could be made to a court that it should read this requirement loosely, and find it satisfied if the type of conduct at issue would in the aggregate substantially affect commerce. But wouldn't it be safer, and eliminate the basis for a constitutional challenge, to reword the standard to require something like the following—that the Act extends only to conduct which, viewed in the aggregate, would substantially affect commerce?

Answer. *Lopez* requires a substantial affect on commerce, but *Lopez* also reaffirms the aggregation rules. "[W]here *a general regulatory statute bears a substantial relation to commerce,* the *de minimis* character of individual instances arising under

that statute is of no consequence." *United States* v. *Lopez,* 514 U.S. 549, 558 (1995) (quoting *Maryland* v. *Wirtz,* 392 U.S. 183, 197 n.27 (1968) (first emphasis added in *Lopez*). The Court's cases uphold "regulations of activities that arise out of or are connected with a commercial transaction, which *viewed in the aggregate,* substantially affects interstate commerce." *Lopez,* 514 U.S. at 561 (emphasis added). The Court immediately went on to note that the statute in *Lopez* "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question *affects* interstate commerce." *Id.*

Lower courts have understood this to mean that commerce clause statutes are valid if they require a jurisdictional element that requires proof of some effect on commerce in each case, even if that effect is de minimis. *United States* v. *Rea,* 169 F.3d 1111, 1113 (8th Cir. 1999). The Fourth Circuit emphasized the absence of such a jurisdictional element in its decision striking down the Violence Against Women Act. *Brzonkala* v. *Virginia Polytechnic Institute,* 169 F.3d 820, 833 (4th Cir. 1999), *cert. granted* (Sept. 28, 1999). The Supreme Court has provided Commerce Clause protection to a church summer camp with "a relatively insignificant impact on the commerce of the entire Nation," on the ground that "the interstate commercial activities of non-profit entities as a class are unquestionably significant." *Camps Newfound/Owatonna* v. *Town of Harrison,* 520 U.S. 564, 586 (1997), citing *Lopez* and *Wickard* v. *Filburn,* 317 U.S. 111, 127–28 (1942), for the aggregation rule.

The cases do not treat the substantial aggregate effect on commerce as a factual issue requiring proof in each individual case. Rather, the claimant proves the effect on commerce in the particular case, and the court infers (or perhaps presumes or takes judicial notice) that all similar cases will have, in the aggregate, a substantial effect on commerce.

The House bill is based on this doctrinal structure. The claimant must prove an effect on commerce in its individual case; unless the religious activity is highly unusual, the court can then readily infer that the aggregate effect on commerce would be substantial. It would be prudent to indicate that the Senate understands this and intends to reach no further. It would be a mistake to amend RLPA in such a way that each plaintiff might be required to offer evidence of the aggregate effect on commerce. Such a requirement would add to every trial an unworkable national survey of similar activity.

C. FEDERALISM

Question. After reading the Supreme Court's recent decision in *Alden* v. *Maine,* it is clear that suits for damages against states and state agencies are viewed as incompatible with state sovereignty. Accordingly, shouldn't a RLPA bill clarify on its fact that it does not purport to authorize such suits?

Answer. RLPA does not authorize such suits, even in those sections where Congress would have the power to do so. There is no ambiguity about this. The Court does not interpret statutes to abrogate state sovereign immunity unless Congress makes an excruciatingly clear statement in statutory text; general language is not enough. *Hoffman* v. *Connecticut Dept. of Income Maintenance,* 492 U.S. 96, 101 (1989); *Dellmuth* v. *Muth,* 491 U.S. 223, 227–28 (1989); *Welch* v. *Texas Dept. of Highways,* 483 U.S. 468, 474 (1987); *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985). RLPA's general language authorizing appropriate relief against a government does not come close to satisfying this standard, as the cases under RFRA repeatedly held. *Mack* v. *O'Leary,* 80 F.3d 1175, 1177 (7th Cir. 1996); *Commack Self-Service Kosher Meats Inc.* v. *New York,* 954 F.Supp. 65, 66–70 (E.D.N.Y. 1997); *Gilmore-Bey* v. *Coughlin,* 929 F.Supp. 146, 149–50 (S.D.N.Y. 1996); *Weir* v. *Nix,* 890 F.Supp. 769, 785 (S.D. Iowa 1995); *Woods* v. *Evatt,* 876 F.Supp. 756, 770 n.16 (D.S.C. 1994); *Rust* v. *Clarke,* 851 F.Supp. 377, 381 (D. Neb. 1994).

There is no harm in saying explicitly that nothing in this Act abrogates the sovereign immunity of states. But any such disclaimer must be carefully drafted to say exactly that and nothing more. Such a disclaimer will be surplusage, and non-immune defendants will argue that Congress surely must have meant the language to do something. They will attempt to read into it some limitation on relief greater than deference to sovereign immunity. There is some value in explicitly telling uninformed plaintiffs that Congress did not abrogate immunity, but non-essential advice in a federal statute must be drafted very carefully to avoid misinterpretation.

D. RULES OF CONSTRUCTION

Question. What is your view of the rules of construction section of the House-passed RLPA bill? Are these rules clear to you, and do they appear constitutional in their application? Or would you suggest some modification to this section?

Answer. The rules of construction in the House bill resulted from negotiations among lawyers for a very wide range of groups, liberal and conservative, religious and secular. They did not entirely trust each other, they did not entirely trust the courts not to engage in hostile interpretation, and they probably overlawyered the bill. But each rule of construction is designed to avoid some possible misinterpretation that seemed to be a realistic threat to some part of the coalition supporting the bill. I have no doubt that they are constitutional, and they are reasonably clear, especially with the aid of the explanations in the House committee report.

Each provision in the rules of construction represents the strongly felt demand of one or more groups that once supported the bill, and any attempt to modify one of those provisions at this point is likely to be viewed with deep suspicion by the groups that demanded the provision in the first place. At this point, I would leave them alone.

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR LEAHY

Question 1. According to your testimony, RLPA's spending authority 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 and Title IX of the Education Amendments of 1972, which forbids sex discrimination in federally assisted educational programs. But there is one distinction at least: unlike Title VI and Title IX, RLPA does not permit the Federal Government to deny or withhold Federal financial assistance as a remedy for a statutory violation.

As explained in *South Dakota* v. *Dole,* the Spending Clause empowers Congress to attach conditions on the receipt of federal funds; if the recipient does not meet the conditions, it does not get (or cannot keep) the funds. Does the fact that RLPA permits States and localities to continue to receive funds even if they violate RLPA take this legislation outside the usual concept of Spending Clause power?

Answer 1. No. Most Spending Clause statutes are enforceable in theory either by withholding of federal funds, or by suits by the United States to demand compliance, or by private rights of action. Withholding funds has been extraordinarily rare; the actual method of enforcement overwhelmingly has been suits by the United States when there is a broad pattern of violations, and suits by individual victims when there are individual violations. A recent example is *Davis* v. *Monroe County Board of Education,* 119 S.Ct. 1661 (1999), a suit for damages under Title IX.

The federal interest under the Spending Clause is to ensure that all intended beneficiaries of federal funds actually benefit. A funds cutoff means that no intended beneficiaries benefit, so that has rarely been an attractive means of enforcement.

Some Spending Clause statutes provide that the commonly used means of enforcement shall be the only means of enforcement. RLPA provides that funds shall not be withheld, as you note. The Equal Access Act has a similar provision, 20 U.S.C. § 4071(e) (1994), which has not occasioned any litigation. I was not involved in the discussions that led to these provisions, but my understanding is that they were requested by representatives of the states and that supporters of the bills acquiesced. With or without such a provision, a funds cutoff is unlikely and litigation to achieve compliance will be the real means of enforcement.

It is always open to the states to decline the funds and escape any associated obligation to comply with the Act. The only difference is that that choice is now left wholly to the states; the United States does not have the option of abandoning efforts to obtain compliance and simply cutting off the funds.

Question 2. In *Hunt* v. *Hunt,* 162 Vt. 423 (1994), a parent used RFRA to avoid having to pay child support. In your view, was *Hunt* v. *Hunt* correctly decided?

Answer 2. With respect, someone has misinformed the Senator about what the case holds. The court held that the parent *does* have to pay child support, because the support of children is a compelling interest and actually making him pay is the least restrictive means of achieving that interest. The court went on to hold that the state had not yet shown that jailing the parent for contempt of court was the least restrictive means of enforcing the order to pay.

We do not know what happened on remand. Two judges thought that the money should be collected by garnishment or wage withholding from the defendant's church, which held all his earnings in a communal fund out of which he and other members were supported. One of these two judges feared that state law did not authorize this method of collection; he predicted that the contempt sanction would soon be reimposed because the less restrictive means would be unavailable. The other judges refrained from giving advisory opinions about the remand.

We do not know how the case turned out, but nothing in the court's opinion suggests that it would accept failure to collect the child support as the ultimate result. If the garnishment worked, the child support would be collected by garnishment. If the garnishment failed, contempt would be the least restrictive means and the child support would be collected by contempt. The case actually turns on the state's failure to explore other means before it resorted to the most drastic remedy.

The state is entitled to a means that actually achieves its interest, and least restrictive means analysis should not be applied to incremental reductions in remedies or penalties for noncompliance. But imprisonment differs from garnishment qualitatively and not just in degree, and a direct order against the church (which controlled the money) was more likely to actually collect the child support the coercing the father (who did not control the money). I thought *Hunt* was wrong when I first heard about it, but now that I have read it carefully, I believe it is a plausible result. As so often happens, the soundbite description of a case is misleading, and our judges who carefully studied a whole case did a pretty good job.

Question 3. In *Cheema* v. *Thompson,* 36 F.3d 1102 (9th Cir. 1994), RFRA was used to force a public school district to permit Sikh elementary school children to carry sharp ceremonial knives to school with them each day. In your view, was *Cheema* correctly decided?

Answer 3. Once again, someone has misinformed the Senator. The case involved the ancient requirement that Sikh males carry kirpans, or ceremonial knives. The memorandum identified at 36 F.3d 1102 is unreported; the text is available at 1994 WL 477725 (9th Cir. 1994). A subsequent opinion is reported at 67 F.3d 883 (9th Cir. 1995), and that opinion sets out the preliminary injunction actually issued in the case.

The children were *not* permitted to carry "sharp" knives. The preliminary injunction explicitly required "a dull blade." 67 F.3d at 886. This dull kirpan was to "be sewn tightly to its sheath." *Id.* It was to be worn "under the children's clothing," subject to "reasonable inspections to confirm that the conditions specified above are being adhered to," and if "any of the conditions" were violated, the school was authorized to suspend the right to wear the kirpan. *Id.* These were the terms of the order, and there is no dispute about what it said. "Sharp" knives were forbidden.

There was evidence that when the knives were sewn into their sheath, "even an adult school board member could not remove them." 1994 WL 477725 n.4. There was evidence that "numerous other school districts allow children to wear kirpans," and *no* evidence "of any incident where kirpans have been involved in school-related violence." *Id.* at *3.

Cheema was a preliminary injunction on a limited hearing; it was not a final resolution of the dispute. Everyone agreed that the school board had a compelling interest in protecting the safety of the children. The only substantial issue in the case was what restrictions on kirpans were necessary to achieve that interest.

The most important and astonishing fact about the case is that the school board refused to offer evidence on this issue! Despite the clear language of RFRA, the school board took the position that it did not have to demonstrate that exclusion of kirpans was the least restrictive means of furthering its compelling governmental interest. *Id.* Consequently, it "put in the record no evidence whatsoever of any attempt to accommodate the Cheemas' religious practices," and it did "nothing to compile a factual record in support of its case." *Id.* There is no indication in the second opinion that the school board had altered its stance. Either the school board knew the restrictions offered by the parents were sufficient and it could find no evidence to offer, or it was so contemptuous of the statute and of religious liberty that it refused to gather or offer any evidence. If the school board's refusal to offer evidence led the court into a factual error, the school board has only itself to blame.

I have no personal knowledge about a safe way to handle kirpans. But on this record, I think the case was rightly decided. I should also say that I have had a Sikh child in my younger son's school, and I have never had the slightest reason to be concerned about his kirpan.

Question 4. In *Lundman* v. *McKown,* 530 N.W.2d 807 (Minn. Ct. App. 1995), the Christian Scientist used RFRA as a defense to a wrongful death suit arising from her failure to get medical care for her 11-year old son. In your view, was *Lundman* correctly decided?

Answer 4. Again someone has misinformed the Senator. There was no RFRA issue in the case, and RFRA is not mentioned in the opinion. RFRA could have been plead as an additional defense, but it is clear that RFRA would not have changed the result. The court applied the compelling interest and least restrictive means test under the Minnesota Constitution, 530 N.W.2d at 818, and applying that standard, it held the mother liable for $1.5 million in compensatory damages. I do not agree

with everything that is said in the opinion, and I claim no expertise on the various tort issues in the case, but on the religious liberty issues, I believe the result is correct.

The court properly refused to hold the church liable for merely teaching its beliefs. It did hold those who cared for the child liable for failing to summon conventional medical assistance when the seriousness of his illness became apparent. Preserving the lives of children is clearly a compelling interest, and on these facts, summoning conventional medical assistance is the only means the court can evaluate and that would have worked.

Question 5. In *Thomas* v. *Municipality of Anchorage,* 165 F.3d 692 (9th Cir. 1999), the court held that the Alaska housing laws prohibiting apartment owners from refusing to rent to unmarried couples could not be enforced against landlords who refuse to rent to unmarried couples for religious reasons. Do you think that *Thomas* was correctly decided, both with regard to its hybrid rights theory, as well as with regard to its conclusion about the government's lack of a compelling interest?

Answer 5. To know whether *Thomas* was rightly decided, I would need to know facts that are not revealed in the opinion. If plaintiffs were small landlords, personally involved in the management of a few units of housing, then I think the case was rightly decided. The more units they own, the less plausible it is to find that regulation of this large commercial enterprise burdens their personal exercise of religion, and the greater the state's interest in regulation. I assume that the plaintiffs' real estate operations were small enough to make their claim of religious exercise plausible, because no one raised the issue or suggested otherwise.

Keep in mind that this was a free exercise case and not a RFRA case. The court held that the Alaska law was neutral and generally applicable. 165 F.3d at 701. I think this was error. The Alaska law contained an exception for singles-only projects and for married-couples-only projects, but no exception for claims of religious conscience. The state thus placed a lower value on religious exercise than on what is at best a mere preference for social segregation on the basis of marital status. The Anchorage ordinance had an exception for units in which the tenant would "share common living areas" with the landlord or his representative. This is a sensible exception, but again it places less value on religious exercise than on a secular claim to autonomy. It is precisely such devaluing of religious exercise as compared to secular interests that remains unconstitutional after *Employment Division* v. *Smith,* 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993). The legislature and city council responded to secular claims of hardship but failed to provide similar exemptions for religious hardship.

Because neither law was neutral and generally applicable, the compelling interest test should have been applied without regard to the court's hybrid-rights theories, which present more difficult questions. The opinion struggles valiantly to make sense of hybrid rights, but I do not believe it succeeds. The court's standard of a colorable claim or a likelihood of success on the non-free-exercise-right seems to me unstable. Such a hybrid right will cease to exist if the colorable claim is ever decided on the merits in a case with no free exercise component. That implies that hybrid rights in the Ninth Circuit are only temporary rights.

The Supreme Court has not said what it means by hybrid rights. But if the theory is to make any sense, I think it must be enough that interests protected by the other constitutional rights were infringed, even if those infringements could have been justified under the rules applicable to the other constitutional rights. In *Thomas,* there plainly was a physical intrusion into the landlord's property and a restriction on his right to speak about his religious views. If there is going to be a category of hybrid rights, then it ought to cover this case.

I think the court's holding on the compelling interest issue was correct. It is dispositive that the state does not pursue the asserted interest generally. Sometimes it protects unmarried couples against discrimination; sometimes it does not; often, it affirmatively discriminates against married couples on the face of the law. Indeed, Alaska law creates the categories of marital status and distinguishes among those categories for many purposes. To claim a compelling interest in *Thomas* makes a mockery of the concept. No civil rights or civil liberties lawyer would ever accept such a Swiss-cheese compelling interest as sufficient to override a right he took seriously. Many citizens care deeply about the interest in ending discrimination on the basis of marital status, but the state of Alaska does not. For Alaska, marital status is only a sometime thing.

Finally, if there were evidence that unmarried couples were actually unable to find housing, *that* would be a compelling interest. The state has a compelling interest in seeing that all its citizens are housed; it does not have a compelling interest in seeing that tenants have a legally protected right to flout their landlords' most deeply held beliefs.

Question 6. Can you think of any pre-*Smith* case in which the Supreme Court affirmed the use of the compelling interest test, where accommodation of the religious beliefs of one person would have infringed other legally cognizable rights of another person?

Answer 6. Yes. *Bob Jones University* v. *United States,* 461 U.S. 574, 602–04 (1983), held that Bob Jones University had no free exercise right to discriminate on the basis of race, *because* the prohibition on racial discrimination served a compelling interest by the least restrictive means. Protecting the legal rights of another generally satisfies the compelling interest test, but is not a reason to dispense with its application.

There are similar cases involving other constitutional rights. Preventing sex discrimination in places of public accommodation has been held to serve a compelling interest by the least restrictive means. *New York State Club Ass'n, Inc.* v. *City of New York,* 487 U.S. 1 (1988); *Board of Directors* v. *Rotary Club,* 481 U.S. 537, 549 (1987); *Roberts* v. *United States Jaycees,* 468 U.S. 609, 623–29 (1984). Eliminating effects of racial discrimination has been held to be a compelling interest. *United States* v. *Paradise,* 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC,* 478 U.S. 421 (1976). In each of these cases, the legally cognizable right of another was held to satisfy the compelling interest test, not to dispense with its application.

However, it cannot be that the mere existence of a "legally cognizable right" automatically satisfies the compelling interest test. That would leave all constitutional rights at the mercy of legislative discretion, because the legislature can create new "legally cognizable rights" any time it chooses. Title VII appears to give a Catholic woman who wants to be a priest a legally cognizable right to be employed in that position, but it does not follow from the creation of such a right that the government has a compelling interest in enforcing it. Some state civil rights laws have no exception for religious employment; in those states it would seem that an atheist has a legally cognizable right to be employed as a priest or minister. A Colorado statute provides that no employer may discriminate on the basis of any "lawful activity off the premises of the employer during nonworking hours." Colo. Rev. Stat. § 24–34–402.5(1) (Supp. 1998). This gives legally cognizable rights to habitual drunks, pornographic film collectors, adulterers, professional gamblers, racists, fascists, communists, sexual harassers who do it only off the job, exploiters of the poor, and all those who indulge in any other immoral or disreputable but not illegal activity. All these people would seem to have a legally cognizable right to be employed in any open position in any church or synagogue in Colorado, but creating the right does not create a compelling interest.

Question 7. Empirical results from the 1998 National Congregations Study show that 17 percent of U.S. religious congregations tried to obtain a permit or license from a governmental authority in the past year, and only 1 percent of those applications were denied.

(*A*). Do you have any reason to doubt the accuracy of these results?

Answer 7A. I have no reason to doubt the accuracy of what is reported in the study. The study was led by Professor Mark Chaves of the University of Arizona; he and his co-authors are serious and reputable scholars. For reasons explained in part B, many of the percentages in the study, including the 1 percent figure that you quote, cannot be understood as representative of all U.S. congregations.

(*B*). Assuming the essential accuracy of these results, what are their implications for the debate about RLPA's proportionality?

Answer 7B. Very little. RLPA and the National Congregations Study are focused on different questions. Proportionality is an issue in § 3 of RLPA, the section enacted under the Enforcement Clause of the Fourteenth Amendment.

Section 3 is concerned with land use regulation, and principally with zoning, but the NCS asked about permits and licenses of all kinds. Only 2 percent of the permits in the sample were described as zoning permits. Mark Chaves and William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study,* Table 1. There were 429 permit applications in the study, which means that they had only 7 to 10 zoning permit applications.[1] One of those was denied. *Id.,* manuscript at 12. A sample of 7 to 10 is far too small to support any generalization, but the one fact we have is that at least 10 percent (1 out

[1] 7 out of 429 would be 1.6 percent, which would round to 2 percent. 10 out of 429 would be 2.3 percent, which would also round to 2 percent. 6 or fewer would round to something less than 2 percent; 11 or more would round to something more than 2 percent.

of 10), and perhaps as many as 14 percent (1 out of 7), of the zoning permit applications in the study were denied.[2]

Second, there has been substantial testimony that the zoning problem is most severe for small and new churches, and that older, more established churches tend to be grandfathered in at their current location. But the NCS could not easily measure this problem, because it greatly undersampled small congregations. This is not so much a defect in the study as it is an unavoidable consequence of the difficulty of sampling those small churches at all.

The problem is that there is no comprehensive list of religious congregations from which one might draw a sample. The NCS attacked this problem with a very clever solution. It began with a representative sample of English-speaking adults. If a respondent said he ever attended religious services, he was asked where. This produced a list of all the congregations attended by a random sample of adults, which is probably as close as scholars have ever gotten to a random sample of congregations.

But the method has a problem with special relevance to RLPA. Because the sample starts with individuals, the likelihood that a congregation will be mentioned is directly proportional to its size. A congregation with 1,000 members is 10 times more likely to be in the sample than a congregation with 100 members, and 50 times more likely to be in the sample than a house church with 20 members. So the congregations most likely to have serious zoning troubles are least likely to be in the NCS sample. In the extreme case, the sample will never find a congregation that was driven out of existence for lack of a place to worship.

Professor Chaves was well aware of this feature of his sample. He is able to estimate the severity of the problem, and for some purposes, he could offset it with statistical manipulations. Only 10 percent of the congregations in his sample had fewer than 75 regular participants. Mark Chaves, Mary Ellen Konieczny, Kraig Beyerlein, & Emily Barman, *The National Congregations Study: Background, Methods, and Selected Results,* Table 4. Yet the authors estimate that 50 percent of the congregations in the country have fewer than 75 regular participants, and 10 percent have fewer than 20 regular participants. *Id.* Fewer than 10 percent of the congregations in the country have 400 or more regular participants, but half the congregations in the sample had 400 or more regular participants. *Id.*

Professor Chaves reports that 35 percent of the congregations in the sample applied for a permit; his estimate of 17 percent of congregations in the nation reflects a statistical adjustment for the underrepresentation of small congregations. *Are Congregations Constrained,* manuscript n. 16. But when he says that only 1 percent of permit applications were denied, he has made no adjustment; that is a raw comparison of the number of permits to the number of denials, with no attempt to correct for the size of congregations. *Id.* It is probably impossible to adjust this figure; he has too few denials and possibly too few small congregations, and he certainly has too few zoning cases. This is an enormously valuable study, but the data most relevant to RLPA simply isn't there.

It is perhaps revealing, or perhaps just coincidence, that the NCS reports a 1 percent denial rate for all permits, and the survey of Presbyterian congregations reported a 1 percent denial rate in land use cases. See my testimony of Sept. 9. It might be revealing because the Presbyterians are a denomination of mostly older and well-established churches, probably more similar to the NCS sample than to struggling new congregations. It might be just coincidence because the two studies mostly involve very different kinds of permits.

Third, a government with discretionary power over a permit can impose a substantial burden on a church even if the permit is eventually granted. In the Presbyterian study, 15 percent to 18 percent of congregations reported significant conflicts or cost increases before a permit was eventually granted; the NCS study appears not to have asked about this kind of burden. If St. Peter's Catholic Church in Boerne, Texas were in the sample for this study, it would count as a permit granted, but getting that permit took three years of litigation and the church's agreement to spend well over half a million dollars on structures of little benefit to the church. The diversion of all those religious funds to secular purposes substantially burdens the free exercise of religion.

