AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

H.R. 1445, THE WORKPLACE RELIGIOUS FREEDOM ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER–EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

November 10, 2005

Serial No. 109–26

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house
or
Committee address: http://edworkforce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

24–514 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON EDUCATION AND THE WORKFORCE

JOHN A. BOEHNER, Ohio, *Chairman*

Thomas E. Petri, Wisconsin, *Vice Chairman*
Howard P. "Buck" McKeon, California
Michael N. Castle, Delaware
Sam Johnson, Texas
Mark E. Souder, Indiana
Charlie Norwood, Georgia
Vernon J. Ehlers, Michigan
Judy Biggert, Illinois
Todd Russell Platts, Pennsylvania
Patrick J. Tiberi, Ohio
Ric Keller, Florida
Tom Osborne, Nebraska
Joe Wilson, South Carolina
Jon C. Porter, Nevada
John Kline, Minnesota
Marilyn N. Musgrave, Colorado
Bob Inglis, South Carolina
Cathy McMorris, Washington
Kenny Marchant, Texas
Tom Price, Georgia
Luis G. Fortuño, Puerto Rico
Bobby Jindal, Louisiana
Charles W. Boustany, Jr., Louisiana
Virginia Foxx, North Carolina
Thelma D. Drake, Virginia
John R. "Randy" Kuhl, Jr., New York

George Miller, California
Dale E. Kildee, Michigan
Major R. Owens, New York
Donald M. Payne, New Jersey
Robert E. Andrews, New Jersey
Robert C. Scott, Virginia
Lynn C. Woolsey, California
Rubén Hinojosa, Texas
Carolyn McCarthy, New York
John F. Tierney, Massachusetts
Ron Kind, Wisconsin
Dennis J. Kucinich, Ohio
David Wu, Oregon
Rush D. Holt, New Jersey
Susan A. Davis, California
Betty McCollum, Minnesota
Danny K. Davis, Illinois
Raúl M. Grijalva, Arizona
Chris Van Hollen, Maryland
Tim Ryan, Ohio
Timothy H. Bishop, New York
John Barrow, Georgia

Paula Nowakowski, *Staff Director*
John Lawrence, *Minority Staff Director*

SUBCOMMITTEE ON EMPLOYER–EMPLOYEE RELATIONS

SAM JOHNSON, Texas, *Chairman*

John Kline, Minnesota, *Vice Chairman*
John A. Boehner, Ohio
Howard P. "Buck" McKeon, California
Todd Russell Platts, Pennsylvania
Patrick J. Tiberi, Ohio
Joe Wilson, South Carolina
Marilyn N. Musgrave, Colorado
Kenny Marchant, Texas
Bobby Jindal, Louisiana
Charles W. Boustany, Jr., Loiusiana
Virginia Foxx, North Carolina

Robert E. Andrews, New Jersey
Dale E. Kildee, Michigan
Donald M. Payne, New Jersey
Carolyn McCarthy, New York
John F. Tierney, Massachusetts
David Wu, Oregon
Rush D. Holt, New Jersey
Betty McCollum, Minnesota
Raúl M. Grijalva, Arizona
George Miller, California, *ex officio*

C O N T E N T S

	Page
Hearing held on November 10, 2005	1
Statement of Members:	
Johnson, Hon. Sam, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce	1
Prepared statement of	4
McCarthy, Hon. Carolyn, a Representative in Congress from the State of New York	10
Prepared statement of	14
Souder, Hon. Mark A., a Repesentative in Congress from the State of Indiana	6
Prepared statement of	8
Statement of Witnesses:	
Foltin, Richard T., Esq., Legislative Director and Counsel, American Jewish Committee	21
Prepared statement of	23
Land, Dr. Richard, President, Ethics and Religious Liberty Commission, Southern Baptist Convention	18
Prepared statement of	20
Marcosson, Samuel A., Associate Dean and Professor of Law, Louis D. Brandeis School of Law, University of Louisville	34
Prepared statement of	35
Olson, Camille A., Partner, Seyfarth Shaw LLP, on behalf of the U.S. Chamber of Commerce	38
Prepared statement of	40
Additional Submissions:	
Letters of Support for H.R. 1445:	
Coalition for Religious Freedom in the Workplace	86
Nevada-Utah Conference of Seventh-day Adventists	82
Union of Orthodox Jewish Congregations of America	84
United States Conference of Catholic Bishops	83
U.S. Senators Santorum and Kerry	12
Appendix I: New York's Human Rights Law:	
Letters to witnesses requesting supplemental testimony	55
Response from Richard T. Foltin, the American Jewish Committee	58
Response from Camille A. Olson, Esq., Seyfarth Shaw LLP, on behalf of the U.S. Chamber of Commerce	62
Various appendices pertaining to New York's human rights law	64

H.R. 1445, THE WORKPLACE RELIGIOUS FREEDOM ACT OF 2005

Thursday, November 10, 2005
U.S. House of Representatives
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:33 a.m., in room 2175, Rayburn House Office Building, Hon. Sam Johnson [chairman of the subcommittee] presiding.

Present: Representatives Johnson, Kline, Boehner, Jindal, Kildee, McCarthy, Holt, and Tierney.

Staff present: Steve Forde, Director of Media Relations; Ed Gilroy, Director of Workforce Policy; Rob Gregg, Legislative Assistant; Byron Campbell, Legislative Assistant; Richard Hoar, Professional Staff Member; Jim Paretti, Workforce Policy Counsel; Steve Perrotta, Professional Staff Member; Deborah L. Emerson Samantar, Committee Clerk and Intern Coordinator; Jody Calemine, Counsel Employer-Employee Relations; Tylease Fitzgerald, Legislative Assistant/Labor; Michele Varnhagen, Labor Counsel/Coordinator; Michele Evermore, Legislative Associate/Labor.

Chairman JOHNSON [presiding]. A quorum being present, the Subcommittee on Employer-Employee Relations will come to order.

We are holding this hearing today to hear testimony on H.R. 1445, the Workplace Religious Freedom Act.

[The bill follows:]

H. R. 1445

To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 2005

Mr. SOUDER (for himself, Mrs. MCCARTHY, Mr. JINDAL, Mr. WEINER, Mr. CANTOR, Mr. VAN HOLLEN, and Mr. PRICE of North Carolina) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Religious Freedom Act of 2005".

SEC. 2. AMENDMENTS.

(a) DEFINITIONS.—Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j)) is amended—

(1) by inserting "(1)" after "(j)";

(2) by inserting ", after initiating and engaging in an affirmative and bona fide effort," after "unable";

(3) by striking "an employee's" and all that follows through "religious" and inserting "an employee's religious"; and

(4) by adding at the end the following:

"(2)(A) In this subsection, the term 'employee' includes an employee (as defined in subsection (f)), or a prospective employee, who, with or without reasonable accommodation, is qualified to perform the essential functions of the employment position that such individual holds or desires.

"(B) In this paragraph, the term 'perform the essential functions' includes carrying out the core requirements of an employment position and does not include carrying out practices relating to clothing, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions, if any of the practices described in this subparagraph restrict the ability to wear religious clothing, to take time off for a holy day, or to participate in a religious observance or practice.

"(3) In this subsection, the term 'undue hardship' means an accommodation requiring significant difficulty or expense. For purposes of determining whether an accommodation requires significant difficulty or expense, factors to be considered in making the determination shall include—

"(A) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from 1 facility to another;

"(B) the overall financial resources and size of the employer involved, relative to the number of its employees; and

"(C) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities.".

(b) EMPLOYMENT PRACTICES.—Section 703 of such Act (42 U.S.C. 2000e–2) is amended by adding at the end the following:

"(o)(1) In this subsection:

"(A) The term 'employee' has the meaning given the term in section 701(j)(2).

"(B) The term 'leave of general usage' means leave provided under the policy or program of an employer, under which—

"(i) an employee may take leave by adjusting or altering the work schedule or assignment of the employee according to criteria determined by the employer; and

"(ii) the employee may determine the purpose for which the leave is to be utilized.

"(2) For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, for an accommodation to be considered to be reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.

"(3) An employer shall be considered to commit such a practice by failing to provide such a reasonable accommodation for an employee if the employer refuses to permit the employee to utilize leave of general usage to remove such a conflict solely because the leave will be used to accommodate the religious observance or practice of the employee.".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by section 2 take effect on the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by section 2 do not apply with respect to conduct occurring before the date of enactment of this Act.

Under committee rule 12(b), opening statements are limited to the chairman and ranking minority member of the committee. Therefore, if other members have statements, they will be included in the hearing record.

With that, I ask unanimous consent for the hearing to remain open 14 days to allow member statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Without objection, so ordered.

I am pleased to chair this morning's hearing on the Workplace Religious Freedom Act sponsored by our committee colleague, Mr. Souder. I am also pleased to welcome our subcommittee colleague, Mrs. McCarthy, who will also be testifying on this important bill.

It will be a pleasure to hear from both of you today.

Today, the subcommittee will hear testimony on an issue of great importance and of deep interest to members on both sides of the aisle. The issue is, how in the workforce do we accommodate the beliefs and practices of those of strong religious faith? Or, put another way, how do we protect the rights of people of faith, adhering to their beliefs in an increasingly diverse workplace? At the same time, how do we strike the right balance so that employers and businesses, often small businesses, are able to staff and run their operations in a productive manner?

I think we would start with the basic premise. In general, employees should not have to choose between a job and their religions. It is just that simple.

Since its enactment in 1964, Title VII of the Civil Rights Act has long given absolute protection to individuals by making it unlawful for a private, nonsectarian employer to discriminate against any employee or applicant on the basis of their religious beliefs.

In fact, to give meaning to that protection, Congress amended Title VII in 1972 to ensure the maximum ability of employees to adhere to their religious faiths and practices in the workplace, while recognizing the legitimate day-to-day needs of employers determined to run successful businesses.

However, despite the provisions of Title VII, there is concern that these protections have been undermined by interpretation by the courts, and in particular by two Supreme Court decisions.

In one case, the court held that if an accommodation of a religious belief or practice causes an employer to bear more than a minimal cost, it is an undue hardship and thus the employer is not required to make that accommodation.

Several years later, the Supreme Court further limited the scope of Title VII, basically ruling that there are several options for reasonably accommodating an employee's religious practices, and it is the employer's choice which accommodation he or she will provide.

Many have argued that the legacy of these decisions has been to render Title VII protection of religious practice meaningless. H.R. 1445 is a response to those cases and an attempt to restore those protections.

H.R. 1445 would prohibit discrimination against any employee who, with or without reasonable accommodation, is qualified to perform the essential functions of the position, unless the accommodation constitutes an undue hardship.

"Undue hardship" is defined as requiring significant difficulty or expense as measured by, one, the cost to the employer, including the loss of productivity and/or retraining or transferring employee from one facility to another; two, the overall financial resources and size of the employer; and three, for multi-facility employers, the geographic or administrative separateness of the facilities.

At the same time, H.R. 1445 specifically states the essential functions of any position do not include dress codes or scheduling issues. Therefore, an employer must accommodate an employee's request for leave to participate in religious observances or to modify a dress code for religious purposes.

Finally, the bill requires that an employer initiate and engage an affirmative and bona-fide effort to accommodate an employee's religious belief or practice.

The issues at stake are far too important to leave to the law of unintended consequences. If we are to pursue legislative solutions, they must be fair, equitable and properly balanced in many important and sometimes competing interests.

In that light, I look forward to hearing the testimony from all of our witnesses. We will first hear from our distinguished colleagues, then from an equally distinguished panel of experts, each of whom will provide insight as to how Title VII is working, whether or not it is broken, and how H.R. 1445 would address any problems.

With that, I would yield to my friend, Mr. Kildee, for any opening statement he may have.

[The prepared statement of Chairman Johnson follows:]

Prepared Statement of Hon. Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce

I am pleased to chair this morning's hearing on the Workplace Religious Freedom Act, sponsored by our committee colleague, Mr. Souder. I am also pleased to welcome our Subcommittee colleague, Mrs. McCarthy, who will also be testifying on this important bill. It will be a pleasure to hear from both of you today.

Today the Subcommittee will hear testimony on an issue of great importance, and of deep interest to members on both sides of the aisle. The issue is how, in the workforce, do we accommodate the beliefs and practices of those of strong religious faith? Or put another way, how do we protect the rights of people of faith adhering to their beliefs in an increasingly diverse workplace?

At the same time, how do we strike the right balance so that employers and businesses—often small businesses—are able to staff and run their operations in a productive manner while respecting all employees?

I think we would start with the basic premise—in general, employees should not have to choose between a job and their religion. It's just that simple.

Since its enactment in 1964, title 7 of the civil rights act has long given absolute protection to individuals by making it unlawful for a private, non-sectarian employer to discriminate against any employee or applicant on the basis of their religious beliefs.

In fact, to give meaning to that protection, Congress amended Title 7 in 1972 to ensure the maximum ability of employees to adhere to their religious faiths and practices in the workplace—while recognizing the legitimate day to day needs of employers determined to run successful businesses.

However, despite the provisions of Title 7, there is concern that these protections have been undermined by interpretation by the courts, and in particular by two Supreme Court decisions.

In one case, the Court held that if an accommodation of a religious belief or practice causes an employer to bear more than a minimal cost it is an "undue hardship" and thus the employer is not required to make that accommodation. Several years later, the Supreme Court further limited the scope of Title 7, basically ruling that there are several options for reasonably accommodating an employee's religious practices, and it is the employer's choice which accommodation he or she will provide.

Many have argued that the legacy of these decisions has been to render Title 7's protection of religious practice meaningless.

H.R. 1445 is a response to those cases, and an attempt to restore those protections.

H.R. 1445 would prohibit discrimination against any employee who "with or without reasonable accommodation" is qualified to perform the essential functions of the position, unless the accommodation constitutes an "undue hardship."

"Undue hardship" is defined as "requiring significant difficulty or expense," as measured by: (1) the cost to the employer (including the loss of productivity and/or retraining or transferring employees from one facility to another); (2) the overall financial resources and size of the employer; and (3) for multi-facility employers, the geographic or administrative separateness of the facilities.

At the same time, H.R. 1445 specifically states that the essential functions of any position do not include dress codes or scheduling issues; therefore, an employer must accommodate an employee's request for leave to participate in religious observances or to modify a dress code for religious purposes.

Finally, the bill requires that an employer initiate and engage in an affirmative and bona-fide effort to accommodate an employee's religious belief or practice.

The issues at stake are far too important to leave to the law of unintended consequences.

If we are to pursue legislative solutions, they must be fair, equitable, and properly balance the many important, if sometimes competing, interests.

In that light, I look forward to hearing the testimony from all of our witnesses.

We will hear first from our distinguished colleagues, then from an equally distinguished panel of experts, each of whom will provide insight as to how Title 7 is working, whether it is broken, and how H.R. 1445 would address any problems.

Mr. KILDEE. Thank you, Mr. Chairman, and thank you for convening this hearing this morning.

I would like to thank especially my colleagues, Mr. Souder and Mrs. McCarthy, for agreeing to testify on religious discrimination in the workplace and their very serious proposal to advance employee rights against that discrimination. That proposal is the Workplace Religious Freedom Act. This bill deserves our attention, as do the underlying problems of workplace discrimination which it seeks to address.

Congress enacted Title VII of the Civil Rights Act in 1964, prohibiting, among other things, religious discrimination in the workplace. That right against religious discrimination recognizes a core principle in American government and society. We cherish religious liberty. Religious liberty in fact was so important to our founding fathers that they enshrined it in the very first amendment to our Constitution.

Mr. Chairman, when it comes to religious freedom in the workplace, Congress must be very, very sensitive. We must protect the rights of the worker to practice his or her religion. We must also consider the legitimate needs of the employer to have a productive workplace, and we must protect the rights of fellow coworkers.

This bill seeks to strike the right balance among providing meaningful religious accommodation, protecting others when those accommodations might conflict with their rights, and avoiding needless burdens on the employers.

I suspect that today we will hear about whether that right balance has been struck. It seems that most people, if not everyone, engaged in this issue have the same intent and purpose in mind: to advance the right of employees against religious discrimination, without imposing undue hardships on the employers and without infringing on the rights of others. During the course of this hearing, we should keep in mind that common intent and purpose.

I look forward to hearing today's testimony from a very esteemed group of witnesses. Their testimony will help us advance a common cause: to protect people from having to choose between living their faith and earning a living, while ensuring that any accommodation which the law might mandate does not trample on the fundamental rights of others.

Thank you very much, Mr. Chairman.

Chairman JOHNSON. Thank you, Mr. Kildee.

We have two distinguished panels of witnesses today.

For the first panel, we welcome our colleagues and fellow members of the Education and Workforce Committee, Congressman Souder and Congresswoman McCarthy, who have sponsored the Workplace Religious Freedom Act.

I do not think I need to explain the light system to you two, but we will restrict you to 5 minutes.

Mr. Souder, you are recognized.

STATEMENT OF HON. MARK E. SOUDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. SOUDER. Thank you very much, Mr. Chairman, for the opportunity to testify and for holding this hearing today on the Employer-Employee Relations Subcommittee.

The Workplace Religious Freedom Act has broad bipartisan support in both the House and Senate, indicating that it is an issue that deserves serious consideration. Senators John Kerry and Rick Santorum, a somewhat unusual combination, just like Congresswoman McCarthy and myself, and Chris Van Hollen was just at our press conference, have been leaders on this legislation for a number of years. I am pleased to be able to work with them in moving this legislation forward in the House.

Let me start by laying out a rationale why this legislation is needed at this particular point in American history.

I would add: an unusual opportunity time. We argue all the time about faith-based legislation, but here is one where the left and right both agree. It is a way for us to show, in a united way, the importance of religious liberty and faith in our country at a time when we are in fact becoming more diverse. This bill offers that opportunity.

As America becomes increasingly diverse in its ethnic and religious heritage and as more Americans are finding their religious beliefs at odds with the secular and often anti-religious society, the need for strengthening religious liberties has become all the more important, and indeed necessary.

America was founded as a place of religious freedom, and yet today these very freedoms are being denied as some employers refuse to work out reasonable accommodations for their employees' religious observances.

Catholics, Jews, Muslims, conservative evangelical Christians and individuals from many other faiths have found themselves in the position of having to compromise their religious convictions in order to keep their job.

In fact, three are behind me: James Aligne is from Maryland and he lost his job; Deborah Fountain from California lost her job; and Miguel Hernandez from Arizona, are all here.

They lost their jobs because they tried to practice their faith. In fact, in Deborah's case, the employer then came back and found a reasonable accommodation. None of them were things that could not have been accommodated inside the workplace, which is what our bill tries to do.

In fact, the Supreme Court has effectively thwarted the intent of Congress as expressed in the 1972 amendments in Title VII of the Civil Rights Act of 1964: to protect all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or perspective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Because in the Trans World Airlines case, what they did is they took a de minimis standard opposed to an undue hardship. Well, de minimis makes it almost impossible to prove because a de minimis cost gives the employer such a huge upper hand in the negotiations, and in many of these cases they are not high-paying jobs, they are lower-paying jobs. So it is not like the employee has a lot at stake here in the sense of lawsuits.

Before my time runs out, because the chairman outlined much of the undue hardship and the reasonable accommodation standard, I want to address some concerns that the business community, including in my district, has expressed to me and some of the conservative concerns with this bill, which I believe are incorrect.

One of them is that this is somehow going to impose or lead to a proliferation of lawsuits. In fact, litigation probably will decline under this bill if it became law.

What has happened is, in the last 10 years where they have the data, from 1993 to 2003, religious discrimination in the workplace rose 82 percent because we do not understand the standards. And this is in spite of the fact that the burden is really on the employee because you do not do class action suits. You do get large-dollar settlements here. All you can do is get your job back or the amount that you lost in that period, and if it is a low-paying job, the cost of going to trial is far greater.

So, the only cases that are being brought are basically nonprofits who have a backlog of cases because the discrimination has become more prevalent. So it is not like there is going to be this huge bursting out of lawsuits where attorneys' fees can get you 30 or 40 percent and huge, huge settlements. These are basically grassroots people from all sorts of faiths who have lost mostly low-to medium-paid jobs and do not have the resources even to protect their religious rights.

Now, from the business side, they will probably get less lawsuits because if we can clarify this, then you can at the very least stabilize it.

Now, another thing is, how do we sort through whether people are going to claim they are in a religion? Well, we have standards. It is defined in the different acts, and furthermore if it does, there is no financial incentive to make up a religion so you do not have to work Saturdays, because the whole thing here is then you are going to have to go through the lawsuits. All you are going to do is get the job back, unless you could establish that it was a valid reason in court.

That is the key thing. The court gets to determine whether it is a truly held belief, a valid belief, and they can go into that examination, and that has not been a problem. I do not believe the validity of the religion will be a problem.

[The prepared statement of Mr. Souder follows:]

Prepared Statement of Hon. Mark E. Souder, a Representative in Congress From the State of Indiana

Thank you, Mr. Chairman, for the opportunity to testify before the Employer-Employee Relations Subcommittee today. I appreciate being able to discuss a bill that I have introduced, along with my colleague Congresswoman Carolyn McCarthy, that will help restore religious liberties in the workplace.

The Workplace Religious Freedom Act, H.R. 1445, has broad, bi-partisan support in both the House and Senate, indicating that it is an issue that deserves serious consideration. Senators John Kerry and Rick Santorum have been the leaders on this legislation for a number of years, and I am pleased to be able to work with them in moving this legislation forward in the House.

Let me start, by laying out the rationale for why this legislation is needed at this particular point in American history. Then, I'll address, briefly, some of the concerns that I have heard about this legislation, and I'll be happy to answer any questions my colleagues may have.

Why WRFA? Why Now?

As America becomes increasingly diverse in its ethnic and religious makeup, and as more Americans are finding their religious beliefs at odds with a secular, often anti-religious society, the need for strengthening religious liberties has become all the more important and, indeed, necessary. America was founded as a place of religious freedom, yet today those very freedoms are being denied as some employers refuse to work out reasonable accommodations for their employees' religious observances. Catholics, Jews, Muslims, conservative evangelical Christians and individuals from many other faiths have found themselves in the position of having to compromise their religious convictions in order to keep their job.

While the large majority of the Title VII religious accommodation cases involve religious garb, grooming or observance of holy days, about 25 percent of the cases involve other religious accommodation requests, such as conscience objections to certain work activities. One gentleman who is with us in the audience today was working as a network designer and systems engineer in the Maryland suburbs. As a member of the Seventh Day Adventist Church, he objected to his assignment to work on a website project that sold and distributed pornography. Fortunately, this gentleman was able to find work elsewhere since he was a highly skilled worker, but he shouldn't have been forced to make this choice. There are many other employees across the country that are not so fortunate.

A former small businessman and a conservative evangelical Christian myself, I understand the tension in the workplace between accommodating the beliefs of all religious employees—particularly those of a minority religion—and maintaining a profitable and productive business. It isn't always easy to find a solution agreeable to both the employer and employee. Yet, if America is to stand as the protector of religious freedom, the work environment must be a place where people of all faiths are free to follow their conscience without fear of losing their job.

How Would WRFA Change Current Law?

As you may know, existing civil rights law does provide some protections to religious people in the workplace. However, these protections have been severely undermined by a few Supreme Court cases that have effectively thwarted the intent of Congress—as expressed in the 1972 amendments to Title VII of the Civil Rights Act of 1964—to protect "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business (42 U.S.C. § 2000e(j))."

In Trans World Airlines v. Hardison, the Supreme Court re-interpreted Title VII religious liberty protections by applying a "de minimis" cost standard to the definition of "undue hardship" on the employer. The Court held that "to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." This new de minimis standard established such a low threshold for employers that today there is little incentive for them to work out religious accommodations with their employees.

The Workplace Religious Freedom Act is necessary to re-establish the intent of Congress that only real hardship is reason for an employer not to provide a reasonable accommodation for an employee. My bill would define "undue hardship" as a "significant difficulty or expense," similar to the definition used in the Americans with Disabilities Act. The bill establishes several criteria for determining what constitutes a significant difficulty or expense, including the costs of providing such an accommodation, the size of the employer (in terms of financial resources and number of employees), and the geographic separateness or administrative or fiscal relationship of an employer's multiple facilities.

The bill I introduced will also establish that a "reasonable accommodation" "shall remove the conflict between employment requirements and the religious observance or practice of the employee." The reasonable accommodation requirement of current law was interpreted by the Supreme Court in Ansonia Board of Education v. Philbrook to favor the preferred accommodation of the employer—not the employee. The Workplace Religious Freedom Act would require the employer to find an accommodation that satisfies the employee as long as that accommodation does not impose a significant difficulty or expense on the employer.

Together, I believe the proposed new definitions of "reasonable accommodation" and "undue hardship" strike the appropriate balance between employer and employee rights as they relate to religious liberty in the workplace.

To clarify the rights of employers, however, the legislation states that an employee must be able to perform the "essential functions" of his or her job "with or without reasonable accommodation." This provision ensures that an employee cannot request an accommodation that would make it impossible to fulfill the core requirements of a job. The "essential functions" term cannot, however, be interpreted to include practices such as wearing religious clothing, taking time off for religious observances, or "other practices that may have a temporary or tangential impact on the ability to perform job functions." Those practices may not be considered an "essential function" of a job under this legislation, unless an accommodation for those practices is believed to be an "undue hardship" on the employer. For instance, if an individual applied for a weekend watchman job at a warehouse and knew that his particular faith disallowed working on either a Saturday or Sunday, the employer would not be obligated to provide an accommodation for that individual.

Addressing Concerns

Whenever legislation deals with such a highly individual and personal subject as religion in the workplace, there will always be criticism from various groups that are unsure of how it will be carried out in practice. Fortunately, however, WRFA does have some precedent in state law that can be examined to determine how it might play out on a national level. The state of New York passed a law similar to WRFA in 2002 that, by all reports, has not resulted in the dire predictions anticipated by critics on both the right and left. According to Attorney General Eliot Spitzer, New York's law has not been overly burdensome on businesses or resulted in an increase in litigation; nor has it resulted in the infringement of a woman's ability to have an abortion or purchase birth control as the ACLU has predicted.

Still, even with the positive experience with workplace religious freedom law in New York, criticisms of WRFA still exist. I do believe, however, that some of these concerns can be resolved with a clear explanation of the facts about the bill.

I know that my colleague Mrs. McCarthy will be addressing some of the concerns from the more liberal perspective, so I will focus my analysis on those criticisms from traditional Republican constituencies—namely the business community. First, however, let me just say that religious accommodation will not work without a little give and take from all interested parties. Religious accommodation cannot mean anything an employee wants it to be—especially when it has a direct impact on other individuals, whether they be co-workers or a business' clients or customers. Thus, whether one is a conservative Christian, devout Muslim, or adherent of a smaller, less organized religion, he or she should not be able to demand an accommodation that would impose significant difficulty or expense on the employer or result in the inability to perform the core functions of his or her job.

With that said, let me address just a few of the concerns of the business community: the potential for a rise in litigation and a growth in fraudulent religious claims.

First, quite to the contrary of some of WRFA's critics, regarding litigation, the Workplace Religious Freedom Act is expected to reduce or at the very least stabilize litigation. Between 1993 and 2003, claims to the EEOC involving religious discrimination in the workplace rose 82 percent. During this same time period, racial discrimination cases declined slightly. By clarifying the "undue hardship" standard for employers to work out a religious accommodation with employees, litigation will be

reduced as fewer employees will be forced to sue in order to get the attention of their employers.

Additionally, according to James Morgan, a professor of Legal Studies in Business at California State University, Chico, there has been some disagreement in lower courts as to the interpretation of the Hardison and Philbrook Supreme Court Opinions. This judicial confusion has led to varying standards and interpretations of the Title VII religious accommodation provisions, possibly resulting in an increase in litigation. Morgan writes: "A strong argument can be made that many lower courts are writing opinions favoring the employee's position, in possible violation of the restrictive mandate that necessarily flows from the Hardison/Philbrook approach, because they perceive the Court's position as overly burdensome on the rights of religious applicants and employees." [1] WRFA will ensure that the religious accommodation provisions (as amended in 1972 to Title VII of the Civil Rights Act of 1964) are clarified in U.S. Code as originally intended by Congress. This clarification will help reduce litigation, while at the same time provide greater incentive for employers to work out an amicable accommodation with religious employees.

Secondly, let me address the concern that WRFA will result in an increasing number of bogus religious claims by employees who are seeking time off or dislike strict requirements on outward appearance and dress. I can sympathize with these concerns from the business community, especially as religious beliefs are becoming increasingly more personal and difficult to classify according to more traditional views of religious belief and practice. However, the Workplace Religious Freedom Act does nothing to change the current definition of "religion" under EEOC guidelines. Existing Title VII interpretive guidelines published by the Equal Employment Opportunity Commission (EEOC) provide that: (1) religious practices protected under Title VII include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views;" (2) a person may ascribe to a particular religious belief even if "no religious group espouses such beliefs or the fact the religious group to which the individual professes to belong may not accept such belief," and (3) the term "religious practice" includes "both religious observances and practices."

Admittedly, this broad interpretation of religion and religious practices makes it difficult for an employer to call into question the validity of an employee's stated religious beliefs or practices. However, the courts can examine whether an individual has a "sincerely held" religious belief. Few individuals would go through the trouble and expense of being fired from their job and suing their employer in order to obtain an accommodation if they did not sincerely hold their religious beliefs. And, of course, there is a limit to what an employee can receive as an accommodation. If the employee's request would result in a significant difficulty or expense to the employer, the accommodation would not have to be granted. Additionally, I am hesitant to allow the federal government to further tinker with the definition of religion for fear that it could be defined so narrowly that many religious beliefs and practices would be considered ineligible for purposes of making accommodations.

