S. HRG. 102-1076

THE RELIGIOUS FREEDOM RESTORATION ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

S. 2969

A BILL TO PROTECT THE FREE EXERCISE OF RELIGION

SEPTEMBER 18, 1992

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Kennedy, Hon. Edward M	1
Thurmond, Hon. Strom	3
Hatch, Hon. Orrin G	7
Metzenbaum, Hon. Howard M	8

CHRONOLOGICAL LIST OF WITNESSES

William Nouyi Yang, Worcester, MA, accompanied by Robert Peck, legislative counsel, American Civil Liberties Union	5
Panel consisting of: Dallin H. Oaks, quorum of the twelve apostles, Church of Jesus Christ of Latter-Day Saints, Salt Lake City, UT; Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs, Washington, DC; Douglas Laycock, professor, University of Texas School of Law; Mark E. Chopko, general counsel, U.S. Catholic Conference, Washington, DC; and Bruce Fein, Great Falls, VA	30
Panel consisting of: Forest D. Montgomery, counsel, office of public affairs, National Association of Evangelicals, Washington, DC; Michael P. Farris, president, Home School Legal Defense Association, Paeonian Springs, VA; Nadine Strossen, president, American Civil Liberties Union; and James Bopp, Jr., general counsel, National Right to Life Committee, Inc., Washington, DC	135

ALPHABETICAL LIST AND SUBMITTED MATERIAL

Bopp, James, Jr.:	
Testimony	203
Prepared statement	206
Chopko, Mark E.:	
Testimony	99
Prepared statement	101
Farris, Michael P.:	
Testimony	148
Prepared statement	151
An analysis of the Religious Freedom Restoration Act by the Coalitions for America	154
Fein, Bruce:	
Testimony	116
Prepared statement	120
Laycock, Douglas:	
Testimony	63
Prepared statement	66
Montgomery, Forest D.:	
Testimony	135
Prepared statement	138
Oaks, Dallin H.:	
Testimony	30
Prepared statement	33
Peck, Robert:	
Testimony	6
Text of opinion, Yang v. Sturner	10
Strossen, Nadine:	
Testimony	171
Prepared statement	174

Page

Strossen, Nadine—Continued
Thomas, Oliver S.:
Testimony 41
Prepared statement 44
Yang, William Nouyi:
Testimony 5
Prepared statement 14

APPENDIX

Prepared statement by a broad coalition of Indian tribes and organizations and religious, civil rights and environmental organizations 243
Text of S. 2969—A bill to protect the free exercise of religion 262

S. 2969—THE RELIGIOUS FREEDOM RESTORATION ACT

FRIDAY, SEPTEMBER 18, 1992

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

The committee met, pursuant to notice, at 10:15 a.m., in room SD-G-50, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy, Metzenbaum, and Hatch.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. We will come to order.

The brave pioneers who founded America came here in large part to escape religious tyranny and to practice their faiths free from government interference. The persecution they had suffered in the old world convinced them of the need to assure for all Americans for all time the right to practice their religion unencumbered by the yoke of religious tyranny.

That profound principle is embodied in the two great religion clauses of the first amendment, which provide that Congress "shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." But in 1990, the Supreme Court's decision in *Oregon Employment Division* v. *Smith* produced a serious and unwarranted setback for the first amendment's guarantee of freedom of religion.

Before the *Smith* decision, Federal, State, and local governments were prohibited from interfering with people's ability to practice their religion unless the restriction satisfied a difficult two-part test—first, that it was necessary to achieve a compelling government interest; and, second, that there was no less burdensome way to accomplish the goal.

The compelling interest test has been the legal standard protecting the free exercise of religion for nearly 30 years. Yet, in one fell swoop the Supreme Court overruled that test and declared that no special constitutional protection is available for religious liberty as long as the Federal, State, or local law in question is neutral on its face as to religion and is a law of general application. Under *Smith*, the Government no longer had to justify burdens on the free exercise of religion as long as these burdens are "merely the incidental effect of a generally applicable and otherwise valid provision."