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[2] 36 percent of the permit applications were described as "Building/Remodeling," but we have no idea how many of these involved new buildings, expansions, or conversions of the sort that produce land use controversies, or even if any of them did. Few cities would try to drive out a long-settled church by denying permits for interior modifications or repairs with no effect on the scale of operations. All we know for sure about these cases is that none of these were described as zoning cases.

Finally, even if the 1 percent number were a plausible rate of permit denials for small churches and for zoning cases, that would still be a lot of cases. Using its summary numbers—that 17 percent of congregations applied and 1 percent of those were denied—the NCS estimates that 500 congregations per year are denied permits. Manuscript at 15. In zoning, probably a lot fewer than 17 percent apply each year, and a lot more than 1 percent are denied or substantially burdened. Whatever the number of land use permits denied, those are the cases that matter. In the cases where the permit authority would grant the permit anyway, RLPA will be irrelevant. There will never be a claim, and neither the church nor the permit authority will be affected. The real proportionality question is within the 500 cases (or however many it really is) where a land use permit is denied. How many of those involve a likely constitutional violation? That is the point of Question 8.

Question 8. What evidence do you have, not of conflicts between religious building owners and land use authorities, but rather of unconstitutional actions by land use authorities against religious entities? Please provide a list of all cases in which it has been proven that a local land use authority violated the First Amendment in its dealings with a religious organization.

Answer 8. I'm not sure such a list is possible. Part of the reason the statute is needed, as I explained in my testimony on September 9, is that discrimination is difficult to prove one case at a time. Decisions that are merely suspicious when they happen once fit into a pattern of discrimination when many decisions are examined. I believe that in all the cases described to the Committee or to the House Subcommittee on the Constitution, there is a substantial likelihood that the zoning authority's action was unconstitutional.

The Brigham Young study, described in testimony in before this Committee last year and before the House Subcommittee on the Constitution, lists 119 reported cases in which churches successfully challenged zoning decisions. Many of those cases were decided on nonconstitutional grounds. But all are cases where a land use decision unlawfully burdened religious exercise, and in nearly every case, that burden was imposed after an individualized assessment of the proposed land use. Individualized assessments lend themselves to hidden discrimination, which is why constitutional doctrine requires compelling justification for burdens imposed in such cases. *Employment Division* v. *Smith,* 494 U.S. 872, 884 (1990).

In testimony in the House, summarized in my September 9 testimony to this Committee, John Mauck described a survey of twenty-nine zoning codes from suburban Chicago. In twelve of these codes, there was no place where a church could locate as of right without a special use permit. In ten more, churches could locate as of right only in residential neighborhoods, which is generally impractical. Thus, twenty-two of these twenty-nine suburbs effectively excluded churches except on special use permit, which means that zoning authorities hold a discretionary power to say yes or no. A discretionary power to say yes or no to the exercise of a constitutional right is unconstitutional.[3]

Moreover, the survey of zoning codes showed that places of secular assembly are often not subject to the same rules as churches. The details vary, but uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded. Every one of the twenty-nine zoning codes surveyed treated at least one of these uses more favorably than churches; one treated twelve of these uses more favorably; the average was better treatment for about 5.5 such uses. Such facial discrimination between secular and religious places of public assembly is prima facie unconstitutional. It requires compelling justification.

The record contains much anecdotal evidence of zoning decisions that appear on their face to involve discrimination between religious and secular assemblies at the same property, or discrimination between churches of different denominations, or between congregations of different races. John Mauck described twenty-one such cases in his House testimony. Marc Stern described five more examples in his House

[3] *See, e.g., Forsyth County* v. *Nationalist Movement,* 505 U.S. 123, 131 (1992) ("If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." (citations omitted)); *City of Lakewood* v. *Plain Dealer Pub'g Co.,* 486 U.S. 750, 770 (1988) (refusing to presume good faith in administration of vague standards for permits affecting First Amendment rights); *Griffin* v. *City of Lovell,* 303 U.S. 444, 452 (1938) (stating that completely discretionary permit requirement "would restore the system of license and censorship in its baldest form").

testimony in March 1998. Von Keetch described such discrimination against a proposed Mormon Temple in Forest Hills, Tennessee. Rabbi Chaim Rubin described such a case involving his shul in Los Angeles. Attorney Bruce Shoulson testified in the House to more than thirty cases involving efforts to exclude Orthodox Jews in northern New Jersey. I summarized all this testimony and described four additional cases involving Morning Star Christian Church in Rolling Hills Estates, California, Fountain Church of God in Charter Township, Michigan, and Orthodox Jews in Airmont, New York and Cheltenham, Pennsylvania. Each of these more than sixty cases presents prima facie evidence of overt and unconstitutional discrimination. Maybe in some of them there was a compelling government interest or some other explanatory circumstance, but in all of them, a constitutional violation is at least likely.

Question 9. In California, a minister attempted to run a homeless shelter out of a structurally unsafe building, and accumulated numerous citations for code violations. He claimed that he "answered to a higher law." Under RFRA, the court ruled that the church did not need to meet the safety code, and could house the homeless men in an unsafe building. Following RFRA's invalidation, the court held that the safety regulations had to be met.

(*A*). Do you think that the minister should have been required to abide by safety regulations? If some and not others, why, or why not?

Answer 9A. The question does not identify this case, I am not aware of such a case, and I cannot find on Westlaw a case fitting this description. It may be a real case that is entirely unreported, or the persons who tell the Senator about cases may have erred again. Without knowing the facts, I cannot tell you whether it was rightly decided.

I can say that physical safety of human beings is plainly a compelling interest, and there should have been no RFRA right to house men in a structurally unsafe building. If the court exempted the minister from regulations that genuinely furthered safety, the court erred.

On the other hand, not every rule in a building code is connected to safety, and I can readily imagine a city using or creating technical rules to close the minister's shelter even if it were perfectly safe. If those were the facts, the initial decision you describe becomes more plausible.

(*B*). More generally, is the RLPA intended to cover all religious-owned buildings, including hospitals, day care centers, movie theaters, fitness centers, nursing homes, and soup kitchens, and, if so, why?

Answer 9B. No. RLPA is intended to cover buildings that will be used for religious exercise, and the owner has a substantive claim only if that religious exercise will be substantially burdened. A church-owned commercial enterprise is unlikely to qualify as religious exercise. *See Tony & Susan Alamo Foundation* v. *Secretary of Labor,* 471 U.S. 290 (1985). A religious charity staffed in substantial part by volunteers should qualify in my judgment. Between these fairly clear cases, the precise line will be determined case by case.

Question 10. The United States Court of Appeals for the Eighth Circuit recently held that the Eleventh Amendment prevents States from being forced to litigate in Federal court claims arising under section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in "any program or activity receiving Federal financial assistance." *Bradley* v. *Arkansas Dept. of Education,* 1999 WL 673228 (8th Cir. Aug. 31, 1999). The court reasoned that § 504 was not a valid exercise of Congress's spending power "because it amounts to impermissible coercion":

> "[A State] is forced to renounce all federal funding, including funding wholly unrelated to the [Rehabilitation Act], if it does not want to comply with § 504. Congressional imposition of such a condition does not give [a State] * * * a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits."

Please comment on the possible import of *Bradley* on section 2(a)(1) of the RLPA, which prohibits States from substantially burdening a person's religious exercise in "any program or activity * * * that receives Federal financial assistance."

Answer 10. *Bradley* decided an issue that had not been briefed, on the basis of a clear misunderstanding of the statute. Its constitutional holding would make sense if the statute did what the court thought it did, but no statute has ever done that. A petition for rehearing is inevitable, and a corrected result is highly likely. The Fourth Circuit recently reached the opposite result in a Title IX case that was indistinguishable. *Litman* v. *George Mason University,* 1999 WL 547910 (4th Cir., July 28, 1999). *Bradley* is simply wrong.

If the result in *Bradley* does not change, it may be confined to waivers of sovereign immunity, in which case it would have no application to RLPA. If the erroneous holding is sustained and generalized, it would wipe out all civil rights legislation under the Spending Clause, including Title VI on race discrimination and Title IX on sex discrimination in education.

The essential error in *Bradley* was the assumption that the state "is forced to renounce all federal funding" to avoid liability under the Rehabilitation Act. This is plainly incorrect. The relevant unit under the Rehabilitation Act, under RLPA, under Title VI, and under Title IX, is "the program or activity" receiving federal funds, defined as "all the operations of *a* department, agency, special purpose district, or other instrumentality." 29 U.S.C. § δ794(b)(1)(A) (1994); RLPA § 8(4); 42 U.S.C. § 2000d(4)(A) (1994); 20 U.S.C. § 1687(a)(A) (1994). The Eighth Circuit inaccurately paraphrased this definition, omitting the article and converting all the singular nouns to plural, and consequently concluded that the whole state is one collective program or activity. This has never been the law.

If a department accepts federal funds, that department must ensure that no person is denied benefits or a chance to participate because of his disability. That department can choose to accept or reject federal funds, and different departments can make different decisions. Similarly under RLPA: departments that accept federal funds must refrain from unnecessarily burdening the religious exercise of beneficiaries or participants in the aided program or activity; each department can decide separately whether to accept or reject federal funds. The Eighth Circuit invalidated a statute that does not exist.

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR KENNEDY

Question 1. After last year's June 23, 1998, hearing on protecting religious liberties, Senator Hatch asked you whether "religious accommodation is a zero-sum game." See Written Question 15. In response, you stated, among other things, that "[t]he cost of a burden on the right to exercise one's religion is usually concentrated, personal, and intense; the cost of permitting someone else's religious exercise is usually diffuse, general, and mild. * * * Where this is not true—where a proposed exercise of religion imposes concentrated costs on others—the compelling governmental interest test will usually be met."

(*A*). How do you reconcile this theory with the non-diffuse, specific, and potentially severe impact that accommodating a free exercise claim could have on a single mother or gay person who has been refused a job or apartment because of their marital status or sexual orientation—assuming, of course, that the RLPA claim is raised by a non-religious employer or a property owner who does not occupy the dwelling at issue?

Answer 1A. I think the heart of this question is embedded in its assumptions. I am guessing that by "non-religious employer", you mean any employer other than a religious institution. I would mean any employer who could not make a plausible claim under RLPA. So where do we disagree? Who are the employers who might be able to make a plausible claim without being a religious institution?

For such a RLPA claim to be plausible, the employer would have to have only a small number of employees, he would have to be personally involved in running the business, and the business would have to be infused or integrated with a religious mission. Otherwise, the claim that his choice of employees is an exercise of religion will not be plausible. A mere desire to exclude employees of other faiths or worldviews is not enough to turn a substantial commercial enterprise into an exercise of religion.

For the small, personally involved employers in enterprises infused with religious mission, the harm of being forced to hire an employee who rejects the moral and religious values of the enterprise would be "concentrated, personal, and intense." The effort to integrate faith and work would be seriously disrupted. If you doubt this, think about the converse case. A small, close-knit gay rights group or lesbian bookstore would not hire an evangelical Christian who condemns gay and lesbian behavior as immoral, and if it were forced to do so, it would experience the harm to its operations and sense of community as "concentrated, personal, and intense." Neither the gay group nor the religious group should be forced to hire employees opposed to their deepest commitments.

On the other side of the balance, the unavailability of these jobs to potential applicants would be, in all but the most unusual cases, "diffuse, general, and mild." All the other jobs in the economy would remain open; those applicants would lose one possible job out of many. But the employer would lose the unified commitment in

the only such enterprise he has. The harm to the employer is concentrated, and the harm to applicants is usually diffuse.

The harm to applicants is also usually mild, because few persons want to work in a job whose purpose and mission they reject. Indeed, this issue of commitment to a religiously infused enterprise nearly always arises in the abstract, when a small employer with a religious mission refuses on principal to sign a nondiscrimination pledge. There are hardly any real cases in which a person with radically different values applies, is rejected, and sues.

As the employer becomes larger, or the nature of the work becomes less integrated with religious mission, this balance of interests changes. Soon it becomes impossible for the employer to show a substantial burden on religious exercise, and the state's interest in regulation grows in direct proportion to the number of jobs at issue.

The analysis of apartments is similar but not identical. As I said in response to Senator Leahy's Question 5, the only landlords who can make a plausible claim of burden on religious exercise are those who are personally involved in managing a small number of units. It should not matter whether the unit is owner occupied; that is a feature of concessions made in the fair housing laws to racists acting out of simple bigotry or revulsion at physical proximity; that exemption requires no claim of religious conscience.

If these small landlords are forced to put their property to uses they consider immoral, their sense of sin is personal, and the proportion of their property affected is substantial. If they let their property be used for prostitution, or drug dealing, or pollution, courts and legislatures would agree that they are legally and morally responsible for what their tenants do on their property. It should not be so surprising that they also feel morally responsible for other tenant activities that they believe to be immoral. So the harm to the small landlord is concentrated, personal, and intense. But again, all the other apartments in the economy remain open to the potential tenant. In all but unusual cases, the loss to the tenant is diffuse, general, and mild. If the landlord were permitted to openly advertise his policy, no one ever need be embarrassed or inconvenienced by inspecting an apartment that would not be available to them.

The country is deeply divided over the morality of various kinds of sexual behavior. On both sides of this debate, the people most affected are minorities—sexual minorities on one side, and religious minorities deeply committed to traditional sexual morality on the other. People in each of these minority groups are entitled to live their lives according to their own values, without having the other side's values imposed on them. For that to happen, both sides need some space in which they get to run their own lives. This dispute over small landlords and small religious employers is really a debate over how to divide personal space. Neither side should be entitled to invade and control the personally managed property and workplaces of the other. I have repeatedly said that the way to achieve justice for both sides is to enact strong gay rights laws with strong protections for religious liberty.

If there were ever a showing in any of these cases that gays or unmarried couples were having actual difficulty finding employment or housing, that would change the balance and greatly strengthen the claim of compelling interest. But there have been no such cases. This has been largely a symbolic turf fight, about whether one side of a deeply felt moral divide can force its views and conduct inside the other's personal space. With respect to the sorts of employers and landlords who could make a plausible claim under RLPA, I stand by my answer of a year ago: the violation of religious liberty is concentrated, personal, and intense; the harm to those who have access to all the rest of the jobs and apartments in the economy is diffuse, general, and mild.

Finally, I should note one other thing. You ask about single mothers, but none of these cases has involved a single mother, and a single mother would not trigger the same objection from the religious landlords who are making these objections. Whatever her past behavior might have been, they certainly have no moral objection to her caring for her child.

(*B*). Your theory seems to assume that in religious accommodation cases the extent to which the accommodation places "concentrated costs on others" will influence the outcome of a court's compelling governmental interest analysis. Beyond the race context, what case law can you cite to support this proposition?

Answer 1B. There have not been many such cases, probably because the point is so obvious that the cases do not arise. Everyone agrees that I cannot impose the costs of my religious observance on you, or vice versa.

A clear and controlling example is *Estate of Thornton* v. *Caldor,* 472 U.S. 703 (1985), in which the Court struck down a law giving employees an absolute right to be absent from work on their Sabbath. The law violated the Establishment

Clause, because the absolute right took no account of the cost to the employer or other employees. The Court said this violated "a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: 'The First Amendment * * * gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'" *Id.* at 710. In *Thornton* itself, there were only four people who did Thornton's job, and one of them had to be in the store at all times. If Thornton had an absolute right not to work on Sunday, the others had to work every third Sunday instead of every fourth Sunday. That is not a large cost, but it is not trivial, and it was highly concentrated. If such a concentrated cost makes an accommodation violate the Establishment Clause, then avoidance of such a concentrated cost would have to be a compelling governmental interest under RLPA. Any other interpretation would mean that RLPA would violate the Establishment Clause as applied to such cases.

Question 2. If an individual raises a RLPA defense to the application of an anti-discrimination statute (e.g., one prohibiting sexual orientation or marital status discrimination in housing and employment) and demonstrates that the law is a burden or substantial burden on his free exercise of religion, will the plaintiff who is seeking to vindicate her rights under that anti-discrimination law individually bear the responsibility—assuming the state does not intervene in the case—of proving that the law is the least restrictive means of furthering a compelling governmental interest?

Answer 2. Yes.

(*A*). If yes, on what policy grounds can Congress justify placing this costly and potentially onerous burden on an individual who is simply attempting to vindicate his or her statutorily protected right under state law to be free from discrimination?

Answer 2A. On multiple grounds. First, there is no reason to assume that the state agency will not intervene to defend the statute it is charged with enforcing. Such agencies have appeared in many of the cases that gave rise to this controversy. If the agency does not appear (or even if it does), civil liberties, gay rights, and other public interest groups committed to that side of the controversy can appear as intervenors or amici.

Second, there is no reason to assume that the burden will always, or even usually, be costly and onerous to fulfill. It is far more likely that within a few years there will be settled rules that each type of civil rights law either does or does not serve a compelling interest by the least restrictive means, and this litigation will be reduced to routine enforcement actions. We are in a period of test cases right now because marital status and gay rights laws are new, but that is a temporary situation.

Third, even in the test cases, these issues have not required complex trials. No agency has undertaken to prove that widespread discrimination has made it difficult for gays or unmarried couples to find housing or jobs, partly because they think they can win without that, but also because it almost certainly isn't true. A trial on that kind of issue would be expensive, but no such trials have been held. The compelling interest argument in these cases has been principally a legal argument, settled by filing briefs. That form of litigation is no more expensive for the side with the burden of proof than for the side without it.

Fourth, the compelling interest test makes no sense if the burden of persuasion is not on the party asserting the compelling interest. If Congress shifted the burden of proof in cases where an individual plaintiff appeared without government support, it would destroy the integrity of the test, risking inconsistent results on the same issue depending on who the parties were. And it would perversely discourage state agencies from intervening to support plaintiffs suing under the agency's statute. The private plaintiffs would not be better off in such a scheme.

(*B*). If no, why not?

Answer 2B. This question is not applicable. I said yes to the underlying question.

Question 3. If a pervasively-sectarian religious organization receives federal funding through a state for purposes of administering a social service program and that organization begins requiring beneficiaries to undergo proselytization in exchange for participating in the program, would the RLPA or the RFRA prevent the state or federal government from cutting the funding of that organization?

Answer 3. No.

(*A*). If yes, please cite to the applicable RLPA provision.

Answer 3A. This question is not applicable. I said no to the underlying question.

(*B*). If no, why not?

Answer 3B. Because the use of federal funds to coerce citizens to undergo proselytization would be a core violation of the Establishment Clause, and, redundantly, because the government's desire to avoid coercing or infringing the religious liberty

of the program beneficiaries would be a compelling governmental interest. The rules of construction in §§ 5(c) and (d), declaring neutrality on funding issues, would reinforce this result. And the program beneficiaries would themselves have a claim under RLPA, not against the religious agency, but against the government for failing to provide an alternative that delivered the social services without burdening their own religious exercise.

Question 4. To what extent, if any, does the provision in Section 5 of the RLPA stating "this Act may require government to incur expenses in its own operations to avoid imposing a burden or a substantial burden on religious activity" run afoul of the principle that the Eleventh Amendment protects state treasuries?

Answer 4. It does not run afoul of that principle. The Eleventh Amendment protects state treasuries from having to pay the state's debts or any form of compensation for past wrongdoing. The Eleventh Amendment does not protect state treasuries from the cost of compliance with federal law. The distinction is between retrospective monetary relief, however described, and the consequences of future compliance with judicial decrees interpreting and enforcing federal law. The leading case is *Edelman* v. *Jordan,* 415 U.S. 651 (1974), written by then Justice Rehnquist and reaffirmed in *Alden* v. *Maine,* 119 S.Ct. 2240, 2267 (1999).

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. If the Senate passes an amended version of the House bill (H.R. 1691) that includes exemptions for civil rights, domestic violence and child health and safety, what would be the effect, if any, on the free exercise of religion? What would be the worst case scenario, in terms of potentially hampering the free exercise of religion? Do you have any concerns about the constitutionality of including these exemptions (civil rights, domestic violence and child safety and health)?

Answer 1. The immediate effect would be to authorize substantial burdens on religious liberty even in the few cases in these categories in which there is no compelling reason to do so. In the domestic violence and child health and safety cases, there is essentially unanimous agreement that the state has a compelling interest in responding to real threats to health and safety. An exemption would matter only in cases of overreaching by enforcement authorities or by relatives in conflict with the custodial parent. By definition, they would be cases in which there was no real violence or harm to the child.

There are deadly serious people who believe that most religious instruction, including core Christian doctrine, is harmful to children and a form of child abuse. James G. Dwyer, *Religious Schools and Childrens' Rights* (Cornell University Press 1998). Such activists are unlikely to get a state to act directly on that view, but they will seek targets of opportunity, find noncustodial parents or relatives to file complaints, and challenge unusual religious practices where they think a social worker might be persuaded. There are people who believe that a single day of fasting is a form of abuse, or that a single swat on the bottom is a form of abuse, despite the absence of any continuing physical effects. An exemption from RLPA would be irrelevant to cases of real abuse; its only direct effect would be to encourage marginal cases such as these. Among its indirect effects would be to encourage the long-term dream of those people who want to prevent disapproved religions from transmitting their faith to the next generation. The implicit message would be that where children are at issue, Congress believes that religious parents have no rights.

A civil rights exemption is more complicated; it would address a wider range of cases. I discussed some of these cases in my written testimony on September 9, and I cannot do better than to repeat those examples here. Most obviously, there are claims of religious discrimination against religious organizations. The clearest example 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 Ac-

cess Act, but that Act does not apply to the college cases. RLPA should be available; a civil rights amendment would make it unavailable.

RLPA is needed in other cases where civil rights laws are overextended or simple religious speech is mischaracterized as religious harassment vulnerable to a civil rights claim. A Pennsylvania court has held that an employer engaged in illegal religious discrimination when he printed religious articles in the company newsletter and printed Bible verses on company checks. *Brown Transport Corp.* v. Commonwealth, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990). In Colorado, the civil rights law protects smoking, gambling, collecting pornography, and any other "lawful activity off the premises of the employer during nonworking hours." Colo. Rev. Stat. § 24–34–402.5 (1) (Supp. 1998). I discussed other potential applications of this remarkable civil rights law in response to Question 6 from Senator Leahy. It is simply not possible to say, across the board, that any religious liberty claim is subordinate to any other claim that can be brought under a civil rights statute.

A civil rights exception would also invite challenges to familiar 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 in many states permits religious organizations to prefer employees of their own faith to do the organization's work, but not all states have such exemptions, and there are many ambiguous limits to its reach in states that have it. A Jewish organization's 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 Christian organization's preference for Christians, 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 by these exemptions. It is not settled that these exemptions allow churches to avoid employees who behave in ways inconsistent with a nominal or stated religious affiliation. And in states without such exemptions, an across-the-board civil rights exception to RLPA might force churches to hire employees, even in sensitive positions, who flouted their most fundamental moral and theological commitments.

Finally, there are the difficult cases I discussed in response to Question 1 from Senator Kennedy. I believe that certain small and intensely religious enterprises should be protected, even if they are engaged in secular activities as well. The courts are deeply divided on that question, and these claims might lose even under a RLPA with no exceptions. I am confident that larger commercial enterprises would lose on any RLPA claim to exemption from a civil rights law. Without repeating everything I said in response to Senator Kennedy, let me add here that a civil rights exception designed to cut off these few cases would be gross overkill, and that its principal effects would be on the cases discussed in the four paragraphs preceding this one.

Any exception also has the indirect effect of inviting requests for more exceptions, in this Congress or subsequent Congresses. Exceptions abandon the principle that all attempts to regulate religious practices are adjudicated under a uniform standard that is equal for all; it puts Congress in the position of voting on which religious practices it approves and which it disapproves. That is precisely the evil of *Employment Division* v. *Smith* that this bill is intended to fix. Three exceptions would carry us much further in that direction than one exception—probably past the point of no return.