I am sure there are other concerns that I have not addressed, but I believe these are the most common concerns I have heard. Part of the reason I have been looking forward to this hearing is to listen to the panel members and my colleagues to understand the concerns that they may have. This legislation has been carefully crafted over a number of years, but I am always open to considering other legitimate possibilities as long as they result in restoring the intent of the 1972 amendments to the Civil Rights Act of 1964, which was to hold employers accountable to working out a reasonable accommodation for their religious employees.

Thank you again, Mr. Chairman, for this opportunity to testify before the subcommittee today. I am happy to answer any questions.

Chairman JOHNSON. Thank you, Mr. Souder.

Mrs. McCarthy, you are recognized.

STATEMENT OF HON. CAROLYN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mrs. MCCARTHY. Thank you, Mr. Chairman and fellow members of our subcommittee, and Mr. Kildee, ranking member. I welcome

[1] James F. Morgan, "In Defense of the Workplace Religious Freedom Act: Protecting the Unprotected Without Sanctifying the Workplace," Labor Law Journal, Spring 2002: 71.

the opportunity to testify about the Workforce Religious Freedom Act.

I also want to thank my colleague, Mr. Souder, for bringing this to my attention and working with him on it. We have worked bipartisanly on this bill for months and have not wavered in our support.

Secondly, I would like to thank Senator Kerry and Senator Santorum for introducing the same legislation in the Senate. As was mentioned earlier, who thought that two of the Democrats and two of the Republicans would be working on this?

I have a letter of support from the senators, which I would like to include into the record.

Chairman JOHNSON. Without objection, so ordered.

[The letter follows:]

United States Senate

WASHINGTON, DC 20510

November 7, 2005

Chairman Sam Johnson
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
1211 Longworth House Office Building
Washington, DC 20515-4303

Ranking Member Robert E. Andrews
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
2439 Rayburn House Office Building
Washington, DC 20515-3001

Dear Chairman Johnson and Ranking Member Andrews:

We are writing to express our strong support for the bipartisan Workplace Religious Freedom Act (WRFA), HR 1445. We have introduced companion legislation in the Senate. America is distinguished internationally as a land of religious freedom, and it is a value we seek to promote abroad as we speak out against religious persecution and discrimination around the world. For this reason, it is especially important that the United States be a place where people are not forced to choose between keeping their faith and keeping their job. WRFA provides a balanced approach to reconciling the needs of people of faith in the workplace with those of employers.

Title VII of the Civil Rights Act of 1964 was meant to address conflicts between religion and work. It requires employers to reasonably accommodate the religious needs of their employees so long as it does not impose an undue hardship on the employer. The problem is that our federal courts have essentially read these lines out of the law by ruling that any hardship is an undue hardship and have thus left religiously observant workers with little or no legal protection. WRFA will re-establish the principle that employers must reasonably accommodate the religious needs of employees. This legislation is carefully crafted and strikes an appropriate balance, respecting religious accommodation while ensuring that an undue burden is not forced upon employers. WRFA is also careful to ensure that the accommodation of an individual employee's religious conscience will not adversely affect the delivery of products or services to an employer's customers or clients.

This legislation is supported by a broad spectrum of groups including the Christian Legal Society, the Union of Orthodox Jewish Congregations, the Southern Baptist Convention, the National Council of Churches, the North American Council for Muslim Women, the Sikh Resource Taskforce, the Seventh Day Adventist Church, the American Jewish Committee, Agudath Israel of America and many others.

America is a great nation because we honor not only the freedom of conscience, but also the freedom to exercise one's religion according to the dictates of that religious conscience. This fundamental freedom is protected and strengthened in this legislation by re-establishing an appropriate balance between the demands of work and the principles of faith.

We appreciate you scheduling a hearing on this important legislation and stand ready to be of assistance in any way that we can.

Sincerely,

Rick Santorum
United States Senate

John Kerry
United States Senate

Mrs. MCCARTHY. Thank you.

This bill, simply stated, is pro-business, pro-faith and pro-family. It is an important piece of legislation whose passage is long overdue.

I felt the need to get involved with this legislation, with over 40 diverse organizations in favor of this legislation, because I have heard of many individuals who were forced to choose between their job and their religions.

Nowadays, we have a 24/7-week work environment that clashes with our religions observations. Unfortunately, since 9/11, our Muslim and Sikh friends have been the target of backlash. Our great nation was founded under the principles of freedom, including religion. We, as members of Congress, have the responsibility to ensure people are able to freely practice. Asking the person to leave their religion at their door is impossible and something they should not be asked to do.

In 1964, as mentioned before, we had Title VII of the Civil Rights Act. Simply stated, employers are not allowed to discriminate based on race, gender, color and religion.

But as the courts began to rule in the cases, they ruled that any hardship is an undue hardship. This has left religious-observant workers with little legal protection.

We are trying to re-establish the principle that employees must reasonably accommodate the religious needs of employees. We would do this by redefining "undue hardship" as something that imposes significant difficulty or expense on the employer or that would keep an employee from carrying out the essential functions of the job.

It is an important point to make that the third parties would not be adversely affected. I am hearing and reading a lot regarding the bill from organizations which I agree with a majority of the time that third parties would be affected.

I am a pro-choice member of Congress and believe a woman should be able to choose what happens to her body, especially in the case of an emergency. This legislation would not prevent a woman from receiving an emergency abortion, obtaining birth control medications or emergency contraceptives.

For example, if a nurse—and by the way, you all know my background as a nurse—if a nurse has a religious objection to partici-

pating in an emergency abortion, she would be covered. Performing emergency surgery is an essential function of a nurse's job. A court would not hear a case brought by a nurse who feels wrongly dismissed by a hospital because the nurse walked away from a patient in a case of emergency care. A patient who is suffering places a significant burden on a hospital, and a hospital would have to assist them.

Unfortunately, there has been a need to have clinics protected in this day and age. This law would not allow a clinic to be unprotected. If a police officer had a religious objection with guarding the clinic, the request for removal is accommodated as long as a replacement was possible. If not, then the officer must accept the assignment.

Another concern I have heard regarding the bill is women would have difficulty obtaining birth control because this bill would protect a pharmacist who feels it is against their religion fulfilling the prescription.

Currently, the American Pharmacists Association policy is that pharmacies can refuse to fill prescriptions as long as they make sure customers can get their medication some way. This is exactly the point of this legislation.

We would be allowed to have a pharmacist who has a strong religious objection in filling the prescription from doing so without any effect on the individual. She would still receive her prescription.

I would like to point out that WRFA does not apply to employees who have fewer than 50 employees, so we are taking care of the small-business person. This protects against a circumstance in which an employee would not have a personal place or it is located in a rural area.

I think the reason that we are testifying today is really because we want to take away from the mix of what some people might be seeing in this bill. New York State already has this type of legislation in our state, and it is working very, very well. We brought this legislation and we appreciate your having this hearing, because it would give us the opportunity to answer the questions where there might be some confusion about it.

This country is different today than it was 50 or 60 years ago. But even going then, when my great-grandparents came to this country, they were Catholic, and they were discriminated against. That is one of the reasons why I have a very strong feeling about this.

And it is our job as Congress-people to certainly protect the constitutional rights. It is something I strongly feel. We might disagree on a number of issues in this Congress, but when many of us can come together, I think that is the important thing.

Thank you, Mr. Chairman. I look forward to answering any questions.

[The prepared statement of Mrs. McCarthy follows:]

Prepared Statement of Hon. Carolyn McCarthy, a Representative in Congress From the State of New York

Thank you Mr. Chairman and fellow members of the subcommittee.

I welcome the opportunity to testify about the Workforce Religious Freedom Act.

I would first like to thank my colleague, Mr. Souder. We have worked bipartisanly on this bill for months and have not wavered on our support. Secondly, I would like

to thank Senator Kerry and Senator Santorum for introducing the same legislation in the Senate and their tireless work.

This bill, simply stated, is pro-business, pro-faith and pro-family. It is an important piece of legislation whose passage is long overdue.

I felt the need to get involved, with the over 40 diverse organizations, in favor of this legislation because I have heard of many individuals who are forced to choose between their job and their religion. Nowadays we have a 24 hour, 7 day a week work environment that clashes with religious observances. And unfortunately, since 9/11 our Muslim and Sikh friends have been the target of backlash.

Our great nation was founded under the principles of freedom, including religion. And we as members of Congress have a responsibility to ensure people are able to freely practice. Asking a person to leave their religion at their door is impossible and something they should not be asked to do.

In 1964 Congress realized the importance of religion to workers by providing Title 7 of the Civil Rights Act. Simply stated employers are not allowed to discriminate based on race, gender, color and religion. But as the courts began to rule on cases they ruled that any hardship is an "undue hardship." This has left religiously observant workers with little legal protection.

WRFA will re-establish the principle that employers must reasonably accommodate the religious needs of employees. WRFA would redefine undue hardship as something that imposes significant difficulty or expense on the employer or that would keep an employee from carrying out the essential functions of the job.

An important point to make is that third parties would not be adversely affected. I have been hearing and reading a lot regarding the bill from organizations, which I agree with a majority of the time, that third parties would be affected.

I am a pro-choice member of Congress and believe a woman should be able to choose what happens to her body, especially in case of an emergency. This legislation would not prevent a woman from receiving an emergency abortion, obtaining birth control medication or emergency contraceptives.

For example, if a nurse has a religious objection to participating in an emergency abortion she would not be covered under WRFA. Performing an emergency surgery of any kind is an essential function of nurse's job.

A court would not hear a case brought by a nurse, who feels wrongly dismissed by a hospital because the nurse walked away from a patient in need of emergency care. A patient who is suffering places a significant burden on a hospital and the hospital would have to assist them.

If a woman goes to an abortion clinic she can be subjected to violence and threats. Unfortunately there has been a need to have the clinics protected. This law would not allow a clinic to be unprotected.

If a police officer had a religious objection with guarding the clinic his request for removal is accommodated as long as a replacement was possible. If not, then the officer must accept the assignment.

Another concern I have heard regarding the bill is women would have difficulty obtaining birth control because WRFA would protect a pharmacist who feels it is against their religion from filling the prescription.

Currently, The American Pharmacists Association's policy is that pharmacists can refuse to fill prescriptions as long as they make sure customers can get their medications some other way. This is exactly the point of the legislation!! WRFA would allow a pharmacist who has a strong religious objection to filling the prescription from doing so without any affect on the individual. She would still receive her prescription.

I'd like to point out that WRFA does not apply to employers who have fewer than 15 employees. This protects against circumstances in which an employer would not have the personnel in place or is located in a rural area. So, for example, a pharmacy with less than 15 employees would operate under their association's policy.

It is time to allow people to once again practice their religion without fear of losing their job.

Once again I thank you for the opportunity to talk about legislation that is pro-business, pro-faith and pro-family.

I welcome any questions you may have.

Chairman JOHNSON. Thank you, Mrs. McCarthy.

Mr. Souder, I might ask you, you have people here, do you want to take one case in particular and explain to us why you are interested in this legislation? Can I ask you, will it stop the wind from blowing through the windows up there?

[Laughter.]

Mr. SOUDER. Let me use Deborah Fountain's case and relate it to a couple of others.

In her case—she is behind me here—she was an airline attendant and wanted to have the Sabbath off. They fired her. Then they came back and, my understanding is, rehired her with a Sabbath-accommodating schedule, because of course when you are flying seven days a week and have all these flights, it is not that hard to accommodate this kind of stuff.

There was another case of a Sears repairman who wanted Saturdays off, and they said it was the busiest repair day, and so they fired him. Now, the fact is that Saturday turned out not to be the busiest repair day.

In another case, they were pressing on the Saturday Sabbath question and found that the person said he would come in at sundown.

Now, if it is an essential function—this was what Congressman McCarthy said is critical—if it is an essential function, you cannot get the Saturday off. If that becomes a key part of their job—in retail furniture that I grew up in, as much as 40 percent of the sales may fall on a Saturday. If you are the top salesman, then you would define that much like in parental and family leave, where we have key employees, we do this essential function-type stuff all the time in legislation. This is not that hard to work through, yet it is one of the big bogeymen that we try to deal with this.

I have a company in my district that the way they first found they had very devout Muslims was their assembly line crashed at prayer time. They tried to figure out why the line crashed: because two people went down on the rug and started praying to the east.

Now, they could have fired them, which many companies would do. They could have said, "Oh, this is inconvenient. Just work through this." But they adjusted the break period, and in the one break room they set it up so they could have a prayer in the break room, adjusted the schedule, and everybody is happy.

Now, in a tight labor market in that area, they have a significant percentage in this rural country town of Arab employees because they showed some sensitivity to their culture with no impact whatsoever on the production at the factory. What was so hard about that?

Some people just want to fight the change, and that is why it is not effective. If they are a key employee or if it is an essential function, you can have these type of things in law, but some people just do not want to do anything. That, kind of, is inconvenient, and that is what the court has given the advantage of. If a business does not feel like accommodating you, they do not have to accommodate you.

Mrs. MCCARTHY. I would like to just follow up on that too.

In my world of nursing, obviously we worked 24/7. Every patient had to be covered in the hospital that I worked in. And yet many of us nurses, whether they were Muslim nurses or Jewish nurses or myself, we always were able to accommodate each other. I think that is important to know, because basically the hospital allowed us to accommodate each other.

Now, there were many times I would have loved to have Christmas off every single year, but I can certainly remember working on

Christmases because they could not replace me. I worked in the intensive care unit; I understood that.

This legislation would also enforce that. If there is no accommodation there, then that person would have to work. So I think it is a fair and balanced thing.

Chairman JOHNSON. Thank you, both.

Mr. Kildee, you are recognized for 5 minutes.

Mr. KILDEE. Thank you very much.

I appreciate Mr. Souder's and Mrs. McCarthy's work on this.

One question to Mrs. McCarthy. You say New York state has a similar law to the one you are proposing. How has the business community accommodated itself to that law?

Because New York is not just New York City. It is quite a microcosm of America when you travel the whole state of New York.

Mrs. MCCARTHY. I think what this legislation also does, in New York because we do have a similar law, it is really a matter of accommodation. We have found that with the law in New York, it gave the employers and the employees exactly what the rules were, so everyone knew exactly where they were when they were asking for accommodations on their religion.

Now, I understand New York certainly is a very, very large area, but we found that they could accommodate it and it did not hurt businesses at all. I think it is something, whether it is a low-income job or even on the higher end, the businesses have been able to accommodate it.

So, I think that what we are trying to do—and that is why I certainly support this legislation, is that we are doing it in New York. It already is working well in New York, and I think the rest of the country needs to catch up to New York.

Mr. KILDEE. After the enactment of the New York law, did you see any increase in litigation or decrease or about the same?

Mrs. MCCARTHY. Actually less, mainly because, again, the companies saw what their responsibility was and it was clear, it was actually clear, on how to accommodate those that were looking for the day off on their religious observation.

Mr. KILDEE. Thank you very much.

I yield back.

Chairman JOHNSON. Thank you, both. I think there are no more questions. We appreciate your testimony. You all may step down.

Would the next panel come forward and take their seats, please?

Dr. Richard Land is president of the Ethics and Religious Liberty Commission, the Southern Baptist Convention's official entity assigned to address social, moral and ethical concerns. Dr. Land is executive editor of the magazine "Faith and Family Values," and was appointed this year to the U.S. Commission on International Religious Freedom. Dr. Land received his bachelor's degree from Princeton and his doctorate from Oxford.

Mr. Richard Foltin is legislative director and counsel in the American Jewish Committee's Office of Government and International Affairs. He serves as the chair of the ABA's First Amendment Rights Committee and is a member of the National Council of Church's Committee on Religious Liberty. Mr. Foltin received his bachelor's degree from New York University and his law degree from Harvard.

Mr. Samuel Marcosson is an associate dean and professor of law at the University of Louisville's Brandeis School of Law. He has previously served as an attorney for the Equal Employment Opportunity Commission. Mr. Marcosson received his bachelor's degree from Bradley University and his law degree from the Yale Law School.

Mrs. Camille Olson is a partner in the law firm of Sayfarth Shaw and is a member of its Labor and Employment Law Steering Committee and chair of its Employment Law Committee. She has 20 years of practice in all areas of employment law, including employment discrimination. Ms. Olson received both her bachelor's and law degree from the University of Michigan.

You all have watched the lights up there. When they are green, you have 5 minutes to start, and when the little yellow one comes on, you have 1 minute. We would appreciate it if you all would restrict your comments to 5 minutes.

We will begin with Dr. Land.

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

Dr. LAND. Thank you, Mr. Chairman. It is an honor to be here to speak on this legislation.

As you are aware, the Southern Baptist Convention is the nation's largest non-catholic denomination, with more than 16 million members worshiping in more than 43,000 autonomous churches in the United States. The Ethics and Religious Liberty Commission is the official Southern Baptist entity charged by the Southern Baptist Convention to speak to our nation's moral, cultural and religious liberty issues.

I appreciate the opportunity to speak to this committee about the importance of the Workplace Religious Freedom Act of 2005 to Southern Baptists and to all people of faith.

The Southern Baptist Convention believes strongly in the principle of religious liberty for all Americans of all faiths, as well as those who espouse no faith. We believe that God has given this freedom to mankind and that therefore we have a duty to respect and ensure that freedom.

As recognized by the founders of this nation, freedom of religion is not merely the right to believe what we want, but the right to act in conformity with those beliefs. This is reflected in the historical record of the debates about the First Amendment, which shows that the framers rejected a proposed First Amendment text which would have protected freedom of conscience for a text that protects free exercise.

Given the great amount of time people spend in the workplace, it makes sense and is consistent with fundamental American values that more than 30 years ago Title VII of the Civil Rights Act of 1964 was amended to require employers to accommodate the religious needs of employees in the workplace unless doing so would impose an undue hardship on the employer.

It is tragic that this protection of the rights of Americans of faith has been eviscerated by the federal courts over the years and that the ability of religious Americans to have their religious needs ac-

commodated in the workplace relies upon the benevolence of one's foreman, shop steward or human resources leadership.

The Workplace Religious Freedom Act is not designed to revolutionize federal law. It simply seeks to reinstate the protection Congress put in place years ago and the courts have eroded.

WRFA is supported not only by most Southern Baptists but by as a broad and diverse a coalition of faith communities and organizations that you could assemble, conservatives and liberals, Catholics, Jews, evangelicals, Protestants, Sikhs, Muslims and others.

WRFA has also brought together a remarkably diverse set of bipartisan congressional sponsors. What unites us all is the simple principle that we will not prejudice particular faiths or practices, but wish to put a legal standard in place which says, so long as a religious accommodation will not adversely affect third parties, whether that third party is the employer, coworker or clients/customers of the employers, the employee's religious needs should be accommodated at work.

This principle unites people of diverse faiths because we all have challenges to our religious observances. This is truly one of those situations where we protect our own by protecting everyone. The Sikh ought to have his faith-mandated requirement to wear a turban accommodated, just as the Baptist who wishes to dress modestly. The Adventist and Orthodox Jew ought to have their work schedule accommodated for their holy day, just as the Catholic, Protestant and evangelical Christian who wishes not to work on Christmas or Good Friday.

The computer scientist who is suddenly assigned to a military contract which conflicts with her faith-informed pacifist beliefs ought ideally to be accommodated with a reassignment, just as a laboratory technician ought to be accommodated to not have to work on an embryonic stem-cell research project over her religious objections.

An array of criticisms have been asserted against WRFA, some from representatives of the business community who warn against it being unduly burdensome on employers and some who warn it imperils civil rights of one sort or another. What all these criticisms have in common is they are entirely hypothetical and speculative.

I believe business can accommodate the needs of people of faith without experiencing any measurable negative effects. Indeed, it is my conviction that a business that shows a genuine concern for the personal and spiritual lives of its employees, in doing so, is going to become a more productive company because its employees will be happier and more fulfilled.

WRFA has been road-tested in New York state, and as attested to in a letter to this subcommittee from Attorney General Eliot Spitzer, that state's WRFA statute has not proven to either burden businesses or imperil civil rights. We believe the results at the national level would be the same.

Thank you.

[The prepared statement of Dr. Land follows:]

Prepared Statement of Dr. Richard Land, President, the Ethics & Religious Liberty Commission, Southern Baptist Convention

Good morning, I am Dr. Richard Land, President of the Southern Baptist Convention's Ethics & Religious Liberty Commission. As you are aware, the Southern Baptist Convention is the nation's largest non-catholic denomination, with more than 16 million members worshipping in more than 43,000 autonomous churches in the United States. The Ethics & Religious Liberty Commission is the official Southern Baptist entity charged by the Southern Baptist Convention to speak to our nation's moral, cultural, and religious liberty issues.

I appreciate the opportunity to speak to this committee this morning about the importance of the Workplace Religious Freedom Act of 2005 to Southern Baptists and to all people of faith. The Southern Baptist Convention believes strongly in the principle of religious liberty for all Americans of all faiths, as well as those who espouse no faith. We believe that God has given this freedom to mankind, and that therefore, we have a duty to respect and ensure that freedom.

As recognized by the Founders of this nation, freedom of religion is not merely the right to believe what we want, but the right to act in conformity with those beliefs. This is reflected in the historical record of the debates about the First Amendment which show that the Framers rejected a proposed First Amendment text which would have protected freedom "of conscience" for our text that protects "free exercise."

Given the great amount of time people spend in the workplace, it makes sense and is consistent with fundamental American values that, more than 30 years ago, Title VII of the Civil Rights Act of 1964 was amended to require employers to accommodate the religious needs of employees in the workplace unless doing so would impose an undue hardship on the employer. It is tragic that this protection of the rights of Americans of faith has been eviscerated by the federal courts over the years and that the ability of religious Americans to have their religious needs accommodated in the workplace relies upon the benevolence of one's foreman, shop steward, or human resources leadership.

The Workplace Religious Freedom Act is not designed to revolutionize federal law, it simply seeks to reinstate the protection Congress put in place years ago and the courts have eroded.

WRFA is supported not only by most Southern Baptists, but by as broad and diverse a coalition of faith communities and organizations you could assemble-conservatives and liberals, Catholics, Jews, Evangelicals, Protestants, Sikhs, Muslims, and others. WRFA has also brought together a remarkably diverse set of bipartisan congressional sponsors. What unites us all is the simple principle that we will not prejudge particular faiths or practices, but wish to put a legal standard in place which says-so long as a religious accommodation will not adversely affect third parties, whether that third party is the employer, co-worker or clients/customers of the employer, the employee's religious needs should be accommodated at work.

This principle unites people of diverse faiths because we all have challenges to our religious observances, and this is truly one of those situations where we protect our own by protecting everyone. The Sikh ought to have his faith-mandated requirement to wear a turban accommodated just as the Baptist who wishes to dress modestly. The Adventist and Orthodox Jew ought to have their work schedule accommodated for their holy day just as the Catholic, Protestant, or evangelical Christian who wishes not to work on Christmas or Good Friday. The computer scientist who is suddenly assigned to a military contract which conflicts with her faith-informed pacifist beliefs ought, ideally, be accommodated with a reassignment just as a laboratory technician ought to be accommodated to not have to work on an embryonic stem-cell research project over her religious objections.

An array of criticisms have been asserted against WRFA, some from representatives of the business community who warn against it being unduly burdensome on employers, and some who warn of WRFA imperiling civil rights of one sort or another. What all these criticisms have in common is that they are entirely hypothetical and speculative. I believe business can accommodate the needs of people of faith without experiencing any measurable negative effects. Indeed, it is my conviction that a business that shows a genuine concern for the personal and spiritual lives of its employees is going to be a more productive company because its employees will be happier and more fulfilled.

Hopefully, a business will accommodate the religious needs and convictions of its employees voluntarily, and I am gratified to know that most go to considerable length to do so. But I know that some businesses are less responsive to their employees in these regards. In these cases, some guidelines seem imperative. Both the employer and the employee need to know what is expected of them and each other.

H.R. 1445 provides some very reasonable guidelines to help both the employee and the employer understand their responsibilities to each other in the accommodation of the employee's faith requirements in the workplace.

I know this approach works. WRFA has been "road tested" in New York State, which several years ago updated its state religious accommodation law to track the text proposed in H.R. 1445. As attested to in a letter to this Subcommittee from New York State Attorney General Eliot Spitzer, that state's WRFA statute has not proven to either burden businesses or imperil civil rights. We believe the results at the national level would be the same.

I appreciate the opportunity to share my convictions and express my support for this legislation. I will be pleased to make myself or my staff available to work with you or to answer any questions you may have, now or in the future.

Chairman JOHNSON. Thank you, sir. We appreciate your testimony.

Mr. Foltin, you may begin.

STATEMENT OF RICHARD T. FOLTIN, ESQ., LEGISLATIVE DIRECTOR AND COUNSEL, AMERICAN JEWISH COMMITTEE

Mr. FOLTIN. Mr. Chairman, Congressman Kildee, members of the subcommittee, thank you for this opportunity to testify on the Workplace Religious Freedom Act, an important bipartisan civil rights and religious liberty legislation introduced by Representative Mark Souder and Carolyn McCarthy.

My name is Richard Foltin. I serve as legislative director and counsel in the Office of Government and International Affairs of the American Jewish Committee.

I also have the privilege of serving as co-chair, together with James Standish, of the General Conference of Seventh-Day Adventists of the coalition promoting passage of WRFA. This is a broad coalition of over 40 religious groups which spans the political spectrum, reflecting the robust diversity of American religious life.

With the permission of the chair, I would like to submit for the record statements and letters of support for WRFA that have been prepared by several of these organizations.

Chairman JOHNSON. Without objection, so ordered.

[See Appendix I for all supplemental letters.]

Mr. FOLTIN. As you know, current civil rights law defines the refusal of an employer to reasonably accommodate an employee's religious practice as a form of religious discrimination unless such accommodation would impose an undue hardship on the employer.

But, as has already been discussed, this standard has been so vitiated by the fashion in which it has been interpreted by the courts as to needlessly force upon religiously observing employees a conflict between the dictates of religious conscience and the requirements of the workplace.

Indeed, as has already been pointed out by Congressman Souder, we are joined today by several employees or former employers who were placed in just that position. I would like to make note of a particular one of these individuals, Mr. James Aligne, who worked as a network designer and systems engineer for a company in Maryland.

In this role, he worked on a variety of commercial Web sites. He was assigned to work on a Web site for the sale and distribution of pornography, in violation of his religious beliefs. The continued

pressure to work on the project led Mr. Aligne to decide to seek employment elsewhere.

Now, as a highly qualified individual searching for work in a robust market, he was able to find that alternative work quickly. But the fact is that the current state of the law, in too many cases, can leave people in Mr. Aligne's position unprotected.

And unlike Mr. Aligne, many of those who experience intolerance in the workplace are low-skilled workers with few options. Those are the people, more than anyone else, who WRFA would protect.

The good news is that since the problems in this area turn on judicial interpretation of existing law, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress. That is what the Workplace Religious Freedom Act, which is moderate and well-crafted legislation, is intended to do.

Instead of the not more than de minimis standard established by the Supreme Court in 1977 in the Hardison case, WRFA would define "undue hardship" as an action requiring significant difficulty or expense, and would require that to be considered undue hardship, the cost of accommodation would have to be quantified and considered in relation to the size of the employer.

WRFA would also require that to qualify as a reasonable accommodation, an arrangement must actually remove the conflict, which would put to rest the notion that a neutral working arrangement or an attempt to accommodate that fails to accommodate a religious practice can itself be viewed as a religious accommodation.

The accommodation might, of course, still be an undue hardship, but a toothless and confusing definition of "reasonable accommodation" should not be utilized to avoid engaging in "undue hardship" analysis.

I note here that on the specific issue of collective bargaining arrangements, nothing in the bill purports to override the routine application of a bona fide seniority system.

Finally, in order to address concerns raised by the business community, WRFA would add to existing religious accommodation law, with certain clarifying language, a provision that an employer need not provide a reasonable accommodation if, as a result of the accommodation, the employee will not be able to fulfill the essential functions of the job.

I think all of these aspects of WRFA are part of New York state law, as has been discussed. And I would like to submit for the record a letter from the attorney general of the state of New York discussing how that law has worked, without raising the parade of horribles that some have raised as concerns about WRFA in that state.

[See Appendix I for all supplemental letters.]

Now, concerns have been raised as to the impact on business of WRFA. While I would be glad to elaborate on this in Q and A, I would just like to note that WRFA does not give employees a blank check to demand any accommodation in the name of religion and receive it. Rather, it restores the protection Congress intended for religious employees, while at the same time leaving in place a balancing test that still gives substantial regard to the legitimate needs of business, even as it somewhat levels the playing field for an employee in need of accommodation.

In addition, concerns have been raised that implementation of WRFA will lead to material adverse impacts on third parties either by somehow legitimizing the harassment of fellow employees in the workplace in the name of religion or by limiting access to reproductive health care.

Neither of those scenarios is a realistic scenario, based on a reasonable reading of this legislation, which makes clear, as one turns to existing cases which have interpreted existing law, that the courts are not by any means likely, in fact are exceedingly unlikely, to read into WRFA the kind of open door to harassment and denial of essential benefits that some have suggested would occur.

In sum, the courts clearly take impact on third parties very seriously as an element of undue hardship. And again and again, their analysis has not turned on the existing de minimis standard, and they would come to the same conclusions under the change in the standard proposed under WRFA.

Thank you.