The Supreme Court did not have to go that far to reach its result in the *Smith* case. As Justice Sandra Day O'Connor wrote of the majority's ruling in her eloquent and forceful opinion concurring in the result but criticizing the majority's reasoning,

> Today's holding dramatically departs from well-settled first amendment jurisprudence, appears unnecessary to resolve the questions presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

The Religious Freedom Restoration Act, which Senator Hatch and I, and 23 other Senators have introduced, would restore the compelling interest test for evaluating free exercise claims. It would do so by establishing a statutory right that adopts the standards previously used by the Supreme Court. In essence, the act codifies the requirement for the Government to demonstrate that any law burdening the free exercise of religion is essential to furthering a compelling governmental interest and is the least restrictive means of achieving that interest.

The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail. It simply restores the long-established standard of review that had worked well for many years and that requires courts to weigh free exercise claims against the compelling State interest standard.

Our bill is strongly supported by an extraordinary coalition of organizations with widely differing views on many other issues. The National Association of Evangelicals, the American Civil Liberties Union, the Coalitions for America, People for the American Way, just to name a few, support the legislation. They don't often agree on much, but they do agree on the need to pass the Religious Freedom Restoration Act because religious freedom in America is damaged each day the *Smith* decision stands.

Today, the committee will hear compelling testimony about the destructive impact of the decision. We are fortunate to have a very distinguished group of witnesses and I look forward to their testimony.

We have a statement from Senator Thurmond which we will enter in the record at this point.

[The prepared statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE JUDICIARY COMMITTEE, REFERENCE HEARING ON S. 2969, THE RELIGIOUS FREEDOM RESTORATION ACT, 226 DIRKSEN SENATE OFFICE BUILDING. FRIDAY, SEPTEMBER 18, 1992. 10:00 A.M.

MR. CHAIRMAN:

The hearing this morning on S. 2969, the Religious Freedom Restoration Act, brings into sharp focus the many different views on the advisability and manner of reversing the Supreme Court's 1990 decision in Employment Division of Oregon v. Smith.

This opinion, as my colleagues know, concerns the Free Exercise Clause of the First Amendment to the Constitution. As stated by the Court, the respondents in this case, were fired from their jobs with a drug rehabilitation program because of their use of peyote as part of a religious ceremony. At the time, the use of peyote was a crime in Oregon for which no religious exemption existed. Respondents were denied unemployment compensation on the ground that they were dismissed for misconduct. Subsequently, the Oregon Supreme Court reversed, holding that the denial of unemployment benefits violated respondents free exercise rights under the First Amendment.

Of importance to the hearing this morning is that the Court, in reversing the Oregon Supreme Court, declined to apply the compelling governmental interest test, as set forth in Sherbert v. Verner, a 1963 decision. S. 2969 would reverse the Court's holding, and would statutorily require the Court to apply the compelling governmental interest test to all challenges based on the Free Exercise Clause.

Mr. Chairman, I understand the arguments in support of S.

2969, but I am concerned that there are many aspects to this legislation which must be carefully considered before it is enacted. For example, I am concerned, as some of the witnesses suggest, that this legislation may have unintended consequences, especially as to the issue of abortion. I am also concerned that this legislation may deprive the Court of a certain amount of flexibility which is necessary in determining constitutional issues.

Given the seriousness of these and many other issues, Mr. Chairman, I want to assure the witnesses that I intend to study this legislation, and their recommendations, very carefully. In my view, legislation such as this, which impacts constitutional decision-making, demands our most careful and thorough review.

In conclusion, Mr. Chairman, I want to thank the witnesses for their time and effort in appearing before the Committee this morning.

Senator KENNEDY. Our first witness this morning is Mr. William Yang of Worcester, MA. Mr. Yang, we welcome you here and we are delighted to have you before the committee. We know that you testified over in the House of Representatives, as well, and we appreciate very much your presence here this morning.

STATEMENT OF WILLIAM NOUYI YANG, WORCESTER, MA, ACCOMPANIED BY ROBERT PECK, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. YANG. Thank you, Mr. Chairman. My religion is animism. We worship parents, we worship spirits, and we believe in reincarnation. My family and I immigrated from Laos to the United States in 1976 due to the Communist takeover of our country. We settled and continued our life in America. It was hard and difficult for us to adapt to this new society, a new future. We never dreamed that something like was going to happen to us.