I do not believe that the exceptions you ask about would be unconstitutional. Some of them would be superseded by surviving constitutional protections. If the Supreme Court is serious about hybrid rights, then parent-child cases are the clearest example of a hybrid right. Lower courts have continued to protect the right of religious organizations to select their own clergy, even after *Smith.* Recent landlord-tenant cases have been litigated under state and federal constitutions, not under RFRA. Exceptions to RLPA would not end this constitutional litigation.

Question 2. What are your views of the merits of addressing religious freedom concerns by drafting a statute that is "issue-specific" (*i.e.,* statute would address specific areas like land use regulation that might conflict with the free exercise of religion) rather than adopting the House bill? If the Senate drafted an issue-specific bill,

what issues do you believe have a sufficient congressional record to be included in such a bill and could withstand Supreme Court scrutiny?

Answer 2. Well-drafted issue-specific bills are desirable, but they are no substitute for RLPA. Issue-specific bills have the advantage that they can deal specifically with a particular burden on a religious practice, pre-empting arguments that it is not really a burden or that it is justified by a compelling interest. A clear example is the Religious Liberty and Charitable Donations Protection Act (principally codified at 11 U.S.C. § 548), which clearly resolved a problem that had given rise to much litigation under RFRA and the Free Exercise Clause.

Issue-specific bills have the disadvantage that if they end in legislative compromise, they may legislate restrictions on religious liberty instead of protections. And they have the separate disadvantage that they solve a problem only after it has done so much damage that it comes to widespread public attention. These two disadvantages are mutually reinforcing; legislative efforts after a problem is repeatedly litigated and comes to widespread public attention tend to turn into an interest group battle in which Congress is lobbied to suppress rather than protect the religious practice at issue. This country needs, and historically has had, a general principle of religious liberty, always available for application to new problems as they arise. In a nation with enormous religious diversity and pervasive regulation, it is impossible to anticipate all the religious liberty problems that will arise and to draft issue-specific legislation to deal with those problems. Many of the worst cases arise only once, or a handful of times.

If the Senate were to turn to issue-specific bills, a land use bill is drafted and ready, principally in § 3(b) of RLPA. Only in land use has Congress assembled a record that would support legislation under the Enforcement Clause of the Fourteenth Amendment. Other issue-specific bills, at least in this Congress, would have to be under Article I powers that do not require the same sort of record. These bills would also have to be drafted from scratch. They would need to address a diverse set of problems, each issue-specific bill covering a few cases. RLPA is a far more workable approach.

Question 3. Please describe your version of the ideal legislation to address concerns with constraints on the free exercise of religion.

Answer 3. My ideal legislation would be RFRA without the needlessly confrontational statement of Congressional findings. Given the decision in *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), RLPA may be the best we can do.

Question 4. In your written statement submitted to the Committee, you state that "a civil rights exception would be a blunderbuss." Can you think of any other way to prevent the House bill from being used to infringe upon the rights of racial and ethnic minorities, gays and women?

Answer 4. Even in its present form, the bill cannot be used to infringe upon the rights of racial and ethnic minorities or women, even in the broadest conception of those rights. 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. With or without RLPA, the only religious liberty claim that can prevail against a claim of race or sex discrimination is the right of religious organizations to choose their own employees for clergy and similar positions.

The political issue is about gays, and even that grossly overstates it; few claims of gay rights would be affected. RFRA passed this body 97–3, and the only thing that has changed in the interim is a handful of cases about small religious landlords refusing to rent to unmarried couples. Not one of these cases has involved gays. There is only the fear that some religious landlord might someday discover a gay tenant or prospective tenant and make the same objection. Respected Senators are prepared to filibuster against the whole idea of religious liberty just to protect the right of gays to impose themselves on a handful of deeply religious landlords owning a handful of apartments.

If the fear is that larger landlords could successfully invoke RLPA, I think that fear is without foundation. Courts are intensely skeptical of claims that large imper-

sonal operations are really religious, and if the number of RLPA claims ever began to affect the supply of housing, the government's claim of compelling interest would become much stronger. The Senate could conceivably draft an exclusion of large landlords to give reassurance on that point, although that has the great danger of departing from RLPA's uniform standard and inviting demands for further exclusions. If the Senate were to draft such an exclusion, it could not be confined to owner-occupied units, for the reasons I explained in response to Question 1 from Senator Kennedy.

Question 5. What assurances can you give those who are concerned about child abuse that a child's parent will not be able to rely on RLPA as a defense to avoid charges of child abuse and argue that his or her religious beliefs sanction such abuse? Please describe how the assertion of such a defense ought to be handled by a court under RLPA.

Answer 5. As I indicated in response to your Question 1 to all witnesses, everyone agrees that protecting the health and safety of children is a compelling governmental interest. This is so well settled that there are hardly any cases challenging it. In *Lundman* v. *McKown,* 530 N.W.2d 807 (Minn. Ct. App. 1995), the Christian Science case that Senator Leahy asked about, both sides agreed that protecting the child was a compelling interest. The religious claimants made least-restrictive-means arguments that the court quickly rejected. Another example, involving a much lower threshold of possible harm to a child, is *State* v. *Corpus Christi People's Baptist Church,* 683 S.W.2d 692 (Tex. 1984), holding that state licensing and enforcement of state standards in a religious childrens' homes is the least restrictive means to serve the compelling interest in protecting the children. It appears to have been undisputed that the actual quality of care in the homes was high.

I have not done a thorough search, but I am not aware of any reported case involving a religious defense of child abuse. If such a case ever arose, the court should reject the RLPA defense. The only significant issue would be the same as in any other case of alleged child abuse—was there really abuse? If so, the state has a compelling interest in preventing that abuse, and the least restrictive means of preventing it is a means that really works without further risk to the child. If there was not really abuse, the parent-child relationship is protected by constitutional law and state policy with or without a religious liberty claim; states do not knowingly remove children from parents who have not actually endangered the child. As I said before, the principle significance of RLPA in child rearing cases is as an additional defense to overreaching by state officials or activist litigants.

Question 6. Some people are concerned that under this language, a husband will be able to rely on RLPA and cite his religious beliefs as a defense for beating his wife. Is that a reasonable concern? Please describe how the assertion of such a defense ought to be handled by a court under RLPA.

Answer 6. That is not a reasonable concern. This is like the child-beating case, only simpler. In the case of children, it is necessary to draw the line between reasonable discipline and abuse. That introduces a threshold issue. There is no such line to be drawn in the case of beating an adult. The strongest conception of religious liberty has never included the right of one person to impose his religious practices on another. See my answer to Question 1(B) from Senator Kennedy. In terms of the language of RLPA, government has a compelling interest in protecting the wife.

This case has none of the ambiguities that make the landlord-tenant cases difficult. Those cases turn on the allocation of personal space: the would-be tenants claim a right to occupy the landlord's property, and the landlord claims that his own property is his moral responsibility. There is no such disagreement about the physical person of another: the wife's body is part of her space and not her husband's. She may consent to many intimate touchings, but that does not imply consent to a beating, and anyway, she can withdraw any consent at will. This is simply not a hard case.

RESPONSES OF CHAI R. FELDBLUM TO QUESTIONS FROM SENATOR HATCH

A. 14TH AMENDMENT

Question 1. Your first question was whether the "land use provision is adequately tailored to remedy violations by governmental entities of religious persons' constitutional rights." In particular you were concerned "whether a court might find the bill indiscriminate insofar as it allows any 'person' to bring suit under this provision, rather than limiting its reach only to individual domiciles, religious assemblies, and institutions."

Answer 1. I do not think there is a significant problem with the bill allowing any "person" to bring a claim of religious discrimination under the land use provision. As my testimony indicates, I have serious concerns with the breadth of the Religious Liberty Protection Act (RLPA), as passed by the House of Representatives. However, within the areas where Congress has a substantial record of governmental entities failing to accommodate the needs of religious organizations and individuals (and land use may well fall into this category), there is no need to limit the claims solely to religious organizations.

Question 2. Your second question related to the *Florida Prepaid* decision. You asked whether the Supreme Court's "distinction between intentional and negligent conduct by a governmental actor," which the Court made in the *Florida Prepaid* decision, was "limited to the due process analysis undertaken in *Florida Prepaid,*" or whether "a court might similarly ask whether the zoning abuses reflect a careless—but not intentionally discriminatory—application of zoning laws to religious persons, and therefore do not provide a basis for Congressional action under the 14th Amendment."

Answer 2. It is always hard to know what the Supreme Court will do in the future. However, I think it is unlikely that the Court will directly import the intentional v. negligent standard, which applies in the due process arena, to the area of religious discrimination. In any event, however, it seems to me that the core of your legislative findings in the land use area is that zoning decisions appear to be "careless" rulings against religious assemblies actually mask some discomfort or bias against such assemblies. Given the difficulty in unmasking such motives, it might be difficult for such religious assemblies to prevail in a 14th Amendment challenge. But the essence of Congress' power to legislate in a prophylactic and remedial manner under the 14th Amendment, *see City of Boerne* v. *Flores,* 521 U.S. 507 (1997), should be sufficient to allow Congress to provide a statutory remedy in precisely these types of situations.

B. COMMERCE CLAUSE

Question. You note that the Supreme Court's decision in *Lopez* requires that the regulated activities must "substantially affect" commerce in order to come within Congress' Commerce Clause power. Hence you ask: "wouldn't it be safer, and eliminate the basis for a constitutional challenge to reword the standard to require something like the following—that the Act extends only to conduct which, when viewed in the aggregate, would substantially affect interstate commerce?"

Answer. You could rework the statutory language to explicitly require that the governed activities "substantially affect" commerce. However, I do not think such a change is necessary, and I doubt it would make any significant difference to the Supreme Court. As my testimony indicated, I think the Supreme Court (at least with its current composition) is going to be quite strict in its view of Congress' Commerce Clause power. Hence, regardless of what Congress sets forth in a statute (either in the findings or in the statute's jurisdictional requirements), the Court will apply its own view as to whether the regulated activities—in the aggregate—substantially affect commerce. You could change the language in the bill to signal to the Court that you understand the limitations or your Commerce Clause power at this time. On the other hand, since it is impossible to know whether a future Supreme Court might expand the scope of Congress' Commerce Clause power, I am not sure you would want to codify the current limitations on your power into statutory language.

C. FEDERALISM

Question. You ask whether, in light of *Alden* v. *Maine* (in which the Supreme Court made "clear that suits for damages against states and state agencies are viewed as incompatible with state sovereignty"), shouldn't RLPA "clarify on its face that it does not purport to authorize such suits?"

Answer. There is no need for such a clarification. Unless Congress *expressly states* that the legislation it passes abrogates state sovereign immunity, such abrogation will not occur. See *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234 (1985). Given the Supreme Court's clarity and consistency on this point, I have no doubt that suits for damages against the states are not authorized under RLPA as currently drafted. (Of course, even when Congress does include an express statement of the type required, the legislation must have been passed pursuant to Congress' 14th Amendment power or Spending Clause power for that abrogation to be effective.)

D. RULES OF CONSTRUCTION

Question. You ask whether the rules of construction in the House-passed RLPA are clear, appear constitutional, and could benefit from modification.

Answer. Most of the rules of construction seem clear to me; a few seem a bit obtuse. This is not surprising. Most construction provisions are drafted to respond to particular concerns and fears on the part of those negotiating a bill. Thus, while these provisions are very clear to the parties who have developed them, those provisions are often less than clear to a reader not involved in the negotiations.

It does not seem to me that any of the rules of construction raise constitutional problems.

I do not have a strong opinion as to whether the rules could benefit from modification. As I noted, most construction provisions are negotiated to respond to a particular fear or concern. Often these provisions are completely unnecessary and redundant, and so the best modification is simply to delete them. (Certainly, a number of the rules of construction in the House-passed RLPA seem completely unnecessary—as a legal matter.) However, if one is interested in having the underlying bill pass, any such deletions or modifications can be problematic—as a political matter.

If RLPA were redrafted to respond to more targeted areas of concern, as I suggest in my testimony, some of these rules of construction may not be as necessary.

RESPONSES OF CHAI R. FELDBLUM TO QUESTIONS FROM SENATOR LEAHY

Question 1. You note that "unlike Title VI and Title IX, RLPA does not permit the Federal Government to deny or withhold Federal financial assistance as a remedy for a statutory violation," and thus you ask whether this takes RLPA "outside the usual concept of Spending Clause power."

Answer 1. You raise a very interesting question, and one on which the Supreme Court has not yet directly ruled. It is true that Title VI of the Civil Rights Act of 1964 and Title IX of the Education on Amendments of 1972 permit the federal government to withhold funds as a remedy for a violation of the law. As a practical matter, however, the federal government rarely takes such a step, and instead uses litigation to enforce compliance with these laws.

It is an intriguing question, however, whether the *absence* of *statutory* authority to withhold federal funds as a remedy for a violation of the law might be viewed by the Supreme Court as undermining Congress' claim that the law was passed pursuant to Spending Clause power. I would certainly hope not, but as I have noted before, one can not be certain about what the Supreme Court will do in these areas.

I believe such a conclusion, if reached by the Supreme Court, would be wrong. The conceptual underpinning of Spending Clause power is that States are free to accept federal funds with conditions attached, or to decline such funds. Whether Congress also decides that withdrawal of Federal funds will or will not be a possible remedy for a violation of such conditions should not be a determining factor in whether the Spending Clause power has been legitimately exercised. Presumably, however, we will hear from the Supreme Court in the future if it disagrees with this reasoning.

Question 2. You ask whether *Thomas* v. *Municipality of Anchorage,* 165 F.3d 692 (9th Cir. 1999) was correctly decided, "both with regard to its hybrid rights theory, as well as with regard to its conclusion about the government's lack of a compelling interest."

Answer 2. I believe *Thomas* v. *Municipality of Anchorage* is a poorly reasoned, and incorrectly decided, case with regard to both its hybrid rights theory and its conclusion regarding government's lack of a compelling, interest. The case, however, is a stark example of the type of challenges to civil rights laws that will arise if RLPA is passed in its current form.

The Ninth Circuit concluded that an apartment owner's speech rights were implicated by an Alaska housing law that prohibited landlords from renting to unmarried couples. The court reasoned that since the owner could not ask tenants about their marital status, or run advertisements stating that apartments would be available only to married couples, the owner's freedom of speech was burdened. Once a claim other than religious liberty was presented in the case, the claim was transformed into one of "hybrid rights," and the lenient standard of *Employment Division* v. *Smith* no longer applied. Having reached that conclusion, the court proceeded to subject the Alaska housing law to strict scrutiny.

The issue of "hybrid rights" is complicated, primarily because the Supreme Court's opinion in *Smith* does not clearly explain how the hybrid rights theory is to operate or the conceptual underpinnings of such a theory. While the Ninth Cir-

cuit panel makes a valiant effort to develop a coherent theory, it ultimately fails to be particularly satisfying. Any neutral law that burdens a religious practice will presumably also burden, in some way, that person's religiously motivated speech about the practice. If that fact on its own creates a colorable First Amendment speech claim, and thereby transforms the case into one of hybrid rights, it is difficult to see what remains of the reasoning and holding of *Smith.* (One might like this as a policy matter, but it does not make for particularly coherent constitutional law. If a landlord has a valid First Amendment speech claim against the government, that is the claim that should be brought directly.)

Once it applied a strict scrutiny test, I think the court wrongly concluded that the State of Alaska did not have a compelling interest in eradicating marital status discrimination. The fact that there is no "firm national policy" against marital status discrimination, and the fact that the Supreme Court has never accorded classifications based on marital status strict scrutiny—two principal facts relied on by the Ninth Circuit—does not seem sufficient to answer the question whether the *State of Alaska* appropriately considered the eradication of marital status discrimination to be of compelling interest. Clearly, the legislature felt a need to establish civil rights protections on the basis of marital status, and it seems a bit presumptuous on the part of the court to decide that meeting such a need was not really a "compelling government interest."

Question 3. You ask whether there is "any pre-*Smith* in which the Supreme Court affirmed the use of the compelling interest test, where accommodation of the religious beliefs of one person would have infringed other legally cognizable rights of another person."

Answer 3. In all of the pre-*Smith* religious accommodation cases that I have read (in which the Supreme Court ostensibly applied the "strict scrutiny" standard). I have not seen a case in which accommodating the religious beliefs of the person pressing the claim would have resulted in actual harm to another individual. Rather, in these cases, the religious individual is usually seeking some exemption or modification from a governmental policy—for example, not having to receive a Social Security number to receive benefits—where the granting of the exemption or modification would not be detrimental to anyone else.

The only closely analogous situation would be that of *Bob Jones University* v. *United States,* 461 U.S. 574 (1983). In that case, the two universities (Bob Jones and Goldsboro) argued that the government's decision to deny them tax-exempt status because certain of their policies took race into account (e.g., a policy prohibiting interracial dating) was a violation of their Free Exercise rights. The Supreme Court accepted that the race-conscious policies of the schools were based on sincere religious beliefs, but concluded that the government's interest in eradicating even any vestiges of racial discrimination was compelling and that denial of tax-exempt status was a narrowly tailored means to achieving that objective.

Question 4. You asked for a comment on "the possible import of *Bradley* [v. *Arkansas Dept. of Education*], on section 2(a)(1) of the RLPA, which prohibits States from burdening a person's religious exercise in 'any program of activity that receives federal financial assistance.'" In *Bradley,* as you note, "the court reasoned that § 504 was not a valid exercise of Congress' spending power 'because it amounts to impermissible coercion.'"

Answer 4. I believe the *Bradley* decision was wrongly decided, but the key issue will be what guidance the Supreme Court gives us in the future regarding possible limitations on Congress' Spending Clause power. The *Bradley* court assumed that so much money was at stake for any State that violates the requirements of § 504 of the Rehabilitation Act of 1973 that it is impossible to say that a State had voluntarily "consented" to such conditions. But it is far from clear what funds are actually at stake in any particular § 504 case. I think it is prudent to wait for additional case law in this area to develop before reaching conclusions regarding the scope of Congress' Spending Clause power.

RESPONSES OF CHAI R. FELDBLUM TO QUESTIONS FROM SENATOR KENNEDY

Question 1. You ask for a comment on the proposition, articulated by Professor Laycock, that '"[t]he cost of a burden on the right to exercise one's religion is usually concentrated, personal, and intense; the cost of permitting someone else's religious exercise is usually diffuse, general, and mild * * * Where this is not true—where a proposed exercise of religion imposes concentrated costs on others—the compelling governmental interest test will usually be met.'"

You particularly ask how this theory can be reconciled with the impact that "accommodating a free exercise claim could have on a single mother or gay person who

has been refused a job or an apartment because of their marital status or sexual orientation."

Answer 1. In many cases, the burden on a religious individual of a neutral law of general applicability will, in fact, be intense and concentrated for the individual, while the cost of granting that individual an accommodation from the burden will be diffuse and mild for society at large. For example, as I noted in one of my responses to Senator Leahy's questions, in most published cases that I have reviewed, a religious individual is usually seeking some exemption or modification from a governmental policy—for example, not having to receive a Social Security number to receive benefits—and receiving the exemption or modification would not particularly harm society in any way.

In certain limited cases, however, this proposition will not hold true. As your question recognizes, some individuals hold certain religious beliefs (e.g., homosexuality is sinful; extra-marital sex is sinful) that will impact more directly on the life and dignity of other individuals—for example, gay people or women who have had children out of wedlock. In such cases, the clash between the religious beliefs of one individual, and the sense of self, personhood and dignity of another individual, necessary will result in the religious burden being experienced as intense and personal—and the impact of *accommodating* that religious belief *concomitantly* being experienced as intense and personal.[1] Thus, for example, if a gay person, or an unwed mother, is denied a job or an apartment by people who believe that such denial is mandated by their religious beliefs, the individuals denied such opportunities will not experience the impact of accommodating the religious beliefs of others as "diffuse, general, and mild."

Nor will it be much solace to individuals who are denied job or housing opportunities to be told that they can conceivably find another job or seek out another apartment. The blow to the dignity and self-respect to that individual of being denied an opportunity granted to all others, solely because of an essential aspect of their personhood, is not alleviated simply because of the fact that they can "go elsewhere." The bottom line is that, in circumstances such as these, the experience is intense and personal for everyone.

Question 2. You ask whether a plaintiff who is seeking to vindicate her rights under an anti-discrimination law, and faces a defendant who raises a RLPA defense, would be required to "individually bear the responsibility—assuming the state does not intervene in the case—of proving that the law is the least restrictive means of furthering a compelling government interest." If the answer is "yes," you ask "on what policy grounds can Congress justify placing this costly and potentially onerous burden on an individual who is simply attempting to vindicate his or her statutorily protected right under state law to be free from discrimination."

Answer 2. There is no doubt that a plaintiff faced with a defendant who raises a RLPA defense will have to prove that the state civil rights law at issue is the least restrictive means of furthering a compelling government interest. This will be a difficult and costly proposition for the plaintiff. Thus, in response to your second question. I do not believe it is appropriate for Congress to place this type of burden on individual plaintiffs. Congress is creating a new statutory right through passage of RLPA. It has an obligation to carefully analyze the type of litigation that will arise under the law, and to reduce any unnecessary or unwarranted effects of the law. It is clear that RLPA defenses will be raised in civil rights cases, and thus as a policy matter, Congress must consider what hurdles and costs are appropriate (and inappropriate) to erect in such cases.

Question 3. You pose the following hypothetical: "If a pervasively sectarian religious organization receives federal funding through a state for purposes of administering a social service program, and that organization begins requiring beneficiaries to undergo proselytization in exchange for participating in the program, would the RLPA or the RFRA prevent the state or federal government from cutting the funding of that organization?

Answer 3. I should hope not. Such actions on the part of the religious organization would run afoul of the Establishment Clause, and the governments providing the funding would—as a constitutional matter—be required to withdraw such funding. A statutory defense could not overcome such a constitutional defect.

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[1] It is certainly true that some religious individuals will not experience the burden on their religious beliefs as intensely as others. One would hope, however, that such individuals would have the integrity not to bring a RLPA claim in the first place. Of course, some such individuals might bring such a claim simply to avoid compliance with a civil rights law—in which case, the religious burden on them would not be sincerely experienced as personal and intense. however, I like to believe there are people who sincerely experience the burden as personal and intense, and that is why they seek RLPA-like protection.

Question 4. You ask whether the provision in section 5 of RLPA, that provides that government may be required to incur expenses in order to avoid imposing a burden on religious activity, "runs afoul of the principle that the Eleventh Amendment protects state treasuries."

Answer 4. I do not believe this provision violates the Eleventh Amendment—at least insofar as the Supreme Court has interpreted the Eleventh Amendment up until this point. Over the years, the Court has consistently held that the Eleventh Amendment bars retrospective monetary relief, and does not bar the expenditure of funds for future compliance with federal law. See, e.g., *Edelman* v. *Jordan,* 415 U.S. 651 1974). Assuming that Section 5 of RLPA falls into the latter category of prospective costs which, to me, appears to be the correct category), there should not be an Eleventh Amendment problem with this provision.

RESPONSES OF CHAI R. FELDBLUM TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. You ask what would be the effect on the free exercise of religion if the Senate included exemptions for civil rights, domestic violence, and child health and safely, in RLPA. You also ask whether such exemptions would be constitutional.

Answer 1. I believe such exemptions, if included by the Senate, would clearly be constitutional. Congress is creating a new statutory right through passage of RLPA. If Congress added such exemptions, it would simply be saying—in these particular areas—that the state *has* a compelling government interest in providing for the civil rights of individuals, for the protection of victims of domestic violence, and for children's health and safety.

Including exemptions for civil rights, domestic violence, and child health and safety in RLPA would have an effect on the free exercise rights of certain individuals. That is, if such individuals had religious beliefs which mandated them to discriminate against certain individuals, to discipline their spouses through physical force, or to make decisions that placed their children's health in danger—such individuals would not be able to bring a RLPA claim in court to argue for the right to engage in such activities. Conversely, the individuals who are the objects of such actions would not be forced to contend with such RLPA defenses in situations where they are seeking to vindicate their rights.