[The prepared statement of Mr. Foltin follows:]

Prepared Statement of Richard T. Foltin, Esq., Legislative Director and Counsel, Office of Government and International Affairs, the American Jewish Committee*

Mr. Chairman, thank you for this opportunity to testify before the House Education and the Workforce Subcommittee on Employer-Employee Relations on the Workplace Religious Freedom Act, important civil rights legislation introduced as H.R.1445 by Representatives Mark Souder and Carolyn McCarthy.

And thank you, as well, Representatives Souder and McCarthy, for bringing this crucial religious liberty and antidiscrimination legislation to the fore. Your bipartisan effort sends exactly the right signal—that the effort to safeguard religious liberty and fight against religious discrimination is one that should, and must, bring together Americans from a broad range of political and religious persuasions.

My name is Richard T. Foltin. I serve as Legislative Director and Counsel in the Office of Government and International Affairs of the American Jewish Committee. The American Jewish Committee was founded in 1906 with a mandate to protect the civil and religious rights of Jews. Through the years, AJC has been a vigorous proponent of the free exercise of religion, not only for Jews, but for people of all faiths.

I also have the privilege of serving as co-chairman—together with James Standish, legislative director of the General Conference of Seventh-day Adventists—of the Coalition for Religious Freedom in the Workplace. This broad coalition of over forty religious groups—spanning the political spectrum and reflecting the robust diversity of American religious life—has come together to promote the passage of legislation to strengthen the religious accommodation provisions of Title VII of the Civil Rights Act of 1964. A list of the organizations comprising the coalition is appended to my testimony.

Current civil rights law defines the refusal of an employer to reasonably accommodate an employee's religious practice, unless such accommodation would impose an undue hardship on the employer, as a form of religious discrimination. But this standard has been interpreted by the courts in a fashion that places little restraint on an employer's ability to refuse to provide religious accommodation, needlessly forcing upon religiously observant employees a conflict between the dictates of religious conscience and the requirements of the workplace.

The Workplace Religious Freedom Act (WRFA) will promote the cause of protection of the free exercise of religion just as have two other bipartisan initiatives, the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted into law in 1993 and 2000, respectively. WRFA is a similar response to the failure of the Supreme Court, and of lower courts following the high court's lead, to give due regard to the importance of accommodation of religious practice in a heterogeneous society. However, as I discuss further below, the Workplace Religious Freedom Act is clearly distinguishable in terms of

*See additional submissions in Appendix I.

the issues that led the Supreme Court to strike down RFRA, as applied to state and local governments, as unconstitutional.

The Need for WRFA

Why is the Workplace Religious Freedom Act necessary? After all, in 1972 the U.S. Congress amended the Civil Rights Act of 1964 so as to define as a form of religious discrimination the failure of an employer to reasonably accommodate an employee's religious observance unless such accommodation would impose an undue hardship on the employer's business.[1] In so doing, Congress properly recognized that the arbitrary refusal of an employer to accommodate an employee's religious practice is nothing more than a form of discrimination. Unfortunately, this standard, set forth in section 701(j) of Title VII (42 U.S.C. section 2000e(j)), although appropriate on its face, has been interpreted by the Supreme Court and lower courts in a fashion that makes it exceedingly difficult to enforce an employer's obligation to provide religious accommodation.

The constricted reading of section 701(j) is no small matter. RFRA and RLUIPA were enacted by Congress in order to extend important protections to all Americans from undue government encroachment on their religious liberties. But for many religiously observant Americans the greatest peril to their ability to carry out their religious faiths, on a day-to-day basis, may come in the workplace.

Of course, many employers recognize that both they and their employees benefit when they mutually work together to find a fit between the needs of the workplace and the religious obligations of the employee. But it is not always so. In too many cases, employees who want to do a good job are faced with employers who will not make reasonable accommodation for observance of the Sabbath and other holy days.[2] Or employers who refuse to make a reasonable accommodation to employees who must wear religiously-required garb, such as a yarmulke, a turban or clothing that meets modesty requirements.[3] And the issues of holy day observance and religious garb, while accounting for a substantial portion of religious accommodation cases, far from exhaust the situations in which an employee is faced with an untenable choice because of an employer's failure to provide a reasonable accommodation.

Based on figures released by the Equal Employment Opportunity Commission, the number of claims of religious discrimination in the workplace filed for the fiscal year ending on September 30, 2004, as compared to the fiscal year ending on September 30, 1992, reflect a staggering increase of over 75 percent. During the same period, by comparison, claims involving racial discrimination declined slightly.

Behind the filing of each claim is the story of an American forced to choose between his or her livelihood and faith. Frequently, those who put their faith first suffer catastrophic losses, including their homes, their health insurance, their ability to help their children through college, and, in some particularly sad situations, their marriages. Where employers have no good reason for refusing to make religious accommodation, Americans should not face such a harsh choice.

One of the contributing factors to this dramatic rise in claims is the weakness of the accommodation provisions as currently written. Under current law, there is little incentive for recalcitrant employers to accommodate the religious beliefs of their employees. This does not deter people of faith in the workplace from asserting their rights, however, because many of them are unwilling to compromise their conscience no matter what the legal ramifications might be.

But there are other factors behind the increase in religious discrimination claims as well. These include the movement toward a twenty-four-hours-a-day/seven-days-a-week economy, with consequent conflict with religious demands for rest and worship on Saturdays, Sundays, or holidays; our nation's increasing diversity, marked by a broad spectrum of religious traditions, some of which may clash with workplace parameters that do not take into account the religious observances of immigrant communities; latent animosity toward some religious traditions after the September 11 attacks, a phenomenon evidenced by a particularly severe spike in religious claims after the attacks, when Sikh and Muslim Americans faced greater hostility at work; and a growing emphasis on material values at the expense of spiritual ones, with some employers refusing to see any adjustment in workplace requirements to allow for religious practices.

To be sure, EEOC data also suggests that in recent years that agency has evidenced a commendable increase in its bringing of religious discrimination cases, including cases premised on an employer's failure to provide an appropriate accommodation of religious practice. But the EEOC's ability to bring those cases successfully is necessarily limited by the strength of the underlying law. And the claims brought before the EEOC are but the tip of the iceberg. Many such claims go through local or state processes instead. And we will never know of the many people who do not bring claims having been advised, whether by an enforcement agency or by private

counsel, that the present law leaves them with no—or a vanishingly small chance of—recourse * * * and, therefore, to the choice of violating a religious precept or giving up a source of livelihood.

Hardison and Its Progeny

The seminal Supreme Court case in this area is Trans World Airlines v. Hardison, 432 U.S. 63 (1977). Larry Hardison was a member of a seventh-day denomination, the Worldwide Church of God, who was discharged by Trans World Airlines because he refused to work on Saturdays in his position as a clerk at an airline-maintenance facility that required staffing 24 hours per day, 365 days per year. The U.S. Court of Appeals for the Eighth Circuit ruled that TWA had not provided an adequate religious accommodation. TWA, joined by the employees' collective-bargaining representative, filed an appeal with the Supreme Court contending "that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment of the Constitution." The Court did not reach the constitutional question; it determined, instead—in a 7-2 decision—that anything more than a de minimis cost to an employer would be an "undue hardship" for purposes of section 701(j), and found that the proposed accommodations would have imposed such a cost. The Court also found that TWA had made reasonable efforts at accommodation.

Hardison had proposed several proposed accommodations to his employer, two of which were found by the Court of Appeals for the Eighth Circuit to be reasonable: "TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, * * * TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages." 432 U.S. at 84. But the high court rejected "[b]oth of these alternatives [because they] would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages. To require more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

Although Justice Marshall's dissent in Hardison, joined by Justice William Brennan, argues that Trans World Airlines had not satisfied its obligation to reasonably accommodate even under the "more than a de minimis cost" definition of "undue hardship," its more crucial point is that the Court's reading of section 701(j) reflects a determination by the Court that the Congress, in providing in the Civil Rights Act that an employer must make reasonable accommodation for religious practice, did "not really mean what it [said]." 432 U.S. at 86, 87. Justice Marshall went on to state:

An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.

432 U.S. at 87. In other words, the Court's reading of section 701(j), in particular the de minimis interpretation of "undue burden," so vitiates the obligation to reasonably accommodate as to result in "effectively nullifying it." 432 U.S. at 89.[4]

The history of religious accommodation litigation since 1977 bears out this vision. It would be an overstatement to say that employees seeking a reasonable accommodation of their religious practices never prevail in court, to say nothing of the many whose cases we never hear about because they and their employers work out an accommodation amicably. But a brief overview demonstrates that for the most part, to borrow the title of one law review article on the subject, "heaven can wait."

Thus, one might expect a "reasonable accommodation" to be one that actually removes the conflict with religious practice, with employers then required to show an "undue hardship" before being relieved of the obligation to provide such an accommodation. To be sure, courts have in some instances interpreted the requirement of reasonable accommodation to mean just that. See Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220, 226 (3d Cir. 2000). Nevertheless, there have also been disturbing cases in which courts have suggested—beginning with Hardison—that employees' rights under collective bargaining agreements or other "neutral" shift-allocation procedures are, in of themselves, reasonable accommodations even when those agreements make absolutely no provision for employee religious practices that may come into conflict with the requirements of the workplace.

It is in the application of the Hardison Court's interpretation of "undue hardship" that religiously observant employees have most often come to grief. The absence of nontrivial economic cost to employers has not prevented the courts from finding, on the basis of quite dubious rationales, that the provision of a reasonable accommodation will amount to an undue hardship.

In one case, Mohan Singh—a Sikh forbidden by his religious precepts from shaving his facial hair except in medical emergencies—applied for the position of manager at a restaurant where he was already employed, but he was denied the position because he would not shave off his beard. When the Equal Employment Opportunity Commission brought a religious discrimination claim on Mr. Singh's behalf, a federal district court ruled that "relaxation" of the restaurant's grooming standards would adversely affect the restaurant's efforts to project a "clean-cut" image and would make it more difficult for the restaurant to require that other employees adhere to its facial hair policy. EEOC v. Sambo's of Georgia, 530 F. Supp. 86 (N.D.Ga. 1981).

Hardison also held that the existence of seniority provisions in a collective bargaining agreement serves as a basis to find undue hardship in the granting of an accommodation because, for instance, to allow the employee his Sabbath off would be in derogation of the seniority rights of another employee. But, all too often, this conclusion is reached without further inquiry as to whether the bargaining representative might have been enlisted in a search for voluntary swaps or whether an exemption might be sought to provisions of the collective bargaining agreement that seem to stand in the way of an amicable arrangement (i.e., an arrangement that does not require a senior employee to give up his or her right not to work on a particular day).

The Supreme Court's lead in restrictively reading section 701(j) has been reflected in lower court rulings on other aspects of how that provision is to be applied. In Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982), Marvin Brener, a hospital staff pharmacist and Orthodox Jew, asked his supervisor to arrange his shift so that he would not have to work on Saturday, his Sabbath, or on Jewish holidays, such as Rosh Hashanah and Yom Kippur. Though granting the request at first, the hospital eventually refused, arguing that accommodation of Mr. Brener's religious practice posed a "morale problem" because other pharmacists were complaining about this "preferential treatment." Brener—scheduled to work on a day that his faith forbade him to—was forced to resign. He sued, but lost. In its ruling, a federal court of appeals held that it is the employee's, rather than the employer's, duty to arrange job swaps with other employees to avoid conflict with religious observance.[5] But an employer's inquiry is far more likely to be given serious consideration by fellow workers. Further, the employer is better situated to know which of the other employees is likely to be receptive to a request to adjust schedules. Conversely, once the employer appears indifferent to the request for accommodation, other employees may be less likely to cooperate. In short, placing the onus for arranging job swaps on an employee works to discourage that employee from seeking to avoid discrimination.

In another case, Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), the Supreme Court found that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate" and that the employer could refuse alternatives that were less onerous to the employee, but still reasonable. But even if the employer is left the discretion to choose the reasonable accommodation most appropriate from its perspective, two principles should apply—first, the accommodation should actually remove the conflict (which was the case in Philbrook but not, as has been noted above, in other cases), and, second, an accommodation should not treat a religious practice less favorably than other, secular practices that are accommodated.

The Workplace Religious Freedom Act

The constrictive readings of section 701(j) discussed above are inconsistent with the principle that religious discrimination should be treated fully as seriously as any other form of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination to be found elsewhere in this nation's civil-rights laws. Since the problems in this area turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress. That is what the Workplace Religious Freedom Act is intended to do.

Instead of the "not more than de minimis" standard, WRFA would define "undue hardship" as an "an action requiring "significant difficulty or expense" and would require that, to be considered an undue hardship, the cost of accommodation must

be quantified and considered in relation to the size of the employer. In this respect, it would resemble (although not be identical with) the definition of "undue hardship" set forth in the Americans with Disabilities Act. The ADA presents, in fact, an apt analogy to the provisions of Section 701(j). As it later did for Americans with disabilities, the U.S. Congress determined in enacting Section 701(j) that the special situation of religiously observant employees requires accommodation so that those employees would not be deprived of equal employment opportunities.

Crucially, WRFA would require that to qualify as a reasonable accommodation an arrangement must actually remove the conflict. This would put to rest the notion that a collective bargaining agreement or any other neutral arrangement, or an "attempt to accommodate," that fails to accommodate a religious practice might itself be viewed as a "reasonable accommodation." The accommodation might, of course, constitute an undue hardship, but a vitiated definition of reasonable accommodation should not be utilized to avoid engaging in undue hardship analysis.

WRFA would also make clear that the employer has an affirmative and ongoing obligation to reasonably accommodate an employee's religious practice and observance. This provision does not in of itself alter the standard for what is a reasonable accommodation or an undue hardship. It does, however, require that all to whom section 701(j) applies bear the responsibility to make actual, palpable efforts to arrive at an accommodation.

On the specific issue of collective bargaining arrangements, nothing in the bill purports to override section 703(h) of Title VII (42 U.S.C. section 2000e-2(h)), a provision included in Title VII to make clear that "the routine application of a bona fide seniority system [i.e., without intention to discriminate because of race, color, religion, sex, or national origin] would not be unlawful under Title VII." Teamsters v. United States, 431 U.S. 324 (1977). It would, however, encourage religiously observant employees and their employers, and a collective bargaining representative where applicable, to seek amicable arrangements within the context of an existing seniority system, perhaps through voluntary shift swaps or modifications of work hours.

WRFA also explicitly puts to rest any suggestion in the Philbrook case that it is appropriate to forbid the use of personal leave time for religious purposes when that leave is available for other, secular purposes.

Finally, in order to address concerns raised by business interests, WRFA—tracking an element of the Americans with Disabilities Act—would add to existing religious accommodation law, with certain clarifying language, a provision that an employer need not provide a reasonable accommodation if, as a result of the accommodation, the employee will not be able to fulfill the "essential functions" of the job. Once it is shown that an employee cannot fulfill these functions, the employer is under no obligation to show that he or she would incur an undue hardship were a reasonable accommodation to be afforded.

Concerns about Impact on Business

As was just referenced, there have been concerns raised WRFA will impose an unmanageable burden on employers. But the concept of religious accommodation is not, as we have seen, a new one under federal civil rights law. And, as under the current interpretation of Title VII, WRFA does not give employees a "blank check" to demand any accommodation in the name of religion and receive it. Rather, it restores the protection Congress intended for religious employees in enacting the 1972 amendment by adjusting the applicable balancing test in a fashion that still gives substantial regard to the legitimate needs of business standard even as it somewhat levels the field for an employee in need of accommodation.

In this regard, it is well to note that, as an amendment to Title VII and therefore subject to its restrictions, WRFA does not apply to employers of less than 15 full time employees. Moreover, the factors that it sets forth for determining what is an "undue hardship" are designed to make the determination context specific so that a relatively small employer—of, say, 100 employees, might well not have to provide an accommodation where a larger employer of 1,000 would have to do so.

It is commonly argued that fakers will seek illegitimate accommodations based on fraudulent beliefs. But the fact is that courts have for decades engaged in assessing the sincerity of asserted religious beliefs. Indeed, under the Supreme Court's 1965 decision in United States v. Seeger, 380 U.S. 163 (1965), the threshold question of sincerity as to religious belief must be resolved as a question of fact. In practical terms, the problem of insincerity in the realm of religious accommodation in the workplace is particularly small. People who do not have a genuine and sincere reason to ask for an accommodation are simply unlikely to risk employer displeasure and social stigma by doing so. In addition, religious accommodation cases are almost always brought after a worker has been fired. Given the economic disincentive to

bring such suits, it would be odd indeed for an individual to be fired and then spend financial resources to vindicate a religious belief she doesn't sincerely hold.

Historical precedent indicates that bogus claims are much more prominent in the minds of WRFA opponents than in reality. New York State has had a holy-day accommodation law for many years, yet there is no record of people bringing cases for failure to honor their "Church of the Super Bowl" or "Mosque of the Long Weekend." For that matter, there has been no epidemic of these fanciful claims under existing federal religious accommodation law.

Concerns about Impact on Third Parties

Another set of concerns has been raised that implementation of WRFA will lead to material adverse impacts on third parties. These concerns arise primarily in the context of two types of hypothetical situations—that WRFA will be used to protect those who would cite religious beliefs as a justification for harassing gays in the workplace, and that WRFA will be used to limit access to reproductive healthcare. These concerns are based on an unreasonable and untenable reading of the proposed law under which claims for accommodations that would have material adverse impact on third parties that have, until now, lost virtually without exception, might have different results should WRFA be passed. As an organization that supports both reproductive rights and measures to protect against discrimination on the basis of sexual orientation, the American Jewish Committee would not be supporting WRFA if we thought that it would lead to such baleful results.

A central component of WRFA, as is the case under current accommodation law, is its balancing test, albeit with a modification of the operative definitions of "reasonable accommodation" and "undue hardship." Nothing in that change in definition will alter the fact that courts are quick to recognize that workplace harassment imposes a significant hardship on employers in various ways: Permitting harassment to proceed unchecked opens the employer up to lawsuits based on the employer maintaining a hostile work environment; the loss of productivity and collegiality caused by attacks on colleagues constitutes a significant burden; and the cost of recruiting and hiring new employees to replace those who leave due to harassment also meets the significant burden test.

Thus, in Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012 (4th Cir. 1996), an appellate court dismissed the religious accommodation claim brought by an employer who was fired for writing accusatory letters to co-employees. The court reasoned, "where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If [the employer] had the power to authorize [the plaintiff] to write the letters, the company would subject itself to possible suits from [other employees] claiming that [the plaintiff's] conduct violated their religious freedoms or constituted religious harassment." As in Peterson, the court considered the proposition that the plaintiff's conduct constituted an undue hardship to be self-evident, and did not find it necessary to analyze the claim in terms of the de minimis standard.

Similarly, in the only reported Title VII religious accommodation case of which I know involving harassment of gays in the workplace, a court of appeals unequivocally decided in January of 2004 that Title VII provides no protection for the harasser. In that case, a Christian employee was fired when he refuse to remove form his cubicle a quote from the Bible condemning homosexuality. Both the lower court and the appeals court had no problem at all finding against the plaintiff on the Title VII claim he brought for failure to provide a religious accommodation. The Ninth Circuit did not discuss the standard the employer had to meet, but rather focused on the burden on fellow employees, finding, in effect, that religious beliefs cannot insulate actions that demean or degrade other employees. Peterson v. Hewlett-Packard, 358 F.3d 599 (9th Cir. 2004). There is nothing in WRFA that would change this analysis.

It is also significant that there is only one reported Title VII religious accommodation case involving the issue of harassment of gays in the workplace. While it is true that reported cases are a fraction of all cases brought, and that cases brought are a fraction of all complaints, nevertheless, it is illustrative that attempts to use Title VII to protect those involved in harassment of gays in the workplace are exceedingly rare.

Concerns have also been raised that WRFA would permit an emergency-room nurse to walk away from a woman in need of an emergency abortion on the grounds that the nurse's participation in the procedure would violate his or her religious precepts—as if any court hearing a case brought by the nurse against an employer for unfair dismissal would likely find that it is not a significant burden on the hospital when its employees refuse to treat patients in need of emergent care. If employees

leaving patients suffering isn't a significant burden on a hospital, one is forced to ask, what is? If facing significant malpractice liability from the patient for substandard care isn't a significant burden, what is? If risking the hospital's accreditation isn't a significant burden, what would be?[6]

The same analysis plays out in the context of the claim that WRFA would permit policemen to refuse to guard abortion clinics. If a policeman had a religious objection to guarding an abortion clinic, he could, under WRFA, ask to be reassigned. His employer would be required to facilitate such a reassignment, but only if by so doing it did not incur a significant burden. Sometimes accommodation would simply not be practicable. Does this mean that the abortion clinic would remain unguarded? No. In such circumstances the policeman would have to accept his assignment or accept the consequences of disobeying an order. Nothing in WRFA comes close to leaving abortion clinics exposed.

And, finally, it is claimed that WRFA would somehow empower pharmaceutical employees to refuse to fill prescriptions for birth control medication or for emergency contraception, even at the cost of the patient's prescription not being filled at all. Last year, this concern was raised in the context of a case in which a CVS pharmaceutical employee refused to fill a prescription for birth control pills because the pharmacist did not "believe" in birth control. After some initial confusion, CVS confirmed that the refusal was not in line with company policy, which requires that a pharmacist who refuses to dispense medication based on personal ideology must make sure that the patient's prescription is filled anyway, either by another pharmacist at that location or by another pharmacy in the area. In a similar vein, an Eckerd pharmacy fired a pharmacist who refused to fill a rape victim's prescription for emergency contraception.

As with existing Title VII provisions, WRFA provides a floor in terms of the extent to which an employer must accommodate an employee's religious practice, not a ceiling. Thus, WRFA has no role to play as to whether a pharmacy will require—as CVS and Eckerd do—that prescriptions be filled, regardless of an employee's personal beliefs. But, crucially, as in the context of abortion services, once a pharmacy does have such a policy, any fair reading of the "undue hardship" standard must lead to the conclusion that an employee fired for not filling the prescription would not be sustained under WRFA. Quite the opposite, given the impact on a customer whose prescription is not filled, this would constitute a palpable significant difficulty or expense.

In sum, the courts clearly take impact on third parties very seriously as an element of undue hardship and, again and again, their analysis does not turn on the de minimis standard. Indeed, the cases cited by opponents of WRFA often turn on aspects that have nothing to do with the "undue hardship" standard at all.[7] Moreover, the assertion that baleful results will flow from strengthening federal protections against religious discrimination are also without basis in the experience of prior efforts to enhance antidiscrimination law.[8]

Thus, the suggestion that Congress should not pass WRFA because it will open the door to harassment and denial of essential medical treatment places a fanciful swatting at phantoms over the very real need to remedy the harm faced by religiously observant employees every day.

Why the "Targeted" Approach Will Not Work

It has been suggested that the way to deal with these concerns is to resort to a so-called "targeted" approach, under which Congress would single out particular religious practices—dress, grooming, holy days—for protection under the WRFA standard. But the "targeted" approach embraces a troubling notion—that certain religious practices are simply not worthy of even a day in court to establish whether accommodation of those practices can be afforded without significant difficulty or expense for the employer or third parties. Again, the AJC—joined by many of the organizations supporting WRFA—is committed to combating discrimination on the basis of sexual orientation and to reproductive rights. But we are also committed to a fundamental premise of our Constitution and our society, that it is not up to the government to prescribe orthodoxies of belief or practice, and that the religious beliefs and practices of those with whom we disagree on these (and other) fundamental matters should be accommodated if this can be done without harm to others.

Moreover, under the "targeted" approach as many as 25% of accommodation claims would be consigned by a Faustian bargain to the old, inadequate standard—all in order to ensure that a subset of those claims with little chance of success are eliminated from a miniscule improved chance of success.

Claims that would be eliminated from coverage a targeted application of the WRFA standard include:

• Jehovah's Witness employees who request to opt out of raising the flag and pledging allegiance at work;
• A Methodist attorney who requests accommodation not to work on tobacco litigation;
• A Quaker (Society of Friends) employee who requests to be transferred to a division that does not work on armaments;
• An Orthodox Jewish woman who requests permission not to shake the hands of male customers;
• A Hindu employee who requests permission not to greet guests with the phrase "Merry Christmas;"
• A Christian employee who requests to be assigned to work that does not involve embryonic research;
• A Muslim hospital employee who requests to be exempted from duty in which she would be present when a member of the opposite sex is unclothed.

While these examples provide an overview of some of the types of cases that would be omitted from coverage by WRFA were the targeted approach adopted, it is by no means designed to give the totality of cases. Indeed, the variety of religious beliefs is one of the factors that make our nation such a fascinating place to live. In addition, there are numerous relatively new religious groups in the United States. Many of these groups are relatively small and some are primarily made up of immigrants. As a result, they often are unaware of their rights under current law, and frequently do not have the resources to vindicate their rights in the courts. Thus, the reported cases almost certainly undercount the claims from these groups. To agree to a targeted bill is to agree to a lower protection for these groups without their having any input in the decision.[9]

WRFA provides that when it can be shown that accommodating a person of faith in the workplace proves significantly difficult or expensive, the accommodation need not be provided. Whether that difficulty arises due to disharmony caused by a religious employee harassing another employee, when an employee refuses to provide medical care when no reasonable accommodation can be made, or whether the accommodation of the religious employee would result in disfavoring fellow employees or other third parties in a host of other ways, the balancing test provides assurance that religious employees will not trample the rights of others in the workplace.

Constitutional Issues

Amendment of the law so as to provide a reading of Section 701(j) that affords meaningful protections for religiously observant employees is consistent with the Establishment Clause's requirement that government action not favor one religion over another, or religion over non-religion.

It has been suggested by some commentators that the reading of "undue hardship" to mean not more than de minimis difficulty or expense was necessary to avoid a reading of the accommodation provision that would have caused it to run afoul of the Establishment Clause. Although not explicitly invoking the Establishment Clause, Justice White—writing for the Court in Hardison—asserted that any construction of Title VII that was more protective of religious practice would mean that employees would be treated not on a nondiscriminatory basis but unequally on the basis of their religion. " * * * [T]he privilege of having Saturdays off would be allocated according to religious belief," he said in writing for the Court, "Title VII does not contemplate such unequal treatment."

But Justice Marshall's dissent in Hardison, joined by Justice Brennan, saw no constitutional problem in requiring employers "to grant privileges to religious observers as part of the accommodation process." Justice Marshall went on, "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer." 432 U.S. at 91. He added in a footnote:

The purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions. * * * And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of "sponsorship, financial support, and active involvement of the sovereign in religious activity," against which the Establishment Clause is principally aimed.

432 U.S. at 90-91, fn. 4. As we all know, Justices Marshall and Brennan were both resolute supporters of a strict reading of the Establishment Clause. Thus, it is particularly compelling that neither believed that the Constitution required a weak reading of section 701(j).

The case of Estate of Thornton v. Caldor, 472 U.S. 703 (1985), is distinguishable. In that case the Supreme Court struck down by a vote of 8-1, as a violation of the

Establishment Clause, a Connecticut statute that gave employees the absolute right not to work on their respective Sabbaths. Writing for the Court, Chief Justice Burger said the state law imposed an excessive burden on employers, as well as on nonreligious employees who also had "strong and legitimate" reasons for wanting to avoid having to work on the weekend. 472 U.S. at 710, fn.9. The opinion of the Chief Justice did not, however, address the question of the constitutionality of a less absolute approach to the issue of employee Sabbath observance.

In a concurring opinion, joined by Justice Marshall, Justice O'Connor agreed with the Court's decision, but stated also that "the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of Sabbath observance." She went on to note that "the statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees." 472 U.S. at 711 (O'Connor, J., concurring). Hence, in her view, the statute advanced religion in violation of the Establishment Clause. Importantly, Justice O'Connor distinguished the Connecticut statute from the religious accommodation provision of Title VII:

* * * a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. * * * Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only * * * Sabbath observance, I believe that an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

472 U.S. at 712.

Both prior to and subsequent to Thornton, a number of federal appellate courts have held the reasonable accommodation provisions of section 701(j) to be constitutional, reasoning that, under the tripartite analysis of Lemon v. Kurtzman, 403 U.S. 672 (1971), the requirement had a secular purpose (the elimination of religious workplace discrimination); a primary effect that neither advances nor prohibits religion; and does not lead to excessive government entanglement with religion. See, e.g., EEOC v. Ithaca Industries, Inc., 849 F. 2d 116 (4th Cir.), cert. denied, 488 U.S. 924 (1988); McDaniel v. Essex International, Inc., 696 F.2d 34 (6th Cir. 1982).

Left unaddressed by the courts, except for the views expressed by Justices Marshall and Brennan in their dissent in Hardison, is whether a standard more protective of religious observance than de minimis but not absolute, as was the Connecticut statute struck down in Thornton, would survive Establishment Clause scrutiny. In our view, it would. Turning to the Lemon tripartite analysis,[10] easing of the undue hardship standard (and, indeed, the other aspects of the bill), so as to afford greater protection for employees serves the secular purpose of combating discrimination. Moreover, the parallels between WRFA and the Americans with Disabilities Act—albeit their provisions are not identical—demonstrate that the Congress will not be granting a religion a kind of protection not available to secular interests. The primary effect prong appears satisfied by the balancing of interests and non-absolute nature of the accommodation reflected in the bill. Finally, the excessive entanglement prong has been invoked by the courts only in cases involving government monitoring of religious institutions that receive public funds.

An invalidation of WRFA on Establishment Clause grounds would be grounded in paradox; it would be to say that an assuredly valid government purpose of combating religious discrimination may be accomplished only by a reading of section 701(j) so circumscribed as to fail to afford religiously observant employees a genuine modicum of protection. Surely, that cannot be the constitutionally mandated result.