When we were in Laos, we were CIA secret army. At that time, I was 15 years old. I carried an M-16 on my back to fight against communism and socialism. I saw a lot of soldiers dying left and right and I saw a soldier decapitated, bodies mutilated. It does not scare us as much as when I saw my nephew—the body had been cut open.

I have lost four nephews in 4 years. The first incident happened in 1984 in an accident. An autopsy was performed at the site. The second death occurred to the other nephew when he died in his sleep. An autopsy was performed at the medical examiner's office. The third occurred in 1986, and the fourth on December 24, 1987. All four deaths were during the same period. Therefore, we know it is a curse on us because we didn't prevent it from happening in the past.

Those 4 years, we celebrated Christmas in the dark, along with a joyless New Year. We did not know what to do, where to turn, or who we could depend on until we were referred to the American Civil Liberties Union by a friend. With the help of the ACLU, our case was brought to the U.S. district court.

On January 15, Senior District Judge Raymond Pettine ruled in our favor for the respect of our religious beliefs and practices. We feel that this ruling reflected the importance of our religious freedom and value of individual rights under the first amendment.

The decision sent out a very strong and positive message to the local Hmong community, and also all the Hmong community in the United States of America, that they don't have to fear the Government violating their basic religious rights. We feel that as a minority in this great Nation, we can trust our Government to protect our religious rights under the U.S. Constitution. We regret that such a tragedy had to occur to our family and community.

However, 6 months later Judge Pettine reversed his previous decision. We felt very, very disappointed. We were angry and upset. We don't know what to do. Why did he take away our rights and our hope? Why did he turn our future upside down? Why are we excluded from the first amendment, deprived from constitutional rights? We felt betrayed and neglected by the judicial system and we have been discriminated against by the Federal Government.

His overturned decision is a contradiction to the United States citizenship we were granted in 1983. When I became a citizen in 1983, the judge in Federal court told me to raise my right hand and he told me, are you willing to tell the truth and nothing but the truth under the U.S. Constitution? I said, yes, I do. I responded. Then he said, are you willing to help us to fight against any enemy who tries to take over our country? I said, yes, I will. Then he said the U.S. Constitution provides for every citizen in this country, which is where I got this pin of the first 13 States in the United States, and I got this Bill of Rights, the first 10 amendments.

I have four sons at home. I don't know what to teach them. If I teach them the truth, that means the U.S. Constitution only provides for certain types of citizens in this country, not us. If I tell them a lie—the U.S. Constitution provides for every citizen in this country, but it is not true, only for certain types of people.

Mr. Chairman, you and your committee don't know how difficult it was for us who went through the last 4 years. When we go out, the sky is dark. There is no bright spot for us. The skies are cloudy. You are our last hope. We need your help more than anything. Please, open your heart, make room in your heart and help us, because you have the power. You can turn the light on, you can turn the light off. When you turn the light on, our future is bright. When you turn the light off, we have no future. Our future, our rights, our hope is in your hands. Please help us to restore them.

Thank you.

Senator KENNEDY. Thank you very much, Mr. Yang. I know it has been a very difficult period for you in your life. I imagine as you were fighting over there in Laos, you probably thought in many respects that that was going to be the toughest part of your life, when you saw the friends that died in the conflict and members of your family whose lives were destroyed. And I imagine you thought the most difficult part of your life was really behind you when you came here to the United States, isn't that so?

Mr. YANG. Yes.

Senator KENNEDY. Then you became a citizen, committed to the values which motivated you to support the United States and its cause abroad, and certainly one of those must have been the value of being able to practice your religion in the way that you believe and the way you have been taught. And now you find that those very strong religious beliefs have been effectively violated, and that this has brought very considerable sadness and anguish to your life.

You know, so often in this committee when we talk about constitutional rights, we sort of quote law review articles or Supreme Court decisions, debating these matters back and forth. I think your testimony here today—I know it is very difficult for you, but I think it reminds all of us of what the Constitution is really all about, what it should be all about.

So I know this has been a difficult time for you to review the sadness in your own family, but we are very, very grateful to you for doing it.

Mr. PECK. Mr. Chairman?

Senator KENNEDY. Yes?

Mr. PECK. My name is Robert Peck. I am legislative counsel for the ACLU.