Question 2. You ask about the "merits of addressing religious freedom concerns by drafting a statute that is 'issue-specific'" (for example, just land use), and you ask what issues "have a sufficient congressional record to be included in such a bill and could withstand Supreme Court scrutiny."

Answer 2. As I discuss in my testimony, I believe the most prudent course of action is for Congress to enact an issue-specific bill. Moreover, as I make clear in my testimony, I believe Congress has gathered at least an adequate record in the land use area to justify invoking its 14th Amendment power. I also believe the record demonstrates significant disregard on the part of governmental officials to the religious beliefs of prisoners, and I believe Congress' Spending Clause power provides sufficient authority to address that area.

Question 3. "Please describe your version of the ideal legislation to address concerns with constraints on the free exercise of religion."

Answer 3. As I note above, I believe an issue-specific bill represents the most prudent and appropriate course for Congress to take. The areas of land use and prisons seem to be the areas that require Congressional intervention.

RESPONSES OF JAY S. BYBEE TO QUESTIONS FROM SENATOR HATCH

Question 1. Is the Religious Liberty Protection Act, H.R. 1691, narrowly tailored to remedy violations of free exercise rights when Section 3(b)(1) forbids government from imposing a substantial burden on the free exercise rights of "a person[]" in any land use regulation or exemption, rather than referring to individual domiciles, religious assemblies and institutions?

Answer 1. Although the incidence of land use regulation that burdens religious exercise typically falls on individual domiciles, religious assemblies and institutions, I do not think the legislation would be improved by limiting the language to those entities. Section 3(b)(1) does not grant rights under RLPA to any "person" but only to any person whose religious rights have been burdened by land use regulation. Not all persons whose rights might be burdened by a land use regulation will also be the property owner. For example, a member of a congregation whose house of worship was denied a building permit or a zoning variance is a "person" whose religious rights have been burdened, but may not be the owner of record of the church

property. To The extent that the congregation member has standing to bring a claim, the broader term "person" would include the member, while the narrower phrase "domicile owner, religious assemblies and institutions" would not.

Section 4(a), states that "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." I would read Section 4(a) as a limitation on who may bring suit; otherwise, Section 4(a) is surplusage. When Section 3(b) is read in light of Section 4(a), the use of the term "person" includes only those persons who have Article III standing to bring the claim, thus giving RLPA it broadest coverage.

Question 2. May Congress, in the exercise of its authority under Section 5 of the Fourteenth Amendment, address careless, but not intentionally discriminatory, government actions that substantially burden religious exercise?

Answer 2. In *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank,* 119 S.Ct. 2199 (1999), the Court held the Patent Remedy Act exceeded Congress' power under Section 5 of the Fourteenth Amendment. The Court repeated what it had previously stated in *Boerne* v. *Flores,* 521 U.S. 507 (1997), that legislation enacted under Section 5 must have a "remedial or preventive object," one that is "responsive to, or designed to prevent, unconstitutional behavior." *Florida Prepaid,* 119 S.Ct. at 2207 (quoting *Boerne,* 521 U.S. at 532). The Court found the Patent Remedy Act was not based on a "pattern of patent infringement by the States" and could not be said to be remedial. *Id.*

In *Florida Prepaid,* the Court pointed out that under the patent laws, a party infringes a patent even if it has acted negligently. Thus, states that have infringed patents may have done so by their negligent actions. The Court has recognized that government violates the guarantee of due process by its deliberate actions, not by its merely negligent acts. *See Daniels* v. *Williams,* 474 U.S. 327 (1986); *Davidson* v. *Cannon,* 474 U.S. 344 (1986). Merely negligent state actions may infringe a patent (and violate the patent laws) but would not violate the Due Process Clause (because the action was not intentional). *Florida Prepaid,* 119 S.Ct. at 2209–10. The Patent Remedy Act was not "proper prophylactic § 5 legislation" because there was no evidence that the states had infringed patents through "intentional or reckless" acts. *Id.* at 2210.

The Religious Liberty Protection Act differs from the act at issue in *Florida Prepaid* in several regards. The exercise of Congress' Section 5 authority in RLPA rests only nominally on the Due Process Clause. The Due Process Clause is, of course, the basis by which the First Amendment has been made applicable to the states, but the Due Process Clause itself is not involved in religion cases in the same way that it was involved in the Patent Remedy Act. Although the Court routinely acknowledges that claims that the states have violated the Free Exercise Clause are based on the First and Fourteenth Amendments, the Court has long ceased citing the text of the Due Process Clause and relies, jot-for-jot, on the text of the First Amendment. *See, e.g., Lee* v. *Weisman,* 505 U.S. 577, 580 (1992); *Everson* v. *Board of Education,* 330 U.S. 1, 8 (1947). *See also West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943). The Court considers claims of religious discrimination against the states on precisely the same terms as similar claims against the federal government; the Due Process Clause neither adds to nor subtracts from the analysis used to consider the two claims. *See Marsh* v. *Chambers,* 463 U.S. 783, 790–91 (1983).

Until *Employment Division* v. *Smith,* 494 U.S. 872 (1990), intentional discrimination was not a necessary element of a free exercise claim. So far as I am aware, the Court had never held that without an assertion of intentional discrimination, a free exercise claim was, for that reason alone, flawed. *Smith* may have changed this. It may be read to impose an the free exercise of religion what *Washington* v. *Davis,* 426 U.S. 229 (1976), demands of race discrimination claims under the Fifth and Fourteenth Amendments: proof of intent. *See Smith,* 494 U.S. at 886 n.3. *See also Bowen* v. *Roy,* 521 U.S. 693, 517 (1986). Even if *Smith* now requires some kind of proof of intent, that requirement exists by virtue of the First Amendment and not the Due Process Clause. The Court may prove more sympathetic to careless or negligent infringement of religious liberty than it would be to negligent infringement of procedural due process rights.

Even assuming that *Smith* means that any free exercise claimant must assert intentional government discrimination, I do not believe that Congress must assemble a record in which each and every instance demonstrates irrefutably that a government deliberately discriminated against religion. Indeed, I think it is a premise of Congress' use of Section 5 in the land use regulation area, that religious animus is easily disguised in matters such as zoning cases. As I pointed out in my original statement to the Committee, zoning cases involve individual assessments, thus making it very difficult for any particular person or institution to prove that he has been

discriminated against. Even the Court in *Smith* recognized that "individualized governmental assessment of the reasons for the relevant conduct" may justify a different approach. *Smith,* 494 U.S. 884. I think what Congress must show to satisfy *Boerne* is some kind of pattern of religious animus in land use matters. The pattern need not be so systematic that Congress must conclude that religious parties always, or even usually, lose in land use proceedings. I believe that a record that showed that in a number of cases governments intentionally discriminated against religion, and that Congress found additional evidence that governments had proceeded with reckless indifference or even careless indifference to religious sensibilities should raise a defensible inference that the record demands appropriate remedial and prophylactic measures. Although the Court has never definitively told Congress what kind of factual basis it must have, it at least advised that Congress must have more than "anecdotal" evidence. *Boerne,* 521 U.S. at 531.

One of the reasons the Court may give Congress greater leeway in his context than in *Florida Prepaid* is that intentional discrimination on the basis of religion or race is much more subtle, complex, and culturally-bound than intentional violation of patents. Within the academic literature there is much discussion of the contours of subconscious discrimination. *See, e.g.,* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism,* 39 Stan. L. Rev. 317 (1987); Charles R. Lawrence III, Book Review, 35 Stan. L. Rev. 831 (1983). What Professor Lawrence wrote with respect to race, may be equally true with respect to religion: "Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—not unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes." Lawrence, 39 Stan. L. Rev. at 332. The RLPA is prophylactic; it seeks to *prevent* religious discrimination. If Congress enacts RLPA, it should do so because Congress has determined that land use decisions in the past have been fraught with actual discrimination, and because it is so difficult for religious parties to prove the religious animus.

Question 3. Section 2(a) prohibits government from burdening a "persons' religious exercise * * * 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." Should this language state "substantially affect" or "substantially affect conduct, which in the aggregate * * *" to conform to the Court's decision in *Lopez*?

Answer 3. Given the skepticism with which the Court approached the Religious Freedom Restoration Act in *Boerne,* I think that it is important that Congress reduce any potential points of friction between this legislation and the Court's decisions. Professor Laycock has supplied evidence that in post-*Lopez* (*United States* v. *Lopez,* 514 U.S. 549 (1995)) decisions, both the Court and lower federal courts have considered the regulated activity in the aggregate. *See Testimony of Douglas Laycock* (Sept. 9, 1999), at 10–11. It might still be prudent for Congress to make clear that RLPA reaches activities that, considered in the aggregate, substantially affect commerce. This modest change would (1) make it clear to lower courts that Congress intended to reach activities that, in the aggregate, substantially affect commerce, and (2) demonstrate to the Supreme Court that Congress understood the limitations on its authority outlined in *Lopez.*

Question 4. In light of *Alden* v. *Maine,* should RLPA clarify on its face that it does not purport to authorize suits for damages against the states?

Answer 4. In *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996), the Court held that Congress may not abrogate state sovereign immunity in federal courts under its Article I powers. *Alden* v. *Maine,* 119 S.Ct. 2240 (1999), made clear that state courts do not have an obligation to hear such suits. *Seminole* means that federal courts may not award damages for those actions brought under Sections 2(a)(1) and (2) of RLPA, because those sections rely on Congress' spending and commerce authority, respectively. *Alden* means that states are immune in any such actions brought in state court, unless the state consents.

Suits for damages brought under the authority of Section 5 of the Fourteenth Amendment stand on a different ground. In such actions, Congress may abrogate state sovereign immunity and impose damages on the states when "Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,'; * * * and * * * acted 'pursuant to a valid exercise of power.'" *Florida Prepaid,* 119 S.Ct. at 2205 (quoting *Seminole Tribe,* 517 U.S. at 55). Since nowhere in RLPA does Congress unequivocally announce that it is abrogating state sovereign immunity, there is no need for Congress to announce that it is *not* doing so. So stating, however, would not affect the legislation and would remove any lingering doubts.

Question 5. Are the rules of construction constitutional?

I have just a couple of observations on the rules of construction. In general, I believe that they are unobjectionable. Section 5(f) provides that "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." I understand this provision to mean that finding that a burden on religious exercise falls within Section 2(a)(2) would not have collateral effect *as a matter of law.* I do not think that Congress can forestall the use of such a finding as a matter of fact. In other words, the facts that bring a state action within Section 2(a)(2) (because the state-imposed burden affects commerce) will have undoubtedly have some probative value in a subsequent case involving that burden. Section 2(a)(2) merely provides that such effect does not occur automatically.

Question 6. If Congress adopted H.R. 1691 with an exemption for civil rights, domestic violence, and child health and safety, would it affect the free exercise of religion and would such exemptions be constitutional?

Answer 6. I believe that such exemptions would be constitutional, because the exemptions do not exempt civil rights, domestic violence and child health and safety from any requirement of the First Amendment. RLPA becomes a statutory requirement, and Congress may generally set whatever rules and conditions it wishes. In some cases, litigants may couple a claim under RLPA with a First Amendment claim. In that case, the exemptions would not apply to the First Amendment claim, only to the claim under RLPA.

As for the effect such exemptions would have on religious liberty, these are clashes of titans. The evangelical landlady who refuses to follow the fair housing laws because her putative tenants are violating what she regards as the commands of her religion puts the landlady's rights under RLPA squarely in opposition to her would-be tenants' civil rights. This presents a conflict of *statutory* rights, not constitutional rights.

In the main, I suspect that there will be relatively few issues involving domestic violence and child health and safety that have not already been confronted by the courts in the context of the First Amendment.

Question 7. Should religious freedom be addressed by Congress on an issue-specific basis?

As I stated in my written remarks to the Committee on September 7, this legislation is not free from constitutional doubt. I opposed RFRA as beyond the power of Congress under Section 5. My review of RLPA leads me to conclude that Congress has solved many of the problems that lead the Court in *Boerne* to hold RFRA unconstitutional. As my earlier remarks show, I believe that RLPA is most defensible as an exercise of Congress' authority under Section 5 which, after *Boerne,* is most likely to be successful when Congress addresses state violations of religious liberty on an issue-specific basis.

I thank the Committee for inviting me to testify and to supplement my remarks through this letter.

RESPONSES OF GENE C. SCHAERR TO QUESTIONS FROM SENATOR HATCH

A. 14TH AMENDMENT

Question 1. Let's first focus on the land use provision of the bill—which relies largely on section 5 of the 14th Amendment. Under the Supreme Court's decision this June in *Florida Prepaid,* the Court struck as invalid the Patent and Plant Variety Protection Remedy Clarification Act, holding that Congress must justify an invocation of the 14th Amendment by identifying specific conduct transgressing the Amendment's substantive provisions, and tailoring its legislative scheme to remedying or preventing such conduct.

With that preface, do you think the land use provision is adequately tailored to remedy violations by governmental entities of religious persons' constitutional rights? Specifically, I would like your opinion on whether a court might find the bill indiscriminate insofar as it allows any "person" to bring suit under this provision, rather than limiting its reach only to individual domiciles, religious assemblies and institutions.

Answer 1. I believe the land use provision of RLPA is, in fact, adequately tailored to justify the invocation of Section 5. *Florida Prepaid* explicitly recognized that Congress has the power under Section 5 to enforce the protections of the Fourteenth Amendment through substantive or even preventive legislation under two conditions: (1) "there is reason to believe that many of the laws affected by the congres-

sional enactment have a significant likelihood of being unconstitutional," and (2) there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 119 S.Ct. 2206, 2210 (1999).

Section 3(b) is a response to well documented, widespread abuse of land-use regulation to the detriment of religion. The record is replete with statistical and anecdotal evidence of this abuse. Much testimony has already been presented, including, in particular, that of Von Keetch and Professor Durham before the House Judiciary Committee. I would also refer to the testimony of Douglas Laycock on July 14, 1998 and May 12, 1999 before the House Subcommittee on the Constitution, and in particular the examples of the Morning Star Christian Church and the Metropolitan Church in Corinth, Texas. Examples of this abuse are also recited in my previous testimony before this Committee, including those involving the Society of Jesus, the Korean United Methodist Church, and the Sacred Heart Catholic Church of San Francisco. Clearly, creating a cause of action for a "person" whose religious exercise is substantially burdened by land use regulation is not so incongruous or disproportionate to these recorded problems that reliance on Section 5 of the Fourteenth Amendment is infirm.

It may be, as the question supposes, that someone other than an owner of a home or a religious building would bring a claim under this provision of RLPA. That, however, would not be a problem in my view. In the examples cited above, the property owner was not the only person hurt by the unfair government action. Those who *used* the property (or would like to have used it) were hurt as well, even if they were not owners. Accordingly, I do not believe that a decision to allow non-property owners to bring claims under this provision would be beyond the scope of the evidence before Congress.

Nevertheless, it also true that, all else being equal, the narrower the sweep of *any* law enacted under Section 5, the less likely it is to be invalidated by the courts. For that reason, the narrowing of this provision that is suggested in the question may reduce the likelihood of a successful court challenge. But that narrowing, in my view, is not required by applicable precedent.

Question 2. The *Florida Prepaid* decision also draws the distinction between intentional and negligent conduct by a governmental actor, suggesting that the latter type of conduct may not justify Congress's invocation of the 14th Amendment. Do you believe this analysis is limited to the due process analysis undertaken in *Florida Prepaid,* or is it possible that a court might similarly ask whether the zoning abuses reflect a careless—but not intentionally discriminatory—application of zoning laws to religious persons, and therefore do not provide a basis for Congressional action under the 14th Amendment.

Answer 2. As I read the *Florida Prepaid* decision, the Court's analysis of the distinction between intentional and negligent conduct is expressly limited to alleged deprivations of due process, and would not apply to deprivations of other constitutional rights. It is important to remember that the Court did not rule that Section 5 cannot be invoked as against unintentional violations of the Due Process Clause. Instead, the Court echoed an earlier line of cases holding that "an unintended injury to a person's property" cannot violate due process at all, because it "does not 'deprive' that person of property within the meaning of the Due Process Clause." 119 S.Ct. at 2209 (citing *Daniels* v. *Williams,* 474 U.S. 327, 328 (1986)).

In other words, the Court's distinction between intentional and negligent conduct was not designed to draw a line between acceptable and unacceptable uses of Section 5, but between actions that may violate due process and those that do not. By its terms, that kind of analysis would not apply to government actions that "abridge the free exercise" of religion within the meaning of the First Amendment, and I am aware of no case law that so holds.

But even if the distinction made in *Florida Prepaid* between intentional and negligent action applied, the record before Congress sufficiently indicates the existence of a problem with *intentional* discrimination. I again would refer to the testimony of Von Keetch and Professor Durham before. the House Judiciary Committee, and of Douglas Laycock before the House Subcommittee on the Constitution, and the examples of abuse involving the Society of Jesus, the Korean United Methodist Church, and the Sacred Heart Catholic Church of San Francisco cited in my prepared testimony.

B. COMMERCE CLAUSE

Question. The House-passed bill purports to encompass all matters in which a governmental actor's substantial burden on a religious claimant "affects" commerce. Yet the Supreme Court's decision in *Lopez* strenuously holds that a constitutional exercise of the commerce clause must "substantially affect" commerce. Now I sup-

pose the argument could be made to a court that it should read this requirement loosely, and find it satisfied if the type of conduct at issue would *in the aggregate* substantially affect commerce. But wouldn't it be safer, and eliminate the basis for a constitutional challenge, to reword the standard to require something like the following—that the Act extends only to conduct which, viewed in the aggregate, would substantially affect commerce?

Answer. Even in the wake of *Lopez,* I believe that Section 2(a)(2) of RLPA, as written, would be a constitutional exercise of Congress's Commerce Power under settled Supreme Court jurisprudence. To be sure, the change suggested in the question would somewhat reduce the chance that RLPA's application to a particular case would be found unconstitutional. But for reasons explained below, I do not believe it is necessary. And the concern underlying this suggestion can largely be addressed through a congressional finding, either in the legislative history or in a separate provision of RLPA.

It is of course true that, under *Lopez,* activity that is constitutionally regulable under the Commerce Power must "substantially affect" interstate commerce. *Lopez,* 514 U.S. at 1630. However, the Supreme Court has often upheld regulation of activity that, in isolation, has less than a substantial effect on interstate commerce so long as similar activity by others, when aggregated, substantially affects interstate commerce. *Lopez* expressly recognized this settled principle, and did not purport to overrule it. *Id.* (discussing *Wickard* v. *Filburn,* 317 U.S. 111, 128 (1942)). There can be no serious doubt that, in the aggregate, the activity protected by RLPA substantially affects interstate commerce.

Moreover, the rationale for the Court's invalidation of the Gun-Free School Zones Act in *Lopez* is inapplicable to RLPA. The Court there expressly distinguished that statute from which that contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." 514 U.S. at 1631. The lower courts accordingly have interpreted *Lopez* not to apply in such cases.[1] RLPA, of course, has such a jurisdictional element, to wit: the requirement that the burden on the claimant's religious exercise "affect * * * commerce with foreign nations, among the several States, or with Indian tribes." By itself, this jurisdictional element will necessarily limit the reach of RLPA to "a discrete set" of religious burdens "that additionally have an explicit connection with or effect on interstate commerce." *Id.* For that reason, RLPA would be easy to distinguish from the statute at issue in *Lopez.*

Furthermore, as Professor Laycock has pointed out in his written testimony, RLPA's "affecting commerce" element is similar to jurisdictional elements in a wide range of federal statutes, and is the accepted way of indicating a congressional intent to exercise the commerce power to the maximum extent possible, but no further. Indeed, the Fifth Circuit has expressly recognized, in a similar context, that "the words 'affecting commerce' are jurisdictional words of art, typically signaling a congressional intent to exercise its Commerce Clause power broadly, perhaps as far as the Constitution permits." *United States* v. *Wallace,* 89 F.2d 580, 583 (5th Cir. 1989).

It is also not clear that the amendment contemplated in the question would eliminate the constitutional issue. For example, Justice Thomas' concurrence suggests that, as originally understood, the commerce power extended only to activities—such as trade itself—that are actually *in* commerce, not to all activities that substantially *affect* commerce. *See* 514 U.S. at 584–602 (Thomas, J., concurring). If a majority of the Court were to accept that view, it probably would not matter whether RLPA used the "affects" standard or the "substantially affects" standard. But even Justice Thomas indicated a great reluctance to adopt the position set out in his concurrence, for he recognized that such a step would require overruling a great deal of Supreme Court precedent, and would invalidate a host of federal statutes.

That said, I believe it would be useful for Congress to demonstrate expressly an awareness of *Lopez's* "substantial affects" requirement. At this point, this can best be done in a finding, contained in the legislative history, that the activity regulated by RLPA substantially affects interstate commerce. *Lopez* itself suggested that such

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[1] *See United States* v. *Melina,* 101 F.3d 567, 573 (8th Cir. 1996); *United States* v. *Tocco,* 135 F.3d 116, 123–24 (2d Cir. 1998); *United States* v. *Pierson,* 139 F.3d 501, 503 (5th Cir. 1998); *United States* v. *Cunningham,* 161 F.3d 1343, 1345–46 (11th Cir. 1998); *United States* v. *McAllister,* 77 F.3d 387, 390 (11th Cir.), *cert. denied,* 117 S.Ct. 262 (1996); *United States* v. *Wells,* 98 F.3d 808, 811 (4th Cir. 1996); *United States* v. *Gateward,* 84 F.3d 670, 671–72 (3d Cir.), *cert. denied,* 117 S.Ct. 268 (1996); *United States* v. *Abernathy,* 83 F.3d 17, 20 (1st Cir. 1996); *United States* v. *Turner,* 77 F.3d 887, 889 (6th Cir. 1996); *United States* v. *Bell,* 70 F.3d 495, 497–98 (7th Cir. 1995); *United States* v. *Bolton,* 68 F.3d 396, 400 (10th Cir. 1995), *cert. denied,* 116 S.Ct. 996 (1996); *United States* v. *Hanna,* 55 F.3d 1456, 1461–62 & n.2 (9th Cir. 1995).

a finding could be a factor for the Court to consider in determining whether Congress has acted within its commerce power authority. *See,* 514 U.S. at 562–64. If changes were to be made to the House version of RLPA for other reasons, this finding could perhaps be included in a separate section of the statute itself.

C. FEDERALISM

Question. After reading the Supreme Court's recent decision in *Alden* v. *Maine,* it is clear that suits for damages against states and state agencies are viewed as incompatible with state sovereignty. Accordingly, shouldn't a RLPA bill clarify on its face that it does not purport to authorize such suits?

Answer. I do not believe such a disclaimer is necessary. Courts already presume, in the absence of a "'clear legislative statement'" to the contrary, that a statute does not abrogate a state's constitutional sovereign immunity. *Seminole Tribe* v. *Florida,* 517 U.S. 44, 55–56 (1996) (quoting *Blatchford* v. *Native Village of Noatak,* 501 U.S. 775, 786 (1991)). RLPA does not contain a clear legislative statement of intent to subject unconsenting states to damage suits, and will therefore be presumed not to authorize such suits.

To be sure, such a disclaimer could be useful in reducing litigation risk because it would demonstrate a congressional sensitivity to state prerogatives. But I would not consider the absence of such a disclaimer as a barrier to passage of the House version of RLPA.

D. RULES OF CONSTRUCTION

Question. What is your view of the rules of construction section of the House-passed RLPA bill? Are these rules clear to you, and do they appear constitutional in their application? Or would you suggest some modification to this section?

Answer. The rules of construction provided in this section, though perhaps not strictly necessary, prevent potential misuses of RLPA. These provisions also help to ensure that RLPA will be constitutional in all of its applications. I do not believe any of these rules of construction would be unconstitutional in application.