The Supreme Court's rulings in United States v. Lopez, 115 S. Ct. 1624 (1995), and in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), among other decisions of the last decade striking down legislation enacted in reliance upon the Commerce Clause and section 5 of the Fourteenth Amendment, respectively, gives rise to an understandable concern as to the prospects for WRFA should it be enacted.

Turning to the Boerne issue first, the Court went to significant lengths in that case to distinguish its decision striking down the Religious Freedom Restoration Act from earlier cases upholding the authority of the Congress under section 5 to enact the voting rights laws. And section 5 has provided the basis for other congressional action to ensure uniform federal protection of civil rights. To the extent the Civil Rights Act of 1964 is grounded in section 5 there is ample basis to find that the Act affords remedies that strengthen and fortify existing rights. WRFA is simply a clarification of terms from Title VII of the 1964 act, as amended.

In addition, and crucially, the 1964 Civil Rights Act is founded in the Commerce Clause. Commerce Clause legislation remains valid so long as Congress has a rational basis for concluding that the regulated activity "substantially affects" inter-

state commerce. United States v. Lopez, 115 S. Ct. at 1629. The prohibition on invidious discrimination in connection with employment seems the sine qua non of legislation with respect to an activity that "substantially affects" interstate commerce. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 and, by implication, the rest of the Act).

Conclusion

Enactment of the Workplace Religious Freedom Act will constitute an important step towards ensuring that all members of society, whatever their religious beliefs and practices, will be protected from an invidious form of discrimination. The refusal of an employer, absent undue hardship, to provide reasonable accommodation of a religious practice should be seen as—and was intended by Congress in 1972 to be treated as—a form of religious discrimination. And religious discrimination should be treated fully as seriously as any other form of discrimination that stands between Americans and equal employment opportunities.

In assuring that employers have a meaningful obligation to reasonably accommodate their employees' religious practices, WRFA will restore to Title VII's religious-accommodation provision the weight that Congress originally intended. And, although necessarily framed as a strengthening of the legal protection to be afforded religiously observant employees, enactment of WRFA will, it is hoped, have a benefit that is not strictly legal. It may cause employees and employers to start talking to each other where they have not—employers may not think they now have to address issues of accommodation because they believe the law is on their side, and some employees may simply think they have no recourse. The true mark of this bill's success, when it becomes law, will be if there is less, not more, litigation over accommodation of religious practice.

We come to this hearing a scant two weeks after the final days of the Jewish holiday of Succoth, the concluding festival of the holiday season that includes the better known festivals of Rosh Hashanah and Yom Kippur. During that holiday season there are a number of days on which work is religiously proscribed. Too often a season that should be one of joy becomes, for Jews who observe the proscription on work, a period of anxiety and, sometimes, blighted careers as they face the possibility of losing their livelihood for following the dictates of their faith.

Nearly thirty years ago, Justice Thurgood Marshall concluded his dissent in Hardison by saying:

The ultimate tragedy [of this decision] is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased.

432 U.S. at 97. Perhaps we will come to look back on the hearing held today as the harbinger of the realization of Justice Marshall's hope—that the civil rights laws of this great nation will give due regard to the religious diversity that is one of its marks of pride.

Organizations Supporting the Workplace Religious Freedom Act

Agudath Israel of America
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
American Values
Anti-Defamation League
Baptist Joint Committee on Public Affairs
Bible Sabbath Association
B'nai B'rith International
Central Conference of American Rabbis
Christian Legal Society
Church of Scientology International
Concerned Women for America
Council on Religious Freedom
Family Research Council
General Board of Church and Society, The United Methodist Church
General Conference of Seventh-day Adventists
Guru Gobind Singh Foundation
Hadassah—WZOA
Institute on Religion and Public Policy
Interfaith Alliance
International Association of Jewish Lawyers and Jurists
International Commission on Freedom of Conscience
International Fellowship of Christians and Jews
Islamic Supreme Council of America
Jewish Council for Public Affairs
Jewish Policy Center
NA'AMAT USA
National Association of Evangelicals
National Council of the Churches of Christ in the U.S.A.
National Jewish Democratic Council
National Sikh Center
North American Council for Muslim Women
North American Religious Liberty Association
Presbyterian Church (USA)
Rabbinical Council of America

Religious Action Center of Reform Judaism
Republican Jewish Coalition
Sikh American Legal Defense Education Fund
Sikh Council on Religion and Education
Southern Baptist Convention, Ethics and Religious Liberty Commission
Traditional Values Coalition
Union of Orthodox Jewish Congregations
Union for Reform Judaism
United Church of Christ Office for Church in Society
United Synagogue of Conservative Judaism

ENDNOTES

[1] Section 701(j) of Title VII provides, with respect to the definition of "religion" as follows:

[1] The term "religion" includes all aspects of religious observance and practice, as well, as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious practice without undue hardship on the conduct of the employer's business.

[1] This language, in essence, codifies a 1967 Equal Employment Opportunity Commission guideline that provided a definition of "religion" for purposes of enforcement of the law prohibiting employment discrimination on the basis of religion. In enacting this provision, however, the Congress modified the guideline so as to shift from the employee to the employer the burden of proving that the accommodation sought is not reasonable.

[2] E.g., Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1996), and Beadle v. Hillsborough County Sheriff's Dep't, 29 F.3d (11th Cir. 1995), cert. denied in both, 115 S. Ct. 2001 (1995).

[3] E.g., United States v. Bd. of Education, 911 F.2d 882 (3d Cir. 1990).

[4] Justice Marshall's discussion of section 701(j)'s legislative history is worthy of note. Section 701(j) was introduced by Senator Jennings Randolph explicitly to rebut cases suggesting that "to excuse religious observers from neutral work rules would 'discriminate against * * * other employees' and 'constitute unequal administration of the collective-bargaining agreement.' [citing Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971)] * * * The primary purpose of the amendment, [Senator Randolph] explained, was to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.' [citing 118 Cong. Rec. 705 (1972)] His amendment was unanimously approved by the Senate on a roll-call vote [citing 118 Cong. Rec. 731 (1972)], and was accepted by the Conference Committee [cites omitted], whose report was approved by both Houses. 118 Cong. Rec. 7169, 7573 (1972). Yet the Court today, in rejecting any accommodation that involves preferential treatment, follows the Dewey decision in direct contravention of congressional intent." 432 U.S. at 89.

[5] The court also noted, in yet another example of the courts' restrictive reading of the undue burden standard, that the hospital was not obligated to accommodate Brener's religious observance if that would lead to "disruption of work routines and a lessening of morale among other pharmacists."

[6] See, in this regard, Shelton v. University of Medicine & Dentistry of New Jersey, 223 F. 3d 220 (3d Cir. 2000) (opinion by Judge Scirica with Judges Alito and Aldisert concurring). While the nurse's claim was dismissed in that case for her failure to accept the hospital's proffer of a reasonable accommodation, the federal court of appeals asserted, in the context of a discussion of "undue burden," that "we believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and the injured—will provide treatment in time of emergency." 223 F.3d at 228. Nothing in this statement suggests that the court's analysis would be different in light of the change contemplated by WRFA.

[7] See, e.g., Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470 (7th Cir. 2001) (case turns on employer's having offered a reasonable accommodation, not undue hardship issue); Parrott v. District of Columbia, 1991 WL 126020 (strongly worded discussion of undue hardship requested accommodation would pose for employer suggests that WRFA standard would not have made a difference in result); Bruff v. N. Miss. Health Services, Inc., 244 F.3d 495 (5th Cir. 2001) (similarly); Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995) (case turns on employee's failure to accept a reasonable accommodation, not undue burden); Johnson v. Halls Merchandising, Inc., 1989 WL 23201 (W.D. Mo.) (plaintiff's claim dismissed because the defendant attempted to reasonably accommodate plaintiff's religious practices but "plaintiff did not make any effort to cooperate with her employer or to accommodate her beliefs to the legitimate and reasonable interests of her employer, i.e., to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers").

[8] In 2002, New York State enacted a state version of WRFA, N.Y. Executive Law Sec. 296(10). Similarly, in 1997, President Bill Clinton adopted guidelines on the treatment of religion in the federal workplace that functionally strengthened the religious accommodation standards of that workplace. These enactments have not led to any parade of horribles.

[9] This carving up of religious claims into two different categories is both philosophically troubling and possibly constitutionally problematic, as it opens WRFA up to claims that it violates the Establishment Clause by privileging some religious beliefs over others. See Estate of Thornton v. Calder, Inc., 472 US 703 (1985), and G. Holland, "High Court Hears Hallucinogenic Tea Case," washingtonpost.com at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101103.html , posted November 1, 2005, reporting on that day's oral argument in Gonzales v. O Centro Espirita Beneficiente Unaiao Do Vegeta , October Term, 2005, No. 04-1084 (Breyer, J., told the attorney for the Government "that he saw 'a rather rough First Amendment

problem' of discriminating among religions if government policy allows the Native-American Church to use peyote as a sacramental substance, while other sect's adherences [sic] are forbidden to use other substances.")

[10] Although the continued vitality of the Lemon test frequently comes up for question, it is useful to apply that analysis in this context because it is a restrictive reading of what government action is allowed pursuant to the Establishment Clause.

Chairman JOHNSON. Thank you, sir.

Mr. Marcosson, you are recognized.

STATEMENT OF SAMUEL A. MARCOSSON, ASSOCIATE DEAN AND PROFESSOR OF LAW, LOUIS D. BRANDEIS SCHOOL OF LAW, UNIVERSITY OF LOUISVILLE

Mr. MARCOSSON. Thank you, Mr. Chairman, Representative Kildee, members of the subcommittee. I am Samuel Marcosson, associate dean and professor of law at the Brandeis School of Law at the University of Louisville. I am honored to be with you this morning as you consider H.R. 1455.

I teach a number of subjects that are at least relevant to this bill, including constitutional law, employment discrimination and disability law. I also spent 8 years working in the Office of General Counsel at the Equal Employment Opportunity Commission, during which time I litigated, among others, the appeals of a number of cases raising issues of religious discrimination and accommodation of religious beliefs.

My views on WRFA begin with this essential premise: Government must, under the Establishment Clause, be neutral between religions and between religion and non-religion, neither favoring or disfavoring religion or any particular sect.

In my view, as written, WRFA risks and raises substantial concerns about compliance with the Establishment Clause. Compulsion by government, as WRFA would of course represent, to favor religion may violate this requirement.

The Supreme Court's adoption of the de minimis standard in TWA v. Hardison was done at least in part and implicitly in recognition of the concern that any additional burden on businesses might in fact represent a favoring of religion perhaps in violation of the Establishment Clause.

That implicit conclusion about the concerns was made explicit in the later decision of the case of Thornton v. Caldor in which the court actually struck down a Connecticut statute because it went too far in accommodating religious beliefs, in that case Sabbatarian beliefs of workers.

So it is quite clear that this Congress, in my view, must be concerned and sensitive to the possibility that WRFA, like the Connecticut statute, but unlike Title VII, may go too far. I would like to raise a couple of concerns that I have that suggest that it may cross that line into non-neutrality.

First, the "accommodation" and "undue hardship" provisions in WRFA are patterned after the Americans With Disabilities Act, which is universally understood to be non-neutral as to disability. That non-neutrality is not a difficulty when it comes to disability law, but it is a substantial concern when it comes to religion.

Indeed, in at least one respect, WRFA goes further than the ADA, at least as some courts have interpreted the Disabilities Act,

because it requires that reasonable accommodation actually eliminate the conflict in order to be deemed reasonable.

The Seventh Circuit and others have held in ADA cases that an accommodation might in fact be reasonable even if it does not eliminate the conflict. So we have a statute, the ADA, that is already seen as non-neutral and WRFA, a proposal that goes even further than that, and perhaps would therefore be seen by the courts also as non-neutral when it comes to religion.

Moreover, it is at least arguable that employers might be required under WRFA to create and honor a forum for religious speech by their employees in the workplace, a forum they would otherwise deny to non-religious speech because they do not wish to be associated with it.

The compulsion on an employer to associate with religious or any speech raises substantial concerns when it is religious because, as I have said, it would be at least arguably non-neutral. And even if it were neutral, it might very well be seen to be contrary to the Supreme Court's decision in Boy Scouts of America v. Dale, in which the court found a First Amendment free speech right for an association, individual or entity not to be compelled to associate with views with which it disagrees or that it finds controversial.

Third, WRFA may also create conflict among employees. Under section 701(j) as it currently is written, employers can point to conflicts between coworkers as a basis for undue hardship, and prevail on the theory that it is almost always at least de minimis, if not more hardship to have to deal with conflict among coworkers. WRFA as written does not cite specifically conflict among coworkers as a form of significant difficulty or expense, nor does it talk about the problem of the employer being able to have the right to control its message.

In my view, the proposal would be significantly improved and its constitutional difficulties ameliorated if two things were done.

In the section that lists the factors the courts are supposed to look to in determining whether an accommodation raises substantial difficulty or expense, rather than pointing only to financial factors as the legislation does currently, if it included conflicts among employees as a factor toward significant difficulty, and if it included reference to the employer's ability to control the message it wishes to transmit.

Those two changes, those two amendments, in my view, would significantly increase the changes that WRFA would be upheld, were it to be challenged on constitutional grounds in the federal courts.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Marcosson follows:]

Prepared Statement of Samuel A. Marcosson, Associate Dean and Professor of Law, Louis D. Brandeis School of Law, University of Louisville

Chairman Johnson, Representative Kildee, I am Samuel Marcosson, Associate Dean for Student Life and Professor of Law at the University of Louisville's Louis D. Brandeis School of Law. I am honored to be with you this morning as you consider H.R. 1445, the Workplace Religious Freedom Act. I teach a number of subjects relating to this bill, including Constitutional Law, Employment Discrimination, and Disability Law. I also spent eight years working in the Office of General Counsel at the Equal Employment Opportunity Commission, during which I litigated the ap-

peals of a number of cases raising issues of religious discrimination and accommodation of religious beliefs.

My views on the WRFA begin with this premise: when government moves to compel employers to provide accommodations in the workplace for the religious beliefs and practices of their employees, it must walk a fine line between the laudable goal of removing the conflict that many Americans face between their faith and their work responsibilities, and favoring religion in a way that creates conflict and raises constitutional concerns. As written, the WRFA may tilt too far in the direction of accommodating religion in a way that favors religion, and at the expense of other workers. There are some changes I will suggest in my testimony that would help to resolve these concerns.

The Supreme Court's decision in TWA v. Hardison, 432 U.S. 63 (1977), upheld Title VII's requirement in § 701(j) that employers provide religious accommodations. But Hardison stressed the limitations built into the statutory requirement: the employer need not incur "undue hardship," and any costs beyond de minimis expense would constitute undue hardship. The Court strongly implied that imposing any greater burden would raise substantial constitutional issues by favoring religion over non-religion.[1]

That implication became a reality when the Court decided Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), and struck down a Connecticut law that gave employees an absolute right not to have to work on their Sabbath. Looked at together, Hardison and Caldor send a clear message: employers may be required to accommodate religious beliefs, but if legislation goes too far it will be struck down. There are several ways in which I fear the WRFA may cross the line.[2]

The WRFA as a Non-Neutral Requirement

Courts may view the WRFA as more than a neutral non-discrimination requirement.[3] The accommodation standard it contains in Section 2(a) is patterned after the provision in the Americans with Disabilities Act,[4] because it relieves the employer of the obligation to accommodate only if it would incur "significant difficulty or expense." This is the ADA's definition of undue hardship as well.[5]

The ADA's accommodation provision has been understood universally as affording a right to people with disabilities that is not given to others. While this is not problematic in the disability context, it raises significant concerns when it comes to religion. The Supreme Court had made clear that government cannot disfavor religion,[6] but it also cannot favor religion with special benefits. Unlike Title VII as currently written, the WRFA would probably confer such a benefit, because the employer would have to incur more than a de minimis cost to comply with the statute. Thus, the WRFA appears vulnerable to a challenge that it is non-neutral.

The WRFA can also be seen as non-neutral in another sense. Under current law, employers can control expression in the workplace if they regard certain types of employee speech as contrary to their legitimate business interests. For example, under the National Labor Relations Act, companies may restrict the times and places in which employees may advocate for collective bargaining. Translated into constitutional terms, it might be said that the employer may choose not to make its workspace available as a forum for worker speech with which it disagrees or which it feels is inappropriate for the workplace. The WRFA may well create a special right for those with a religious message to speak to their co-workers—creating a forum for religious speech alone where none existed before, despite the contrary wishes of the employer (and perhaps many of the co-workers). Such a regime would run afoul of the requirement that government not favor religion.[7]

On each of these points, it bears emphasis that it would be prudent to take potential constitutional concerns into account in considering what form the WRFA should take, even if there are reasonable arguments for the validity of the current version. It would serve no one's interests—not those of religious Americans seeking accommodations, nor those of employers, co-workers, the courts, or the EEOC—to have to start all over again because the courts determine the law violates the First Amendment. If the WRFA can be amended to remove possible constitutional infirmities, while still achieving its underlying purposes, it makes all the sense in the world to do so.

There is a set of situations where the "forced speech" fear is not a concern—those where the employee wishes not to speak because to do so would conflict with his or her religious beliefs. In those situations, the employer's difficulty is not that it might be compelled to associate with a message it wishes to avoid, but that its own message might not be delivered. In my view, the WRFA successfully deals with these situations by allowing employers to require that employees perform the "essential functions" of their jobs. For those positions requiring the employee to com-

municate the company's message, his or her inability to do so on religious grounds would not require an accommodation.

The WRFA May Create Conflicts Among Employees

Second, the WRFA appears to raise a genuine potential for creating conflicts between workers. As written, it would make it significantly more difficult for the owner to point to workplace friction as a basis for refusing to grant a requested accommodation from one of its rules. In some situations, a religious practice might offend co-workers, or interfere with their rights.[8] In others, one or more co-workers might be required to cover for a colleague who obtained a Sabbath day off, or relief from a particular task he or she would otherwise have to perform.

As to all of these issues, employers will of course be able to raise the defense contained in the amended § 701(j)(3), and try to demonstrate that the requested accommodation would require "significant difficulty or expense." One of the bill's strengths is that it sets forth specific factors that are relevant to what constitutes "significant difficulty or expense," but it is troubling that the factors identified by the bill are limited to financial considerations.[9] They do not include the company's right to define the message it sends in the conduct of its business and to avoid conflict with the rights of co-workers. Some defenders of the WRFA have suggested that it is alarmist to suggest that it will cause difficulties in these areas, but H.R. 1445 would be significantly strengthened if these considerations were explicitly added to the factors that should be considered in assessing an employer's undue hardship defense.

The Need for and Effectiveness of H.R. 1445

Finally, while there undoubtedly are cases where religious beliefs have received less accommodation than members of Congress believe is justified, that is not the same as saying that there is a widespread pattern or problem justifying legislative action. In my experience at the EEOC, religious accommodation claims were no more or less successful (and in fact were far less plentiful) than other sorts of cases. Nor, in my judgment, does the problem lie principally in the substantive coverage of § 701(j).

First, there are relatively few religious discrimination charges of any kind filed each year with the EEOC. Since 1992, such charges have never amounted to more than 3.1% of the total charges the Commission has received in any given year.[10] In addition, charges alleging a failure to provide a religious accommodation represent only a fraction of the total religious discrimination claims. And although I have not worked at the Commission since 1996, I can state categorically that the Commission took those charges just as seriously, investigated them as thoroughly, and litigated them just as aggressively, as any others. In the years 1992 to 2004, the range of "reasonable cause" determinations in religious discrimination cases ranged from a low of 2.5% of resolutions to a high of 10.2% in 2001,[11] figures that mirror the range of such findings under the other statutes the EEOC enforces.[12] There is not, in other words, a special problem either in terms of the breadth of the problem or the seriousness of the executive branch's response.

Nor, I submit, is there a problem with the ultimate resolution of such cases in federal court, at least not one attributable to the coverage provided under § 701(j). The unfortunate fact is that only a very small percentage of plaintiffs prevail in employment discrimination claims of any type. It is particularly ironic that the WRFA seeks to mirror the ADA's definitions of "essential functions" and "undue hardship," in an effort to strengthen § 701(j). It has been well-documented that ADA cases have fared dismally in federal court.[13] An acceptable version of WRFA might well improve the landscape for religious accommodation claims somewhat, but in the long run more effective and stronger religious accommodation protection depends primarily on the effectiveness of Title VII generally. This, in turn, depends upon (1) broader reform of the standards by which summary judgment is granted, and how claims are proved, in employment discrimination cases,[14] (2) the make-up of the federal judiciary that rules on Title VII and other employment discrimination cases, and (3) a commitment to provide adequate resources to permit the EEOC to perform its mission more effectively, both in the investigative stage and in litigating cases.

Conclusion

Protecting religious beliefs from the conflicts and pressures of the working world is an important goal. While there might be other means to serve that goal more fully and effectively, the WRFA could be one way of doing so, so long as it is amended to clearly and fully respect both the rights of co-workers, and the legitimate, nondiscriminatory expectations of employers.

ENDNOTES

[1] Hardison, 432 U.S. at 84-85 (stressing reluctance to interpret Title VII to require employer to allocate "the privilege of having Saturdays off * * * according to religious beliefs," and stating that requiring more than de minimis hardship would constitute "requir[ing] an employer to discriminate against some employees").

[2] It is important to emphasize, however, that the WRFA does not go as far as the Connecticut law struck down in Estate of Thornton. That law gave religious employees an absolute right to their Sabbath as a day off, with no exception for the employer based on hardship. The WRFA is not absolute, nor does it suffer from the other flaw the Court pointed to, which is the singling out for special favor of one particular religious practice or belief above all others.

[3] See Estate of Thornton, 472 U.S. at 712 (O'Connor, J., concurring) (distinguishing Title VII and Connecticut statute because Title VII can be seen as a neutral anti-discrimination law, whereas the state law would be perceived as an endorsement of religion).

[4] 42 U.S.C. § 12112(5)(A).

[5] 42 U.S.C. § 12111(10)(A).

[6] See, e.g., Rosenberger v. Rector of the Univ. of Virginia, 515 U.S. 819 (1995) (government may not exclude religious viewpoint from a public forum).

[7] This also implicates the Supreme Court's decision in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Employers might well raise substantial First Amendment issues if they are compelled to allow speech in the workplace with which they do not wish to be associated.

[8] See Virts v. Consolidated Freightways, 285 F.3d 508 (6th Cir. 2002) (employee's requested accommodations would interfere with co-workers' seniority rights under collective bargaining agreement); Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995) (employer not required to accommodate religious expression that co-workers perceived as offensive and harassing).

[9] The WRFA would specify as factors in the undue hardship inquiry "the identifiable costs of the accommodation," and "the overall financial resources and size of the employer involved, relative to the number of its employees." Critically, nothing in the WRFA would direct courts to consider non-financial factors such as those discussed in the text.

[10] "Charge Statistics, FY 1992 Through FY 2004," available at http://www.eeoc.gov/stats/charges.html.

[11] "Religion-Based Charges, FY 1992-FY 2004," available at http://www.eeoc.gov/stats/religion.html.

[12] For example, when it came to ADA charges, the Commission has found reasonable cause from a low of 1.1% of charges resolved (1992), to a high of 13.3% in 2001. See "Americans with Disabilities Act (ADA) Charges FY 1992—FY 2004, available at http://www.eeoc.gov/stats/ada-charges.html. Similarly, under the Age Discrimination in Employment Act, reasonable cause findings made up 2.2% of resolutions in 1992, and reached a peak of 8.3% in 1999. See "Age Discrimination in Employment Act Charges FY 1992—FY 2004, available at http://www.eeoc.gov/stats/adea.html.

[13] See Kathryn Moss, et al., Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts, 29 Mental and Physical Disability Law Reporter 303, 303 & nn. 16-24 (2005) (citing studies).

[14] For example, many federal courts grant summary judgment on the ground that plaintiffs have produced insufficient evidence of the employer's motive, even when they have put forward proof that the employer's proffered, non-discriminatory reason is pretextual. See, e.g., Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc) (summary judgment may be granted for the employer even if the plaintiff has substantial evidence of pretext). Such evidence should be sufficient to allow the plaintiff to put his or her case to the test before a jury.

Chairman JOHNSON. Thank you, sir.

Ms. Olson, you are recognized.

STATEMENT OF CAMILLE A. OLSON, ESQ., PARTNER, SEYFARTH SHAW LLP, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Ms. OLSON. Thank you, and good morning, Mr. Chairman and members of the subcommittee. I am pleased to appear today to testify on behalf of the U.S. Chamber of Commerce in connection with the Workplace Religious Freedom Act of 2005.

Especially listening to the testimony this morning and reflecting on my background as a labor and employment attorney as practiced in Chicago, Illinois, over the last 20 years, as well as teaching employment discrimination law to students at Loyola University and DePaul University in Chicago, testifying on behalf of the U.S. Chamber of Commerce, the chamber is really here representing the largest groups of employers in the country. It is one of the largest business federations, representing over 3 million businesses and or-

ganizations of all sizes, industry sectors and geography. I serve on the chamber's Labor Relations Committee, as well as its Subcommittee on Employment Nondiscrimination Issues.

The chamber has serious concerns regarding the Workplace Religious Freedom Act with respect to its affect on coworkers, employees in the workplace, as well as with respect to the running of an employer's business.

Let me begin my discussion by referencing Title VII because I believe, listening to the testimony this morning, that there is some confusion regarding an employer's existing obligations under Title VII, as well as an employee's rights, both in terms of its rights substantively under the statute, as well as its rights to damages, including compensatory and punitive damages, and the right to a jury trial in connection with these issues.

Title VII's paramount concern is to eliminate discrimination in employment, including discrimination against individuals based on their religious beliefs.

Unlike the Americans With Disabilities Act, however, and other statutes, under Title VII, the prohibition against discrimination based on someone's religious preferences also includes a prohibition against discrimination with respect to somebody who does not hold the same religious practices.

Title VII's religious discrimination claims currently proceed under a two-part framework. I would like to describe that to you so you understand the current analysis that employers are going through throughout the country right now under Title VII.

First of all, an employee has to show that it has a bona fide religious practice or belief that conflicts with the job duty, provides notice to the employer about the belief or conflict, and the employee then suffers an adverse action or consequence because of the conflict between that belief and a job duty.

Once that is met, the employer then has the burden of proof of showing that it initiated good-faith efforts to show that it could come up with a reasonable accommodation of the religious practice. And if it can, it needs to work with the employee to attempt to reasonably accommodate the religious practice without an undue hardship.

Let me stop one moment and just reflect on the issue under Title VII of the many cases that have come to bear really over the last 10 years. Many of those cases involving religion involve a wide variety of different religions. Religion is defined as a purely moral and ethical belief. It can be religion so long as it is sincerely held with the strength of religious beliefs. It need not be acceptable, logical, consistent or comprehensible to others.

Recent Title VII cases involving religion and recognizing different accommodation issues that employers engaged in with employees took into account religions such as the Church of Body Modification, in which an employee's requested accommodation related to be able to display various body modifications including scarrings, including piercings, including branding and cutting of the person's body. It also included another religion named The World Church of the Creator, which preaches "Creativity" beliefs, the central tenet of which is white supremacy.

As the Supreme Court has stated, it is no business of courts to say what is a religious practice or activity. Title VII's "reasonable accommodation" framework is an effort to reconcile conflicts between religious beliefs and business concerns. It requires an employer today to provide an accommodation to an employee so long as it is not an undue hardship. The burden is on the employer to support a claim of undue hardship with proof of an actual imposition on coworkers, a disruption of work-related services or products within the particular factual context that has arisen.

"Undue hardships" in connection with Title VII analysis, as well as the ADA analysis, includes an analysis of both economic costs, as well as non-economic costs such as lost business, hiring more employees, lost efficiencies, compromising seniority rights of employees, the safety of employees, the health of patients, the integrity of products that are produced by an employer, as well as requiring certain employees to shoulder more than their share of potentially dangerous or less appealing work or work shifts, as well as accommodating and reviewing an employer's policies relating to diversity, nondiscrimination and non-harassment, as well as an employer's compliance with the FDA, with OSHA, with state and federal government regulations with respect to safety and health.

The concern that the chamber has with respect to the existing bill as drafted is one which really relates to the fact overall that there are current safeguards in Title VII that are today in my practice and in the practice of employers throughout the country are reasonably accommodating both the business interests, along with the interests of all employees.

I would like to just mention, if I can here in summing up, four different specific concerns that the chamber has with respect to the language of this bill.

The first relates to the issue of preferential treatment of employees, and whether because of their religious beliefs with respect to time off and other scheduling issues, that this raises an issue——

Chairman JOHNSON. Can you end pretty quick please?

Ms. OLSON. I am sorry. Yes, your honor.

With respect to a number of different issues that have been raised previously, I think it is also important to note that, as written, this bill includes an absolute prohibition against even engaging in the interactive process with respect to requests for time off and grooming and clothing issues because those issues are removed from the definition of an "essential function," so that it would eliminate that discussion between employers and employees.

I think it is also important just to note that while this does borrow the framework of the ADA, it is missing some of the safeguards that the ADA has and it is inapplicable in certain ways because the ADA, as described earlier by panelists, does not include certain anti-discrimination prohibitions.

With that, I will sum up my comments and thank you for the opportunity to provide them today.

[The prepared statement of Ms. Olson follows:]

Prepared Statement of Camille A. Olson, Esq., Partner, Seyfarth Shaw LLP, on Behalf of the U.S. Chamber of Commerce

Good morning Mr. Chairman and members of the Subcommittee. I am pleased to appear this morning to testify on H.R. 1445, the Workplace Religious Freedom Act

of 2005 ("WRFA"). I am a partner with the national law firm of Seyfarth Shaw LLP, where I co-chair the Labor and Employment Group's Complex Litigation Practice. In addition to my private law practice which has focused on employment discrimination issues for over twenty years, I have also regularly taught employment discrimination to law students at DePaul University and Loyola University in Chicago, Illinois.