Senator KENNEDY. I was just going to come in and ask you some questions in just a moment.

Mr. PECK. Fine.

Senator KENNEDY. We are going to have a difficult morning because we have the defense authorization, and Senator Hatch and I are going to do the best we can to be attentive because this is an enormously interesting and powerful issue, and to also hear the witnesses.

But I would like, just before questioning you briefly, to recognize Senator Hatch. This legislative effort is introduced by the two of us, supported by Senator Metzenbaum. You have three of the strong supporters of it here today. I would recognize him now for whatever comment, and Senator Metzenbaum, and then we will come to the questions, Mr. Peck.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Senator Kennedy, and I want to welcome both of you here and I empathize a great deal with your position.

Mr. YANG. Thank you.

Senator HATCH. I think it adds impetus to why this legislation is very, very important.

I want to thank you, Senator Kennedy. I appreciate your leadership on this vital legislation, and I am pleased to be a principal cosponsor with you of the Religious Freedom Restoration Act of 1992.

This legislation, as has been said, responds to the Supreme Court's April 17, 1990, decision in *Employment Division* v. *Smith,* in which the Supreme Court indicated that an individual's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. This happens to be the lowest level of protection the Court could have afforded religious conduct.

In my view, this standard does not sufficiently protect a person's first amendment to the free exercise of religion. Freedom of religious practice is the first freedom mentioned in the Bill of Rights. I think it deserves stronger protection than the Supreme Court has given it in *Smith,* and I will mention just two examples that illustrate the concern engendered by this decision.

First, if a State has a legal drinking age of 21, it would be illegal for anyone under that age to use sacramental wine in taking communion in that State, in the eyes of some. Second, a Jewish student in a public school who wishes to wear a yarmulke in class can be forced to remove it pursuant to a general rule against headwear in class.

I believe the free exercise of religion needs protection even when legislative majorities are unresponsive to religious liberty concerns in any particular instance. I do not believe that a person's right to take communion or wear a yarmulke in public school should turn on the whim of legislative majorities.

A tough standard is necessary to protect religious liberty, and it is clear to me that a legislative response to the *Smith* decision is

important for the preservation of the full range of religious freedom the first amendment guarantees to the American people, especially for those whose religious beliefs and practices differ from the majority in a State or in a country.

Now, this bill imposes the compelling interest test on the State and Federal Governments when a governmental rule or law burdens someone's free exercise of religion, and I believe it is imperative for Congress to act expeditiously in response to the *Smith* decision, so I look forward to working with Senator Kennedy, Senator Metzenbaum, and other distinguished people on the Judiciary Committee and in the Senate, and Senator Biden, our distinguished chairman, in achieving this result.

Now, I will conclude by observing that a broad spectrum of organizations support this bill. When the American Civil Liberties Union and the Coalitions for America see eye to eye on a major piece of legislation, I think it is certainly safe to say that someone has seen the light, and I have to say that it is always a pleasure to work with both groups because both groups do a great deal to enlighten this committee, and this Senator, in particular. So we are very appreciative that we have both of these groups in support of this bill.

I understand that there are many difficulties that can be raised, but we are talking about a first amendment right, the first mentioned first amendment right, and I would like to see this bill passed. Senator Kennedy, your leadership on it is critical and I appreciate it. Thank you.

Senator KENNEDY. Well, thank you very much.

Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. I think this is one of the most important hearings we will be conducting during this session of Congress, and I only regret that a prior commitment will make it impossible for me to remain.

We all know that America, this country of ours, was founded as a land of religious freedom, as a haven from religious persecution. The American people probably do not know that the founding principle was dealt a serious blow by the 1990 Supreme Court decision. That decision seriously weakened an individual's right to the free exercise of his or her expression. The *Smith* decision abandoned the well-established strict scrutiny test to determine when the Government may impinge on the right to religious freedom. In my opinion, that decision was wrong. The Court in *Smith* replaced this standard with a less stringent test that has already resulted in more than 50 decisions against religious claimants.

I am proud to be an original cosponsor of the Religious Freedom Restoration Act, which restores the high standards for protecting religious freedom. It creates no new rights for any religious practice, nor does the bill ensure that all religious practices will be permitted. It simply restores the law of the land and protections that were in place before the *Smith* decision.