Most of the rules provided in Section 5 are limiting provisions. Subsections (a) and (b) clarify that RLPA, although it permits some burdens on religion (i.e., those that pass the "strict scrutiny" test), does not provide additional *authority* for a government to burden religious belief or practice in any way. Such authority, if it exists, must come from some other source. Similarly, Subsections (c) and (d) ensure that RLPA will not enlarge or diminish any person's (or institution's) right to receive government funding. And Subsection (f) clarifies that a finding for purposes of RLPA that a particular activity affects interstate commerce raises no such presumption for purposes of other statutory schemes. These provisions all merely limit the potential effect of RLPA, and do so in a way that is constitutional.

Subsection (e) serves an important constitutional purpose by clarifying that RLPA does not commandeer state action, and therefore does not run afoul of the Supreme Court's decisions in *New York* v. *United States,* 505 U.S. 144 (1992), and *Printz* v. *United States,* 521 U.S. 898 (1997). RLPA effectively preempts the application of state laws and judicial decisions which would substantially burden religious exercise, but would not pass strict scrutiny. Subsection (e) provides that a government may avoid such preemption through any constitutional means that would otherwise eliminate the substantial burden on religion—for example by creating a religious exemption in a statutory scheme [2]—but does not require governments to take any action.

As the Supreme Court explained in *New York,* Congress has the power "to offer states the choice of regulating [private] activity according to federal standards or having state law preempted by federal regulation." 505 U.S. at 167. Subsection (e) simply attempts to ensure that states have this choice under RLPA, and that RLPA therefore will not be used to *force* the states to pass any new laws, create any new regulatory regimes, or otherwise take any affirmative action to implement RLPA.

To be sure, the provision could be augmented somewhat to reduce the *risk* that RLPA will be applied by the courts in an unconstitutional manner. For example, a sentence could be added stating directly that RLPA does not impose any affirmative

[2] The Supreme Court has repeatedly upheld religious exemptions to otherwise generally applicable laws. *E.g., Walz* v. *Tax Comm'n,* 397 U.S. 664 (1990); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *Corporation of the Presiding Bishop* v. *Amos,* 483 U.S. 327 (1987); *Employment Division* v. *Smith,* 494 U.S. 872 (1990) (dictum); *Gillette* v. *United States,* 401 U.S. 437 (1971); *Arlan's Dep't Store* v. *Kentucky,* 371 U.S. 218 (1962); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). The only religious exemption that the Court has invalidated was an exemption that the Court apparently believed had the effect of subsidizing religious speech. *Texas Monthly, Inc.* v. *Bullock,* 489 U.S. 1 (1989).

obligations on state and local governments. And a sentence could be added at the beginning of the provision to the effect that the only legal effect of RLPA in any particular case is to preempt government action that violates the statute's terms. However, such amendments are not necessary to save the statute from unconstitutionality, inasmuch as these points are already fairly implicit in the statute.

Subsection (g) is the only rule of construction in Section 5 of the House Bill that potentially broadens the scope of RLPA. It provides: "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." By its terms, this provision does not permit RLPA to be interpreted in a way that would be unconstitutional. To be sure, it may sometimes require courts to resolve whether the Constitution would allow a particular application of RLPA, rather than allowing them to adopt a narrow interpretation of RLPA simply to avoid a constitutional issue. But this effect certainly does not violate the Constitution.

Finally, Subsection (h) is a standard severability clause. In the unlikely event that a particular provision of RLPA is held unconstitutional, this clause ensures that the remaining portions of RLPA should not be held invalid as a result. Like the other rules of construction in Section 5, this clause ensures that RLPA will have its intended effect of protecting religious exercise to the maximum extent permitted under the Constitution.

RESPONSES OF GENE C. SCHAERR TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. If the Senate passes an amended version of the House bill (H.R. 1691) that includes exemptions for civil rights, domestic violence and child health and safety, what would be the effect, if any, on the free exercise of religion? What would be the worst case scenario, in terms of potentially hampering the free exercise of religion? Do you have any concerns about the constitutionality of including these exemptions (civil rights, domestic violence and child safety and health)?

Answer 1. I do not support the inclusion of issue-specific exemptions in RLPA. Such exemptions are not necessary in my opinion to protect society's most important interests. The substantial burden/compelling governmental standard ensures that the government will be able to protect its most important interests regardless of conflicting religious claims. It merely provides that, even where the government has a compelling interest, it does, not have an *automatic* right to intrude upon religious freedom, but may only override religious freedom claims where truly necessary to furthering that compelling governmental interest.

An exemption for civil rights laws would have particularly unfortunate effects, both symbolic and practical. Most fundamentally, a "civil rights" exemption would send the message that the constitutionally protected freedom of religion—what President Clinton has called our "first freedom"—is subordinate to other types of civil rights. It would be ironic and a setback for religious freedom if Congress amended RLPA to suggest that any claim under the general heading "civil rights" (other than those under RLPA) must necessarily trump any RLPA claim. As passed by the House, RLPA instead puts religious freedom on par with other types of civil rights claims, and allows the appropriate balance to be reached through case-by-case accommodation and decision-making.

A civil rights exemption would also leave a significant gap in RLPA's protection of religious freedom. For example, in recent years, churches have been sued under Title VII and state employment laws for alleged gender discrimination in the selection of their clergy. Although these claims have generally been rejected under the Free Exercise Clause, not all religious hiring decisions will come within the scope of the ministerial privilege created by that Clause, and yet may be central to an organization's religious freedom. Consider for example a convent of nuns that restricts its membership to single women for religious reasons. Absent RLPA, a married woman desiring to become a nun could potentially sue the convent under local ordinances prohibiting marital status discrimination. Or a man wishing to become a nun could sue the convent charging gender discrimination. A "civil rights" exemption would preclude the convent from even raising a defense under RLPA. While this may not be the worst scenario that could arise, it is not far-fetched.

Moreover, if domestic violence and civil rights laws (other than RLPA) are exempted from RLPA, one must ask why laws prohibiting murder, theft, fraud, child labor, bribery and many other things are not similarly exempted. Once the list of specific exemptions is begun, however, it becomes impossible to complete on any principled basis. One could never identify all of the types of government laws that would outweigh a person's claim to religious freedom. For this reason, RLPA provides a single flexible standard for balancing governmental interests against claims

of religious freedom on a case by case basis. I believe this standard strikes the appropriate balance for all types of RLPA claims, not just those involving government action in areas *other* than civil rights.

Question 2. What are your views on the merits of addressing religious freedom concerns by drafting a statute that is "issue-specific" (i.e., statute would address specific areas like land use regulation that might conflict with the free exercise of religion) rather than adopting the House bill? If the Senate drafted an issue-specific bill, what issues do you believe have a sufficient congressional record to be included in such a bill and could withstand Supreme Court scrutiny?

Answer 2. An issue-specific approach to the protection of religious liberty would not adequately substitute, in my view, for provisions in the House Bill that would protect religious freedom within the general scope of Congress' commerce and spending powers. An approach that would protect religious exercise only in certain areas of law would necessarily leave large gaps in the protection of religious liberty. Moreover, under the Supreme Court's decision in *Boerne* v. *Flores,* Congress's authority under the Fourteenth Amendment to impose the substantial burden test is limited to discrete areas in which a pattern of constitutional violations has been identified. The record in this case supports such action in the area of land use regulation (covered in Section 3(b) of House bill), but probably not in other areas of law.

In my opinion, the House version of RLPA, which (among other things) restores the substantial burden test within the scope of Congress' Article I powers, is the most effective and appropriate way of protecting religious freedom. In exercising its Article I powers, Congress is not limited by the Supreme Court's interpretation of the Free Exercise Clause; it may protect religious freedom even where not constitutionally required. Moreover, the substantial burden/compelling governmental interest framework provided in RLPA is inherently sensitive to the various governmental and private interests that may arise in any context. For example, RLPA might prevent a federally funded high school from enforcing a policy forbidding the wearing of hats against students who cover their heads for religious reasons. But it would not prevent a prison from enforcing a uniform dress code on prisoners, even against religious claimants, if such a policy were necessary to prevent the concealment of weapons or drugs. Similarly, RLPA might permit a nonprofit religious radio station to hire employees on the basis of religion, despite governmental regulations to the contrary. But I cannot imagine a situation in which it could be invoked to allow a person to discriminate on the basis of race in employment or housing in violation of Title VII.

In short, the substantial burden/compelling interest standard is flexible enough to encompass all areas of law. I do not see any benefit to limiting the application of this test to only discrete issues.

Question 3. Please describe your version of the ideal legislation to address concerns with constraints on the free exercise of religion.

Answer 3. For reasons explained above, I believe that a statute such as the version of RLPA passed by the House is the fairest and most effective means of protecting religious liberty, without undue interference with legitimate governmental prerogatives and interests.

Please feel free to contact me if you have further questions.

ADDITIONAL SUBMISSIONS FOR THE RECORD

JUNE 23, 1999

PREPARED STATEMENT OF HON. IRENE B. FRENCH

Good morning, my name is Irene B. French and I am the Mayor of Merriam Kansas and the Vice Chair of the Finance, Administration, and Intergovernmental Relations Steering Committee with the National League of Cities (NLC). I am submitting this testimony in opposition to "The Religious Liberty Protection Act of 1999" (H.R. 1691) which is currently pending in the House of Representatives, on behalf of NLC. H.R. 1691 effectively preempts traditional local authority over zoning and land use issues any time a claim of religious connection is asserted.

The National League of Cities represents 135,000 mayors and city council members from cities and towns across the country that range in population from the nation's largest cities of Los Angeles and New York to the smallest towns. NLC appreciates the opportunity to submit this written statement on this very important issue. NLC, as a representative of local elected officials, support the free exercise of religion as guaranteed by the United States Constitution. It is however vitally important that the Committee hear from state and local government elected officials on this bill which affects the historic authority and daily operations of local authorities in such a broad-sweeping and dramatic way.

Currently a bill, H.R. 1691, is moving through the House under the misleading title of "The Religious Liberties Protection Act of 1999" (RLPA). This bill would supposedly codify our nation's reverence for religious liberty, yet a close examination of this legislation indicates that it would do nothing to advance individuals' ability to practice religion. Instead, *RLPA attacks another American founding principle, the principle of federalism.*

Protection of religious liberty is a laudable goal, indeed one of the founding precepts of our nation. From the time the first courageous Pilgrims landed on our shores, religious freedom has helped make America the great nation that it is, a nation of spirited citizens with their eyes on higher good, as well as the common good. The American people valued religious liberty enough to enshrine it in the First Amendment and forever bind government to respect an individual's fundamental right to practice his or her faith. Enacting a bill such as RLPA, however, undermines our sacred principles of federalism and guts local governments' authority to apply neutral laws to all members of a community.

Under a law such as RLPA, local governments are prohibited from making land use decisions that would "impose a substantial burden on a person's religious exercise." Yet there is *no* evidence to support the premise upon which RLPA is founded, namely that local governments, through their zoning powers, have targeted religious entities' freedom to practice religion. Examples cited by proponents of the bill instead refer to cases in which church-operated facilities or religiously motivated opinions have been affected, not the actual practice of religion. Furthermore, the Supreme Court ruled that RLPA's predecessor, the Religious Freedom Restoration Act, was unconstitutional, in the case of *City of Boerne* v. *Flores.* In the *Boerne* case, the Court held that *no intent to discriminate is found in local ordinances that are generally applicable to the population at large.* In explaining its ruling, the Supreme Court said, "when the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious belief."

RLPA goes far beyond what is needed to protect religious freedom; instead, it would saddle municipal governments with federal restraints on their ability to foster physical and social harmony. RLPA takes away municipal governments' historic authority to decide land use issues such as parking, building height, size and setbacks, landscaping, historic preservation, and traffic within their own communities. Under RLPA, religious facilities would be effectively immune from local zoning restrictions, an exemption that, for example, a secular soup kitchen or meeting hall would not enjoy. RLPA would also force cities to permit religious facilities to disregard local open space regardless of that city's zoning requirements, thereby flying in the face of aesthetics and enjoyment of the community at large, as well as environmental laws. Legislatures in some states have shown a sensitivity to the need for local land use regulation and may offer a viable alternative to RLPA as currently drafted.

The "Religious Liberty Protection Act" seeks to replace the Religious Freedom Restoration Act of 1993 (RFRA), declared unconstitutional in *Boerne.* If passed,

RLPA would pose problems similar to those created by RFRA in the current and relevant areas of school safety and child support. Under RFRA, for example, a court permitted schoolchildren to wear the seven-inch knives their religion required to school, despite the school district's ban on knives. Also under RFRA, another court declined to hold a religious believer in contempt of court for his continued refusal to pay child support because he claimed that all of his money belonged to his church.

This opportunity for individuals and institutions to claim that local laws and state statutes place a "substantial burden" upon their religious exercise invites frivolous litigation. City or county governments would have to prove in court that a wide variety of state and local laws regarding child abuse, alcohol and drug abuse enforcement, jail inmate restrictions, and employee safety requirements further a "compelling government interest" and are the "least restrictive means" of serving that interest. Such language blunts the ability of local governments to require that churches, religious facilities, and individuals comply with the health and safety laws that have been adopted to protect the entire community.

In addition, H.R. 1691 permits claimants to bypass local appeals processes and state courts, allowing them to file cases directly in federal court. The resulting increase in federal court suits means that state and local taxpayers will face an increased financial burden each time a religious claimant is unhappy with some state or local law. Local elected officials should be allowed to fulfill their responsibilities to act in the best interest of the entire community.

We ask that the Committee consider carefully the far-reaching ramifications of legislation such as RLPA, which will do nothing to further the cause of public safety and may even hinder local governments in their efforts to provide safe, peaceful communities. We respectfully ask the Senate Judiciary Committee not to act on a bill like H.R. 1691. This bill erodes federalism, and does nothing to bolster religious freedom. It is not Congress's place to achieve the religious liberty already guaranteed by the United States Constitution by usurping traditional functions of local government like zoning. In our view, issues affecting land use and public safety are best decided not in Washington, but in our local communities.

DEPARTMENT OF CORRECTIONAL SERVICES,
THE HARRIMAN STATE CAMPUS,
Albany, NY, June 22, 1999.

Mr. ERIC GEORGE, *Counsel,*
Senate Judiciary Committee,
Dirksen Senate Office Building,
Washington, DC.

DEAR MR. GEORGE: In accordance with our recent conversation, enclosed are the written comments I have prepared relative to the Religious Liberty Protection Act of 1999. I appreciate having been afforded this opportunity to present these comments and I regret that I am not able to attend the hearing on June 23, 1999.

Sincerely,

GLENN S. GOORD,
Commissioner.

PREPARED STATEMENT OF GLENN S. GOORD

I am the Commissioner of the New York State Department of Correctional Services and have served in such capacity since 1996. I have nearly twenty-six years of experience working in the field of corrections. Before setting forth my substantive comments, I would like to express my appreciation to the members of the Senate Judiciary Committee for this opportunity to present for the record my position with regard to the Religious Liberty Protection Act of 1999—a position which I know is shared by numerous other correctional administrators throughout the nation.

The New York State Department of Correctional Services is the third largest state prison system in the country with an under-custody inmate population in excess of 71,000, a work force of over 31,000, and a combined operating and capital budget in excess of $2 billion a year. As I am sure all of you can appreciate, the safe and secure operation and management of a prison system is an extremely complex undertaking. Twenty-four hours a day, seven days a week, a prison system must provide for the health, safety and well-being of each individual committed to its custody regardless of the individual's physical, mental or emotional state or background. Prisons are also responsible for ensuring that all of the men and women who are

employed within the system are provided with the safest work environment possible.

Prisons must not only be equipped to deal with inmates who may be violent or notorious, but also inmates who may be victim prone, or diabetic, or confined to a wheelchair, or have HIV disease, or be psychotic or mentally retarded, or have histories of alcohol and substance abuse, or be compulsive sex offenders, or be old and infirm, etc. The list of problems presented by inmates is practically endless. Correctional administrators are challenged as they have never before been challenged, not only to safely incarcerate such individuals for the duration of their sentences, but also to provide meaningful programmatic opportunities for such individuals to use their time in prison productively in an effort to turn their lives around. The simple reality is that the overwhelming majority of inmates will some day be released back into the communities from which they came. It is the responsibility of prison administrators to provide inmates with ample opportunities to better themselves while incarcerated.

With this as background, let me assure the members of this committee that every correctional administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.

Therefore, for a variety of reasons, correctional administrators will attempt whenever possible to provide meaningful opportunities for all inmates to practice their religion. In fact, many laymen who are all too familiar with the concept of separation of state and church, are surprised to learn, for example, that prison systems have established numerous paid chaplain positions to minister to the religious needs of their inmate populations. For the New York prison system, a total of 171 full time chaplain positions have been established.

In addition to paid chaplain positions, scores of outside volunteers also come in on a regular basis to help provide for the religious needs of the different inmates. In fact, New York's Correction Law specifically provides that religious ministers may visit at their pleasure the correctional facilities located within their congregations.

Along these same lines, New York's Religious Programs and Practices Directive contains the following statement of policy:

> In recognition of the First Amendment right of "religious liberty" and in pursuit of the objective of assisting inmates to live as law abiding citizens, it is the intent of the Department to extend to inmates as much spiritual assistance as possible as well as to provide as many opportunities as feasible for the practice of their chosen faiths consistent with the safe and secure operations of the Department's correctional facilities.

Furthermore, in New York, inmate facilitated religious education meetings as well as congregate worship are permitted with appropriate oversight by security staff.

By the same token, although religion is something to be promoted in an institutional setting, it is inevitable that conflicts will arise between specific security protocols and an individual's claimed religious tenet. When such conflicts' arise and result in litigation, it is important that the appropriate test be utilized which provides a careful balancing between overall systemic safety and security from the perspective of corrections and an individual's claimed religious tenet. The present test that is applied in a prison setting, which was enunciated in the United States Supreme Court decision in *Turner* v. *Safley,* 482 U.S. 78 (1987), achieves the appropriate balance when such conflicts arise.

Under the *Turner* standard, when a prison regulation impinges upon an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penalogical interests. While at first blush this seemingly straightforward standard may not seem overly problematic to satisfy, the reality is that correctional officials must meet a concrete burden before a regulation will pass muster under a *Turner* analysis. In applying the "reasonably related" test, it has been determined that courts should consider whether there is a valid connection between the prison regulation and the legitimate governmental interest put forward to justify it; whether there are alternative means of exercising rights that remain open to inmates; whether accommodation of the asserted rights will have a significant ripple effect on fellow inmates or prison staff; and whether there is a ready alternative to the regulation that fully accommodates the prisoners' rights at de minimis cost to a valid penalogical interest. In no uncertain terms, this standard requires prison administrators to accommodate the religious practices of inmates in their custody;

however, it also permits individual rights to be balanced against the needs of the prison community as a whole and the overriding need for security and order.

By contrast, the Religious Liberty Protection Act of 1999 (RLPA) would re-establish a standard that had been in effect under the Religious Freedom Restoration Act until this latter act was declared unconstitutional by the United States Supreme Court. In a nutshell, the RLPA would provide that a government may substantially burden a person's religious exercise only if 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.

In comparison to the *Turner* standard, this act would raise the bar to a level that severely disadvantages corrections. The resurrection of the "least restrictive means" prong of the test will again subject the day-to-day judgment of prison officials to an inflexible strict scrutiny analysis by federal courts which are ill-equipped to administer the security of the nation's prisons and jails. Such an outcome would fly in the face of the recently enacted Prison Litigation Reform Act (PLRA), which at its core recognized that the inmate litigation juggernaut had to be seriously restrained. The taxpayers and law abiding citizens had questioned how the federal dockets were allowed to swell with inmate lawsuits to such extreme levels and how certain federal judges could inject themselves into the micro-management of corrections.

The "least restrictive means" test does not allow for a proper balancing of individual rights and institutional needs. Rather, it elevates asserted individual inmate rights over the operational needs of prisons and the rights of the inmate population as a whole.

It must be understood that within the prison environment, a relatively small number of inmates will attempt to use their constitutional right of access to the courts as a vehicle to wage all out war on the system and wreck as much havoc as is humanly possible. Armed with the new RLPA "compelling interest/least restrictive standard", extremist inmates will seek to bring correctional administrators to their knees. Congress must be cognizant of the fact that this act will go far beyond covering inmate adherents of familiar religions such as Christians, Muslims, Jews and Rastafarians; it will also bring within its ambit individuals who practice such things as devil worship and black magic, or whose religious beliefs are premised upon hatred and bigotry.

The reality also is that leaders of illicit prison organizations are sophisticated individuals who no doubt will attempt to manipulate the RLPA standards to perpetuate illegal and dangerous activities under the guise of "religion." Even in the absence of this standard, illicit organizations have sought to come under the protection of the "religion" umbrella knowing that the federal courts accord greater latitude to individuals who cite religious convictions in litigation as opposed to simply citing freedom of speech implications. It is for this very reason recently that the Latin Kings, a notorious prison gang devoted to violence and extortion that has tentacles in a host of different prison systems throughout the country, attempted to claim that they were in fact a religious organization. Fortunately, the court did not validate this claim. Nevertheless, this does dramatize that illegal prison gangs and other extremist entities will attempt to use the protection of religion to further their nefarious purposes. Clearly, the new RLPA standard, albeit unintentionally, will go a long way toward bolstering the efforts of dangerous inmates to undermine the safety and security of the prison system.

Correctional facilities are operating with limited economic resources and the inmate population is expanding. Prison litigation continues to place a monumental drain on these limited resources, despite the recent enactment of the PLRA. While inmates litigate at little cost to themselves, taxpayers are required to pay for paper, law books, legal assistance, postage, Xeroxing and witness production. In addition, even the most straightforward pro se inmate lawsuit may require that thousands of pages of documents be produced in federal discovery. Out of already strained prison budgets, correctional administrators must pay for additional security and transportation of inmates for court appearances, legal assistance for correctional employees who are the subjects of inmate lawsuits, and lost staff time involved in the active defense of such lawsuits.

While similar predictions such as those outlined above were made prior to the enactment of RFRA, Congress did not heed the request to exempt all of corrections from its scope. However, unlike the period preceding the enacting of RFRA, the current predictions are based upon the actual experience of having lived through the RFRA "compelling interest/least restrictive means" test as applied to prison operations. For New York in particular, this has meant the following:

(1) the one inch beard rule grooming standard was struck down insofar as it was applied to inmates who claimed the trimming of their beards vio-

lated religious beliefs. This particular standard, which limits beard length of an inmate to one inch, was designed to foster institutional safety since inmates are readily capable of hiding weapons such as razor blades, and other contraband, within beards that exceed one inch in length.

(2) an inmate sued under RFRA claiming that he was a member of the "Church of Satan" and that, by not being provided with the "Satanic Bible" and that by not being permitted to wear his satanic medallion and chain, the Department violated his civil liberties and religious freedoms under RFRA. The case is still active since the federal court, based upon the then applicable RFRA standard, refused to grant a defense motion to dismiss by way of summary judgment.

(3) The Department's TB control program which required all staff and inmates to submit to an annual PPD screening test for tuberculosis, had to be revamped to accommodate those inmates who refused to test based upon claimed religious beliefs. These inmates had been placed in medical keeplock status until they agreed to submit to the test. The PPD test is the only test known to science that tests for the presence of latent TB in the human body. Under the RFRA standard, the concerned inmates were allowed to refuse to take a PPD test even though no actual religious tenets, beyond personal statements of belief, were cited in support of their positions.

As previously stated, these concerns are shared by numerous other correctional administrators. The recent experience of the Washington D.C. Department of Correction is a case in point. Individual inmates who posed as members of the Moorish Science Temple religion, smuggled cocaine and prostitutes into the Lorton Correctional Complex, and even filmed a pornographic video in the prison chapel. They were able to evade detection by security personnel precisely because of the higher RFRA standard then in effect. In a nutshell, owing to RFRA, guards were intimidated from conducting other than minimal searches. The event received considerable publicity and was the subject of a September 27, 1996, *Washington Post* news article which was entitled, "Ring Used Religion as Cover to Sneak Drugs Into Lorton." A copy of this article is attached hereto.