I am testifying today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector and geographical region. I serve on the Chamber's Labor Relations Committee as well as its subcommittee focused on employment nondiscrimination issues.

Respect for the diverse religious beliefs in our society is important for employers and employees alike. Employers have experience with the law's requirements that not only prohibit discrimination based on religious beliefs, but also require reasonable accommodation of religious practices and observances. However, accommodating certain religious practices or observances of individual employees is sometimes difficult in light of their impact on other employees as well as other legitimate business concerns.

The Chamber has serious concerns with the Workplace Religious Freedom Act. The legislation appears to go too far in terms of which accommodations must be deemed reasonable, especially in the case of dress codes and the scheduling of employees. We are also concerned that the bill would require employers to accept accommodations for individual employees that may create a hostile work environment for other employees. It also raises numerous questions of practicality and fairness. We urge the Subcommittee to carefully consider these issues and proceed cautiously.

Current Law

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against individuals based on their religious beliefs. In addition to protecting employee beliefs, Title VII also provides protection for the religious observances and practices of employees, requiring that employers not discriminate based on those observances or practices unless the employer cannot reasonably accommodate the observance or practice without undue hardship.

Employers frequently face religious accommodation issues. Often accommodations are easily agreed upon, for example, by permitting employees to swap shifts or permit limited time off during a shift to allow employees time to pray or engage in other religious practices. However, other religious accommodation requests can be very difficult for employers to accommodate in the workplace. Among other things, accommodation requests involve assessing whether or not an accommodation can be made, the scope of the accommodation, and the hardship created by accommodating the request (including the impact of the accommodation on an employer's business, customers, and other employees). Importantly, employers must consider the interaction of other laws as well, including, for example, their obligations under the National Labor Relations Act, in addition to their desire to keep the workplace free from harassment based on one's religious beliefs.

In the context of religious accommodation, Title VII has been criticized as a result of the Supreme Court's interpretation of Title VII's undue hardship exception.[1] Critics claim that the Court significantly weakened the law and that employers may deny requests to accommodate religious practices based on demonstration of a de minimus burden on the employer. It is important to note, however, that under the Supreme Court's interpretation of the accommodation obligations under Title VII, employer obligations are in fact quite substantial.

For example, courts have found employer adherence to "no-beard" in the workplace policies based on "professional appearance" as opposed to safety and health issues as violative of an employer's obligations to reasonably accommodate an employee's desire to maintain a bearded appearance in the workplace.[2] Similarly, employee requests for exceptions to employer work schedules have also been found to violate Title VII. Title VII's existing reasonable accommodation obligations have been determined to include an obligation to meet reasonable scheduling requests, including employee requests to not be scheduled on Easter Sunday to attend both morning and evening services,[3] Jewish employees' requests for leave on Yom Kippur,[4] and individualized employee requests for days off to attend religious services relating to family members.[5] In addition, courts have recognized the ability of employees to engage in religious conduct that does not interfere with their official job duties or, in the case where the employee is a manager or supervisor, does not create an environment of religious favoritism such as a supervisor's spontaneous prayers and Bible references.[6]

Religious Practices

It is clear that the term "religious practices" has been broadly defined under Title VII. EEOC guidance defines the phrase as any "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[7] In practice, both the EEOC and federal courts have upheld this broad interpretation. For example, in 1996, the Orange County Transit Authority discharged an employee who refused to hand out coupons for free hamburgers because he was a vegan. An EEOC area office determined that the employer discriminated against the employee based on his religious beliefs.[8]

In another case, Peterson v. Wilmur Communications,[9] a federal court held that an employee's racist views qualified as religious beliefs. In this case, the employee was a member of the World Church of the Creator, an organization preaching "Creativity," the central tenet of which is white supremacy. The Court noted: "The White Man's Bible, one of Creativity's two central texts, offers a vision of a white, supremacist utopian world of '[b]eautiful, [h]ealthy [white] people,' free of disease, pollution, fear and hunger (citation omitted)."[10] According to The White Man's Bible, "This world can only be established through the degradation of all non-whites * * * the survival of white people must be ensured 'at all costs'."[11] In assessing whether the employee's beliefs qualified as religious and therefore within the scope of Title VII, the court said the question is not whether the employee's beliefs are moral or ethical in the subjective sense, but whether the belief system "espouse[s] notions of morality and ethics and suppl[ies] a means from distinguishing right from wrong."[12] The court concluded that:

Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. The precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means from determining right from wrong."[13]

Another example is EEOC v. Red Robin Gourmet Burgers, Inc.,[14] involving a restaurant server and practicing Kemetecist who explained that Kemetecism was an ancient Egyptian religion, which he practiced by obtaining religious tattoos encircling his wrists. He further claimed that covering his tattoos was a sin, and thus he could not comply with the restaurant's appearance policy prohibiting employees from having visible tattoos. Under Title VII the employer was required to accommodate the employee by allowing him to display the tattoos.[15]

These cases, although perhaps factually unusual, illustrate how broad the concept of religious practices is. The practical effect is that employers simply have no ability to question the legitimacy of employee claims that particular practices, no matter how unusual, are religious.

With the broad definition of religious practice in mind, we can turn to the current reasonable accommodation standard and how WRFA might impact that standard.

Changing the "Undue Hardship" Standard

The stated intent of proponents of WRFA is to change the standard used in determining whether an accommodation would impose an undue hardship. WRFA's principle provisions would prevent a proposed accommodation from being considered an undue hardship unless it required significant difficulty or expense for the employer. Precisely how this provision would be interpreted by the courts is unclear, but the provision clearly moves the line and employers would be legally obligated to accommodate more requests than they are today.

In assessing whether it is appropriate to change the standard, it is important to look at accommodation requests that courts have found to impose an undue burden under current law and assess how WRFA might impact similar cases in the future.

Recently, my firm litigated a case that considered the tension between an employer's dress code and an employee's religious beliefs. In this case, Cloutier v. Costco Wholesale Corp.,[16] a conflict arose between the provisions in the employer's dress code that prohibited facial jewelry and the employee's religious beliefs as a member of the Church of Body Modification. For those not familiar with the church, it includes members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. It seeks to have its members grow as individuals through body modification and its teachings, and to be confident role models in learning, teaching, and displaying body modification.

The employer's dress code was established to cultivate a neat, clean, and professional image. The employee would not accept two offered accommodations, wearing a band-aid over the jewelry or wearing a plastic retainer in place of the jewelry, instead insisting that the only acceptable accommodation would be an exemption from the dress code.

Ultimately, the First Circuit ruled that forcing the employer to exempt the employee from the dress code would be an undue hardship. The court noted that the employer had the discretion to require the dress code and mandating the exemption would adversely affect the company's public image. If the burden were shifted and the employer were required to show that the exemption would have caused a significant difficultly or expense, it is certainly unclear whether the employer would have been able to insist on its dress code or its proffered accommodations.

Another case, Swartzentruber v. Gunite Corp.,[17] illustrates how accommodating one person could contribute to creating a hostile work environment for others. In this case, the employee had a tattoo on his forearm of a hooded figure standing in front of a burning cross. The employee was a member of the Church of the American Knights of the Ku Klux Klan and stated that the tattoo depicted one of the Church's seven sacred symbols. After other employees complained about the tattoo, the employer asked the employee to keep the tattoo covered at work, except when necessary to wash. While this case was ultimately decided on other grounds, how would WRFA's new undue burden standard apply? Would the employer be required to permit the employee to keep his tattoo visible? Would that contribute to claims of a hostile work environment by other employees under Title VII's nondiscrimination provisions related to race?

A number of recent cases illustrate the growing tension between accommodating employee requests to adhere to their religious beliefs in the workplace, and an employer's desire to maintain a place of business that does not impose an employee's religious views on customers as well as meet the Company's obligation to maintain a work environment free from harassment for all employees. In these cases, courts held that:

- An employer properly discharged a telephone triage nurse who refused to stop making religious comments to patients calling a hotline;[18]
- A supervisor who continually lectured a homosexual subordinate about her sexual orientation describing it as a sin was properly terminated for violating the company's reasonable policy against harassment, including harassment based on sexual orientation;[19]
- A social worker who tried to drive out the demons in a client having a seizure instead of calling for medical help was properly fired for violating agency rules;[20] and
- An employer properly terminated an employee who refused to accept her employer's accommodation of permitting her to end her correspondence with employees by writing, "Have a Blessed Day," but refusing to allow the phrase to be inserted into all writings with customers and vendors.[21]

As the above examples illustrate, one important reason that employers might deny a requested accommodation is that it may create a hostile work environment for other employees. To ensure that they are not fostering a workplace that could be a hostile work environment, it is common for employers to adopt neutral policies designed to prohibit intimidation and harassment of all kinds. Shifting the undue burden standard creates conflict with such a policy and leaves the employer in the difficult position of deciding which provisions of Title VII to violate and which to comply with.

Other Concerns

In addition to the concerns discussed above, WRFA raises numerous other serious concerns.

Essential Functions and Dress Codes and Scheduling

As part of its new framework, WRFA would require employers to determine essential functions of employment positions which, among other things, cannot include practices relating to clothing or taking time off. These provisions contain no exceptions. However, there are certainly instances where dress codes and scheduling are essential functions of a job. For example, if a dress code is required to protect the employee's safety, then it should be classified as an essential function. Courts have already grappled with this issue and found, under current law, that even though an employee's religion required an unshaven face, a tight fitting respirator mask requirement was appropriate for employees working around toxic gases.[22] As another example, consider a dress code that, for safety purposes, requires an employee to wear pants while working around machines.[23] WRFA does not permit such concerns to be included as essential functions of a job.

Scheduling may also be an essential function of the job. On one extreme, consider an employer that is only open for business one or two days a week, for example, on weekends. The ability to work Saturdays and Sundays would then truly be an essential function of the job. Other establishments may have busy seasons during

the year where they need all of their employees to be available. For example, the ability to be available for work preceding Christmas might well be an essential function of jobs in the retail sector.

ADA Model

WRFA, by adopting an "essential functions" test, appears to borrow from the Americans with Disabilities Act and the Rehabilitation Act of 1973. However, it is important to note one major difference that exists in accommodating religious practices that does not exist in accommodating individuals with disabilities. It is relatively straightforward for employers to assess the types of physical demands that will be made of employees in particular positions. Therefore, an analysis of determining essential functions of a job for purposes of the ADA is more easily understood. However, given the very broad definition of religion, it will be very difficult, if not impossible, for employers to predict what fundamental parts of a job will conflict with an employee's religious practices. We urge the Committee to consider the practical difficulties that such a requirement will impose upon employers.

Preferential Treatment

The Supreme Court has made it clear that laws that have the primary effect of advancing particular religious practices violate the Constitution's Establishment Clause.[24] It is unclear just how far WRFA changes the test as to which accommodations would cause undue hardship. However, it appears to make it difficult for employers to deny requests for time off to attend to religious services. In addition to Constitutional concerns, to the extent that the bill would give employees of particular religions a preference over others in taking time off, serious questions of fairness and potential conflict with labor union seniority systems would be implicated.

Conclusion

In conclusion, the Chamber has serious concerns with the Workplace Religious Freedom Act. Mr. Chairman and members of the committee, thank you for the opportunity to share the Chamber's concerns with the Workplace Religious Freedom Act with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

ENDNOTES

[1] See Trans World Airlines v. Hardison, 432 U.S. 865 (1977).
[2] Carter v. Bruce Oakley, Inc., 849 F.Supp. 673 (E.D. Ark. 1993).
[3] Pedersen v. Casey's General Stores, Inc., 978 F. Supp. 926 (D. Neb. 1997).
[4] EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th Cir. 1997).
[5] Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993).
[6] Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995), cert denied, 516 U.S. 1158 (1996).
[7] 29 C.F.R. § 1605.1.
[8] Anderson v. Orange County Transit Authority, No. 345960598 (Aug. 20, 1996).
[9] 205 F. Supp. 2d 1014 (E.D. Wis. 2002).
[10] Id. at 1016.
[11] Id.
[12] Id. at 1023.
[13] Id.
[14] No. 04-1291, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005).
[15] See, generally, Donna D. Page, Veganism and Sincerely Held 'Religious' Beliefs in the Workplace: No Protection Without Definition, 7 U. PA. J. LAB. & EMP. L. 363 (Winter, 2005).
[16] 390 F.3d 126 (1st Cir. 2004), cert. denied, 125 S.Ct. 2940 (2005).
[17] 99 F. Supp. 2d 976 (N.D. Ind. 2000).
[18] Morales v. McKesson Health Solutions, LLC, 2005 U.S. App. LEXIS 4629 (10th Cir. Mar. 22, 2005), cer.t denied 2005 U.S. LEXIS 7490 (Oct. 11, 2005).
[19] Bodett v. CoxCom Inc., 366 F.3d 736 (9th Cir. 2004).
[20] Howard v. Family Independence Agency, 2004 Mich. App. LEXIS 410 (Mich. Ct. App. 2004) (unpublished).
[21] Anderson v. U.S.F. Logistics Inc., 274 F.3d 470 (7th Cir. 2001).
[22] Bhatia v. Chevron U.S.A., Inc., 734 F. 2d 1382 (9th Cir. 1984).
[23] Killebrew v. Local 1683 AFSCME, 651 F. Supp. 95 (W.D. Ky. 1986).
[24] Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

Chairman JOHNSON. Thank you, ma'am. I appreciate the testimony.

I recognize Mr. Kline for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman.

I thank the panel for being with us today.

I have a line of questioning I was going to go down, but I am going to change and pick up on what Ms. Olson was talking about, a dress code, just a minute ago.

I am not sure if I understood what you said. Do I understand the language in this bill, are you saying that this excludes the ability to address dress codes? In other words, if someone is by religious practice required to wear a dress instead of pants, is that covered here or not.

Ms. OLSON. Yes. There are two provisions in the existing bill which addresses that. The reading of the statute is that if there is an essential function of a job, the essential function cannot prohibit an employee from wearing certain clothing or taking certain time off for a holy day, for example. Those are removed from the definition of what is an "essential function."

If something is not an essential function of the job, then the employer cannot even engage in that reasonable accommodation process. It is a marginal function and simply has to be eliminated, resolved in favor of the employee in terms of the conflict.

So both in terms of subparagraph (2)(b) in terms of the definition of "essential function," as well as the separate subparagraph that specifically says you must remove the conflict, both of those subparagraphs require that those two issues not even be considered in terms of an interactive process, and that would provide a significant burden both for employers, as well as we believe jeopardize the safety and health of employees in the workforce.

Mr. KLINE. Thank you.

Would anyone else on the panel like to address that?

Mr. FOLTIN. Yes. I would like to respond on that exact issue.

I do not agree with that characterization of what WRFA would do. The "essential function" provision is in fact a new provision. Existing religious accommodation law says nothing one way or another about whether an employee must be able to perform the essential function of a job in order to receive religious accommodation. That provision was put in in response to what we understood were business concerns that this provision was not in WRFA, unlike the Americans With Disabilities Act, and therefore it is there as an additional obstacle to obtaining an accommodation.

That is, before you even get to the analysis of whether there is a reasonable accommodation that can be provided and whether providing that accommodation would lead to an undue hardship, now the employee first has to be shown that he is able to fulfill the essential functions of a job.

So once you get past that hurdle, the fact is that an employer still is able to show that the time, the shift requirements or the garb or grooming requirements would impose an undue hardship on the employer. If the employer can make that showing, then the employer is in a position to deny the accommodation of days off or of dress or of grooming.

So it is simply not the case that the interactive process has been taken out of the need of an employee for an accommodation. It is simply that we believe that as is the case under current law, it should appropriately come into play in the context or deciding whether or not providing that kind of accommodation would be an undue hardship for the employer.

Mr. KLINE. Thank you.

Did anyone else have a particular comment on that?

I was just sitting here thinking as the two of you were talking, and the hearings that we participated in in this subcommittee and others, that it is always the case that with a panel of experts, the experts disagree. I think that has been 100 percent of the time.

I have another minute or two here. At least two of you have addressed the issue of conflict among employees or an unintended impact on other employees. Clearly, when we are looking at legislation, one of the pitfalls always is the unintended consequence, something that we had not taken into account. I think it has happened in legislation since time began.

I see the light is about to turn red, but I think, Mr. Marcosson, you talked about that. What is the concern here of this conflict among employees that you were asking and that it addressed?

Mr. MARCOSSON. Certainly. It seems to me that in a lot of these cases and a lot of the warnings that have been raised about WRFA, have centered on the idea that an employee may go over the line in expressing religious views that might amount to harassment of coworkers or that coworkers will be put in a position where they have to cover for shifts that are not taken by someone who requires the day off for some sort of a religious observance, a holy day or a Sabbath.

I think those concerns are genuine. My concern is not so much that I think it is clear as a bell that this bill would create those conflicts, but that the factors listed in what constitutes "significant difficulty" or "hardship" does not point to conflict among coworkers as something the employer can explicitly cite as something that might amount to significant difficulty or expense. I think by adding that to the list, it would alleviate some of those concerns that coworkers might have and that employers would have as well.

Mr. KLINE. Thank you.

Mr. Chairman, I see my time has expired.

Chairman JOHNSON. Thank you, Mr. Kline.

The chair recognizes Mrs. McCarthy for 5 minutes.

Mrs. MCCARTHY. Thank you, Mr. Chairman.

Going back, Mr. Marcosson, to what you were talking about as far as the employees and the co-employees, how would you change the language around to accommodate what your concerns are?

Mr. MARCOSSON. In the bill, the bill adds a subsection three to section 701(j) that tells courts and employers in looking at the question of "significant difficulty or expense" that factors to be considered in making the determination shall include, and then it lists three of them, all of which relate specifically to financial considerations, looking at the actual bottom-line dollar costs, essentially.

By excluding others, including potential conflicts with coworkers, my fear is the courts will take this as their template and that these factors will become, if not exclusive, at least primary over others that are at least equally of concern, and that it would certainly not hurt the bill.

If it is true that the bill is not designed or intended to allow coworker accommodation to infringe on the rights of coworkers, then it seems to me a reasonable step to add that explicitly to the fac-

tors that ought to be considered when evaluating the undue hardship inquiry.

Mrs. MCCARTHY. Thank you.

Mr. Foltin, how do you respond to that?

Mr. FOLTIN. I think that the fact is the bill does say that these are factors to be included among those considering whether or not there is undue hardship. So the fact that a specific factor is not listed does not mean that it cannot be taken into consideration.

The cases where we have had the most problem with the courts not giving due regard, or giving too much regard to the issues that the employer raises because of the de minimis standard, have been economic. So that is why I believe the bill is drafted to include the specifically economic factors.

Now, if I may, on a related issue, the claim has also been made that because the standard is being raised from de minimis, it is going to be harder for the employer to take into account these non-economic factors because of the change in standard. I think that that is not borne out.

By looking at the cases in which courts have dealt with issues having to do with conflict between employees or harassment of one employee of another, in looking at those cases one finds time and time again that unlike the cases where economic factors are involved, the courts are very strong in their reasoning as to how no employer should have to put up with that kind of behavior by one employee to another.

So there is nothing about the change in standard from de minimis to significant difficulty or expense that, based on a fair reading of cases that have been applying this law for many years, would lead one to have to worry that somehow we would be opening the door to harassment by one employee of another.

Mrs. MCCARTHY. Thank you.

Chairman JOHNSON. Thank you, Mrs. McCarthy.

Mr. Souder, you are recognized for 5 minutes.

Mr. SOUDER. Thank you. Thank you for allowing me to ask questions on the subcommittee.

Ms. Olson, I am incredibly disgusted, as well as disappointed, with the chamber's testimony. The one thing I do appreciate is that they have come out of the closet, so to speak, after years in many cases of trying to slow this legislation down, to deprive it even of a hearing in the past.

But it is just amazing that you would pick out a couple of cases, which, by the way, were not even upheld. They ruled against this earring thing that has been circulating in the business community and in magazines like some kind of Internet phenomena, trying to scare businesses that there is going to be the Church of the Earring.

My lands, you do not have a single case from New York. Here we have a law in New York, why are you silent on New York, if this is going to be such a big problem?

If you want to know why the business community has such difficulty, when I worked as legislative director in the Senate dealing with ADA and passed it through and basically carried much of the business water in trying to work through family and medical leave, it is because you do not come in with any credibility.

Tell us the problems in New York state. There are 10 times as many cases in civil rights discrimination as there are on religious. So do you favor the repeal of civil rights legislation? Is that the chamber's position here?

You have raised a number of concerns. There is no question that if this bill is to become law, we have to work out some things at the margin. I have a business degree, an MBA degree; have a family business; have had to deal with these things myself; and have been frustrated many times with the laws that we pass in the federal government that have unintended consequences. But my lands, we are going to have a standard that says that if there is conflict among employees—and this is addressed to the law professor too.

So one of the problems we have in this country right now, and it is increasingly becoming a problem, as we heard from the Sikhs, is some people think the Sikhs are part of Al Qaida, and they do not want them working in their company and they do not want them in their community. So should they be fired? If employees do not like the way somebody is a Muslim at their factory, that is going to cause conflicts in America right now. You either believe in religious freedom or you do not.

Now, there should be standards. As was eloquently stated, "undue hardship" is a standard. Dress codes, if the dress code is relevant to the job and is part of the image of the company, it certainly would fall in effective part of your job and undue hardship. But if the dress code is not relevant to the carrying out of the job, why should it be considered if it is part of someone's legitimate religious faith?

Now, I have raised two big questions and made some challenges and would be interested in some responses.

Ms. OLSON. Thank you very much.

Chairman JOHNSON. Before you answer, let me just tell you, Mr. Souder, that private business is just that, and they have the right to set the rules in their own business. This is a free country, and we preserve free enterprise.

You may answer the question.

Ms. OLSON. Thank you very much.

In connection with the cases that have been cited and the information that the chamber has provided to the subcommittee, those cases are cases that are good law today. Those cases are not cases that have been overturned, but also explain the wide variety of different accommodations that employers are making in the workplace.

The description that you just gave us in terms of the interactive process and how it ought to occur in connection with employers and employees is exactly the process that is contemplated and required by the current requirements of Title VII, and if those requirements are violated, subject an employer to compensatory and punitive damages, attorneys' fees, back pay and reinstatement.

In fact, the cases that are being described are the ones in which accommodation issues sometimes have fallen in terms of a violation of the law by the employer; sometimes have come out with an employer ending up making an accommodation or offering an accom-

modation that was not accepted, that was viewed as reasonable by the court.

So they come up on both sides. This is the system that is in place today and as I practice every day, is being utilized by employers.

The chamber's position is that that system is working well. It does consider conflicts between employees as well as the economic issues that are raised here, as well as many other issues such as the enforcement of diversity, non-harassment statutes, as well as OSHA and other requirements.

Mr. SOUDER. Have you had problems in New York?

Ms. OLSON. Pardon me?

Mr. SOUDER. Have you had any problems in New York?

Ms. OLSON. In New York, I do not practice in New York, and I would be more than happy to take a look at that, but I cannot provide any guidance on the New York situation.

Mr. SOUDER. So you are on the national chamber board, you are giving testimony on behalf of the chamber, and your testimony is that the chamber did not give you any examples, and the chamber does not have any examples from the state of New York, but you will look into it.

Ms. OLSON. We will look into that, but I do not have those examples today.

Mr. MARCOSSON. Mr. Chairman, if I might address Representative Souder's question briefly.

Chairman JOHNSON. Go right ahead.

Mr. MARCOSSON. As far as the issue of Sikhs being fired from their jobs because coworkers object to them, making assumptions about them that are unfounded, in my view that is not a current problem under Title VII, nor is it the problem addressed by WRFA. That would be, in my view, a flat-out case of religious discrimination, not a matter of accommodation.

Mr. SOUDER. It was a headgear question, and the other people felt the headgear was disruptive and upset them at work.

Mr. MARCOSSON. In a situation like that, I would view that, if I were at the EEOC still, I think the EEOC would view that, in an investigation of a charge, they would view that as flat-out religious discrimination, not a matter of the employer seeking some accommodation for a belief, but if they were fired because of misconceptions or prejudice about their religion or its expression in a situation like that, it would be flat-out religious discrimination.

I think the suit would not even be brought under Section VII (O)(1)(j). It would be brought under the peer discrimination section, and not only would be covered, but should be covered, is covered, and I think would prevail under those circumstances.

Mr. FOLTIN. Mr. Chairman, if I could just have a word on this?

Chairman JOHNSON. Of course.

Mr. FOLTIN. It has never been the claim of supporters of WRFA that nobody ever prevails on a religious accommodation case. Clearly, there are cases that are heard by the EEOC, and thankfully in recent years actually the EEOC has been paying more attention to these kinds of cases than it has in the past.

But the fact is that with the kind of de minimis standard we have, the kind of minimal interpretation of what an employer's obligations are, it is still too hard to bring these cases and employers

too often believe that based on what we believe is an arbitrary determination as to what the workplace requires, that they are entitled to resist.

In fact, there is a case out of a District Federal Court which upheld the right of an employer to deny a promotion to a Sikh because this individual did not have the right image to rise to higher office within that organization.

The law ought to be clear, clearer than it is now, that that is an act of discrimination. Perhaps having that kind of law in place would save organizations like SALDEF, the Sikh civil rights organization, from having to bring the kinds of cases that are described in the letter that I just submitted along with the other letters that I submitted for the record earlier.

Chairman JOHNSON. Thank you.

Dr. Land, do you want to comment?

Dr. LAND. Well, when I find myself in a bevy of lawyers, I usually find it best to keep quiet.

[Laughter.]

Obviously, the status quo is not working for increasing numbers of people of devout religious faith, many diverse kinds of faith, in the workplace. I believe that the Workplace Religious Freedom Act is a good-conscience effort to try to address the needs of our fellow citizens who are being discriminated against in the workplace based upon their devoutly held and sincere religious convictions.

Chairman JOHNSON. Thank you, sir.

Mr. Kildee, you are recognized for 5 minutes.

Mr. KILDEE. Thank you, Mr. Chairman.

Professor Marcosson, how do the courts' handling of the religious discrimination claims compare to their handling of other types of discrimination cases? Are there any common problems?

Mr. MARCOSSON. I think that there are. I think it is important to remember that the problems or the difficulties for plaintiffs seeking religious accommodation, bringing religious accommodation claims, are not exactly unique to religious accommodation claims.

Title VII claimants, Americans With Disabilities Act claimants, none of those claims are succeeding with any great regularity in federal courts. The problems that plaintiffs are facing in those cases and that the EEOC faces when it brings cases are much more general, and those apply as well to religious accommodation cases, as they apply to all others.

You have issues of courts too readily granting summary judgment in race discrimination cases, ADA cases, because they do not give enough weight to plaintiffs' evidence showing that the employers' explanation is pretextual, for example. You have an EEOC that is chronically, in my day when I was there, and I think even today, underfunded and unable to keep up with its workload and thoroughly investigate charges, whether it is religious accommodation or any other of the statutes that the EEOC enforces.

So some of the problems that have been cited today certainly relate specifically to religious accommodation, but I do not think we should lose sight of the fact that there are other problems that may contribute at least as much to the lack of success that accommodation cases have had in the federal courts.

Mr. KILDEE. Ms. Olson, you pointed out that the chamber has serious concerns about WRFA. Would the Chamber of Commerce support any reforms to increase the rights of employees to religious accommodation? And what would alleviate the concerns of the chamber?

Ms. OLSON. Based on the chamber's experience in connection with working with, for examples, members of the subcommittee that I am on in terms of nondiscrimination and our experiences in representing employers and dealing with these accommodation issues daily, we do not see, many of the examples that have been given here today were examples where an employer's failure to provide an accommodation to an employee because of their religious belief would violate Title VII as it is currently drafted, and there are significant penalties attached to that.

So the chamber does not see the need for there to be a revision to those current requirements and obligations. Those are well set out, and really require an individual analysis of the facts and the specific issues with respect to coworkers, particular religious beliefs at issue, with particular employment situations in terms of health, safety and other issues. So at this point, the answer is no, the chamber does not see a need to make any changes.

Mr. KILDEE. There has always been a certain, if not opposition, inertia at the chamber when it comes to such things as the NLRA, OSHA. I mean, the chamber has never come here asking us to provide greater protection for the worker in the workforce or giving the right to collective bargaining. I mean, we would be surprised probably a bit if you did not come with a position of inertia or opposition, because in my lifetime you were opposed to NLRA, you were opposed to OSHA.

So it is not really surprising, is it, that you would be opposed to any governmental protection of employees in the workplace.

Ms. OLSON. Absolutely not. We are strongly, obviously, in favor of the current protections with respect to employees under Title VII.

This is a situation where you are oftentimes balancing the rights of co-employees in the workplace to work, some employees who do not want to work in connection with having an imposed religious belief or practice on them, alongside other employees.

I think that those issues have to be balanced, as opposed to a bright-line test like exists within the current draft of the Workplace Religious Freedom Act which would provide certain absolute resolutions of conflicts in favor of the employee who has the religious practice that they want to impose in the workplace.

Mr. KILDEE. Thank you.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you. I appreciate your comments.

Can I ask all of you, under current law and EEOC guidance, how broad is the scope of religion? I recognize we are not just talking about what we might call mainstream denominations or religions that enjoy a widespread following. What, if any, are the limits of that definition?

You may recall some years ago the Supreme Court forced the military to take Wiccans into their environment as a religion. So

do we have a specific idea that we are trying to foment here? Can you answer that?