Some opponents of this legislation have linked it with another passionate issue, abortion. Arguments that this bill would establish

a religious right to an abortion are misleading and fly in the face of the many pro-life Congresspersons and organizations that actively support this legislation. In a world full of religious intolerance, the guarantee of religious freedom must not be taken for granted.

I look forward to the hearing today and I will read the record, and I urge the swift passage of this crucial legislation.

Mr. Yang, I am familiar with your case and your situation. I think it was a travesty, the manner in which your family was treated. I don't believe that we in Congress can undo that which occurred, but my feeling is that in this instance the Government seriously erred in the result that you received.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Let me ask you, Mr. Peck, if you want to review for our committee briefly how the *Smith* decision really affected Mr. Yang's situation.

Mr. PECK. I would be happy to, Mr. Chairman. As you know from Mr. Yang's compelling testimony, it is part of his religious beliefs that an autopsy, which is a mutilation of the body, affects their ability to undergo reincarnation. As a result, other tragedies are visited upon the family. These tragedies translated for the Yang family into four consecutive deaths around Christmas time.

It was when this fourth one occurred that he found the ACLU, and we went to court directly under the Constitution, under a *Bivens* action, asking the court to find that the procedures used were constitutionally invalid. On January 12, 1990, Judge Pettine ruled that the Yang family's religious practices were violated by the mutilation of their son's body by autopsy.

Three months later, on April 17, 1990, the Supreme Court handed down its *Smith* decision, jettisoning the compelling interest test in favor of a rule that found valid neutral and generally applicable laws. After the *Smith* decision, there was another autopsy case involving a Jewish family, *Montgomery* v. *County of Clinton,* in Michigan. This was a Federal case in which, relying on the *Smith* standard and rejecting, because *Smith* had been intervening, the *Yang* case, the court came to the determination that religious beliefs could not overcome this neutral, generally applicable law.

On November 9, 1990, during the damages portion of the *Yang* case, Judge Pettine felt he was compelled to reconsider his earlier decision in light of the *Smith* case. On that day, November 9, 1990, he ruled that he had to reverse himself. He said that the previous decision in *Yang* had to be withdrawn, and found against the religious claims, dismissing the action, with prejudice.

He wrote, "It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion." I would like his second opinion in that case to be entered into the record, if that would be permissible.

Senator KENNEDY. It will be so included.

[The document follows:]

You Vang YANG, Ia Kue Yang, Plaintiffs.

v.

William Q. STURNER, Individually and in his capacity as Chief Medical Examiner for the State of Rhode Island, Defendant.

Civ. A. No. 88-0242 P.

United States District Court, D. Rhode Island.

Nov. 9, 1990.

Hmong couple brought suit against Rhode Island's chief medical examiner based on performance of autopsy on their son's body without their consent. On cross motions for summary judgment, the District Court, 728 F.Supp. 845, held that medical examiner's actions were not justified by compelling state interest, and examiner was liable for damages. Thereafter the District Court, Pettine, Senior District Judge, withdrew the prior opinion and entered judgment which held that application of a Rhode Island law governing autopsies did not profoundly impair the religious freedom of the Hmongs.

Dismissed.

Constitutional Law ⇐84.5(1)
Coroners ⇐14

Application of a Rhode Island law governing autopsies did not profoundly impair the religious freedom of Hmongs, who believed that autopsies were a mutilation of the body; the law was facially neutral and did not appear to have been enacted with animus toward any religious group, and thus its impairment of religious beliefs did not rise to a constitutional level. U.S.C.A. Const.Amend. 1.

Amato DeLuca, Providence, R.I., for plaintiffs.

Barbara Grady, Asst. Atty. Gen., State of R.I., Providence, R.I., for defendant.

ADDENDUM

PETTINE, Senior District Judge.

On January 12, 1990, this Court released an opinion granting summary judgment on the issue of liability to the plaintiffs, the Yangs, for the emotional distress they suffered as a result of the defendant's, Dr. Sturner's, violation of their First Amendment rights. The facts of the case are set out in this Court's opinion at 728 F.Supp. 845 (D.R.I.1990). In brief, Dr. Sturner, Rhode Island's Chief Medical Examiner, conducted an autopsy on the Yangs' son. This autopsy violated their deeply held religious beliefs. The Yangs are Hmongs, originally from Laos, and believe that autopsies are a mutilation of the body and that as a result "the spirit of Neng [their son] would not be free, therefore his spirit will come back and take another person in his family."