In conclusion, while religious practices must be accorded due deference and significance within the prison setting, nevertheless, in the absence of an appropriate balancing test which the *Turner* standard provides, religion can and will become a vehicle for extremist elements to further their illicit purposes, thereby undermining prison safety and security for all other inmates and staff. Therefore, I respectfully urge that this committee consider an amendment to the RLPA which would exempt all of corrections from its scope.

Ring Used Religion as Cover To Sneak Drugs Into Lorton

By Charles W. Hall
Washington Post Staff Writer

A drug ring posing as a church group smuggled cocaine and prostitutes into the Lorton Correctional Complex and filmed a pornographic video in the prison chapel, using a law protecting religious freedom to avoid scrutiny by guards, officials said yesterday as they announced more than 30 arrests.

Posing as members of the Moorish Science Temple, a religion popular in jails and prisons, the group exploited what officials called a gaping loophole in Lorton's security.

Citing a 1993 federal law protecting religious freedom of prisoners, members were allowed to have private visits with inmates at virtually any hour, were subjected to only minimal searches and routinely intimidated guards by threatening to sue them, officials said.

"We had correctional officers who were afraid to do their jobs," acknowledged D.C. Corrections Director Margaret A. Moore, who announced several measures to tighten prison visits at a news conference in Alexandria.

U.S. Attorney Helen F. Fahey said she hoped the arrests will warn visitors not to smuggle drugs into Lorton. She emphasized that the crackdown was not intended as an attack on any religious group.

"This case is not an indictment of the Moorish Science Temple," Fah-

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38 Accused of Smuggling Drugs Into Lorton Using Religion Guise

LORTON, From A1

ey said. "It is an indictment of individuals who exploited a religious exemption to smuggle drugs."

A. Harvin-Bey, grand sheik of Moorish Science Temple No. 74 in the District, condemned those involved in the alleged crimes at Lorton.

"We don't condone anything like that, and if they are members [of the Moorish Science Temple], then justice should take its course," Harvin-Bey said. "It's sad that anyone would misuse any religious organization. That's not what our teachings promote."

Harvin-Bey said the temple has attracted millions of worshipers across the country. There are about 10 temples in the Washington area, he said. The religion, which is open to all races, focuses on the ancestry of American slaves, saying they descended from Moabites who formed the Moorish empire.

A grand jury issued 38 secret indictments Tuesday. About 6 a.m. yesterday, federal agents and local police officers began arresting suspects. By 6 p.m., seven remained at large, said William Megary, acting special agent in charge of the FBI's Washington field office.

Officials said 21 suspects were from the District, eight from Maryland, two from Virginia and seven had unknown addresses.

All of the defendants were charged with cocaine distribution offenses, and two—Nathaniel Pleasant Bell and Karima Cook, both of Baltimore—were charged with transporting women across state lines for prostitution.

Federal prosecutors and prison officials said they had suspected for several years that illegal activities were occurring during some religious services. Outsiders seeking to attend religious services in the complex had only to fill out a card, and prison officials did not verify whether they were church members, Moore said.

In addition, according to papers filed yesterday in U.S. District Court in Alexandria, such visitors received numerous exemptions from standard security procedures at the District's 6,000-inmate prison complex in southern Fairfax County.

In January, officials said, a cooperative inmate gave investigators vital access to the drug ring.

Posing as a drug seller in the maximum-security unit, the inmate received visitors, many in dresses of the type often worn by Islamic women. The drugs were supplied by an undercover officer posing as a drug seller outside the complex.

Because all of the cocaine ultimately was routed to the cooperating inmate, none actually reached the general inmate population, prosecutors said.

On Jan. 23, Bell and Cook, who also were charged with smuggling cocaine, allegedly brought in three women to a scheduled religious service in a conference room that was being used as a makeshift chapel. Prison officials earlier had intercepted a phone call between Bell and an inmate making plans to bring in the women, authorities said.

For about 10 minutes, an inmate using a smuggled video camera recorded sex acts between the women and the inmates, according to Timothy J. Shea, an assistant U.S. attorney who helped supervise the investigation. The informant later was able to obtain a copy of the video inside Lorton.

Moore said the prison temporarily will issue no new passes to visitors who say they represent religious groups and will subject all current volunteers to criminal background checks. In addition, she said, guards will be ordered to constantly monitor services through observation windows and periodically walk through rooms where services are taking place.

Moore said prisons nationally are experiencing problems with the 1993 Religious Freedom and Restoration Act, saying it limits the ability of prison officials to restrict religious activities among inmates.

Todd Craig, a U.S. Bureau of Prisons spokesman, said representatives of religions who visit federal prisons already go through criminal background checks and receive extensive training on rules.

Jonathan Smith, executive director of the D.C. Prison Project, said that he would closely review any restrictions on religious worship but that he probably would not oppose reasonable security measures.

"Religious activities in prisons are one of the most valuable tools available for an inmate's rehabilitation," Smith said. "If they want to search visitors, I probably would not have a problem. If they say there will be no more religious visitors, we would very likely challenge that in court."

Staff writer Leef Smith contributed

PREPARED STATEMENT OF LARRY E. NAAKE ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Counties (NACo) is pleased to present our views on legislation regarding preemption of local authority under proposed "religious liberty protection" legislation.

NACo is the only national association representing county government in the United States. Through our membership—containing over 3000 counties and 90 percent of the U.S. population—urban, suburban, and rural counties join together to build effective and responsive county government. The goals of NACo are to improve county government, serve as the national spokesperson for county government, act as a liaison between the nation's counties and other levels of government, and achieve public understanding of the roles of counties in the federal system to limit our local governments' opportunity to work on the most significant problems in our jurisdictions.

NACo strongly supports the fundamental right to the free exercise of religion, as guaranteed by the First Amendment to the U.S. Constitution. We fear, however, that bills such as the "Religious Liberty Protection Act of 1999" (RLPA) do not advance individuals' ability to practice their religion and instead are attacks against local government. Such bills are inconsistent with established principles of federalism and dramatically sweep away local government authority to apply laws equally to all members of our communities.

Under bills like RLPA, a county would effectively be prohibited from restricting a religiously-affiliated building to an area with adequate parking, with buffers from residential neighbors and away from environmentally-sensitive wetlands. Such bills would call into question the practices of county child abuse protection offices in removing children from homes where religious practices are used as a reason for excessive "discipline". Similarly, a county's ability to license and regulate childcare facilities, including those affiliated with a religious institution, could be challenged in court.

We challenge the premise stated by proponents of RLPA-type bills, namely, that local governments have targeted individuals or religious institutions in the application of our local ordinances and regulations. County land use decisions are neutral in their applicability to property owners, and any incidental burden on a land owned by a church, synagogue, mosque or other house of worship in no way involves discrimination on the basis of religious belief. Similarly, counties are charged with protecting the health and safety of all their residents—responsibilities that may involve balancing a parent's desires to physically abuse his or her children in the name of religiously-sanctioned "discipline"; to refuse to pay child support; to reject adequate and appropriate health care, or to neglect their children's education because of purported "religious beliefs", against the county's legal and moral obligation *in loco parentis.*

Under laws such as RLPA, many religiously-affiliated institutions would assert a federal cause of action whenever they were subjected to same laws and regulations that apply to secular institutions. We foresee a plethora of frivolous lawsuits claiming that a county zoning ordinance imposes a "substantial burden" on the religious exercise of congregants, merely because the church or institution is required to acquire adequate acreage to accommodate the large parking areas and buffer zones necessary to protect neighbors and the surrounding environment.

Counties can envision having to prove in federal court that our employee uniform, worker safety and protective headgear requirements further a "compelling government interest" and are the least restrictive means of furthering that interest. We expect to have to endure legal challenges to our child support programs whenever a parent needs an excuse to disregard his obligations. We fear that we will be unable to prosecute parents who withhold lifesaving medical care from children on religious grounds. Refusal of a welfare recipient to seek employment on the basis of religious practices might become a means to refuse to comply with federally-mandated rules under which county welfare offices operate. Our immunization programs, responsible for protecting our communities from infectious disease, could be undermined by federal challenges from individuals who object on religious grounds to vaccinations. Even county animal cruelty laws could be challenged by members of religions that believe in animal sacrifice.

Equally of concern to counties is that RLPA-type bills would allow claimants to circumvent state courts and local appeal processes, taking grievances directly to federal court. Such an "end run" around the processes established by our state laws runs counter to the foundations of federalism that this Congress purports to endorse. Such bills preempt the traditional system for resolving local disputes and puts federal judges in the position of micromanaging purely local affairs. The fram-

ers of the Constitution never intended federal courts to be the first resort in resolving community disputes between local governments and private parties. These issues should be settled locally, as close to the affected community as possible.

We urge the Committee to carefully consider the implications of any RLPA-type bills that come before you and refuse to act on bills that so dramatically alter the relationships between local governments and their citizens. Congress should not promote legislation that usurps traditional county functions and upsets the principles of federalism upon which our great country was founded.

We appreciate the opportunity to express our views, and hope that we will be allowed to relate them in person to the Committee at a future hearing.

PREPARED STATEMENT OF OLIVER S. THOMAS ON BEHALF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA

I am Reverend Oliver Thomas, Special Counsel for Religious and Civil Liberties of the National Council of Churches of Christ in the USA (NCC).

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. 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 the people's 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 both Chairman Hatch and Senator Kennedy could support enthusiastically—a statute that only three members of Congress voted against!

The coalition that assisted you in the drafting and grass-roots support of the bill included Beverly LaHaye's Concerned Women for America and Norman Lear's People for the American Way. Lou Sheldon's Traditional Values Coalition and Barry Lynn's Americans United. Chairing that coalition was one of the greatest 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 committee staff, 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.

Like you, I am an elected official. I chair my local board of education. My experience confirms what opinion polls have taught us. 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, the Congress 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.

VITA

The Reverend Oliver Thomas, Esq., is Special Counsel for Religious and Civil Liberties to the National Council of Churches, the nation's largest ecumenical body. Previously, Mr. Thomas served as General Counsel to the Baptist Joint Committee which during his tenure was the religious liberty office for ten Baptist bodies including the Southern Baptist Convention (the nation's largest Evangelical body).

As a minister, Mr. Thomas has served on the pastoral staff of churches in Tennessee and Louisiana. He is a frequent guest preacher for churches of various denominations.

As a scholar, Mr. Thomas taught church-state law at Georgetown University Law Center. His articles have been widely published in such scholarly journals as the University of Texas Law Review and the Journal of the National Association of Administrative Law Judges. He has lectured at such law schools as Harvard, Notre Dame and Pat Robertson's Regent University.

As an attorney, Mr. Thomas has practiced exclusively in the field of religion since 1985. He has been involved in church-state litigation in state and federal courts as well as at the United States Supreme Court.

In addition to representing numerous Evangelical groups, Mr. Thomas co-authored The Right To Religious Liberty, the American Civil Liberties Union's handbook on church-state law. More recently, he co-authored Finding Common Ground, the First Amendment guide for public schools endorsed by Secretary of Education Richard Riley and The Joint Statement of Current Law which served as the basis for the Presidential Directive on religion and public education.

Mr. Thomas frequently has consulted with and drafted legislation for members of Congress. He is best known for his work as Chair of the Coalition for the Free Exercise of Religion. This coalition consists of the 68 religious and civil liberties organizations that assisted Congress in the drafting and passage of the Religious Freedom Restoration Act.

Mr. Thomas graduated first in his class at the University of Tennessee and at the New Orleans Baptist Theological Seminary where he was chosen as the most outstanding student in his graduating class. He has earned law degrees from both the University of Virginia and the University of Tennessee.

Mr. Thomas is president of his local school board and has worked with hundreds of school districts on issues pertaining to religion. His wife is a teacher, and his daughters attend public schools.

AMERICAN ACADEMY OF PEDIATRICS,
Washington, DC, June 22, 1999.

The Hon. HENRY J. HYDE,
Chairman, House Judiciary Committee,
Rayburn House Office Building,
Washington, DC.

DEAR MR. CHAIRMAN: I am writing on behalf of the 55,000 members of the American Academy of Pediatrics to urge that you take great care in considering the "Religious Liberty Protection Act of 1998" (H.R. 1691). We are concerned that this legislation as presently written may make it more difficult for state and local governments to protect children from abuse and neglect, particularly medical neglect motivated by parents' religious beliefs.

Action by child protective services agencies to safeguard children in dangerous situations may be delayed or enjoyed as a result of litigation enabled by this legislation. Moreover, the fear of costly litigation may deter child protective services agencies from intervening on behalf of children in cases where the parents are likely to assert a religious belief as the basis for their abusive actions or negligent failure to act.

While we hope and expect that most courts would find that protecting a child's health or safety is a "compelling government interest," it is much less clear how courts would decide what is the "least restrictive means" of furthering that interest. It is easy to imagine, for example, that a court would fail to appreciate the gravity of a medical condition (*e.g.,* diabetes) and thus fail to order adequate treatment in face of a parent's religious objections. This is a significant concern. There have been a number of documented cases where children have died *needlessly* because of religion-motivated medical neglect.

If further action is taken on this bill, we urge that you add an exemption for government actions intended to protect the health or safety of children.

The American Academy of Pediatrics (AAP) is an organization of primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists dedicated to the health, safety and wellbeing of infants, children, adolescents and young adults. Thank you for your attention to the Academy's concerns.

Sincerely,

JOEL J. ALPERT, MD, FAAP,
President.

AMERICAN ACADEMY OF PEDIATRICS,
Washington, DC, June 25, 1999.

The Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Russell Building,
Washington, DC.

DEAR MR. CHAIRMAN: The American Academy of Pediatrics requests that the enclosed letter be included in the record of the hearing on protecting religious liberty, held by the Judiciary Committee on June 23, 1999. The letter was sent to the House Judiciary Committee to express our concern that the "Religious Liberty Protection Act of 1999" (H.R. 1691) will jeopardize the health and safety of abused and neglected children.

Thank you for the opportunity to make the views of our organization known on this important issue.

Sincerely,

JANIS GUERNEY,
Assistant Director.

SEPTEMBER 9, 1999

PREPARED TESTIMONY OF ROBERT J. BRUNO

Thank you, Mr. Chairman and members of the Committee, for the opportunity to present my testimony on this very important legislation, known as The Religious Liberty Protection Act. I am an attorney in private practice for the past 22 years in Minnesota with substantial experience in litigating cases involving the religious clauses of the First Amendment. I appeared in *City of Boerne* v. *Flores,* 117 S.Ct. 2157 (1997), as attorney for amici curiae Children's Healthcare Is a Legal Duty, Inc. and the American Professional Society on the Abuse of Children, pointing out the deleterious effects of the Religious Freedom Restoration Act on children and others who were adversely affected by the actions of a religion.

Mr. Chairman, and members of the Committee, RLPA's unlimited application to government action of all types, administrative, legislative, and judicial, at all levels, federal, state, and local, is breathtaking in scope. Because government frequently acts in a capacity of protecting the rights of citizens from overreaching by others, RLPA would adversely affect the remedies available to the most vulnerable in our society, especially children. When government is confined to employing only the least restrictive means of protecting children from abuse and nonsupport against those who are religiously motivated to do so, such children are deprived of the full range of their legal remedies on the basis of someone else's religion, and therefore denied equal protection of the laws.

Furthermore, and perhaps more importantly, RLPA's scope encompasses all judicial government action, even when the judicial role is to apply neutral rules of law to evenhandedly adjudicate controversies between private individuals and churches or religiously motivated individuals. When the judicial application of a neutral rule of law in such private litigation would result in a substantial burden on religion, such as a money judgment or an injunction restricting behavior, RLPA would require the modification of the rule of law to the extent necessary to avoid the substantial burden on the religious party. Such RLPA-required judicial preference for the outcome in favor of the religious party deprives the nonreligious party of the equal protection of the laws and it constitutes an establishment of religion under the First Amendment.

The correction of these little-recognized but substantial defects in RLPA would require substantial amendments to this legislation. The problems that will be created by RLPA's sweeping scope may exceed even what I am suggesting here. Others, including the ACLU, have provided testimony that supports my thesis about RLPA's hampering of government's protective function. I support their view that civil rights laws should not be trumped by religious preferences, but their analysis does not go far enough to consider other classes, such as children, which are properly protected by government from religious overreaching. Others have provided testimony that Congress lacks authority under the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause, which I also support because the enormous sweep of RLPA renders it neither congruous nor proportional as a remedy for specific problems which Congress may legitimately attempt to correct by legislation. Still others have presented testimony that RLPA is unconstitutional as an establishment of religion. To the extent that RLPA deprives children and other protected classes the equal protection of the laws on the basis of religion, or deprives private litigants of the protection of neutral laws, those deprivations and preferences in favor of religion would violate the Establishment Clause, in my opinion.

It is my hope that consideration of these effects will give you pause to reconsider the enormity of the problems created by RLPA, and that you will avoid taking more than measured steps addressing specific burdens on religion. I urge you to vote against RLPA, or at the very least to engraft amendments dealing with the issues I am presenting.

I. BACKGROUND

The enactment of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb– et seq., ("RFRA") was hailed by civil liberties and religious interest groups as the appropriate response to the perceived threat to the free exercise of religion posed by the Supreme Court's decision in *Employment Div.* v. *Smith,* 494 U.S. 872. RFRA proponents perceived the rule of law announced in *Smith* as a perverse renunciation of free exercise of religion rights guaranteed by the First Amendment, and they rushed to Congress to correct the Court's interpretation. The proposed solution was to use Section 5 of the Fourteenth Amendment to impose strict scrutiny on all governmental burdens on religion, regardless of whether government intended to bur-

den religion or religious activity, and regardless of whether the burden on religion was any greater for religious believers than for anyone else.

RFRA was not necessary to impose strict scrutiny on laws which target religion for special burdens, because such laws are facially invalid and unaffected by the rule in *Smith. Church of the Lukumi Babalu Aye* v. *Hialeah,* 508 U.S. 520 (1993) (ordinances targeting Santeria must pass strict scrutiny); *Larson* v. *Valente,* 456 U.S. 228 (1982) (laws targeting churches of a particular character must pass strict scrutiny). Likewise, *Smith* did not affect the imposition of strict scrutiny on the right of free exercise of religion that is coupled with another important constitutional right, the so-called hybrid cases. The only infirmity in the Supreme Court's jurisprudence which RFRA sought to correct was the Court's refusal to apply an across-the-board compelling government interest by least restrictive means test to every conceivable government action which only incidentally burdens a particular religious belief or activity.

After the Supreme Court's decision in *City of Boerne* v. *Flores,* 117. S.Ct. 2157 (1997), striking down RFRA because it was neither congruent nor proportional as a remedy under Section 5, and a usurpation of the Court's function to interpret the Constitution, Congress is now again asked to enact strict scrutiny across-the-board to all government action to relieve incidental substantial burdens on religion, only this time based upon provisions other than Article 5, including the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause.

The infirmities perceived by the Supreme Court in *Flores,* namely that the remedy was not congruent and was out of proportion to the perceived problem, and was an attempt to change Constitutional interpretation by legislation, loom as large as ever under the proposed RLPA. The Court pointed out in *Flores* the lack of historical basis for Congress' understanding of the Free Exercise Clause, namely that strict scrutiny has never been understood to apply to all government action that imposes only an incidental burden on religion. The lack of historical basis for the rule is for good reason. Upon close examination, such use of strict scrutiny to prevent incidental burdens affects far more than the relationship between government and the religious believer. RLPA would require strict scrutiny not only of statutes that are enacted by government for the protection of children, vulnerable adults, and other protected groups, but also the common law that is the foundation for order in a diverse society.

Legislation which requires strict scrutiny to all incidental burdens on religion, runs headlong into the Equal Protection and Due Process Clauses, the Establishment Clause, and the State's authority under the Tenth Amendment to adopt cumulative remedies when it acts as *parens patriae.*

II. RLPA'S SINGLE LEAST RESTRICTIVE MEANS TEST SUBJUGATES THE RIGHTS OF PROTECTED CLASSES

Congress is limited to its enumerated powers and the states retain their integrity of self-governance under the Tenth Amendment and the federalism principle inherent in the constitution. *New York* v. *United States,* 505 U.S. 144 (1992). Unless a state intrudes upon an individual right incorporated under the Fourteenth Amendment, or upon pre-emptive Congressional exercise of its powers, a state is free to accomplish its interests by any means consistent with its laws.

With these principles in mind, the state and local governments have an intense interest as *parens patriae* in the protection of their children. The vulnerability and legal incompetence of children, as well as protection of the local fisc, underscore the compelling nature of a state's interest in enacting and enforcing laws which protect and nourish the lives and health of children.

It has long been held that indeed, a state's interest in child protection is so compelling that it does not require strict scrutiny even when the parent's right to free exercise of religion under the First Amendment is burdened. *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). In *Prince,* the Court did not engage in strict scrutiny analysis when it upheld the state's child labor law conviction of a parent who required her child to distribute religious tracts on the street against claims that such conduct was religiously required, stating:

> "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death * * * Parents may be free to become martyrs themselves, but it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

Id., at 167 170.

In furtherance of this unquestioned interest in child protection, states have enacted comprehensive schemes to deal with the problems of child endangerment, abuse, neglect, and non-support. States have determined that the interest of child welfare is so compelling that a single least restrictive remedy is insufficient to protect children from the full range of danger to their health and welfare. State governments have enacted a wide variety of statutory remedies to supplement the common law for the protection of children, including criminal child abuse and neglect penalties, civil tort liability, mandatory abuse and neglect reporting, social service and judicial protective intervention, mandatory immunization and other prophylactic measures, child labor laws, prohibitions on the use of alcohol and tobacco, and access to adult materials.

For children who are in the custody of persons whose religious beliefs or practices are contrary to commonly accepted notions of child welfare, RLPA would require that the state be confined to a single "least restrictive" remedy to protect the child. The types of religious practices which adversely affect child welfare include reliance on spiritual means for treatment of illness which withholds needed medical care, corporal punishment, abuse through exposure to dangerous animals or poison, child sexual practices, and polygamy.

RLPA would require the state to prove that its action to protect the religiously endangered child is the least restrictive means of doing so, a standard that places the child at a disadvantage, and deprives the child of all other remedies. Such children who do not receive the same protection of laws that other children receive, based solely upon the religious beliefs of their caretakers or others, are denied the equal protection of the laws under RLPA's least restrictive means requirement.

Child support is also a paramount interest of the state and has been addressed with a wide panoply of remedies designed to provide the fullest protection both for the individual child as well as the public fisc responsible for supporting the child. The remedies enacted by the state may include a criminal penalty for non-support, civil child support orders, support proceedings commenced by local government, private support proceedings including paternity and marriage dissolution, remedies such as wage withholding and sequestration of property, and the enforcement of civil support orders by civil contempt of court proceedings.

RLPA would confine the remedy to impose and collect child support to one "least restrictive means" where the refusal to pay is based upon religious belief. *Hunt* v. *Hunt,* 648 A.2d 843 (Vt. 1994) (contempt of court for refusal to pay child support could not be imposed because the state had not proven it was the least restrictive means); *Murphy* v. *Murphy,* 574 N.W. 77 (Minn. App. 1998) (a voluntarily underemployed father could not have income imputed to him for child support where his motives are religious.) In *Hunt* the court held that where the non-supporting father was a member of a church which prohibited support of children who lived outside of the closed religious community, RFRA required that the state show that exercise of the contempt power was the least restrictive means of enforcing its child support order, and dismissed the contempt citation leaving the state powerless to enforce its order for support. In *Murphy* the Minnesota court held that strict scrutiny prevented a court from ordering child support from a non-custodial father based upon his earning capacity rather than actual income, where he was a member of a religious group which required that all income be turned over to the group.