Mr. MARCOSSON. I will certainly take a pass at it anyway, Mr. Chairman.

The Supreme Court, I think, as well as the administrative agencies that enforce other federal laws than Title VII, and the EEOC in enforcing Title VII, I think all are very reluctant, deeply so, to get into questions of trying to question the validity of someone's religious beliefs, for good reason, because answering those questions requires courts to get into areas the courts are not particularly well-suited to answer about what is religion, what is faith, what is sincere.

The Supreme Court has made clear that those sorts of inquiries are so sensitive that the Court would rather err on the side of giving the person the benefit of the doubt that what they are expressing is genuinely a religious belief.

I think that is a wise court, and I think the commission has followed that path as well in giving a broad berth to assuming, unless there is a really serious question on the matter, that what someone is asserting is in their scheme of belief religious in nature, and then proceeding from there.

That has its own problems of being over-broad, perhaps, and allowing too many cases, but I think it avoids even a more serious problem of government sort of having to make those decisions about what counts as truly religious.

Mr. FOLTIN. If I may respond?

Chairman JOHNSON. Yes, sir.

Mr. FOLTIN. I think I have two responses to that.

First, it is the case that the courts have steered away from appropriately determining what is a legitimate religion. That is, the notion of what is a religion that would be covered is going to be broad because the state ought not be in the business of deciding that Christians are more entitled to accommodation than, say, Wiccans.

However, it is the case that the sincerity of the religious belief is something that the courts have tested, do test from time to time. In fact, it is part of the prima facie case that an employee must make, is they must make a showing that they have a bona fide religious belief that requires the accommodation. So, it is not that the courts or any decision-maker is powerless to look into a sham allegation of need for religious accommodation.

In addition, as a practical matter, when you look at the difficulty of bringing these cases, the fact that my colleague from the chamber notwithstanding, these cases do not typically result in large damage awards, meaning that lawyers are reluctant to bring these cases, and the fact that an employee often will have to be fired before they actually get to bring their claim, all of this means that the people that bring these claims, the people that suffer detriment because they need an accommodation, are almost by definition going to be sincere people who require that accommodation or else they are out of a job. Most employees are not looking for an opportunity to put themselves in conflict with their employers over a religious belief that is not really a religious belief that they hold.

So for both a combination of legal reasons, but also as a matter of practical reasons as well, I think we do not need to be concerned anymore than is the case under current law that somehow this amendment to the law would create enormous burdens for employers in dealing with frivolous or extravagant religious claims.

Chairman JOHNSON. You make that statement, but in some cases the Supreme Court has ruled on that issue to a limited degree, as you indicate.

Mr. FOLTIN. I think what I am saying is consistent with what the Court said.

Chairman JOHNSON. Anyone else wish to comment?

Dr. LAND. I would just like to say that as a Baptist, I would be opposed to the government making any discrimination or trying to discern between competing religious claims or claims of religious faith. The last thing we should ever want the government to do, and it seems to me one of the things government is least capable of doing, is trying to adjudicate which religious beliefs or which religions would be accepted and which would not. That would run afoul of the Establishment Clause, it would seem to me, and would be contrary to what this country is all about.

So I think the courts have adjudicated this to the best of the American values and the American tradition that a person's right to believe what they want to believe or not believe what they do not want to believe is an absolute right. The government should not be trying to decide which ones qualify as bona fide religions and which ones do not.

Chairman JOHNSON. It is a great country, isn't it?

Dr. LAND. Yes, sir. Better than any one that we have come up with yet. It can always be improved, but better than any other that has come forward so far.

Chairman JOHNSON. You bet.

Ms. Olson?

Ms. OLSON. Mr. Chairman, if I just might note that I think we are all in agreement in terms of the panelists on that issue, in terms of the fact that religion is defined very, very broadly. The sincerity of the belief in terms of the employee that is exercising their rights under Title VII is something that is usually looked at very closely by the courts.

But the issue of what is a religion is not, because the Supreme Court has told us that it need not be a concept of God, of afterlife or a supreme being; that it is really just a purely moral or ethical belief that is sincerely held with the strength of a religious belief, whether or not the belief itself is religious.

I think that the wide variety of religions that exists and that qualify for that definition of "religion" really brings the wide variety of different issues that are more difficult to imagine than what you see in terms of the Americans With Disabilities Act and an employer's obligations to accommodate there, which is why an employer's obligations under Title VII today in connection with this issue, and in connection with the reasonable accommodation obligations are ones that employers are spending, in my experience, quite a bit of time working very closely with employees to ensure that they can accommodate those beliefs, along with the beliefs of other em-

ployees who do not share that same faith or that same belief system.

Chairman JOHNSON. Thank you.

Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman.

I will submit a question in writing to all the witnesses concerning their views on the New York law, which is comparable to this law, and their experience basically with that law. So I would ask consent to ask in writing, and you respond in writing to the question.

Chairman JOHNSON. Yes. Would you all be willing to accept questions from anyone on the panel and try to answer them?

Dr. LAND. Yes. We would be ready to assist in any way we can.

Chairman JOHNSON. Thank you very much.

Thank you, Mr. Kildee.

I want to thank the witnesses.

Mr. SOUDER. Could I make a request?

Chairman JOHNSON. Sure. You are recognized.

Mr. SOUDER. Because this is such an important hearing, after all these years, there has never been a hearing like this, and for the hearing record, I have some additional materials I would like to insert. If it came from the committee as opposed to an advocate, that to actually look at what is happening in New York and see if there has either been a study or get some data. Did cases increase? What kind of cases came up?

Also, we have historical cases around the country on the dollar settlements and some of this, so we don't just have a record of a few cases, but really look at this. Because if we are going to move this law forward, we really need to figure out how to be fair and how to do it in the best way so it does not hurt business, but it does allow religious freedom.

Chairman JOHNSON. You are welcome to put questions into the record if you so desire. I think the committee could look at something like that.

I want to thank the witnesses for your time and testimony, and both the witnesses and the members who were here for their participation. Thank you for being part of the great American experiment.

If there is no further business, the subcommittee stands adjourned.

[Whereupon, at 11:56 a.m., the subcommittee was adjourned.]

Appendix I

Letters to Witnesses Requesting Supplemental Testimony on New York's Human Rights Law

MAJORITY MEMBERS:

JOHN A. BOEHNER, OHIO, Chairman

THOMAS E. PETRI, WISCONSIN, Vice Chairman
HOWARD P. "BUCK" McKEON, CALIFORNIA
MICHAEL N. CASTLE, DELAWARE
SAM JOHNSON, TEXAS
MARK E. SOUDER, INDIANA
CHARLIE NORWOOD, GEORGIA
VERNON J. EHLERS, MICHIGAN
JUDY BIGGERT, ILLINOIS
TODD RUSSELL PLATTS, PENNSYLVANIA
PATRICK J. TIBERI, OHIO
RIC KELLER, FLORIDA
TOM OSBORNE, NEBRASKA
JOE WILSON, SOUTH CAROLINA
JON C. PORTER, NEVADA
JOHN KLINE, MINNESOTA
MARILYN N. MUSGRAVE, COLORADO
BOB INGLIS, SOUTH CAROLINA
CATHY MCMORRIS, WASHINGTON
KENNY MARCHANT, TEXAS
TOM PRICE, GEORGIA
LUIS FORTUÑO, PUERTO RICO
BOBBY JINDAL, LOUISIANA
CHARLES W. BOUSTANY, JR., LOUISIANA
VIRGINIA FOXX, NORTH CAROLINA
THELMA D. DRAKE, VIRGINIA
JOHN R. "RANDY" KUHL, JR., NEW YORK

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA, Senior Democratic Member

DALE E. KILDEE, MICHIGAN
MAJOR R. OWENS, NEW YORK
DONALD M. PAYNE, NEW JERSEY
ROBERT E. ANDREWS, NEW JERSEY
ROBERT C. SCOTT, VIRGINIA
LYNN C. WOOLSEY, CALIFORNIA
RUBÉN HINOJOSA, TEXAS
CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
RON KIND, WISCONSIN
DENNIS J. KUCINICH, OHIO
DAVID WU, OREGON
RUSH D. HOLT, NEW JERSEY
SUSAN A. DAVIS, CALIFORNIA
BETTY McCOLLUM, MINNESOTA
DANNY K. DAVIS, ILLINOIS
RAÚL M. GRIJALVA, ARIZONA
CHRIS VAN HOLLEN, MARYLAND
TIM RYAN, OHIO
TIMOTHY H. BISHOP, NEW YORK
JOHN BARROW, GEORGIA

MAJORITY--(202) 225-4527
(TTY)--(202) 226-3372
MINORITY--(202) 225-3725
(TTY)--(202) 226-3116

November 18, 2005

Via Electronic and First-Class Mail

Mr. Richard Foltin
Legislative Director & Counsel
American Jewish Committee
1156 15th Street, NW - Suite 1201
Washington, DC 20005

Dear Mr. Foltin:

Thank you for your recent testimony before the Subcommittee on Employer-Employee Relations on H.R. 1445, the "Workplace Religious Freedom Act of 2005." On behalf of all of the members of the Subcommittee, we express our thanks for your informative testimony.

As you may recall, during the hearing, a number of questions were asked regarding New York's state law prohibiting religious discrimination in the workplace, which has been represented as being substantively identical to the federal legislation contemplated in H.R. 1445. As was indicated at hearing, we would like each of the witnesses to submit supplemental testimony focusing specifically on New York law, your views with respect to same, and any analysis of or experience with that law you would like to share with the Subcommittee. We would ask that you submit your written response to this request no later than the close of business on December 16, 2005.

Again, we thank you for your participation in and contribution to this hearing. If you have any questions regarding this request for supplemental testimony, please feel free to contact Jim Paretti or Robert Gregg at (202) 225-7101.

Sincerely yours,

SAM JOHNSON, M.C.
Chairman

DALE KILDEE, M.C.

MARK E. SOUDER, M.C.

MAJORITY MEMBERS:

JOHN A. BOEHNER, OHIO, Chairman

THOMAS E. PETRI, WISCONSIN, Vice Chairman
HOWARD P. "BUCK" McKEON, CALIFORNIA
MICHAEL N. CASTLE, DELAWARE
SAM JOHNSON, TEXAS
MARK E. SOUDER, INDIANA
CHARLIE NORWOOD, GEORGIA
VERNON J. EHLERS, MICHIGAN
JUDY BIGGERT, ILLINOIS
TODD RUSSELL PLATTS, PENNSYLVANIA
PATRICK J. TIBERI, OHIO
RIC KELLER, FLORIDA
TOM OSBORNE, NEBRASKA
JOE WILSON, SOUTH CAROLINA
JON C. PORTER, NEVADA
JOHN KLINE, MINNESOTA
MARILYN N. MUSGRAVE, COLORADO
BOB INGLIS, SOUTH CAROLINA
CATHY MCMORRIS, WASHINGTON
KENNY MARCHANT, TEXAS
TOM PRICE, GEORGIA
LUIS FORTUÑO, PUERTO RICO
BOBBY JINDAL, LOUISIANA
CHARLES W. BOUSTANY, JR., LOUISIANA
VIRGINIA FOXX, NORTH CAROLINA
THELMA D. DRAKE, VIRGINIA
JOHN R. "RANDY" KUHL, JR., NEW YORK

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA, Senior Democratic Member

DALE E. KILDEE, MICHIGAN
MAJOR R. OWENS, NEW YORK
DONALD M. PAYNE, NEW JERSEY
ROBERT E. ANDREWS, NEW JERSEY
ROBERT C. SCOTT, VIRGINIA
LYNN C. WOOLSEY, CALIFORNIA
RUBÉN HINOJOSA, TEXAS
CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
RON KIND, WISCONSIN
DENNIS J. KUCINICH, OHIO
DAVID WU, OREGON
RUSH D. HOLT, NEW JERSEY
SUSAN A. DAVIS, CALIFORNIA
BETTY McCOLLUM, MINNESOTA
DANNY K. DAVIS, ILLINOIS
RAÚL M. GRIJALVA, ARIZONA
CHRIS VAN HOLLEN, MARYLAND
TIM RYAN, OHIO
TIMOTHY H. BISHOP, NEW YORK
JOHN BARROW, GEORGIA

MAJORITY–(202) 225–4527
(TTY)–(202) 226–3372
MINORITY–(202) 225–3725
(TTY)–(202) 226–3116

November 18, 2005

Via Electronic and First-Class Mail

Dr. Richard Land
President
Ethics & Religious Liberty Commission, Southern Baptist Convention
505 Second St., N.E.
Washington, DC 20002

Dear Dr. Land:

Thank you for your recent testimony before the Subcommittee on Employer-Employee Relations on H.R. 1445, the "Workplace Religious Freedom Act of 2005." On behalf of all of the members of the Subcommittee, we express our thanks for your informative testimony.

As you may recall, during the hearing, a number of questions were asked regarding New York's state law prohibiting religious discrimination in the workplace, which has been represented as being substantively identical to the federal legislation contemplated in H.R. 1445. As was indicated at hearing, we would like each of the witnesses to submit supplemental testimony focusing specifically on New York law, your organization's position with respect to same, and any analysis of or experience with that law you would like to share with the Subcommittee. We would ask that you submit your written response to this request no later than the close of business on December 16, 2005.

Again, we thank you for your participation in and contribution to this hearing. If you have any questions regarding this request for supplemental testimony, please feel free to contact Jim Paretti or Robert Gregg at (202) 225-7101.

Sincerely yours,

SAM JOHNSON, M.C.
Chairman

DALE KILDEE, M.C.

MARK E. SOUDER, M.C.

MAJORITY MEMBERS:

JOHN A. BOEHNER, OHIO, Chairman

THOMAS E. PETRI, WISCONSIN, Vice Chairman
HOWARD P. "BUCK" McKEON, CALIFORNIA
MICHAEL N. CASTLE, DELAWARE
SAM JOHNSON, TEXAS
MARK E. SOUDER, INDIANA
CHARLIE NORWOOD, GEORGIA
VERNON J. EHLERS, MICHIGAN
JUDY BIGGERT, ILLINOIS
TODD RUSSELL PLATTS, PENNSYLVANIA
PATRICK J. TIBERI, OHIO
RIC KELLER, FLORIDA
TOM OSBORNE, NEBRASKA
JOE WILSON, SOUTH CAROLINA
JON C. PORTER, NEVADA
JOHN KLINE, MINNESOTA
MARILYN N. MUSGRAVE, COLORADO
BOB INGLIS, SOUTH CAROLINA
CATHY MCMORRIS, WASHINGTON
KENNY MARCHANT, TEXAS
TOM PRICE, GEORGIA
LUIS FORTUÑO, PUERTO RICO
BOBBY JINDAL, LOUISIANA
CHARLES W. BOUSTANY, JR., LOUISIANA
VIRGINIA FOXX, NORTH CAROLINA
THELMA D. DRAKE, VIRGINIA
JOHN R. "RANDY" KUHL, JR., NEW YORK

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA, Senior Democratic Member

DALE E. KILDEE, MICHIGAN
MAJOR R. OWENS, NEW YORK
DONALD M. PAYNE, NEW JERSEY
ROBERT E. ANDREWS, NEW JERSEY
ROBERT C. SCOTT, VIRGINIA
LYNN C. WOOLSEY, CALIFORNIA
RUBÉN HINOJOSA, TEXAS
CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
RON KIND, WISCONSIN
DENNIS J. KUCINICH, OHIO
DAVID WU, OREGON
RUSH D. HOLT, NEW JERSEY
SUSAN A. DAVIS, CALIFORNIA
BETTY McCOLLUM, MINNESOTA
DANNY K. DAVIS, ILLINOIS
RAUL M. GRIJALVA, ARIZONA
CHRIS VAN HOLLEN, MARYLAND
TIM RYAN, OHIO
TIMOTHY H. BISHOP, NEW YORK
JOHN BARROW, GEORGIA

MAJORITY–(202) 225–4527
(TTY)–(202) 226–3372
MINORITY–(202) 225–3725
(TTY)–(202) 226–3116

November 18, 2005

Via Electronic and First-Class Mail

Samuel A. Marcosson
Associate Dean and Professor of Law
Louis D. Brandeis School of Law
2301 South 3rd Street
Louisville, KY 40292

Dear Professor Marcosson:

Thank you for your recent testimony before the Subcommittee on Employer-Employee Relations on H.R. 1445, the "Workplace Religious Freedom Act of 2005." On behalf of all of the members of the Subcommittee, we express our thanks for your informative testimony.

As you may recall, during the hearing, a number of questions were asked regarding New York's state law prohibiting religious discrimination in the workplace, which has been represented as being substantively identical to the federal legislation contemplated in H.R. 1445. As was indicated at hearing, we would like each of the witnesses to submit supplemental testimony focusing specifically on New York law, your views with respect to same, and any analysis of or experience with that law you would like to share with the Subcommittee. We would ask that you submit your written response to this request no later than the close of business on December 16, 2005.

Again, we thank you for your participation in and contribution to this hearing. If you have any questions regarding this request for supplemental testimony, please feel free to contact Jim Paretti or Robert Gregg at (202) 225-7101.

Sincerely yours,

Sam Johnson
SAM JOHNSON, M.C.
Chairman

Dale E. Kildee
DALE KILDEE, M.C.

Mark Souder
MARK E. SOUDER, M.C.

MAJORITY MEMBERS:

JOHN A. BOEHNER, OHIO, Chairman

THOMAS E. PETRI, WISCONSIN, Vice Chairman
HOWARD P. "BUCK" McKEON, CALIFORNIA
MICHAEL N. CASTLE, DELAWARE
SAM JOHNSON, TEXAS
MARK E. SOUDER, INDIANA
CHARLIE NORWOOD, GEORGIA
VERNON J. EHLERS, MICHIGAN
JUDY BIGGERT, ILLINOIS
TODD RUSSELL PLATTS, PENNSYLVANIA
PATRICK J. TIBERI, OHIO
RIC KELLER, FLORIDA
TOM OSBORNE, NEBRASKA
JOE WILSON, SOUTH CAROLINA
JON C. PORTER, NEVADA
JOHN KLINE, MINNESOTA
MARILYN N. MUSGRAVE, COLORADO
BOB INGLIS, SOUTH CAROLINA
CATHY MCMORRIS, WASHINGTON
KENNY MARCHANT, TEXAS
TOM PRICE, GEORGIA
LUIS FORTUÑO, PUERTO RICO
BOBBY JINDAL, LOUISIANA
CHARLES W. BOUSTANY, JR., LOUISIANA
VIRGINIA FOXX, NORTH CAROLINA
THELMA D. DRAKE, VIRGINIA
JOHN R. "RANDY" KUHL, JR., NEW YORK

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA, Senior Democratic Member

DALE E. KILDEE, MICHIGAN
MAJOR R. OWENS, NEW YORK
DONALD M. PAYNE, NEW JERSEY
ROBERT E. ANDREWS, NEW JERSEY
ROBERT C. SCOTT, VIRGINIA
LYNN C. WOOLSEY, CALIFORNIA
RUBÉN HINOJOSA, TEXAS
CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
RON KIND, WISCONSIN
DENNIS J. KUCINICH, OHIO
DAVID WU, OREGON
RUSH D. HOLT, NEW JERSEY
SUSAN A. DAVIS, CALIFORNIA
BETTY McCOLLUM, MINNESOTA
DANNY K. DAVIS, ILLINOIS
RAÚL M. GRIJALVA, ARIZONA
CHRIS VAN HOLLEN, MARYLAND
TIM RYAN, OHIO
TIMOTHY H. BISHOP, NEW YORK
JOHN BARROW, GEORGIA

MAJORITY–(202) 225–4527
(TTY)–(202) 226-3372
MINORITY–(202) 225–3725
(TTY)–(202) 226-3116

November 18, 2005

Via Electronic and First-Class Mail

Ms. Camille A. Olson, Esq.
Partner
Seyfarth Shaw LLP
55 East Monroe Street, Suite 4200
Chicago, IL 60603

Dear Ms. Olson:

Thank you for your recent testimony before the Subcommittee on Employer-Employee Relations on H.R. 1445, the "Workplace Religious Freedom Act of 2005." On behalf of all of the members of the Subcommittee, we express our thanks for your informative testimony.

As you may recall, during the hearing, a number of questions were asked regarding New York's state law prohibiting religious discrimination in the workplace, which has been represented as being substantively identical to the federal legislation contemplated in H.R. 1445. As was indicated at hearing, we would like each of the witnesses to submit supplemental testimony focusing specifically on New York law, your organization's position with respect to same, and any analysis of or experience with that law you would like to share with the Subcommittee. We would ask that you submit your written response to this request no later than the close of business on December 16, 2005.

Again, we thank you for your participation in and contribution to this hearing. If you have any questions regarding this request for supplemental testimony, please feel free to contact Jim Paretti or Robert Gregg at (202) 225-7101.

Sincerely yours,

SAM JOHNSON, M.C.
Chairman

DALE KILDEE, M.C.

MARK E. SOUDER, M.C.

Response to Request From Richard T. Foltin, the American Jewish Committee

Mr. Chairman, Congressman Kildee, and Congressman Souder, thank you for your request to submit supplemental testimony with respect to the experience in New York State following that state's revision of its religious accommodation legislation in 2002. I appreciate also the Chairman's courtesy in agreeing, through committee staff, to allow me a brief extension of time in which to make this submission and to use this opportunity to provide supplemental material on other pertinent issues.

In 2002, New York State amended the religious accommodation provisions of its Human Rights Law, found at New York Executive Law Section 296(10). (The text of N.Y. Executive Law Sec. 296(10) (2004), as amended—with changes from the law as it read prior to the 2002 amendments noted—is appended as Appendix A.) New York's amended religious accommodation law is, to be sure, not identical with

H.R.1445, the Workplace Religious Freedom Act of 2005 (WRFA). Nevertheless, those amendments, taken together with the New York law's already existing provisions, incorporate the most crucial aspect of H.R.1445—a standard for determining "undue hardship" that is comparable to that proposed by WRFA.

The revised New York law incorporates two significant new elements. Firstly, subsection (a) of Section 296(10), as amended, explicitly extends the obligation of an employer to provide a reasonable accommodation of an employee's religious practice to any "sincerely held practice of his or her religion;" the prior law had referenced only holy day observance.

Secondly, subsection (a), as amended, goes on to provide that it is a discriminatory practice for an employer to require an employee or prospective employee "to violate or forego a sincerely held practice of his or her religion... unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business."[1]

"Undue hardship" is defined by subsection (c)(1) to mean "an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)"—a definition that is similar to, although not identical with, the definition of "undue hardship" in WRFA. While WRFA does not include the parenthetical, the provision that an employer shall not be obligated to accede to "a violation of a bona fide seniority system" is consistent with the provisions of Section 703(h) of Title VII (42 U.S.C. Sec. 2000e2(h)), which will continue to be applicable to federal religious accommodation cases if WRFA is adopted, as it is now. Further, the clause regarding "safe or efficient operation of the workplace" simply expands on the meaning of "significant difficulty or expense." Subsection (c)(1) goes on to list a number of factors to be considered in determining whether the accommodation constitutes "an undue economic hardship," a list which is, again, similar, but not identical, to the nonexclusive list to be found in WRFA.[2]

There is no evidence that enactment of the 2002 amendments has led to the parade of horribles foretold by some critics of WRFA. It has been claimed by some that WRFA would increase the chances of success for a claim that an employer has an obligation to accommodate (i) an employee who asserts a religious basis not to fill prescriptions or provide health care that he or she would otherwise be expected to carry out in the normal course of their duties, or (ii) an employee who asserts a religious basis to harass a fellow employee or customer, or make comments to a fellow employee or customer that such fellow employee or customer would reasonably be expected to find objectionable, insulting or degrading. In a state as large and diverse as New York, and given the speed with which information travels in this Age of the Internet, we would expect to have heard if the predicted onslaught of such claims were occurring, much less that these claims were prevailing.[3] Like the dog that did not bark in the night in the Sherlock Holmes story, it is telling that this has not been the case.

In this respect, Gina Lopez Summa, counsel to the New York State Division of Human Rights, advises in a letter to me dated December 20, 2005 (appended as Appendix B), that the division does not track "creed basis claims" (the division's term for claims based on discrimination in the workplace based on religion) based upon the specifics of the allegations, and that therefore she cannot advise whether claims of the nature described above have been brought following enactment of the 2002 amendments because the information is not readily available. However, in a conversation with Ms. Summa on or about December 14, 2005, I was advised that she was not personally aware of any such claims having been brought under Section 296. One would expect that, as the division's counsel, any such noteworthy claims would have been brought to her attention. Again, the dog has not barked in the night.

Further, critics of WRFA have not demonstrated that the types of cases they fear are, in fact, being brought—and more to the point, even if such claims are asserted, prevailing—under the amended New York law, with its WRFA-like "undue burden" standard. The claims by those critics that WRFA's strengthening of federal statutory protection against religious discrimination will lead to untoward impact on other significant interests has left supporters of WRFA in the difficult posture of trying to prove a negative. At the end of the day, given the lack of any evidence that this has been the case in New York, the burden of establishing such harm must fall on those making such claims.

The claim has also been made that enactment of WRFA would lead to an onslaught of cases making extraordinary, even frivolous, claims for accommodation. As reflected in Ms. Summa's letter, and in documents provided by the Human Rights Division, the evidence clearly suggests precisely the opposite (the referenced docu-

ments are collectively appended as Appendix C). There were 278 "creed basis claims" filed with the division during the period November 1, 2001 through October 31, 2002. During the subsequent comparable period, November 1, 2002, through October 31, 2003, the number of such claims declined to 238, and continued to decline each of the two subsequent reporting periods—to 228 for the period November 1, 2003 through October 31, 2004, and to 163 for the period November 1, 2004 through October 31, 2005.[4] Thus, claims involving religion fell 14 percent between the 2002 and 2003 reporting periods; a further 4 percent during the period ending in 2004; and a further 29 percent for the period ending in 2005. In total, religion-based claims declined 41 percent between the periods ending in 2002 and 2005.

Ms. Summa's letter advises that, inasmuch as the Division's records do not analyze the claims filed based on the type of discrimination alleged (e.g., facial discrimination, harassment, or failure to accommodate), she cannot state authoritatively that there was no increase in accommodation claims subsequent to enactment of the 2002 amendments. Nevertheless, a common sense analysis suggests that a rise in such claims, and certainly a material rise, would be inconsistent with the declining overall number of creed basis cases. If anything, an appropriate inference is that the steady decline in claims includes a reduction in the number of accommodation claims—and that this reduction is attributable to a greater inclination of New York employers to find an amicable resolution of employee requests for accommodation, given that the change in state law now requires a more vigorous effort to provide a reasonable accommodation.

In sum, as New York State Attorney General Eliot Spitzer stated in an op-ed appearing in the Forward on June 25, 2004, "New York's law has not resulted in the infringement of the rights of others, or in the additional litigation that the ACLU [a WRFA critic] predicts will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA." (A copy of Attorney General Spitzer's op-ed is appended as Appendix D, together with his letter of November 10, 2005, to Chairman Johnson and Ranking Member Andrews to similar effect.)

If, at least as reflected by the decline in numbers of religious discrimination claims filed, the New York experience seems to be a success story, this does not—at least to judge by overall trends during the period from fiscal year 1992 through fiscal year 2002, as reflected in information provided by the U.S. Equal Employment Opportunity Commission—appear to be the case with respect to such claims filed with the EEOC against state and local government employers. Attached as Appendix D is an analysis of EEOC religious discrimination charges (including charges involving a failure to accommodate religious practices) against state and local government employers prepared by James Standish, legislative director for the General Conference of Seventh-day Adventists, and the EEOC table upon which that analysis is based.

Relatedly, as I stated in my written testimony before this Subcommittee of November 10, 2005, figures released by the Equal Employment Opportunity Commission reflect that the overall number of claims of religious discrimination in the workplace (against private as well as state and local government employers) filed for the fiscal year ending on September 30, 2004, as compared to the fiscal year ending on September 30, 1992, have increased in excess of over 75 percent. (I learned subsequent to the November 10 hearing that there was somewhat of a decline in claims filed for fiscal year 2005, as compared to fiscal year 2004, but the point remains the same.)

This trend is reflected as well in the growth of claims characterized by the EEOC as involving religious accommodation issues, rising from 193 in fiscal year 1996 to 327 in fiscal year 2005 (with 341 claims filed in fiscal year 2004), a 69 percent increase. Indeed, for the comparable FY96 through FY05 period, total religion-based charges rose less steeply than those analyzed as religious accommodation claims, from 1,564 claims to 2,340, some 50 percent. (EEOC documents reflecting the foregoing are collectively appended as Appendix E.)[5]

The total number of cases may not be high, but they are high enough to demonstrate that there is a problem in terms of the ability of employees to obtain a reasonable accommodation of their religious practices.[6] And we will, of course, never know of the many people who do not bring claims having been advised, whether by an enforcement agency or by private counsel, that the present law leaves them without recourse and, therefore, to the choice of violating a religious precept or giving up a source of livelihood.[7] While over the last decade or so the EEOC has evidenced a commendable increased commitment to bringing religious accommodation cases, its ability to bring those cases successfully is necessarily limited by the strength of the underlying law.

In conclusion, enactment of the Workplace Religious Freedom Act will constitute an important step towards ensuring that all members of society, whatever their religious beliefs and practices, are protected from an invidious form of discrimination—the arbitrary refusal of an employer to provide a reasonable accommodation of an employee's religious practice. New York's experience reflects that WRFA will not have the baleful impact that some have predicted, and the rising number of denial of accommodation claims filed with the EEOC well demonstrates that the time has come for Congress to reinstate the robust protection against an invidious form of discrimination that it originally intended when it included religious accommodation provisions in the federal civil rights laws.