This Court was in the process of researching the case law regarding the damages portion of this opinion. In the course of research, I considered the recent Supreme Court decision of *Employment Division, Department of Human Resources of Oregon v. Smith*, — U.S. —, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), decided on April 17, 1990, several months after my initial opinion. It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion.

My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the *Employment Division* decision. I

would note, however, that at the time of my January decision, I believe that I was on solid ground in ruling for the Yangs. As Justice Blackmun stated in his dissent, the majority's decision in *Employment Division*, "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 1616 (Blackmun, J. dissenting), *see id.* at 1607 (O'Connor, J. concurring in the judgment) (the Court gave "a strained reading of the First Amendment ... [and] disregard[ed] a consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.").

In *Employment Division*, the Supreme Court declined to apply the traditional balancing test used in First Amendment cases and held that the State can prohibit sacramental peyote use by Native Americans under its criminal laws and can thereby deny unemployment benefits to persons discharged for such use without violating the Free Exercise Clause. *Id.* at 1598–1606. It may seem that this holding could be limited to cases involving criminal law violations; however, the language throughout the opinion indicates that "[t]he Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions ... *and* to state laws of general applicability...." *Id.* at 1616 (Blackmun, J. dissenting) (emphasis added).

While the Supreme Court stressed that the compelling state interest test is still required in other constitutional contexts such as free speech or racial discrimination, it is no longer to be used when a generally applicable law affects religious conduct. *Id.* at 1604. "What it produces in those other fields—equality of treatment, and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Id.* In a footnote, the Court noted that "it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, or its administration of welfare programs[.]" *Id.* at 1603–04 n. 2 (citations omitted).

The Supreme Court rejected the notion that the government should be hampered in its implementation of public policy by requiring sensitivity to all religious beliefs:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense. *Id.* at 1603 (citations omitted).

Of course, the Court did not go so far as to say that a State could not be sensitive to religious beliefs, however, the Court did make it clear such sensitivity, although desirable, is not mandated by the constitution. *Id.* at 1606. Moreover, the Court noted that it is not for the federal courts to determine when such sensitivity is appropriate. *Id.*

In sum, the *Employment Division* opinion stands for the proposition that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest...." *Id.* at 1604 n. 3.

While I feel constrained to apply the majority's opinion to the instant case, I cannot do this without expressing my profound regret and my own agreement with Justice Blackmun's forceful dissent. Justice Blackmun points out that the majority distorted long-standing precedent to conclude that:

> strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.' I do not be-

lieve the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance. *Id.* at 1616 (Blackmun, J. dissenting) (citations omitted).

Justice Blackmun feared the impact of the majority's opinion and hoped "that the Court [was] aware of the consequences, and that its result [was] not a product of overreaction to the serious problems the country's drug crisis has generated." *Id.* (Blackmun, J. dissenting).

One must wonder, as Justice O'Connor did in her concurrence, what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group. "Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* at 1608 (O'Connor, J. concurring in the judgment).

In the instant case, the Rhode Island statute governing autopsies is a generally applicable law. The law is facially neutral. There is no indication that the law was enacted with any animus toward any religious group. The law's application did profoundly impair the Yangs' religious freedom; however, under *Employment Division* I can no longer rule that this impairment rises to a constitutional level. Therefore, I do not see any basis for the Yang's first amendment, equal protection or due process claims. Therefore, the opinion published by this Court on January 12, 1990, 728 F.Supp. 845 (D.R.I.1990), cannot stand as precedent; the same is hereby withdrawn and the case is hereby dismissed with prejudice together with all state pendent claims.

Arthur D'AMARIO, III.

v.

Frank J. RUSSO; William Blackwell; The Distance, Inc.; Punch Enterprises; Capitol Records, Inc.; Harrison Funk; Gail Roberts; RTC Management; Jeff Ross.

Civ. A. No. 89-0011L.

United States District Court, D. Rhode Island.

Nov. 14, 1990.