The least restrictive means requirement of RLPA, when it is applied to laws enacted for the protection of a segment of society in the furtherance of a compelling interest, runs headlong into the rights of the beneficiary of those laws to due process and equal protection. Even RFRA proponents have recognized the danger. Civil liberties groups have refused to support the Religious Liberty Protection Act of 1998 without an exemption for anti-discrimination laws.

The least restrictive means test takes no account of the relative importance of the state's articulated compelling interest. Regardless of how important the state's interest, RFRA requires that only the remedy least restrictive of religion may withstand scrutiny. The resulting lack of proportionality between the compelling state interest and the religious interest violates the powers retained by the states under the Tenth Amendment and principles of federalism.

III. RLPA WOULD REQUIRE STRICT SCRUTINY OF ALL JUDICIAL GOVERNMENT ACTION BURDENING RELIGION

RLPA proponents have made little attempt to examine the scope of their proposed solution to *Smith.* One does not have to look far to determine that RLPA's strict scrutiny applies not only to the relationship between the religious believer and government, but also to the relationship between the religious believer and individuals

invoking the power of government for their protection, or for the vindication of their rights. The Court in *Flores* recognized the broad sweep of RFRA:

> "RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, wither adopted before or after its enactment." (Citation omitted).

Id., 117 S.Ct. at 2170.

The Court's reference to "all federal and state law, statutory or otherwise," intimated the public/private, and the statutory/common law sweep of RFRA. It has long been settled that the rules of law applied by a court and the rendering and enforcement of a court's judgments are government action for purposes of the application of constitutional liberties. In *New York Times* v. *Sullivan,* 376 U.S. 255 (1964) the Court held that a rule of law applied by a court in civil actions between private parties is government action for purposes of constitutional scrutiny:

> "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." (Citation omitted).

Id., at 265. See also, *Cohen* v. *Cowles Media Co.,* 501 U.S. 663, 668 (1991).

Two state's courts have addressed the issue of RFRA's application to judicial government action, Minnesota and New York. *Lundman* v. *McKown,* 530 N.W.2d 807, *cert. denied* 516 U.S. 1099 (1995); *Williams* v. *Bright,* 658 N.Y.S.2d 910, 913 (1997). Both courts held that the constitutional right to free exercise of religion is substantially burdened by judicial government action which applies neutral rules of law, and that such infringement requires the application of strict scrutiny to the court's decisionmaking.

In Lundman, I litigated a wrongful death tort action against a mother and other caregivers for withholding medical care and allowing her 11-year-old son to die of untreated diabetes while they prayed. The child's lethargy, uncontrolled vomiting and urination were followed by unconsciousness, rigidity, and gritting of teeth until the child eventually died while the caregiver noted these symptoms in a book, stating that "passing is possible." The wrongful death verdict in favor of the absent father was appealed to the Minnesota Court of Appeals, which held that the freedom of religion provisions of the Minnesota Constitution required the application of strict scrutiny to all incidental burdens on religion, including the incidental burden resulting from a common law tort verdict, citing *State by. Cooper* v. *French,* 460 N.W.2d 2 (Minn. 1990) and *State* v. *Hershberger,* 462 N.W.2d 393 (Minn. 1990). The Minnesota Court of Appeals held that the neutral application of the reasonable person tort standard needed to be modified to the extent necessary to avoid the burden on religion: "[because] an individual's right to religious autonomy is a core ideal of both the state and federal constitutions * * * we apply a standard of care taking account of 'good-faith Christian Scientist' beliefs rather than an unqualified 'reasonable person standard.'" *Lundman, supra,* at 827–28. See *DeBose* v. *Bear Valley Church of Christ,* 890 P.2d 214 (Colo. App. 1995) (suit for molestation of a child by church counselor should be dismissed if jury finds the conduct was based on sincere religious belief. In concurrence, RFRA modified state tort law and "there is no compelling state interest here to allow plaintiffs to pursue a tort remedy.").

The result under RLPA, which compels the application of strict scrutiny to all judicial government action, is the establishment of separate common law standards of care for persons who are religiously motivated, and a separate system of laws for nonreligious persons. It infringes upon and subjugates all other constitutionally protected rights to property, life, neutral adjudication of controversies, equal protection of the laws, due process and all other rights which are supposed to be protected by the judicial branch of government.

The analysis under strict scrutiny of judicial action in other private litigation yields remarkable and startling results. For example, suppose that a boundary line dispute between a church and an adjoining landowner has resulted in litigation in which the adjoining landowner claims to own a significant interest in or a substantial part of the church's property. The adjoining owner seeks the civil court's determination of his property interest under neutral property law principles. From the church's perspective, it faces the prospect that application of neutral principles of law by the state court would result in the loss of a substantial amount of its prop-

erty or assets, certainly a substantial burden upon it. Under RLPA, the state court's judgment decreeing that the true boundary between the properties impinged significantly on church property, would be a substantial burden on the exercise of religion by depriving the religion of its place of worship or a significant amount of its worldly assets.

In this hypothetical case, the government, i.e. the court, would be required to articulate its compelling interest in applying that neutral rule of law. Compelling government interests are interests of the highest order, such as "national security or public safety." *In re Young,* 82 F.3d 1407, 1419 (8th Cir. 1996). One can conceive that there is a government interest of some order in a civil court's application of neutral principles of law or in providing a forum for resolutions of disputes between two private parties. The question under RLPA is whether the government's interest is sufficiently compelling to justify proceeding with the adjudication in a manner which would result in a burden on the church.

The probable result is that the court's interest in providing the forum, or in applying neutral principles of law is not a *governmental* interest of the highest order and therefore not a compelling interest. The result under strict scrutiny is that the court would be required to modify the rule of law or the enforcement of that rule of law to avoid the incidental burden on religion. The church would be entitled to take as much of the disputed property from the adjoining landowner as is sufficient to avoid a substantial burden on it. RFRA would thus destroy the adjoining landowner's state law and Fourteenth Amendment right to his property without compensation, and his right to have the dispute adjudicated under neutral principles of law in violation of due process and equal protection.

The sovereignty of religion from burdensome incidental judicial outcomes is an establishment of religion, and it explains, at least in part, the lack of historical support for religious immunity from laws of general applicability. In words which the Supreme Court has said mark the dimensions of the Establishment Clause:

> "Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached * * *. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.

James Madison's *Memorial and Remonstrance,* at paragraph 4 (reprinted in Appendix, *Everson* v. *Bs. of Ed. of Ewing Twp.,* 330 U.S.1 (1947).

Because RLPA allows the religious believer to subjugate the interests of all persons seeking protection through judicial government action, it violates the Establishment Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and it is therefore an improper exercise of Congressional power under any of the clauses of the Constitution.

IV. CONCLUSION

The application of strict scrutiny to all incidental burdens on religion dramatically alters the landscape of nearly all Church/State and Church/individual litigation. Its effects would not be confined to government's impositions on the free exercise of religion, but instead would include all judicial government action, including private litigation. Children, who have no political representation in the branches of government, are particularly vulnerable and would be adversely affected by RLPA. More consideration needs to be given to the Equal Protection, Due Process and Establishment Clause implications of granting solely to religious believers a right to invalidate all incidental government burdens. For these reasons, Congress should not pass any religious liberty legislation without ensuring that it does not deprive the vulnerable of equal government protection, equal application of the laws, and neutral judicial fora.

I thank the Chairman again for this opportunity to make my views known to the Committee.

PREPARED STATEMENT OF MARCI A. HAMILTON

Mr. Chairman, thank you for permitting me to submit this written testimony for the record. I am the Distinguished Visiting Professor of Law, Emory University School of Law, where I specialize in constitutional law, and especially church-state issues. From 1996 to 1997, I served as lead counsel for the City of Boerne, Texas in the successful constitutional challenge to 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 regarding the Religious Free-

dom Restoration Act ("RFRA") and similar religious liberty legislation in the states. For the record, I am a religious believer.

INTRODUCTION

The question the Religious Liberty Protection Act of 1999 "RLPA") addresses is the following: When is a government prohibited 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. It 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.

Like its predecessor, RFRA, this bill is an attempt by Congress to displace the Supreme Court's reading of the Free Exercise Clause in *Employment Div.* v. *Smith,* 494 U.S. 872 (1990).

RLPA asks Congress to make simultaneous policy judgments regarding a vast array of crucial federal and state legal schemes. The following 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.
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.
10. Military regulations.

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 that make those neighborhoods livable.

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 Opinon 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. This is the constitutional advice rendered by the Court in *Smith* but ignored by the Congress when it enacted RFRA.

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.

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 giants 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 attempted to even 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 by taking only 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"[1] and where religious claimants claim burdens on their religion.

Under *Boerne* v. *Flores,* the Congress may only enforce constitutional rights pursuant to Sec. 5 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 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. Indeed, Professor Mark Chaves of the University of Arizona's Department of Sociology has completed a land use study that confirms an earlier study done by the Presbyterian Church that indicates that religious entities, even minority religions, do extraordinarily well in the land use process. The study is available at this time on my website at www.marcihamilton.com and by contacting Professor Chaves at the University of Arizona.

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 a 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. Local governments, prompted by their constituents, are taking steps to preserve 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.

The need for land use planning and enforcement, even against religious entities, has not been an issue limited to the Democratic Party. Gov. George W. Bush recently signed into law the Texas Religious Freedom Restoration Act, which exempts land use laws from its reach altogether.

At the same time the suburbs and cities are becoming more committed to their land use plans, a significant number of 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 micromanage 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.

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[1] The 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.

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 govermnent 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.

Additional information on state and federal religious liberty legislation can be obtained at my website: www.marcihamilton.com.

PREPARED STATEMENT OF BARBARA BENNETT WOODHOUSE ON BEHALF OF THE CENTER FOR CHILDREN'S POLICY PRACTICE AND RESEARCH

The Center for Children's Policy Practice and Research at the University of Pennsylvania (hereinafter CCPPR) is a nonprofit academic group composed of experts on child welfare and children's issues in the fields of law, medicine and social work. Established by Dean Ira Schwartz of the School of Social Work, the CCPPR is under the Co-Directorship of Dr. Richard Gelles of the School of Social Work, a specialist in domestic violence, Dr. Annie Steinberg of the Medical School Faculty and Children's Hospital, a pediatrician who is board certified in adult and pediatric psychiatry, and Professor Barbara Bennett Woodhouse of the Law School faculty, who is a specialist in constitutional law and in the rights of families and children. We work in collaboration with other experts on children's issues from all segments of the University of Pennsylvania. Our mission is to integrate policy, research and practice toward the goal of preserving children's health and developmental potential, and assuring the rights of America's children to be safe and secure in their own homes and communities. We believe that an interdisciplinary approach, which combines the skills of all relevant professionals, is essential to the formation of effective policies and practices, as well as reliable and sound research, in the area of child welfare.

The CCPPR is submitting this testimony to address questions raised about the potential effects of the Religious Liberty Protection Act (RLPA) on existing state and federal law schemes for protecting children from abuse and neglect. This legislation would significantly change the current legal standards embodied in state and federal statutes and applied by juvenile courts and local and state child welfare agencies regarding the balance between religious freedom of parents and protection of

children from harm. In our opinion, it would place children at greater risk of abuse and neglect.

RLPA prohibits any local or state government entity or program that receives federal funding from placing a "substantial burden" on a person's "religious exercise," even if the burden results from a rule of general applicability. The principle is well established that parents' free exercise rights extend to inculcation of children with their religious beliefs and practices. Many of the most famous free exercise cases from the Supreme Court of the United States have involved parents claiming an infringement of their First Amendment free exercise rights based on laws that interfered with their religiously based parenting decisions. See, e.g., *Prince* v. *Massachusetts,* 321 U.S. 158 (1944) (Jehovah's Witness Aunt and guardian seeks an exemption from child labor laws); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (Amish parents seek an exemption from mandatory education laws); *Bowen* v. *Roy,* 476 U.S. 693 (1986) (Native American parents seek exemption from policy of assigning children a social security number). RLPA would shift the burden of proof to the state of demonstrating a "compelling state interest" and showing that the government go funded program or agency had adopted the "least restrictive means" of furthering that interest. To the extent sects or individual believers treat child rearing practices and inculcating children in the parent's faith as a religious obligation, the overlap between "free exercise" claims and conduct harmful to children is substantial.

Limiting the law to programs receiving federal funds does little to mitigate this harm. Virtually all child welfare activities, from hospitals to foster care programs to family courts themselves, receive some level of federal funding through programs designed to assist states in dealing with the problems of children who are abused, suffering from medical neglect, or lacking "proper parental care and supervision" and thus within the state's "parens patriae" protective custody. States and localities currently participate in a host of federally funded programs including adoption assistance for special needs children, foster care and group homes, social work services to families and children in their own homes, all of which operate under rules of general application which have the potential for creating a "burden" on parents' religious exercise. States and localities routinely must determine whether to intervene, based on reports from medical personnel, schools, police and citizens, when parents' religious beliefs conflict with children's health and safety.

Rights of free exercise, when asserted by parents in connection with child rearing and religious practices, raise unique issues. No other situation involves the believer placing another individual's life at risk as an aspect of vindicating his or her own religious beliefs. Child protection and child welfare laws vary from state to state, but they rarely mandate the strictest level of scrutiny or require that the state's intervention be limited to the "least restrictive alternative". There is good reason not to apply the "least restrictive alternative" standard. In cases involving children, courts must balance, in addition to the parent's private interest in religious exercise and the government interest in protecting children, the child's independent interest in bodily integrity and children's right to life. These interests of children are interests of constitutional magnitude, under the due process clause. For this reason, courts and legislatures have drawn a more nuanced balance, and one that places as much or greater emphasis on children's rights to bodily integrity as on parents' free exercise rights.

The following are several scenarios that illustrate the obstacles RLPA creates for agencies, and the danger it poses of costing innocent children's lives by preventing government from meeting the needs of at risk children:

Effects on Schemes for Mandatory Reporting of Abuse: In 1993, almost 3,000,000 reports of suspected child abuse were filed in the United States. In 1,000,000 such cases, further investigation showed the report to have been well founded. In the initial stages of an investigation, it is impossible to determine which reports are unfounded, which involve suspicious circumstances that cannot be proven, and which will uncover past abuse and grave risks of future harm. In a common scenario, a teacher or other "mandatory reporter" observes bruises on a child and is told by the child "Daddy punished me because I was bad." State laws passed in response to the Child Abuse Prevention, Adoption and Safe Families Act of 1988 (PL 100–294) make it mandatory for the teachers, social workers, medical personnel and others to file a report if they have "reasonable grounds" to suspect child abuse. According to regulations promulgated under PL 100–294 "child abuse and neglect" is defined to include "physical injury." Often, a school principal or child protective services worker will seek the opinion of a health professional who on visual inspection may confirm that the child's condition warrants reporting and further investigation. The parent may be asked to explain the bruises and to give permission for a medical examination. Siblings or others may be interviewed. In *Foy* v. *Holston,* 94 F.3d 1528, 1536 (11th Cir. 1996), for example, a teenage runaway from a religious commune called

"Holyland" exhibited bruising and reported she and other children were severely whipped for minor infractions. She was taken into protective custody, her parents and other children were interviewed, but after further investigation the case was dropped and she returned home voluntarily. Her parents sued, claiming first amendment and due process infringements.

Under RLPA if the parent (as in *Foy* cited above) concedes he caused the braising but claims that his conduct is an integral part of his religious belief whether based on scriptural references to corporal punishment or more unusual beliefs such as the need for force in exorcizing devils, RLPA would be triggered. While some reports (like those in *Foy*) may be dropped as lacking adequate evidence, others will lead to discovery of past abuse and risk of future abuse. Radiological investigation will often reveal both new and old fractures substantiating a history of severe battering. Normally, evidence of cuts or bruises resulting from corporal punishment will justify a court ordered medical exam should the parent refuse to authorize one. The parents protected by RLPA, however, could assert religious objections to any forms of medical care, including diagnostic X rays.

The teacher, school and police, by interposing their authority between parent and child, in matters concerning religion arguably have created a "substantial burden"—but they are required to do so, or be guilty of a violation under laws passed in virtually every state as a precondition for receiving federal funding. Currently, doctrines of qualified immunity protect them precisely because this is an area in which child custody workers must engage, under difficult circumstances and without perfect information, in balancing of the competing interests of children, parents and the state. As the United States Court of Appeals for the Eleventh Circuit stated in *Foy,* supra "[S]tate officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of 'clearly established law.'" The Circuit Court held that, considering the lack of bright line standards in the law of abuse and neglect, the officials enjoyed qualified immunity. Similarly, governments (and the taxpayers) are not liable under current laws every time they fall short of the ideal in investigating or responding to abuse, as long as they act reasonably under the circumstances. RLPA would change this balance, increasing risk for children as well as for government agencies that failed to adopt the least restrictive of an array of reasonable options.

RLPA is Clearly Less Protective of Children's Bodily Integrity than Current Standards such as "Reasonable Grounds" or "Reasonable Efforts:" While the state interest in protection of children will likely pass muster as a "compelling" interest, application of a "least restrictive means" test would place a heavy burden on the state, not contemplated by current law. Can the court order a medical exam based on "reasonable grounds" for intervening when the suspected abuse is religiously motivated—or must there instead be clear and convincing evidence? Currently, even where the law imposes a standard requiring "clear and convincing evidence" of abuse or neglect, once there is a finding that a child is "in need of services" or "a dependent child", courts are typically instructed by statute to enter such orders as may be in the child's "best interest" or be "necessary" to protect the child. Judges are usually provided with a menu of alternatives, from ordering the parent to participate in counseling to removal of the child for placement in foster care. Under RLPA, however, if a court finds that a parent's religion requires application of "the rod" but that the punishment inflicted has been excessive, can it enter an order prohibiting the parent from repeating the same type of conduct, i.e., using a switch or belt? Or can it only restrict the parent from administering whippings that cross the boundary between discipline and abuse? Can the court remove the child into protective custody, or must it first try in-home services as 'the least restrictive means" of vindicating the state's interest while protecting the parents' rights? In each of these circumstances, if a court concludes that the government entity or agency has failed to use the least restrictive means, the costs of attorney's fees and damages awards will add to the burdens of fiscally strained child welfare agencies.

In *Pfoltzer* v. *County of Fairfax,* 775 F. Supp. 874 (E.D. Va. 1991), the parent claimed that the state burdened their religion by placing their children with foster parents who did not adhere to their specific faith and by depriving the parents of their right to conduct religious instruction. Quoting from *Wilder* v. *Bernstein,* 848 F.2d, 1338 (2d Cir. 1988) the court held that "so long as the state makes *reasonable efforts* to assure that the religious needs of the children are met during the interval in which the state assumes parental responsibilities, the free exercise rights of the parents and children are adequately observed." Id. At 885 (emphasis added). The court held that the state's efforts had been reasonable: the children had been taken to a church of their faith (Roman Catholic) by the foster parents, and given access to religious instruction classes. The court highlighted the burdens states would face if they were required to match each foster child to a foster family of the same reli-

gion. "Thus, for example, a state has no duty to place a Buddhist child with a Buddhist foster family, a Quaker child with a Quaker family, or a Zoroastrian child with a Zoroastrian family, unless such family is reasonably and immediately available." *Pfolzer* at 885. This approach, focusing on reasonableness, speed and efficiency, strikes a proper balance between children's interests, governments' resources, and the rights of parents. It is distinctly at odds with the far more stringent "least restrictive alternative" imposed by RLPA.

Effects on Pediatricians' Treatment of Their Patients: For each case appearing in the news media or in printed court opinions, hundreds more are encountered every day by practicing pediatricians and pediatric psychiatrists. CCPPR Co-Director Dr. Annie Steinberg in her practice has encountered numerous instances of parents asserting religious beliefs as the basis for treatment decisions that threaten the life and health of their children. The following are some examples.

Example 1: A father brings a three year old with sickle cell disease and failure to thrive to a hospital receiving federal funds. The child is in medical crisis, suffering the effects of blood cells aggregating, including painful joint swellings. Under counseling from his minister, the father has placed the child on a protein free diet to heal her. While Grandmother, the day to day care giver, is open to a medically appropriate diet, father is home all day and, under their religion, Grandmother must obey him. He insists on continuing the dangerous protein free diet.

Example 2: Moslem parents give birth to a baby in a hospital receiving federal funds. The baby is born with VATER syndrome, which includes the absence of the radius, a bone in the arm, and other treatable conditions. Baby is premature and develops NEC, necrotizing enterocolitis, and needs emergency surgery. The parents refuse to authorize the surgery, claiming their religion gives them the choice to refuse life sustaining surgical treatment for their disabled child.

Example 3: An adolescent presents at a mental health clinic receiving federal funds with suicidal ideation and major depression (untreated). Her parents refuse to allow her to attend outpatient therapy, or receive treatment with antidepressants, insisting their religion requires that she "pray to God for forgiveness of her sins" instead. The danger of suicide is significant, but difficult to quantify.

In order to properly treat such patients despite the parents' religiously based objections, pediatricians and other medical professionals rely on the systems in place for protecting children against "medical neglect." This legislation creates a double standard, placing children whose parents adhere to certain religious beliefs at greater risk and forcing doctors to adopt medically risky compromises to accommodate religious claims of parents.

Failure to Exempt Extreme and Abusive Conduct: Many proponents of RLPA are concerned with protecting parents who believe in spiritual healing from overly intrusive and unnecessary state intervention. However, RLPA is not narrowly focused on this set of benign cases. It applies even when spiritual healing appears to threaten the life of the child, as in the examples cited above. It also applies to the entire range of potential religious practices, however shocking or dangerous. Presently, state laws recognize various levels of harm. Abuse laws generally exempt moderate levels of physical discipline, labor laws distinguish between exploitation and household chores, and states are free, under federal laws such as the Child Abuse Prevention and Treatment Act to craft appropriate exemptions for spiritual healing. All states laws, however, unequivocally impose absolute prohibitions against, inter alia, ritual sexual acts committed on children; harmful ritual mutilation of children; forced marriages of minor children; incestuous or polygamous intermarriages within a religious community, and other forms of religiously motivated conduct which victimizes children.

RLPA does not distinguish among religious beliefs. Any citizen claiming laws of general application burdened his or her religion could invoke RLPA, and such claims would command the same ultra-strict level of scrutiny and narrowly tailored, individualized consideration as any other religiously based claims, adding to the burdens on courts and agencies charged with protecting children. Such scenarios are not far fetched. Recent cases covered in the media include the Branch Davidian sect in Waco Texas, whose leader allegedly engaged in sex with minor children as part of the religious practice of the community; a girl from an extremist Mormon sect whose father was alleged to have forcibly married her to an uncle, imprisoned her and beat her when she ran away; followers of middle eastern fundamentalist sects who forced their minor daughters to marry strangers against their will; and "new age" parents who fed their infant only lettuce and watermelon, believing this was the will of God. Instead of this blunderbuss approach, statutes creating religious exemptions should be tailored to specific concerns.

Implications for States Which Require Heightened Protection of Children's Rights to Bodily Integrity in Cases Involving Repeat Offenders: Many states' laws contain special language requiring courts to make specific findings of fact and narrowly tailor their orders to protect the child, rather than the parents, rights. These laws often single out cases where there has been prior abuse, or where parents have caused the death of a child's sibling. In Maryland, for example, the law in such cases provides "unless the court specifically finds that there is *no likelihood* of further child abuse or neglect by the party, the court *shall* deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well being of the child." Md. Code, Family Law, section 9–101(b) (emphasis added). In addition, section 101.1(b)(3) states that the court *shall* consider evidence of abuse of any child residing within the * * * household" and "*shall* make arrangements for custody or visitation *that best protect the child.*" (Emphasis added).

RLPA contains no such exceptions and its language is clearly at odds with these states' policies of zealous protection of children's rights to be free from repeated incidents of abuse. Religiously motivated abuse and neglect often involve repeated offenses, since the usual deterrents are at their least effective when pitted against deeply held religious convictions, however unusual or bizarre. Thus, the very children most likely to be placed at risk repeatedly, would be deprived of protection in states responding to RLPA's incentives.