ENDNOTES

[1] Subsection (b), as amended, reiterates "undue hardship" as the applicable standard for cases of holy day observance, and goes on to deal with certain specific issues relating to accommodation of that type of religious practice.

[2] The term "undue economic hardship" already appeared in the prior version of New York's religious accommodation law as part of the prior, now-repealed Section 296(10)(c). The pertinent language read, "This subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer." The term "undue economic hardship" was, however, not defined in the prior law, nor were any criteria provided for determining when that type of hardship had been demonstrated.

In providing a definition for "undue hardship," the 2002 amendments looked to New York State case law interpreting the term "undue economic hardship" as it appeared in prior Section 296(10)(c). In State Division of Human Rights v. Carnation Co., 42 N.Y.2d 873 (1977), the New York State Court of Appeals (New York's high court) interpreted "undue economic hardship" as "any significant increase in costs" (emphasis supplied). The Court of Appeals further stated in that case, "It should be obvious that an undue economic hardship does not require any threat or undermining of the economic stability of an enterprise. It would be enough that a palpable increase in costs or risk to industrial peace would be required in accomplishing the end sought by the employee." Id. (emphasis supplied). This common sense reading of even the term "undue economic hardship," as compared to the broader concept of "undue hardship" utilized in WRFA and present New York law, undercuts any notion that WRFA will be read to open the door to harassment in the workplace.

[3] This is not to suggest that every conceivable case in which an employee might seek accommodation with respect to a work duty involving the filling of prescriptions or health care is necessarily problematic. An accommodation that burdens third parties—including an accommodation that would make services unavailable on the employer's terms—would impose an unacceptable disruption on the employer's business, and would therefore not be available under WRFA. On the other hand—consistent with the fundamental premise of our Constitution and our society that it is not up to the government to prescribe orthodoxies of belief or practice—to the extent a reasonable accommodation of religious belief regarding work duties can be afforded without such impact, or other significant difficulty or expense, that relief can and should be extended.

[4] Ms. Summa's letter states, "The number of claims filed during the 2001-02 period, which ended shortly before the Section 296(10) amendments went into effect, was not only higher than the number filed during subsequent comparable periods, but also higher than those filed in prior years. This was attributable to an upsurge that was most likely associated with the aftermath of the attacks of September 11, 2001." This is borne out by the sharp rise in 2001-02 in the number of claims filed by Muslims and persons following in the category of "other." Fortunately, the number of claims filed by persons falling in these categories has fallen in subsequent years.

[5] The document breaking out religion charge receipts for the FY1996-2005 period by bases and issues, including religious accommodation, was prepared by the EEOC's Office of Research, Information and Planning. We have been advised that there are some additional bases and charges, each amounting to less than 1% of religion charge receipts, that were not included by ORIP in this compilation.

[6] Moreover, the small number of religious accommodation cases filed with the EEOC, as compared to the overall number of religious claims, suggests—at least on an impressionistic basis—that the number of accommodation cases coming in the door may be undercounted, perhaps because of miscoding when cases are analyzed for categorization.

[7] Further, James Standish's discussion in his appended memorandum of the disincentives to bring, and for lawyers to take, these cases in the context of denial of accommodation claims against state and local governments applies with equal force to claims against private employers.

Response to Request From Camille A. Olson, Esq., Partner, Seyfarth Shaw LLP

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS,
COMMITTEE ON EDUCATION AND THE WORKFORCE,
U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, December 16, 2005.

Hon. SAM JOHNSON, *Chairman,*
Hon. MARK E. SOUDER, *Member,*
Hon. DALE E. KILDEE, *Member,*
Committee on Education and the Workforce, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN JOHNSON, CONGRESSMAN SOUDER, AND CONGRESSMAN KILDEE: I am writing on behalf of the United States Chamber of Commerce in response to your letter dated November 18, 2005. This letter addresses the Subcommittee's specific request for the Chamber's position with respect to New York's Executive Law Section 296(10) which expanded New York's prohibitions against religious discrimination in the workplace, and its comparability with the "Workplace Religious Freedom Act of 2005" ("WRFA"). As noted in your letter, at the recent hearing with respect to WRFA, it was represented to the Subcommittee that New York's state law prohibiting religious discrimination in the workplace was "substantively identical to the federal legislation contemplated in H.R. 1445." In this supplemental testimony the Chamber explains how New York's law differs substantially, and indeed is very different from WRFA. Further, there are other reasons why the employer community's experience to date with New York's law does not provide the Subcommittee with relevant experience by which to judge the impact of WRFA on the employer-employee relationship.

In late November, 2002, New York's Executive Law Section 296(10) became effective. It expanded the then-existing protections of New York's employment discrimination law to include not only protections for employees who request an accommodation to observe their Sabbath or holy day, but also protections that would require an accommodation of other religious practices or beliefs as well that were not then protected under New York law. It also expanded the law by expanding the prohibitions against discrimination "in holding employment" to also include a prohibition in discrimination with respect to any terms and conditions of employment, including opportunities for promotion, advancement or transfers.

In short, New York's law was expanded to include prohibitions against discrimination in employment with respect to a wide range of practices and beliefs that had previously not been protected under state law, including dress, hairstyles, beards and prayer requirements. In addition, it also provided certain specific guidance with respect to an employer's obligation to reasonably accommodate an employee's sincerely held religious beliefs, including a definition of undue hardship, and an express statement that undue hardship does not include any abridgement of the rights granted to employees through a seniority system, or require an employer pay premium wages to employees whose work accommodation may require that they work only certain hours to accommodate their sincerely held religious beliefs.

Specifically, the amendment to subdivision 10 of section 296 of New York's Executive Law in relation to unlawful discriminatory practices can be summarized as follows:

- Paragraph (a) of subdivision 10 was amended to make it an unlawful discriminatory practice for an employer, employee or agent thereof, to impose upon a person as a condition of employment any circumstances that would require such person to violate or forego a sincerely held religious practice or observance;
- Paragraph (a) of subdivision 10 was also amended to provide for an exemption for an employer in situations, where after bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's observance or practice without undue hardship;
- Paragraph (a) of subdivision 10 was amended to establish that an employer is under no obligation to pay premium wages during hours when ordinarily required if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements;
- Paragraph (a) of subdivision 10 was amended to provide that nothing in an employer's duty to accommodate sincerely held religious practices and observances shall alter or abridge seniority rights;
- Paragraph (c) of subdivision 10 was amended to add a new paragraph (c) to provide that it is an unlawful discriminatory practice for an employer to refuse an employee leave solely because the leave is being utilized for the employee's sincerely held religious observance or practice;

• A new paragraph (d) was also added to subdivision 10 to define "undue hardship" as an accommodation requiring significant expense or difficulty and requiring the consideration of several factors, including, but not limited to, cost of the accommodation; the number of employees requesting accommodation; geographic separateness of facilities; and inability of the employee to perform essential job functions.

• Under the new paragraph (d), undue hardship was specifically defined to include any accommodation that "will result in the inability of an employee to perform the essential functions of the position in which he or she is employed."

It is important to note that today Title VII of the Civil Rights Act of 1964, as amended, provides employees with protections that require an employer to accommodate the wide range of religious observances and practices reflected in the 2002 amendments to New York's law, subsection 10, paragraphs a through c. For example, Title VII currently requires employers to reasonably accommodate an employee's religious observances and practices unless an accommodation would cause an undue hardship on an employer. Prior to November, 2002, these protections present under Title VII were not included within the protections of New York law. The definition of undue hardship included within the 2002 amendments to the New York law differs from Title VII's definition of undue hardship; however, as detailed below, New York's definition also differs from WRFA's definition of undue hardship.

As the Subcommittee noted in its request for supplemental testimony, WRFA has been represented by its proponents as substantively identical to New York law. In fact, as described below, there are significant differences between New York's law and WRFA.

• Subparagraph (2) (B) of WRFA provides a definition of the term 'perform the essential functions' of a job that is not contained anywhere in the New York law. Of concern is the definition's elimination from the consideration of an essential function of any job "carrying out practices relating to clothing and practices relating to taking time off, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions, if any of the practices described in this subparagraph restrict the ability to wear religious clothing, to take time off for a holy day, or to participate in a religious observance or practice." If practices relating to clothing and taking time off cannot be considered as an essential function of any job, under Title VII, an employer may not engage in the interactive process of determining whether or not a reasonable accommodation exists that will accommodate the religious practice, without undue hardship, but must simply grant the employee's request regardless of its impact in the workplace. Again, no such similar requirement is imposed upon employers under New York's law. In fact, New York's law, to the contrary, requires employers "to reasonably accommodate an employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business." New York's law does not require a blanket requirement that an employer exempt from an employee's job any restriction on the ability to wear religious clothing, take time off for a holy day or to participate in a religious observance or practice.

• Subparagraph (3) of WRFA defines the term 'undue hardship' differently than it is defined under New York's law. In pertinent part, New York's law definition of undue hardship § 296(10) provides as follows, with that text that is bolded in New York's law completely absent from WRFA:

Article I. "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

Section 1.01 the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

Section 1.02 the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

Section 1.03 for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

In short, absent from WRFA's definition of "undue hardship" is any reference to consideration of an employer's ability to: run a "safe and efficient operation," implement and enforce a "bona fide seniority system," or the number of employees requiring an accommodation for religious reasons. Equally important is the absence in WRFA of New York's absolute requirement that an accommodation shall be consid-

ered to constitute an undue hardship if it will result in an employee's inability to perform the essential functions of the position in which he or she was employed.

• WRFA amends Section 703 of Title VII by adding in subsection (o) (2) a definition of unlawful employment practice that includes failing to provide a reasonable accommodation to a religious observance or practice that does not "remove the conflict between the employment requirements and the religious observance or practice of the employee". No such language, definition or similar requirement is present in New York's law.

• Similarly, as noted above, whereas New York's law expressly includes guidance with respect to an employee not being entitled to premium wages or benefits in connection with performing work during certain hours to accommodate his or her religious requirements, as well as expressly preserving an employee's seniority rights and affirming that those shall not be altered as a result of the reasonable accommodation obligations set forth in the New York law, no such similar language appears in WRFA.

For all of the reasons set forth above, the Chamber submits that New York's law is not substantially identical to WRFA. In fact, the language of the two laws is substantially different and not comparable. As such, the experience of employers under New York's law does not provide guidance on the manner in which WRFA's obligations would impact the workplace.

Moreover, in the relatively short period of time since the passage of the New York's law, approximately three years, the Chamber understands that New York employers have not experienced enforcement of its obligations in a way that differs from enforcement of the existing obligations of those New York employers under Title VII of the Civil Rights Act of 1964. In addition, there are no publicly available administrative rulings of New York's Human Rights Department interpreting the law, nor any reported court decisions. Where as here, New York's judiciary has not answered questions concerning the scope and nature of the protections afforded under New York's amended law, commentators have opined that "the cycle of legislation is never complete until the courts have interpreted and applied the legislative language to actual litigants". Law Summary, Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience, 69 Mo. L. Rev. 853, 863 (2004). As such, the Chamber submits that New York's law should not guide the Subcommittee's consideration of WRFA's obligations.

In conclusion, the Chamber's position is that New York's law is substantially different from the Workplace Religious Freedom Act and offers no appreciable guidance as to the impact of the passage of the Workplace Religious Freedom Act in the workplace. Mr. Chairman and members of the Subcommittee, thank you for the opportunity to provide this supplemental testimony. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

Respectfully submitted,

CAMILLE A. OLSON,
Seybarth Shaw LLP.

Various Appendices Pertaining to New York's Human Rights Law

Appendix A

New York Executive Law Section 296(10)

N.Y. Executive Law Sec. 296(10) (2004), as amended in 2002 reads as follows:

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee

concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision:

(1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

* * * *

Attached is a copy of the New York State legislature's Act of March 21, 2001, amending Executive Law Section 296(10), with the changes from prior law noted.

While other changes in the provisions of Section 296(10) are set forth in the Act, the Act states that the prior Section 296(10)(c) has been repealed in its entirety without providing the text of forth that repealed subsection. The text of the prior, now-repealed Section 296(10)(c) was as follows:

"This subdivision shall not be construed to apply to any position dealing with health or safety where the person holding such position must be available for duty whenever needed, or to any position or class of positions the nature and quality of the duties of which are such that the personal presence of the holder of such position is regularly essential on any particular day or days or portion thereof for the normal performance of such duties with respect to any applicant therefor or holder thereof who, as a requirement of his or her religion, observes such day or days or portion thereof as his or her sabbath or other holy day.

"In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil

service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law."

STATE OF NEW YORK

7340--A

R. R. 553

2001-2002 Regular Sessions

IN ASSEMBLY

March 21, 2001

Introduced by M. of A. SILVER, WEINSTEIN, DESTITO, COLMAN, DiNAPOLI, PHEFFER, JOHN, LENTOL, CYMBROWITZ, DINOWITZ, HIKIND, JACOBS, GORDON -- Multi-Sponsored by -- M. of A. M. COHEN, DIAZ, EVE, GALEF, KAUFMAN, KLEIN, LAFAYETTE, MAYERSOHN, PERRY, SEDDIO, SIDIKMAN, STRINGER, WEISENBERG -- read once and referred to the Committee on Governmental Operations -- recommitted to the Committee on in accordance with Assembly Rule 3, sec. 2 -- reported and referred to the Committee on Codes -- reported and referred to the Committee on Rules -- passed by Assembly and delivered to the Senate, recalled from the Senate, vote reconsidered, bill amended, ordered reprinted, retaining its place on the special order of third reading

AN ACT to amend the executive law, in relation to unlawful discriminatory practices and repealing paragraph (c) of subdivision 10 of section 296 of such law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraphs (a) and (b) of subdivision 10 of section 296 of
2 the executive law, as amended by chapter 166 of the laws of 2000, are
3 amended to read as follows:
4 (a) It shall be an unlawful discriminatory practice for any employer
5 [~~to prohibit, prevent or disqualify any person from, or otherwise to~~
6 ~~discriminate against any person in, obtaining or holding employment,~~
7 ~~because of his or her~~], or an employee or agent thereof, to impose upon
8 a person as a condition of obtaining or retaining employment, including
9 opportunities for promotion, advancement or transfers, any terms or
10 conditions that would require such person to violate or forego a
11 sincerely held practice of his or her religion, including but not limit-
12 ed to the observance of any particular day or days or any portion there-
13 of as a sabbath or other holy day in accordance with the requirements of
14 his or her religion, unless, after engaging in a bona fide effort, the
15 employer demonstrates that it is unable to reasonably accommodate the

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD09075-10-2

employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except [~~as may be required in an emergency or where his or her personal presence is indispensable to the orderly transaction of business~~] where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

§ 2. Paragraph (c) of subdivision 10 of section 296 of the executive law is REPEALED and two new paragraphs (c) and (d) are added to read as follows:

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision: (1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

§ 3. This act shall take effect on the sixtieth day after it shall have become a law.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A7340A

SPONSOR: Silver (MS)

TITLE OF BILL: An act to amend the executive law, in relation to unlawful discriminatory practices and repealing paragraph (c) of subdivision 10 of section 296 of such law relating thereto

PURPOSE OR GENERAL IDEA OF BILL:

The purpose of this bill is to provide employees greater protection of their right to practice their religion.

SUMMARY OF SPECIFIC PROVISIONS:

This bill would:

-Make it an unlawful discriminatory practice for an employer to directly, or through the actions of an employee or agent, impose upon an individual circumstances that would force that individual to forgo religious observance as a condition of employment, advancement or promotion;

-Provide an exemption for situations where altering employee expectations to allow for religious observance would create an undue hardship on the employer;

-Establish that employers are under no obligation to pay premium wages to employees who are working during hours when premium wages would normally be awarded, if the work during those hours is to accommodate religious observation on the employee's behalf, but that another employee who covers for the accommodated worker continues to be entitled to whatever benefits that worker would normally get;

-Establish that it is an unlawful discriminatory practice for an employer to refuse to allow an employee to utilize leave solely because the leave is being utilized to accommodate religious observance;

-Define "undue hardship" as an accommodation requiring significant difficulty or expense (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system) including but not limited to the following conditions; identifiable cost of the accommodations, such as hiring additional employees, transferring employees to different work sites, and loss of productivity; the number of individuals requesting accommodation; geographic and administrative separateness of multiple facilities; and, inability of the employee to perform essential job functions;

-Define "premium wages" as overtime pay, compensatory time off, and additional remuneration for night, weekend or holiday work; and

-Define "premium benefit" as employment benefits such as seniority, life, health or disability insurance, sick leave, annual leave, educational or pension benefits that are greater than the general employment benefit enjoyed by the employee;

-Expressly state that the act does not alter existing seniority rights or require an employer to violate a bona fide seniority right.

JUSTIFICATION:

The New York Court of Appeals has recognized that "no citizen should be required to choose between piety and gainful employment." See NYC Transit Authority v. Myers, 89 NY2d 79 at 88(1996) . Unfortunately, existing state laws do not ensure achievement of that laudable goal in practice, and each year thousands of people are forced to make that choice. Employees and prospective employees whose dress, hairstyle, beards, prayer requirements and Sabbath and holy day observances are required by their religious beliefs, are all too often faced with the prospect of compromising either their faith or their ability to support themselves and their families. In addition, the Court of Appeals determined in State Division of Human Rights v. Carnation, 397 NYS2d 781 (1977), that to constitute an undue economic hardship, "It would be enough that a palpable increase in costs or risk to industrial peace would be required to accomplish the end sought by the employee."

Executive Law □(10) protects employees who need an accommodation to observe their Sabbath or holy day, but does not require accommodation of other religious practices and beliefs. Moreover, the statute does not delineate the factors to be considered in establishing an "undue hardship," leaving employers and employees uncertain about their rights and responsibilities. Additionally, while Civil Rights Law □(c) arguably protects religious practices and beliefs, it does not require employers to accommodate those practices and beliefs. Similarly, while federal law protects a wide range of religious practices, employers do not have to provide an accommodation if any cost or burden would be incurred.

This bill would extend the protection of Executive Law □(10) to a wide range of religious practices and beliefs, and would make that protection more effective by defining the factors to be weighed in determining whether an accommodation would result in an "undue hardship," and relating those factors to the size, scope and overall operating costs of an employer as well as safety considerations. In no case would an employer be required to provide an accommodation if the employee would therefore be unable to perform the core functions of his or her position.

New York City's Human Rights Law affords similar protection. This bill therefore simply extends to all residents of the State that level of protection already enjoyed by residents of New York City, thereby providing full and fair access to employment for the many New Yorkers of faith for whom religious practice is an essential element of their lives.

PRIOR LEGISLATIVE HISTORY:

This is a new bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None noted.

EFFECTIVE DATE:

60 days after enactment.

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
ONE FORDHAM PLAZA, 4TH FLOOR
BRONX, NEW YORK 10458
www.nysdhr.com

MICHELLE CHENEY DONALDSON
COMMISSIONER

EDWARD A. FRIEDLAND
EXECUTIVE DEPUTY COMMISSIONER

December 20, 2005

Richard T. Foltin, Esq.
Legislative Director and Counsel
Office of Government and International Affairs
The American Jewish Committee
1156 15th St., N.W.
Washington, DC 20005

Re: N.Y. Executive Law Section 296(10)

Dear Mr. Foltin:

You have asked me to comment on New York State's experience since the effective date of the 2002 amendments to subdivision 10 of section 296 of the Executive Law, the provision of New York law that makes it an unlawful discriminatory practice for an employer to deny an employee reasonable accommodation of his or her religious practice absent undue hardship on the employer. Specifically, you have asked me whether there has been an increase in the number of claims for accommodation of religious practice in the workplace filed with the Division since the 2002 amendments went into effect.

These amendments went into effect on November 16, 2002. As documents that my office has made available to you reflect, there were 278 "creed basis claims" (our term for claims alleging discrimination in the workplace based on religion) filed with the Division during the period November 1, 2001 through October 31, 2002. During the subsequent comparable period, November 1, 2002, through October 31, 2003, the number of such claims *declined* to 238, and continued to decline each of the two subsequent reporting periods—to 228 for the period November 1, 2003 through October 31, 2004, and to 163 for the period November 1, 2004 through October 31, 2005.[1] The Division

[1] The number of claims filed during the 2001-2002 period, which ended shortly before the Section 296(10) amendments went into effect, was not only higher than the number filed during subsequent comparable periods, but also higher than those filed in the prior year. This was attributable to an upsurge that was most likely associated with the aftermath of the attacks of September 11, 2001.

does not track the claims filed based on the type of discrimination alleged (e.g., facial discrimination, harassment, or failure to accommodate), so I cannot authoritatively state that there was no increase in accommodation claims subsequent to enactment of the 2002 amendments.

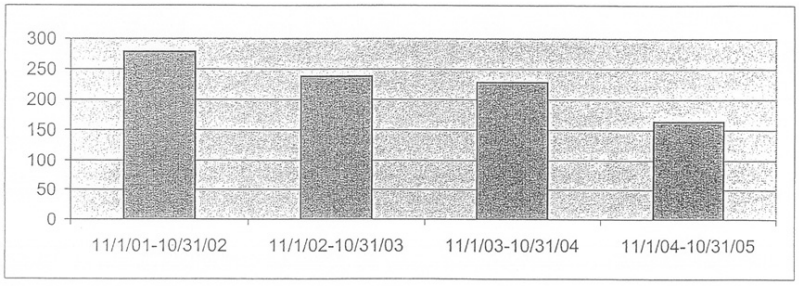
You have also asked me whether, subsequent to the effective date of the amendments, any claims have been filed with the division asserting that the provisions of subsection 296(10) obligate an employer to accommodate (i) an employee who asserts a religious basis not to fill prescriptions or provide health care that he or she would otherwise be expected to carry out in the normal course of their duties; or (ii) an employee who asserts a religious basis to harass a fellow employee or customer, or make comments to a fellow employee or customer that such fellow employee or customer would reasonably be expected to find objectionable, insulting or degrading.

As I stated earlier the Division does not track claims based upon the specifics of the allegations therefore I am unable to provide an answer to this question since this information is not readily available.

Very truly yours,

Gina M. Lopez-Summa
Counsel

Number Of Creed Basis Case Filed By Year



Year	No of Case
11/1/01-10/31/02	278
11/1/02-10/31/03	238
11/1/03-10/31/04	228
11/1/04-10/31/05	163

Prepared on 12/14/2005 By New York State Division Of Human Rights

Creed	11/1/01-10/31/02	11/1/02-10/31/03	11/1/03-10/31/04	11/1/04-10/31/05
Catholic	26	35	27	21
Jewish	54	58	51	37
Muslim	77	52	47	25
Other	91	67	69	65
Protestant	23	16	17	9
Seventh Day Adventist	5	6	10	6
Sikh	2	4	7	0
Total	278	238	228	163

Prepared on 12/14/2005 By New York State Division Of Human Rights

---

FORWARD
FOUNDED IN 1897 • PUBLISHED WEEKLY IN NEW YORK

Forward Forum

BOTH SIDES: Defend the Civil Right to Freedom Of Religion for America's Workers

By ELIOT SPITZER
June 25, 2004

At first glance, Donovan Reed and Kalman Katz have very little in common. Though both are from New York State, Reed is an African-American from Mount Vernon, while Katz is an chasidic Jew from Borough Park. But both Reed and Katz are devoutly religious, and both were put in the untenable position of having to choose between keeping their faith and keeping their jobs.

Katz and Reed were both repair technicians who were denied employment by Sears because of their refusal to work on their Sabbath. After receiving their complaints and conducting a thorough investigation, my office obtained a court-ordered consent decree ensuring that Sears no longer would ask employees of faith to choose between career and conscience.

During the course of our investigation, we became convinced that New York's law governing the accommodation of employees of faith was too vague. Employers were required to accommodate some religious practices but not others, and while employers were excused from accommodation in the case of "undue hardship," that term was not defined. Working together with State Assembly Speaker Sheldon Silver, we crafted a law — patterned after the Workplace Religious Freedom Act, a federal bill known as WRFA that is currently pending in Congress — that expanded the scope and nature of the required accommodation.

Recently, the American Civil Liberties Union has started a campaign to lobby against WRFA, contending that it may violate the reproductive rights of women and the rights of others. I have the utmost respect for the ACLU, but on this issue they are simply wrong.

New York's law has not resulted in the infringement of the rights of others, or in the additional litigation that the ACLU predicts will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA.

New York's law extends the "reasonable accommodation" requirement to all religious practices and beliefs — not just in matters of scheduling or religious garb — and defines "undue hardship" to mean a significant difficulty or expense. The law requires courts confronted with a claim of undue hardship to consider the cost of the accommodation in relation to the size of the employer. The law also recognizes that an accommodation is not necessary if it would prevent the employee from performing the "essential function" of the job.

New York's law — and WRFA — is a significant improvement over the current federal law governing religious accommodation in the workplace. In 1977, the Supreme Court ruled that TWA would suffer

"undue hardship" if it were required to spend $150 to accommodate an employee who refused to work on his Sabbath. That decision made it too difficult for employees to prevail in religious accommodation cases. In fact, in 1997 President Clinton conveyed his dissatisfaction with the federal law governing religious accommodation by issuing "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace," which enhanced the protections afforded to federal employees of faith.

Employees of faith are already enjoying the protections of New York's law, which went into effect almost two years ago. My office has sued FedEx, which prohibits employees who wear beards or dreadlocks for religious reasons from being promoted to positions that require customer contact. And we are investigating a complaint filed by a Sikh whose insistence on wearing his turban cost him his job.

The same benefits can be expected from WRFA. The bill has broad bipartisan support in the Senate, where its chief sponsors are Democrat John Kerry and Republican Rick Santorum. WRFA also has the support of an incredibly diverse coalition of organizations such as the Religious Action Center of Reform Judaism, the National Council of Churches, the National Council of Muslim Women and the Southern Baptist Convention.

WRFA redresses federal court decisions that have expanded the "undue hardship" exception to the religious accommodation requirement of Title VII of the Civil Rights Act of 1964 to include any *de minimus* cost or minimal inconvenience. Like New York's law, WRFA will require an accommodation unless it would impose a significant difficulty or expense or the employee would no longer be able to perform the job's essential functions.

Take the ACLU's example of reproductive rights. WRFA would not permit a nurse who has a religious objection to participating in abortion procedures to abandon the "essential function" of her job and refuse to assist a woman arriving at a hospital who requires an emergency abortion procedure. However, if the hospital arranges for all prescheduled abortions to take place on a particular day of the week, WRFA would empower the nurse to find alternative solutions, such as asking her employer to help her find another nurse who would be willing to swap shifts. Her religious beliefs would be accommodated without impacting the hospital's ability to provide abortion services.

Those of us who are pro-choice need to recognize that this would be an appropriate outcome.

From the Family Medical Leave Act to the Americans with Disabilities Act, Congress has taken great strides to expand the obligation to assist members of society who traditionally have been excluded from the workplace. Employees of faith are entitled to that same protection.

The ACLU has proposed narrowing WRFA so that its accommodation requirements are limited to scheduling or religious garb requests. The framers of the First Amendment did not define religious liberty so narrowly — and neither should we.

Somewhere in America, the next Kalman Katz or Donovan Reed is explaining to his family that his faith has cost him his job. It is wrong for employers to force employees to make that choice, and it is wrong for the ACLU to attempt to frame WRFA as requiring a choice between religious and reproductive rights.

Eliot Spitzer is attorney general of New York.
Copyright 2005 © The Forward

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ELIOT SPITZER
Attorney General

(212) 416-8050

November 10, 2005

Hon. Sam Johnson
Chairman, Subcommittee on Employer-Employee Relations
Committee on Education and the Workplace
U.S. House of Representatives
1211 Longworth House Office Building
Washington, D.C. 20515-4303

Hon. Robert E. Andrews
Ranking Member, Subcommittee on Employer-Employee Relations
Committee on Education and the Workplace
U.S. House of Representatives
2439 Rayburn House Office Building
Washington, D.C. 20515-3001

Dear Chairman Johnson and Ranking Member Andrews:

I am writing to express my strong support for H.R.1445, the Workplace Religious Freedom Act ("WRFA"), which has been introduced by Congressman Souder and is scheduled for a hearing today before the Subcommittee on Employer-Employee Relations. As I am sure you are aware, H.R.1445 enjoys strong bipartisan support, as does the companion bill in the Senate (S.677), which is being co-sponsored by both Senator Charles Schumer and Senator Hilary Clinton.

The issue of religious accommodation in the workplace is one in which I have had great interest since becoming New York's Attorney General. I am proud that during my tenure we have aggressively investigated and prosecuted claims of religious discrimination, including those involving denials of religious accommodation. Those investigations and lawsuits highlighted the deficiencies in New York's law protecting the rights of employees of faith.

As a result, in 2002 New York enacted legislation [N.Y. Executive Law § 296(10)] that significantly enhanced those protections. Specifically, New York's law:

- states that it is an "unlawful discriminatory practice" for any employer to impose upon an employee "any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion," including "the observance of any particular day as a Sabbath or other holy day";

- permits such terms or conditions only if the employer demonstrates that it is unable to "reasonably accommodate" the employee's religious observance or practice "without undue hardship on the conduct of the employer's business";

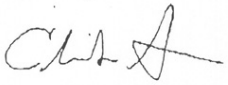
- defines the term "undue hardship" as "an accommodation requiring significant expense or difficulty," and specifies that an accommodation shall be considered to constitute an "undue hardship" if it will result in the "inability of an employee to perform the essential functions of the position in which he or she is employed."