Defendants in civil rights action moved to dismiss. The District Court, Lagueux, J., held that: (1) plaintiff showed reasonable diligence in attempting to effect service on defendants; (2) defendants would be required to pay costs of service incurred after they failed to acknowledge receipt of process sent by first class mail; but (3) complaint did not state a claim upon which relief could be granted.

Ordered accordingly.

1. **Federal Civil Procedure** ⇐417

Plaintiff who fails to meet deadline for service of process faces dismissal of suit unless he can show good cause for delay. Fed.Rules Civ.Proc.Rule 4(j), 28 U.S.C.A.

2. **Federal Civil Procedure** ⇐417

Plaintiff made diligent efforts to effect service sufficient to defeat motions to dismiss because of failure to effect service in timely manner, where he sent service by first class mail, none of the defendants acknowledged receipt, he hired a constable who attempted unsuccessfully to serve the defendants on numerous occasions, and he finally succeeded in serving the defendants after again employing private process servers. Fed.Rules Civ.Proc.Rule 4(j), 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐1751

In ruling on motion to dismiss because of failure to timely effect service, court may grant some leniency to pro se plaintiff

Mr. PECK. He went on to say in that case,

> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in 24 years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were now to grant damages in the face of the *Employment Division* decision.

He went on to castigate the decision, citing very heavily both Justice Blackmun's and Justice O'Connor's opinions in the case abandoning the compelling interest test. It is clear that the Yangs would not have lost their case had not the *Smith* decision intervened.

Senator KENNEDY. OK. Well, that lays out both the legal situation as well as the human situation in a very, very important way. We want to thank you very much for joining with us. We thank you, Mr. Yang. Your sharing with us your own situation is very helpful to us in this committee and we want to thank you very, very much for being with us today. Thank you.

[The prepared statement of Mr. Yang follows:]

STATEMENT OF

WILLIAM NOUYI YANG

ON

S. 2969

"THE RELIGIOUS FREEDOM RESTORATION ACT"

REGARDING

PROTECTION OF RELIGIOUS LIBERTY

BEFORE THE

U.S. SENATE JUDICIARY COMMITTEE

SEPTEMBER 18, 1992

15

My family and I immigrated from Laos to the United States in 1976, due to the communist takeover of our country. We settled and continued our lives in America; it was hard and difficult for us to adapt to a new society, a new future. We never dreamed that something like this was going to happen to us.

When we were in Laos, we were (CIA) secret army. At that time, I was 15 years old and carried an M-16 rifle on my back to fight against communism and socialism. I saw soldiers dying left and right. I saw soldiers decapitated and bodies mutilated, but nothing scared us as much as seeing my nephew's body after the autopsy. His chest had been cut open in the shape of a big, capital "Y," all the way down to his private parts. His head had been cut open from ear to ear, the stitches used to close the incision were 1/2 to 1 inch wide all around his body. My heart and my mind dropped to my feet. I could not walk, I could not move, I could not breathe. I cried with no tears, our family was shocked, horrified and angry, but we did not know where to turn or what to do.

We have lost four nephews in four years. They all died during the Christmas season.

The first incident happened in 1984, in an automobile accident. An autopsy was performed at the accident sight.

The second death occurred when another nephew died in his sleep, in 1985. The autopsy was performed at the Medical Examiner's office.

The third death occurred in 1986, and the fourth on December 24, 1987. All four deaths were during the same period, therefore we know it is a curse on us. Because we did not prevent the autopsies from happening in the past, those four years we celebrated Christmas in the dark along with a joyless New Year. We did not know what to do, where to turn or whom we could depend on.

When I became a United States citizen in 1983, the Judge in Federal court told me, "Please raise your right hand," and asked, "Are you willing to tell the truth and nothing but the truth under the United States Constitution?" I responded, "Yes, I do." "When this country goes to war, are you willing to obey and help fight against the enemy who tries to take over our country?" "Yes, I will," I replied. Then he said, "The United States Constitution is provided for every citizen in this country." That's why we went to the American Civil Liberties Union.

On January 15, 1990, Senior U.S. District Court Judge Raymond Pettine ruled in our favor, for the respect of our religious beliefs and practices. We feel that this ruling reflected the importance of our religious freedom and value of individual rights under the First Amendment.