Repeal by Implication of Existing Federal Laws: "Reasonable Efforts" under the Child Abuse Prevention and Adoption Assistance Act of 1988. Under the 1988 Act, state agencies throughout the country were required as a condition of receiving federal funding to make "reasonable efforts" to avoid removing at risk children from their homes and to reunite children in foster care with their families. The "reasonable efforts" formula—which reflected enlightened states' practices—was designed to balance the state's and child's interests in protection with the parents' and child's interests in reunification. RLPA would, in effect, create a special category of cases requiring not just "reasonable" but "least restrictive" measures. It would also overrule in part at least one Supreme Court case construing that statute. In *Suter* v. *Artist,* 503 U.S. 347 (1992), the Supreme Court refused to find that the Congress intended to create a private cause of action based on a state's failure to make "reasonable efforts" to avoid placement. RLPA would do just that. In addition to heightening the standard of review from reasonableness to strictest scrutiny, it provides for a private cause of action and for an award of attorney's fees as an incentive to litigate. The same factors that persuaded the Supreme Court that Congress had no intention of creating such a scheme in 1988 weigh against Congress' taking such a step now without extensive discussion and full investigation of costs and benefits.

The Adoption and Safe Families Act of 1997: In recent legislation, Congress has acted to strengthen not weaken government's role in protection of children. Dr. Richard Gelles, a Co-Director of CCPPR, worked extensively on this Act and is involved in training of social workers for implementation of the Acts provisions. Professor Woodhouse also has written about ASFA and participated in training, for ASFA compliance. This Act provides that a state or county is *not* required to make "reasonable efforts" let alone extraordinary efforts to avoid removal or to promote reunification in cases involving "aggravated circumstances" or abuse of a sibling. It also requires that a petition to terminate parental fights be filed after a pre-determined period in foster care and places the burden on the state to show a "compelling reason" why terminating the parents' rights will *not* be in the child's best interest. Clearly, RLPA is on a collision course with this recent congressional reform. Any parent who claimed state intervention burdened his religious exercise could demand not reasonable but extraordinary efforts—even in cases involving acts such as torture, sexual abuse, or aggravated assault otherwise qualifying as aggravating, circumstances." Removal of an abused child's siblings is surely not the least restrictive means of responding to an incident of abuse. Congress has struck the balance, in ASFA, in favor of children's safety. Under RLPA, children whose removal from home was based on religiously motivated medical neglect or abuse, would virtually never qualify for termination and placement in adoptive homes since this is certainly not the "least restrictive means" by which states can secure the child's safety. These children would suffer the foster care drift that the Adoption and Safe Families Act sought to avoid.

Other Areas Potentially Affected: Immunization, Labor Laws: In an individual case, forced immunization is rarely the least restrictive alternative. Segregation of the non-immunized child or quarantine are less restrictive. Yet the health of all children in a community depends on universal immunization. Child labor laws also protect the well being of all children. In *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), the court rejected a challenge to the state's police powers, noting "It is too late now

to doubt that legislation appropriately designed to reach [child health, labor, and safety] is within the state's police powers, whether against the parent's claim to control of the child or one that religious scruple dictates contrary action." For over fifty years the Supreme Court has distinguished cases involving children's welfare from other burdens on free exercise. RLPA would for the first time subject such laws to the strictest level of scrutiny, forcing states to justify them in each individual case. Individualized exemptions, while less restrictive of an individual parent's religious exercise, would have a cumulative impact on the state's ability to enforce laws of general applicability.

Implications for State Decisions on Custody and Adoption: Custody and adoption, although generally considered "private" matters, might well be affected by RLPA. The Supreme Court has held that a custody order is a form of state action raising serious constitutional concerns, see *Palmore* v. *Sidoti,* 466 U.S. 429 (1984). As mentioned previously, federal funding of programs for court reform and programs for children in the courts and in adoption and in foster care touch almost every aspect of state and local activity, including the courts and services ordered by the courts. In cases involving disputes between parents of different religions, courts are prohibited from discriminating based on religion but they can and do take into account risks and dangers posed to the child by a parent's religious practices. Applying a "best interest" standard, courts generally "examine the totality of the circumstances in the alternative environments" including the effects of a parent's religious practice on the child's health, emotional and material welfare and relationships with parents, siblings and friends. See *Bienenfeld* v. *Bennett-White,* 605 A.2d 172 (Md. Ct. Spec. App. 1992).

Bienenfeld v. *Bennett-White* involved a dispute between parents, one of whom converted to the Orthodox Jewish faith and the other of whom was an Episcopalian. The mother, claimed that visitation, schooling and many other activities interfered with Orthodox religious practices. If RLPA were applied, it would require that claims of a parent based on the free exercise clause must trump a host of other factors, including the religious rights of a parent who claimed no religious "burden". The court in *Bienenfeld* upheld the constitutionality of the chancellor's removal of the children from the mother's custody to the father's custody, even though it was based in part on the disruptive effects of the mother's new religion on the children's day to day life.

Adoption also potentially raises similar scenarios to custody and overlaps with issues relating to foster care. Federal initiatives provide financial subsidies as well as other programs to promote adoption. Would an agency be forced to find a religious match for a child with "special needs" receiving federal adoption assistance as the least restrictive alternative consistent with the parent's wishes? While time and space have not permitted us to research and document all potential concerns, it is imperative that this and other scenarios involving RLPA's effects on children be fully explored.

Conclusion: These examples are illustrative of RLPA's unforeseen consequences for children. By singling out interventions in religiously based abuse and neglect for a "least restrictive means" test, RLPA would heighten the scrutiny placed on such interventions. This would discourage effective and speedy response in cases involving religious sects, depriving such children of the equal protection of the law. The Center for Children's Policy Practice and Research at University of Pennsylvania joins the American Academy of Pediatrics and other organizations in urging that the Senate reject this Bill. The Senate must, at the very least, hold additional hearings to explore these complex issues. Any legislation must make absolutely clear that RLPA does not apply to state laws and actions involving protection of children from physical and mental abuse and neglect or other laws, both state and federal, whose primary focus is and must remain the best interests of children.

PREPARED STATEMENT OF MS. ELLEN JOHNSON ON BEHALF OF THE AMERICAN ATHEISTS, INC.

WHY AMERICAN ATHEISTS OPPOSES THE RELIGIOUS LIBERTY PROTECTION ACT (RLPA)

The Religious Liberty Protection Act (RLPA) is a controversial piece of legislation based on the older Religious Freedom Restoration Act (RFRA), passed by Congress in 1993 and struck down by the U.S. Supreme Court four years later in the historic *Boerne* v. *Flores* decision. Despite the ruling in *Boerne,* though, RFRA supporters proceeded to introduce "mini-RFRA" proposals in state legislatures throughout the country; and the federal RFRA has been rejuvenated under the guise of the Religious Liberty Protection Act. RLPA, like its predecessor, requires that governments

use a "compelling interest/least restrictive means" test when dealing with faith-based organizations and practices.

Most of American's religious groups support the measure. The Coalition for the Free Exercise of Religion is the main proponent of RLPA, and includes representatives of Protestant, Catholic, and Jewish organizations, along with new agers, Muslims, Hindus, American Humanist Association, Scientologists and many others. Even some separationist groups have joined the Coalition, although lately the American Civil Liberties Union has withdrawn its support for the Religious Liberty Protection Act, fearing that its enactment could be used by churches to trump the nation's civil rights and anti-discrimination laws.

From the beginning, American Atheists has opposed both RFRA and RLPA. Representatives of the organization have spoken out against RFRA proposals in California, Maryland, Texas, New Jersey and elsewhere. At the federal level, we continue to speak out against the Religious Liberty Protection Act.

The Religious Liberty Protection Act is "bad law" and is constitutionally suspect

The act is based on the Religious Freedom Restoration Act, struck down by the U.S. Supreme Court in the 6–3 decision *Boerne* v. *Flores.* RLPA will likely suffer a similar fate. Justices criticized the abuse of congressional authority in the passage of RFRA; in addition, Justice John Paul Stevens found that the act was a clear violation of the Establishment Clause of the First Amendment, and provided religious groups with a legal instrument which "no atheist" could hope to obtain. RLPA requires that government used a wide sweeping "compelling interest" test in dealing with religious groups and practices. American Atheists argues that the effect of such a test is to, essentially, create a dual standard of justice in the application of civil laws—a lenient one for churches and religious groups, and a separate and more burdensome standard when applied to private individuals, businesses and secular groups.

RLPA "establishes" and favors religion over nonreligion

The effect of the Religious Liberty Protection Act does not involve legitimate "neutrality" of government toward religion, but rather favors and advances the interests of faith-based sects and practices. Experts on RLPA, whatever their position, readily admit that it is one of the most wide sweeping and broad-based pieces of First Amendment legislation ever proposed. It would affect everything from the enforcement of criminal laws to zoning regulations, land-use codes and much more. The laws which apply to private citizens, businesses and secular non-profit, charitable groups would not be enforced with the same rigor and application when churches, mosques and temples are involved; the latter may always cite RLPA as a basis for legal immunity. Communities and municipalities will experience a "chilling effect" when attempting to apply zoning, land use laws and other "rules of general applicability" to religious groups.

The act could have unintended and calamitous consequences

As the debate over RLPA has continued, many supporters in both the House and Senate have admitted that the act could result in a broad range of unintended and unwanted consequences. Dr. Marci Hamilton, a constitutional scholar and lead attorney for the city of Boerne, Texas in the *Boerne* v. *Flores* case, has warned that RLPA could provide a legal shield for discrimination in housing on the basis of sexual orientation, immunity from court enforcement of child support orders, violations of the Endangered Species act and other actions, and circumventing of historic and preservation ordinances. The full ramifications of RLPA have simply not been examined in depth because of the "rush to judgment" to enact this legislation.

RLPA "federalizes" legislation that more appropriately belongs to states and local communities, and is beyond the legitimate powers of the Congress

As Dr. Hamilton has observed, "RLPA rests on extremely shaky ground constitutionally. It attempts to expand Congress's power under the Commerce and Spending Clauses and attempts to turn Section 5 of the Fourteenth Amendment into a substantive rather than a remedial power and violates the Establishment Clause."

The Religious Liberty Protection Act has the effect of interjecting a Congressional mandate into areas which are otherwise covered by state laws or local regulations. This is particularly true in respect to laws concerning land use and historical preservation. Congress is thus targeting these areas, decreeing that communities and states may not enforce these laws (or must meet a discriminatory and burdensome "compelling interest" test) when only religious groups are involved.

The Religious Liberty Protection Act marginalizes secularism and discriminates in favor of religion

By establishing a dual-standard in the application of laws, RLPA marginalizes any non-religious activity, group or individual. Private home owners, business owners and other groups are required to live under the mantle of "rules of general applicability"—everyday laws, ordinances and regulations—while faith-based groups are provided with an exception legal instrument against them. Churches, for instance, may use RLPA to shield themselves against ordinances or regulations which others must adhere to, concerning everything from zoning to land use.

RLPA has nothing to do with the legitimate "free exercise of religion"

For over two hundred years, our Constitution and Bill of Rights have provided a balance between the legitimate exercise of religious faith and the separation of church and state. We have both freedom *of* religion, and freedom *from* religious intrusion. But the Religious Liberty Protection Act is not about the right of individuals to voluntarily gather in churches and other houses of worship, and pray. The legislation was first invoked over a land use dispute, where a church demanded an exemption from local historic preservation ordinances.

RLPA is an entitlement program that creates "special rights" *for churches and other religious groups.*

By providing churches, temples, mosques and other faith-based groups with a discriminatory legal instrument, the government is creating "special rights" for these sects. This obviates the notion of equal protection under the law. The potential for abuse is considerable. RLPA will apply not just to "mainstream" religious groups but fringe sects as well as any group or individual that proclaims that they are a religion. Abuses then raise the dangerous prospect of government then deciding what is and is not an "authentic" religion. Do we want that?

America does not need a Religious Liberty Protection Act in order to guarantee the free exercise of religion. Enacting this legislation discriminates in favor of religion-based groups and practices, and endangers the necessary separation between church and state. Thank you.

September 9, 1999.

Senator ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Russell Senate Office Building,
Washington, DC.

Senator PATRICK J. LEAHY,
Ranking Member, Senate Judiciary Committee,
Russell Senate Office Building,
Washington, DC.

DEAR CHAIRMAN HATCH AND SENATOR LEAHY: The undersigned civil rights organizations write to express our concerns about unintended yet potentially harmful effects that the proposed Religious Liberty Protection Act ("RLPA") as currently drafted may have on the enforcement of the nation's civil rights laws.

We understand that a hearing has been scheduled for later this week to address important constitutional questions raised by RLPA. We commend your efforts to identify a constitutional basis that will best ensure the long-term viability of a federal statute protecting the important right of free exercise of religion. However, we also believe that the Judiciary Committee should closely examine the intersection of RLPA with state and local laws prohibiting discrimination in order to avert potentially significant interference with the continued availability of civil rights statutes to victims of discrimination.

We each recognize the need to ensure appropriate safeguards against governmental burdens on the free exercise of religious beliefs. We support their development and implementation. Further, we are sensitive to the fact that such protections are especially important to preserve the exercise of beliefs by adherents of minority religions who are in a position, like many of the groups we represent, of having limited ability to influence the political process. We therefore support the laudable principles that RLPA seeks to achieve. We believe, however, that RLPA can accomplish its goal of protecting religious free exercise without threatening continued enforcement of civil rights laws.

we are aware of testimony which the Judiciary Committee has heard previously from witnesses expressing their general concerns that RLPA may have an adverse effect on anti-discrimination protections. Since that hearing, however, the broad range of groups represented here have extensively analyzed the specific effect RLPA may have on the anti-discrimination statutes protecting our constituents. Accordingly, an additional hearing before the Committee is necessary to permit the entire

civil rights community to present a clear and complete description of the precise harms that RLPA may cause to enforcement of civil rights laws.

As currently drafted, RLPA could be used in civil rights cases to attempt to defeat the right of an individual or group to be free from discrimination on the basis of gender, disability; ethnicity, race or some other statutorily protected category. For example, a landlord or an employer could seek to avoid liability for discrimination by claiming protection under RLPA. In each case in which RLPA is invoked as a defense, the plaintiff could overcome that defense only by showing that the particular civil rights statute in question furthers a compelling governmental interest, and is the least restrictive means to achieve that compelling interest. In essence then, a civil rights case in which RLPA is invoked may necessarily involve not just the facts about the particular parties' experiences, but also a defense of the goals and means of the civil rights statute sought to be enforced. Under this scenario, the plaintiff who seeks to invoke civil rights protection could suddenly be faced with defending the underlying statute in order to have his or her rights vindicated.

Even where civil rights plaintiffs could successfully prove that the applicable anti-discrimination statute meets RLPA's strict scrutiny standard, the substantial litigation burdens associated with presenting such proof could likely deter victims of discrimination from pursuing their rights. The necessity of litigating the issues concerning the civil rights statute itself, in addition to proving the underlying discrimination at issue, could increase the time and costs associated with each individual case, and may have a substantial effect on the ability of victims of discrimination to obtain counsel in civil rights cases and to prosecute such cases successfully.

The full extent to which legitimate claims of discrimination may be thwarted by the defense created by RLPA should be evaluated by the Judiciary Committee. We believe that a hearing before the Judiciary Committee is an important and necessary step in that evaluation.

We appreciate your continued support of the legal protections for the communities we represent and urge you to give ample consideration to the possibility that RLPA would frustrate some of the protections that together we have fought to establish and maintain. We look forward to working with you as RLPA proceeds through the regular Committee process.

Sincerely,

MARCIA GREENBERGER,
Co-President, National Women's Law Center.

REBECCA ISAACS,
Political Director, National Gay and Lesbian Task Force.

LAURA MURPHY,
Director, Washington National Office, American Civil Liberties Union.

SHANNA SMITH,
Executive Director, National Fair Housing Alliance.

DANIEL ZINGALE,
Executive Director, AIDS Action.

ANTONIA HERNANDEZ,
Director and General Counsel, Mexican American Legal Defense and Educational Fund.

ELAINE JONES,
Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.

HILARY SHELTON,
Director, Washington Bureau, National Association for the Advancement of Colored People.

PAT WRIGHT,
Disability Rights Education and Defense Fund, Inc., Co-Chair, CURTIS DECKER, *National Association of Protection and Advocacy Systems, Co-Chair,* ROBERT HERMAN, *Paralyzed Veterans of America, Co-Chair,* MARK RICHERT, *American Foundation for the Blind, Co-Chair, Consortium for Citizens With Disabilities Rights Task Force.*

ELIZABETH BIRCH,
Executive Director, Human Rights Campaign.

NATIONAL CHILD ABUSE COALITION,
Washington, DC, September 8, 1999.

Hon. PATRICK J. LEAHY,
U.S. Senate,
Dirksen Building,
Washington, DC.

DEAR SENATOR LEAHY: We are writing, as members of the National Child Abuse Coalition, to urge your support of an amendment to the Religious Liberty Protection Act which would ensure protection for the health, safety, and welfare of children. Without an exemption for governmental action intended to protect children, the legislation as currently written could lead, in the name of guaranteeing religious freedom, to harmful and unintended consequences for the protection of children from abuse and neglect.

While we support the right of individuals to practice their religion, we also recognize that all children have a right to live in a safe and nurturing environment and that governmental entities must have the ability to intervene effectively to protect children from abuse and neglect, including religiously motivated abuse and neglect. The U.S. Supreme Court has held that the First Amendment does not allow one's religious practice to endanger the life of another. The Court draws a clear distinction between unquestionably protected religious beliefs and individual actions, which may be limited, as in the case of *Prince* v. *Massachusetts,* where the Supreme Court asserted that parents do not have the right to place their children in danger in the name of religion,

RLPA would undermine the ability of states and local communities to ensure that children are protected, creating new limits on government beyond those that currently exist. Because RLPA would prohibit the government from substantially burdening "a person's religious exercise" in an agency or program receiving federal funding, unless the government can demonstrate the action is "in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that governmental interest, it does not simply reaffirm a standard previously used by courts in child abuse and neglect cases: it creates a new one.

RLPA could cause children to be kept in dangerous, even life-threatening situations, because action by child protective service (CPS) agencies to prevent harm to children could be enjoined by litigation, especially where state and local governments attempt to protect children from abuse and neglect motivated by a parent's religious beliefs.

RLPA represents an intrusion upon the States' traditional authority to regulate the health and welfare of their citizens. Notwithstanding the specific threat that RLPA poses for the safety of children, Congress should further consider that it would be foisting RLPA on states that have refused to enact such a sweeping law and would be disregarding the policy judgment the states have made regarding children's needs. For example, California, Maryland, New Mexico, New York, and Virginia have rejected similar measures.

RLPA would create a chilling effect on efforts of public servants and agencies to protect children who are subjected to religiously motivated abuse and neglect, because RLPA significantly increases the likelihood that any government employee who deals with children could be subjected to a costly lawsuit for burdening the religious exercise of parents or others. The threat of litigation expenses for these individuals and agencies would inhibit them from reporting or investigating suspected cases of child maltreatment.

RLPA would drain resources and staff from already overburdened and underfunded agencies as a result of the added fiscal burden of litigation costs likely to be born by CPS. It would divert scarce financial resources from community efforts to protect the safety of children at risk of harm. Time spent unnecessarily in court has a negative effect on the ability of CPS to handle cases effectively.

In summary, RLPA would seriously undermine the ability of government to protect children from abuse and neglect. It would impose a stringent legal test that does not exist under present law for evaluating the propriety of a wide range of governmental actions taken to protect the health, welfare, and safety of children. It would interfere with the ability of State and local governments to provide essential safety and protection services to children. In cases of child abuse and neglect, it would result in fiscally expensive litigation by parents and others who claim that their religious exercise has been substantially burdened. It would encourage adversarial litigation, which drains resources, rather than cooperation on behalf of the best interests of the child.

The undersigned organizations, therefore, strongly urge the adoption of an amendment that would exempt from the scope of this legislation laws regarding the health,

safety, and welfare of children. We hope that you will join in support of such an amendment.

Thank you for you consideration.

Sincerely,

AMERICAN ACADEMY OF PEDIATRICS, AMERICAN HUMANE ASSOCIATION,
AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, CHILD
WELFARE LEAGUE OF AMERICA, CHILDREN'S DEFENSE FUND,
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,
NATIONAL NETWORK FOR YOUTH, NATIONAL PTA,
PARENTS ANONYMOUS, PREVENT CHILD ABUSE AMERICA.

HOUSE OF DELEGATES,
Annapolis, MD, September 9, 1999.

Re: The Religious Liberty Protection Act of 1999.

Hon. ORRIN G. HATCH,
Chairman, Judiciary Committee,
U.S. Senate,
Russell Senate Office Building,
Washington, DC.

Hon. PATRICK J. LEAHY,
Ranking Member, Judiciary Committee,
U.S. Senate,
Russell Senate Office Building,
Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I appreciate the opportunity to express my deep concerns regarding the Religious Liberty Protection Act of 1999 (RLPA) from the perspective of a state legislator who sat in consideration of similar bills that failed In the Maryland General Assembly in both 1998 and 1999.

I would like to preface my remarks by stating that Maryland has a legacy of religious tolerance and that I personally cherish religious liberty and the Constitution of the United States. Indeed, I was one of the many sponsors In 1998 of the Maryland state version of RLPA, entitled "Religious Freedom," which purportedly would have "restored" religious freedom after the Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act (RFRA) in 1997. Maryland's proposed mini-RLPA/RFRA's were touted by proponents as a return to the pre-*Smith* standard embraced by the Maryland Court of Appeals. This, however, was shown not to be the case.

As a member of the House of Delegates' Commerce and Government Matters Committee to which this legislation was assigned, I and my colleagues were able to carefully evaluate a considerable amount of testimony and other documents submitted by both proponents and opponents, including case law engendered by RFRA. Contrary to the claims of proponents, It became clear that state and federal versions of RLPA/RFRA are designed to go far beyond guarantees of freedom of religion in the First Amendment and the Maryland Constitution, and that the passage of these bills would have endangered the public's health, safety and welfare.

Moreover, it became evident that the state of religious freedom in Maryland did not warrant, by any means, the passage of such unworkable legislation which would have significantly changed current legal standards embodied in state and local laws to the detriment of Maryland's citizens. Consequently, I believe that RFRA/RLPA-type bills at both the federal and state levels are ill-conceived and unnecessary and, if enacted, would have serious unintended consequences for many groups, including victims of domestic violence and child abuse and neglect and other crimes. In addition, these bills would have adverse and costly effects on prison and school administration, the environment, and historic preservation. They would preclude local governments from enforcing legitimate and reasonable land use decisions as well.

The aforementioned concerns were brought to my attention by a wide variety of organizations, representing pediatricians, PTA's, teachers, school boards, domestic violence and child abuse experts, local government and correctional officials, and those concerned with historic preservation, among many others.

Because religious conduct can conflict with important public interests In an infinite variety of ways, passage of this type of legislation would invite litigation rather than cooperation among Maryland citizens, encourage the manufacture of ersatz religions, and the filing of frivolous Suits.

I therefore urge the Senate Judiciary Committee to carefully examine the serious implications of the Religious Liberty Protection Act of 1999 and refuse to act favorably upon it. This Act would deprive the State of Maryland of its capacity to govern at numerous points. It would preempt the considered judgment of its legislature. As stated in *Boerne* v. *Flores,* "Requiring a state to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest

is the most demanding test known to constitutional law * * *. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."

In 1822, James Madison wrote that "religion flourishes in greater purity without than with the aid of government." I hope and trust that the Senate does not ignore the wisdom of these words.

Thank you for considering my views on this important matter.

Sincerely,

ELIZABETH BOBO,
Delegate, District 12B.

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