I understand that certain civil rights group have asserted that, if enacted, WRFA would result in the infringement of the civil liberties of other citizens, particularly with regard to access to women's health care services, as well as the rights of gays and lesbians in the workplace.

Although I have the utmost respect for these organizations and have strongly defended the rights they seek to protect, there is no evidence that the enforcement of New York's law has resulted in the infringement of rights that those groups predict. Moreover, New York's law has not been burdensome on businesses in New York, as others had predicted. (I have enclosed a copy of an op-ed article that I wrote last year which explains the New York experience in greater detail.) In short, our law has achieved an appropriate balance between accommodating individual liberty and the conduct of commerce and delivery of services. I believe that WRFA strikes a similar balance.

I sincerely hope the experience of our large and diverse state encourages you to pass the bipartisan Workplace Religious Freedom Act.

Sincerely,



ELIOT SPITZER
Attorney General

Analysis of the U.S. Equal Employment Opportunity Commission Religious Discrimination Charges Against State and Local Government Employers

James D. Standish[1]

Over the fourteen years for which EEOC statistics are available (1992 – 2005), the number of religious discrimination charges brought by the U.S. Equal Employment Opportunity Commission against state and local government employers increased 54%.[2] The number of charges involving a failure to accommodate religious practices in the workplace brought against state and local government employers, a subset of religious discrimination charges and the form of discrimination targeted by the Workplace Religious Freedom Act, went up 440 percent over the same period.[3] From 1992 to 2002 (the high point to date for such charges), the number of charges involving a failure of state and local government employers to accommodate religious practices, went up almost 1,000 percent.[4]

The number of accommodation problems that make it all the way through to the charge process is a tiny fraction of the overall accommodation issues encountered by people of faith in the state and local government workplace. This is because there are significant disincentives to employees proceeding through the process[5] and little incentive to do so.[6] Though the charge statistics represent a small fraction of the number of problems, the dramatic rise in charges is consistent with the rise seen in all forms of religious discrimination charges and claims during the period. Thus the EEOC charge statistics are the best indicator available for the trajectory of the problem, and it therefore reasonable to project that the total extent of the failure to accommodate by state and local government employers has risen in a fairly close relation to the number of EEOC charges brought.

In conclusion, the EEOC charge statistics indicate there has been a serious increase in state and local government employers refusing to accommodate the religious practices of their employees. The extent of the problem in total has likely increased in rough proportion to the rise in EEOC charges brought. Thus, the failure of state and local government employers to accommodate the religious practices of their employees is serious and – like all other forms of religious discrimination – has grown at an alarming rate in recent years.

---

[1] James D. Standish, Esq. (JD, *cum laude*, Georgetown University, MBA, the University of Virginia, BBA, Newbold College, England).

[2] From 234 charges to 360 charges. Source: U.S. Equal Employment Opportunity Commission.

[3] From 5 charges to 27 charges. Source: U.S. Equal Employment Opportunity Commission.

[4] From 5 charges to 54 charges. Source: U.S. Equal Employment Opportunity Commission.

[5] The process tends to be long and makes significant demands on the employee. Lawyers who litigate these cases report that many employees are unwilling to pursue the cases due to concerns over their continued employment, and the time, energy and emotional demands on bringing a charge against their employer. Further, due to the relatively low damages involved in these cases, it can be difficult for employees to find counsel willing to represent them through the process on a contingency basis. Finally, many of those who experience religious discrimination are low educated workers at the low end of the wage scale who are frequently intimidated by authority and who believe an effort to vindicate their rights will be futile.

[6] Damages in accommodation cases are generally limited to lost wages while unemployed. As most employees who experience religious discrimination in the workplace are low paid workers, the damages involved tend to be very small.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Communications and
Legislative
Affairs

The table below includes religion-based charges filed with the Equal Employment Opportunity Commission against agencies of state and local governments during the period 10/01/1998 through 09/30/2005 (FY1999 thru FY2005). The table further shows the number and percentage of those charges that raised the issue of religious accommodation.

Religion-Based Charges Filed with EEOC
Against State and Local
Government Agencies
FY1992 thru FY2005

Fiscal Year	All Religion-Based Charges	Charges with Religious Accommodation Issue	Percent with Religious Accommodation Issue
FY1992	234	5	2.1%
FY1993	263	13	4.9%
FY1994	247	20	8.1%
FY1995	262	25	9.5%
FY1996	276	35	12.7%
FY1997	302	23	7.6%
FY1998	269	24	8.9%
FY1999	284	38	13.4%
FY2000	315	43	13.7%
FY2001	338	48	14.2%
FY2002	342	54	15.8%
FY2003	359	39	10.9%
FY2004	381	27	7.1%
FY2005	360	27	7.5%
Total	4232	421	9.9%

Religion-Based Charges
FY 1992 - FY 2004

The following chart represents the total number of charge receipts filed and resolved under Title VII alleging religion-based discrimination.

The data are compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System - national data base.

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004
Receipts	1,388	1,449	1,546	1,581	1,564	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466
Resolutions	1,297	1,286	1,274	1,606	1,911	2,137	2,247	2,187	2,230	2,217	2,729	2,690	2,676
Resolutions By Type													
Settlements	86	87	81	77	56	89	97	144	156	182	237	221	241
	6.6%	6.8%	6.4%	4.8%	2.9%	4.2%	4.3%	6.6%	7.0%	8.2%	8.7%	8.2%	9.0%
Withdrawals w/Benefits	86	95	91	90	56	74	81	87	94	77	100	86	101
	6.6%	7.4%	7.1%	5.6%	2.9%	3.5%	3.6%	4.0%	4.2%	3.5%	3.7%	3.2%	3.8%
Administrative Closures	363	413	488	620	611	614	559	532	429	382	451	434	490
	28.0%	32.1%	38.3%	38.6%	32.0%	28.7%	24.9%	24.3%	19.2%	17.2%	16.5%	16.1%	18.3%
No Reasonable Cause	707	630	565	779	1,135	1,265	1,363	1,269	1,343	1,349	1,729	1,744	1,672
	54.5%	49.0%	44.3%	48.5%	59.4%	59.2%	60.7%	58.0%	60.2%	60.8%	63.4%	64.8%	62.5%
Reasonable Cause	55	61	49	40	53	95	147	155	208	227	212	205	172
	4.2%	4.7%	3.8%	2.5%	2.8%	4.4%	6.5%	7.1%	9.3%	10.2%	7.8%	7.6%	6.4%
Successful Conciliations	20	18	19	16	25	32	42	42	56	43	54	67	38
	1.5%	1.4%	1.5%	1.0%	1.3%	1.5%	1.9%	1.9%	2.5%	1.9%	2.0%	2.5%	1.4%
Unsuccessful Conciliations	35	43	30	24	28	63	105	113	152	184	158	138	134
	2.7%	3.3%	2.4%	1.5%	1.5%	2.9%	4.7%	5.2%	6.8%	8.3%	5.8%	5.1%	5.0%
Merit Resolutions	227	243	221	207	165	258	325	386	458	486	549	512	514
	17.5%	18.9%	17.3%	12.9%	8.6%	12.1%	14.5%	17.7%	20.5%	21.9%	20.1%	19.0%	19.2%
Monetary Benefits (Millions)*	$1.4	$2.1	$1.5	$1.5	$1.8	$2.2	$2.6	$3.1	$5.5	$14.1	$4.3	$6.6	$6.0

** Does not include monetary benefits obtained through litigation.*

The total of individual percentages may not always sum to 100% due to rounding.

EEOC total workload includes charges carried over from previous fiscal years, new charge receipts and charges transferred to EEOC from Fair Employment Practice Agencies (FEPAs). Resolution of charges each year may therefore exceed receipts for that year because workload being resolved is drawn from a combination of pending, new receipts and FEPA transfer charges rather than from new charges only.

Definitions of Terms

This page was last modified on January 27, 2005.

RELIGION-BASED CHARGE RECEIPTS: FY 1996 – FY 2005

Religion Charge Receipts	FY 1996		FY 1997		FY 1998		FY 1999		FY 2000		FY 2001		FY 2002		FY 2003		FY 2004		FY 2005	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
BASIS																				
Retaliation	291	18.6	380	22.2	427	23.9	475	26.2	723	37.3	898	42.2	970	37.7	905	35.7	870	35.3	801	34.2
Race	397	25.4	447	26.2	484	27.1	488	26.9	550	28.4	571	26.8	675	26.2	684	27.0	714	29.0	711	30.4
National Origin	258	16.5	293	17.1	324	18.1	309	17.1	347	17.9	431	20.3	727	28.3	653	25.8	560	22.7	590	25.2
Sex	322	20.6	301	17.6	331	18.5	332	18.3	365	18.8	423	19.9	445	17.3	457	18.0	489	19.8	482	20.6
Age	205	13.1	277	16.2	260	14.6	251	13.9	297	15.3	342	16.1	366	14.2	382	15.1	375	15.2	416	17.8
Disability	180	11.5	239	14.0	254	14.2	264	14.6	207	10.7	232	10.9	264	10.3	273	10.8	217	8.8	337	14.4
Pay	12	0.8	9	0.5	8	0.4	7	0.4	8	0.4	15	0.7	18	0.7	11	0.4	14	0.6	16	0.7
ISSUE																				
Discharge	829	53.0	880	51.5	925	51.8	917	50.6	962	49.6	906	42.6	1,293	50.3	1,344	53.1	1,299	52.7	1,304	55.7
Harassment	441	28.2	529	31.0	541	30.3	548	30.3	604	31.2	571	26.8	780	30.3	853	33.7	805	32.6	772	33.0
Terms & Cond.	352	22.5	370	21.7	383	21.4	399	22.0	452	23.3	461	21.7	610	23.7	634	25.0	608	24.7	614	26.2
Reasonable Accommodation	193	12.3	195	11.4	219	12.3	253	14.0	243	12.5	243	11.4	326	12.7	307	12.1	341	13.8	327	14.0
Discipline	129	8.2	161	9.4	175	9.8	165	9.1	214	11.0	189	8.9	239	9.3	291	11.5	215	8.7	253	10.8
Hiring	160	10.2	154	9.0	160	9.0	162	8.9	148	7.6	178	8.4	170	6.6	199	7.9	192	7.8	211	9.0
Other	126	8.1	167	9.8	155	8.7	219	12.1	91	4.7	74	3.5	111	4.3	98	3.9	74	3.0	156	6.7
Constructive Discharge	121	7.7	128	7.5	136	7.6	154	8.5	140	7.2	140	6.6	139	5.4	162	6.4	166	6.7	134	5.7
Promotion	99	6.3	132	7.7	143	8.0	138	7.6	153	7.9	138	6.5	123	4.8	153	6.0	147	6.0	130	5.6
Sex. Harass.	73	4.7	83	4.9	103	5.8	89	4.9	104	5.4	88	4.1	93	3.6	99	3.9	111	4.5	132	5.6
Wages	78	5.0	100	5.9	95	5.3	112	6.2	134	6.9	133	6.3	93	3.6	149	5.9	101	4.1	127	5.4
Suspension	52	3.3	68	4.0	59	3.3	54	3.0	60	3.1	56	2.6	72	2.8	88	3.5	86	3.5	92	3.9
Assignment	41	2.6	33	1.9	44	2.5	50	2.8	65	3.4	69	3.2	64	2.5	80	3.2	46	1.9	60	2.6
Demotion	56	3.6	41	2.4	47	2.6	63	3.5	69	3.6	62	2.9	70	2.7	78	3.1	80	3.2	59	2.5
Layoff	38	2.4	39	2.3	43	2.4	30	1.7	38	2.0	30	1.4	71	2.8	69	2.7	61	2.5	55	2.4
Intimidation	40	2.6	73	4.3	72	4.0	81	4.5	97	5.0	98	4.6	113	4.4	84	3.3	54	2.2	56	2.4
Benefits	14	0.9	29	1.7	30	1.7	32	1.8	37	1.9	35	1.6	33	1.3	26	1.0	15	0.6	27	1.2
Training	11	0.7	20	1.2	13	0.7	18	1.0	21	1.1	41	1.9	15	0.6	19	0.8	16	0.6	20	0.9
TOTAL CHARGES	1,564		1,709		1,786		1,811		1,939		2,127		2,572		2,532		2,466		2,340	

Note: Bases and issues arranged in descending order based on FY 2005.

Compiled by ORIP
11/21/05

NEW YORK CONSOLIDATED LAW SERVICE
Copyright (c) 2004 Matthew Bender & Company, Inc.

*** THIS SECTION IS CURRENT THROUGH CH. 70, 05/10/2004 ***

EXECUTIVE LAW
ARTICLE 15. HUMAN RIGHTS LAW

NY CLS Exec §296

§ 296. Unlawful discriminatory practices

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) (Added, L 2002) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) (Added, L 2002) As used in this subdivision:

(1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

Letters of Support for H.R. 1445, the Workplace Religious Freedom Act of 2005

Nevada - Utah Conference of Seventh-day Adventists

P.O. Box 10730 • Reno, NV • 89510-0730 • 775 322-6929

November 7, 2005

The Honorable John Boehner
Attn: Jaclyn Madden
Fax: 202.225.0704

RE: Workplace Religious Freedom Act (H.R. 1445) (SUPPORT)
Employer-Employee Subcommittee Hearing – November 10, 10:30 a.m

Dear Mr. Boehner:

As the Nevada-Utah Conference of Seventh-day Adventist's Religious Liberty and Legislative Affairs Director I am urging you to attend the hearing by the Employer-Employee Subcommittee on Workplace Religious Freedom Act (H.R. 1445), on Thursday, November 10th at 10:30 a.m.

Each year I help mediate dozens of employer-employee conflicts over faith and practice in the states of California, Nevada, and Utah with increasing difficulty in finding fair solutions from employers. We need the Workplace Religious Freedom Act (HR 1445) to help balance the system of justice for people of faith.

Here are some key facts about the Workplace Religious Freedom Act:

- ✓ This important legislation will take great steps toward ensuring that people of faith will not have to choose between their faith and their jobs.
- ✓ While this is a regulatory act, WRFA will simply put into law what reasonable employers already do – accommodate their employees' religious practices.
- ✓ This legislation will not lead to an increase in litigation and it will not allow people of faith to create a hostile working environment by discriminating against those who do not share their religious or social beliefs. We would oppose it if it did.
- ✓ This bill will not affect small businesses with less than 15 employees.
- ✓ We recognize that some employers will not be able to accommodate certain employees. WRFA simply asks that they make a good-faith effort to do so.

I sincerely hope that you will be at the hearing.

Best Regards,

Kevin James, Pastor

Location: 1095 East Taylor • Reno, NV • 89502 • FAX: 775 322-9371

United States Conference of Catholic Bishops
OFFICE OF GOVERNMENT LIAISON
3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3140 • FAX 202-541-3313
EMAIL: OGL@USCCB.ORG • WEBSITE: WWW.USCCB.ORG/OGL

November 9, 2005

The Honorable Robert Andrews
U.S. House of Representatives
2439 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Andrews:

On behalf of the United States Conference of Catholic Bishop, I am writing to express the Conference's support for the Workplace Religious Freedom Act of 2005 (H.R. 1445). If enacted, H.R. 1445 will provide meaningful protection for employees who encounter conflicts between employment requirements and their religious beliefs and practices without unduly burdening employers' operations. We urge you to bring this important and much needed legislation to the House floor for a vote as soon as possible.

Sincerely,

Frank J. Monahan

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
Institute for Public Affairs

November 8, 2005

STEPHEN J. SAVITSKY
President

RABBI TZVI H. WEINREB
Executive Vice President

HARVEY BLITZ
Chair, Board of Directors

MARK BANE
Chair, Inst. for Public Affairs

NATHAN J. DIAMENT
Director

ADVISORY COMMITTEE
Jeffrey Ballabon
Ben Chouake
Benham Dayanim
Howard Friedman
Mandell Ganchrow
Ahuva Genack
Lorraine Hoffman
Steven Laufer
Nathan Lewin
Gary Litke
David Luchins
Louis Malcmacher
Matthew Maryles
Philip E. Milch
Aron Raskas
Howard Rhine
Ben Ringel
Sheldon Rudoff
Martin Wasserman
Dov Zakheim
David Zeffren
YOUNG LEADERSHIP REPRESENTATIVES
Jason Cyrulnik
Yitz Stern
Corey Tarzik

The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.

National Headquarters
11 Broadway
New York, NY 10004

Hon. Sam Johnson, Chairman
Hon. Robert Andrews, Ranking Member
Employer-Employee Relations Subcommittee
of the U.S. House Committee on Education & the Workforce
By Facsimile

Dear Representatives Johnson and Andrews,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America to express our **strong support for the bipartisan Workplace Religious Freedom Act** (HR 1445) which your subcommittee will consider at a hearing on Thursday, November 10.

Along with our organization, the Workplace Religious Freedom Act ("WRFA") is supported by a coalition of more than forty-five religious and community organizations spanning the spectrum of faith and politics. WRFA is a bipartisan effort led in the in the House of Representatives by Reps. Souder and McCarthy and in the U.S. Senate by Senators Santorum and Kerry. The principle which has united these diverse organizations and policymakers is a simple one: that if at all possible and practical, no American should be forced to choose between their career and their conscience.

Prior to 1977, Title VII of the Civil Rights Act of 1964 required employers to reasonably accommodate the religious observances of their employees unless doing so would impose an "undue hardship" upon the employer. In 1977, the U.S. Supreme Court eviscerated this protection for religious workers by holding that if an accommodation imposed even a *de minimis* expense upon the employer, an accommodation was not required under the law. (*TWA v. Hardison*, 432 U.S. 63) WRFA seeks to amend Title VII of the Civil Rights Act to reinstate the protection religious workers require so that they may be faithful to their religion and support their families as well.

WRFA is carefully structured to strike a delicate balance between the needs of employers and employees of faith. It does not impose a strict mandate upon employers to accommodate, but a balancing test which requires accommodation when such would not impose a significant difficulty or expense on the employer and where it would not impede the employee from performing the essential functions of a position.

WRFA will make it more likely that religious employees can wear religious clothing to work, arrange work schedules to have off for holy days and trade work duties which offend their religious conscience to other employees. All of these issues are confronting American employers and employees more and more regularly; WRFA will provide useful guidance to all.

We appreciate your holding a hearing on this important legislation and look forward to continuing to work with you and your colleagues to move HR1445 through the legislative process and protect the religious liberty of all Americans in this important way.

Sincerely,

Rabbi T. Hersh Weinreb

Nathan J. Diament

Submission for the Record Prepared by the Coalition for Religious Freedom in the Workplace

Responses to Questions Regarding the Impact on Employers of The Workplace Religious Freedom Act (WRFA) (S. 677, H.R. 1445)

1. **Does WRFA apply to federal government employees or to the military?**

No. WRFA amends only provisions of Title VII of the U.S. Civil Rights Act of 1964 relating to workplace accommodation of religious practices. It makes no change in terms of which entities are within the scope of the Act. The definition of employers covered by the Act specifically excludes the U.S. Government as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term *does not* include (1) *the United States, a corporation wholly owned by the Government of the United State*..., an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 [of the United States Code])...

Section 701(b), Title VII of the U.S. Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e(b)) (emphasis added).

The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, adopted by executive action by President Clinton in 1997, govern the accommodation of religious practices of Federal employees. The section of the guidelines covering accommodation of employees' religious practices in the Federal workplace provides—pursuant to the continuing application to Federal employees of the Religious Freedom Restoration Act—*greater* protection for Federal workers than the protection for private sector employees proposed in the Workplace Religious Freedom Act. The Guidelines' standard with respect to religious accommodation reads as follows:

> In the Federal Government workplace, if neutral workplace rules—that is, rules that do not single out religious or religiously motivated conduct for disparate treatment—impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act *requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest*. 42 U.S.C. [Sec.] 2000bb-1.

Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, Sec. 2(E), 1997 WL 475412 (White House, Aug. 14, 1997) (emphasis added) (may be viewed at *http://clinton2.nara.gov/WH/New/html/19970819-3275.html*).

2. What happens when providing an accommodation of an employee's religious practices would require a violation of seniority rights under a union agreement?

Where a religious accommodation would be inconsistent with the seniority rights of a fellow employee under a collective bargaining agreement, the seniority rights prevail. This is because, as an amendment to Title VII, WRFA is subject to that title's provision that the routine application of a bona fide seniority system is not to be considered unlawful. Section 703(h), Title VII of the U.S. Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-2(h)). Moreover, courts have held that seniority rights of other employees take precedence even when not based in a collective bargaining agreement. *See Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999).

3. Will WRFA reduce litigation, and if so, how?

WRFA will reduce litigation.

Between 1993 and 2003, the U.S. Equal Employment Opportunity Commission reports claims involving religious discrimination in the workplace rose a staggering 82%. During the same period, by comparison, claims involving racial discrimination declined slightly.

Experts in the area agree that one of the contributing factors to this dramatic rise in claims is the weakness of the accommodation provisions as currently written. Under the current law there is little incentive for a recalcitrant employer to accommodate the religious beliefs of their employees. This does not deter people of faith in the workplace asserting their rights, however, because many of them are unwilling to compromise their conscience no matter what the legal ramifications might be.

WRFA provides an incentive to both employers and employees to work out an accommodation if it is possible. The vast majority of America's employers value the religious diversity of their workforce and already do this. WRFA will provide an added incentive to recalcitrant employers to do the right thing before a case results in litigation. In addition, WRFA is written to provide additional clarity and thereby reduce misunderstandings. Finally, as discussed in the next section, the economics of bringing religious accommodation cases that discourage litigation under current law will not be changed by enactment of WRFA.

4. How is "religion" defined under WRFA and what protections are there to ensure that employees don't make sham religious claims?

Title VII of the U.S. Civil Rights Act of 1964 defines religion as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief…" Section 701(j), Title VII of the U.S. Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e(j)). In amending Title VII; WRFA would not alter that title's definition of religion for purposes of its prohibition on discrimination on the basis of religion. Accordingly,

the barriers that currently exist to an employee making sham religious claims would remain in place.

The first, and most practical barrier, is that there are significant financial disincentives to bringing religious accommodation cases. The financial reality of litigating in this arena is completely different from tort law, or other highly lucrative legal practice in which the chance of winning a large settlement may spur speculative litigation.

In order to prevail in a religious accommodation case, the employee must demonstrate actual damages. In the vast majority of cases, employees don't incur damages until they are fired. Even when employees win cases, however, the damages tend to be modest because they generally consist of lost wages. As most of the employees who are impacted by recalcitrant employees are relatively low wage workers, the lost wages damages tend to be quite small. It would be an unusual person, indeed, who would accept being fired for a sham religious claim, on the speculative chance that he could prevail at court—only to win damages consisting of the lost wages he would have earned if he had stayed with his employer in the first place—and it would be an even more unusual lawyer who would accept such an unlikely case, even among the relatively few who are willing to pursue such a case in the normal course.

Indeed, because of the low damages involved, many of the religious accommodation cases brought over the last three decades have been paid for by non-profit entities, who litigate to defend a principle, rather than to make a profit. These entities are so overwhelmed with requests for help that they must often turn away meritorious cases; they are exceedingly unlikely to fund cases from plaintiffs with claims that do not pass the test of credibility.

Secondly, while courts do not examine the validity of religious beliefs themselves, they may—and do—examine whether the individual has a "sincerely held religious belief." That is, they examine whether a person claiming to follow a particular faith/religion is genuine in his or her claim. *See Brown v. Pena*, 441 F. Supp. 1382 at 1385 (S.D. Fla. 1977) (listing three major factors courts should consider in determining whether a belief is religious, including the sincerity of the belief), *citing Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 324 (5th Cir. 1977). Indeed, the plaintiff in a Title VII religious discrimination case must, as part of his or her *prima facie* case, demonstrate that he or she holds a sincere religious belief that conflicts with an employment requirement. *See Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (9th Cir. 1978).

For these reasons, plaintiffs with sham religious claims seldom bring accommodation cases, much less are successful litigants. Although there have been approximately a thousand reported cases under Title VII's accommodation provisions and state corollaries over the last three decades, until this point, opponents of the Workplace Religious Freedom Act have not been able to identify a single case in which a sham religious claim has prevailed. This will not change, as nothing in WRFA alters a plaintiff's obligation to demonstrate that his or her religious claim is genuine.

In conclusion, there is no financial incentive for employees to concoct sham religious claims under WRFA. Further, it is difficult enough to find an attorney to litigate religious accommodation claims, let alone claims for sham claimants. Finally, courts are empowered to enquire into the sincerity of plaintiff's religious claims and have effectively done so for three decades.

5. Who ultimately makes the decision about what constitutes "undue hardship" on an employer?

Nothing in WRFA changes current law as to who initially makes the determination of undue hardship, nor is there any change in the allocation of burdens of going forward and of proof.

Under well-settled law, the plaintiff in a Title VII religious accommodation has the initial burden of making a *prima facie* case, beginning with the demonstration of the existence of a sincerely-held belief that conflicts with an employment requirement, as set forth above. Secondly, the plaintiff must prove that he or she informed the employer of the belief and of the conflict. *See Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir. 1986). Finally, the plaintiff must demonstrate that he or she was disciplined of failure to comply with the conflicting employment requirement. *See Turpen*, above, at 1026. It is only after the establishment of this *prima facie* case that the burden shifts to the employer to prove that, notwithstanding a good faith effort to accommodate, it could not reasonably accommodate the employee without incurring an undue hardship.

Initially, as is the case now, it will be the employer that determines what is in its own best interest, including whether it considers provision of a reasonable accommodation to impose an undue hardship. The amendment of the definition of undue hardship provided by WRFA simply places a greater incentive on an employer to seek an amicable resolution through accommodation rather than risk possible liability for damages for wrongly dismissing a worker; in other words, WRFA levels the playing field. In more cases than under the current regime, the employer is likely to find that the balance weighs in favor of making the adjustments needed to accommodate, whether through the shifting of schedules or tolerating diversity in appearance. (Although injunctive relief providing for reinstatement would be available under WRFA, as it is under current law, dismissed workers do not, as a practical matter, return to work at a company that does not want them back.)

As has been discussed in other supporting materials, WRFA is necessary because the courts have defined the term "undue hardship," as used in the Civil Rights Act, so narrowly as to eviscerate the protections against religious discrimination contemplated by the Act's framers. The drafters of WRFA were therefore particularly concerned about the power of the judiciary to either over- or under-interpret the law. As a result, the team of legal experts who drafted the bill defined "undue hardship" in careful legal terms. It is impossible to eliminate the possibility of judicial misinterpretation review for an act of Congress for any bill, and WRFA is no exception. <u>There is nothing</u>

in WRFA, however, that makes it uniquely susceptible to judicial misinterpretation, indeed the bill is drafted as tightly as possible to avoid judicial ambiguity.

6. Under WRFA, the definition of the ability to "perform the essential functions" of the job excludes dress and time off. Does this mean that employers must accommodate these religious practices?

No. The "essential functions" provision of WRFA, which states that the employer doesn't have to accommodate an employee who is unable to perform an "essential function" of the job, is a threshold protection for employers. Once it is shown that an employee cannot fulfill these functions, the employer is under no obligation to show that it would incur an undue hardship were a reasonable accommodation to be afforded. This language was inserted into the bill to make clear that employers are not required to accommodate employees who refuse to perform the core requirements of their job. But even when an employee is able to perform the essential functions of the job, as that term is defined, the employer still need not provide an accommodation if to do so would impose an undue hardship.

Because the definition of "essential functions" serves as an **obstacle** to making a case for religious accommodation—regardless of whether there is undue or any other kind of hardship—it is not surprising that WRFA's drafters sought to make it clear that the term "essential functions" does not encompass passing aspects of a job—that is, accommodations that have only a "temporary or tangential impact on the ability to perform job functions"—lest the exception swallow the rule. In addition, religious garb and holy day accommodations were specifically excluded from the definition of "essential function" because, while these types of practices may relate to how an employee performs his or her job, they were viewed as exceedingly unlikely to amount to an unwillingness to perform core elements of that job. But, as with other practices that have a "temporary or tangential impact" on performance of the job, any request for accommodation of these practices remains subject to the "undue hardship" standard.

Thus, under WRFA, employers must accommodate the religious practices of their employees only if the accommodation would not result a "significant difficulty or expense" to the employer. This standard applies to *all* religious accommodation claims, including religious clothing and holy day requirements. If accommodating an employee's holy day requirements, clothing requirements, or any other religious practice would result in a significant cost or difficulty, the employer does *not* have to accommodate the practice.

7. How can we be sure WRFA will not result in the abuse of employers?

WRFA introduces no novel concepts into the law. New York has a state statute that tracks the standard in WRFA, *N.Y. Executive Law* Sec. 296(10), and the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace exceed the protections found in WRFA. These provisions have worked well. They have not resulted in an explosion of litigation, sham religious claims or crippling compliance costs.

As this bill is debated, it is important for all involved to keep a firm grip on reality. There are those at both ends of the political spectrum who have dreamed up cataclysmic scenarios if WRFA is passed. *These scenarios bear no relation to reality*. At the same time, there is no doubt that every day hard-working Americans are put to an unnecessary and arbitrary choice between their faith and their livelihood because of the unhappy state of the law. We cannot let those who play on our worst fears succeed in preventing us from passing this vital legislation.

America is, at its heart, a nation of liberty. Core to understanding of liberty, is the right to worship God according to the dictates of our conscience. We can all agree that no American should be forced arbitrarily to choose between their faith and their job. WRFA will make our national reality a little closer to this national aspiration. There are always reasons not to do the right thing, but the reasons for doing what is right are far more compelling. We must have the courage to stand up for our most fundamental values by passing this modest, balance bill that is a vital step in the right direction.

○