This decision sends out a very strong and positive message to the local Hmong community and also all the Hmong communities in the United States of America, that they don't have to fear the government violating their basic religious rights. We feel that as a minority in this great society, we can trust our government

to protect our religious rights under the United States Constitution. We regret that such a tragedy had to occur to our family and community.

However, when Judge Raymond Pettine reversed his previous decision, we felt very, very disappointed. We were angry and upset. We don't know what to do. Why did he take away our rights and our hope? Why did he turn our future upside down? What did we do to deserve this? Why are we excluded from the First Amendment? Deprived from our Constitutional rights? We feel betrayed and neglected by the judicial system and we have been discriminated against by the Federal government.

I strongly urge this committee to pass the Religious Freedom Restoration Act to protect our religious beliefs. You have the power. When you turn the light on, our future is on. When you turn the light off, we have no future. Our religion, rights, hope and beliefs are in your hands. Please help restore them. Thank you.

APPENDIX A

Neng Yang Case History

At approximately 1:30 a.m. on Monday, December 21, 1987, Neng Yang was found by his wife, Yong Kue, choking with his hands closed tightly and his teeth grinding. She attempted to wake him up with a couple of slaps on the face without any success. She then realized that the situation was more serious than she thought it was. She then woke her parents-in-law for help immediately. Moments later Neng's uncle, William Nouyi Yang, on the third floor was also called in. CPR was done at the best of their ability to save his life. At the same time, a rescue squad was also called and they arrived approximately four to five minutes later. More sophisticated life saving procedures were performed by the rescue workers and the family was told that his heart beat was restored. He was then taken to Rhode Island Hospital for further medical assistance.

At Rhode Island Hospital, Neng's oxygen, heart beat, and blood pressure were restored. However, he developed seizures that caused his body to jerk quite often. He was later transferred to the Intensive Care Unit after the Trauma Room.

On that Monday, in the afternoon, the family members were told by the attending physicians and nurses that all medical examinations and tests were negative, that they did not know what had happened or why it had happened. Other than that, he was not in a coma; he was just unconscious, and his condition was good.

They thought he had a heart attack, but we were not informed of this until one day later. His seizures stopped on early Tuesday morning.

On Tuesday, December 22, 1987, Doua Yang, Neng's older brother, contacted Dr. Constantine for advice on how to establish an effective and better communication relationship with ICU staffs because it was felt by the family that communication with the ICU staffs up to that time was not satisfactory. He was referred to Dr. Donats, the director of the ICU. Later contact between the family and Dr. Richard Millman, the physician in charge of that particular subunit, was reached. A conference with the family was scheduled for the following morning.

Wednesday, December 23, 1987, at a conference with Dr. Richard Millman, we were told that Neng's body was in normal condition except for the seizures, but whether or not his brain was working remained a question. He also stated that the maximum doses of anti-seizure drugs were given to control the seizures and that those drugs have the strength to cause unconsciousness. The doctor stated that two of the doses had made Neng go into a deeper sleep, and so because of this, there was an "excessive draining" of Neng's body. (This was a critical point that we should have been aware of.) For this reason, he told us to wait and see if Neng would gain consciousness as the drugs phased out from his body. He stated that he had doubts whether or not Neng's brain was functioning. However, further neurological examinations would be performed to determine, whether or not, his

brain was actually dead. If so, at that point, the family would have to make a decision on when to turn off the life support system. Dr. Millman also stated that we did not have to worry about making a decision, at least for a while.

On Thursday, December 24, 1987, in the afternoon at a meeting with Dr. Richard Millman, we were told that Neng's brain was dead and that there was no cure for that. He asked us to make a decision as to when Neng's respiratory equipment should be turned off. This was a decision to let him die, which we did. At the same time we were concerned about the issue of an autopsy. We told Dr. Millman that we must consult with our elders who are the ultimate decision makers for such matters.

Dr. Richard Millman told us a few minutes later that he had talked to the medical examiner's office and that an autopsy was not required since the death occurred under the care of a physician. And that he understood our religious beliefs. He then suggested that even though our religious system forbids such action, having a minor one done for research purposes might help. We, again, told him that we strongly did not want that to happen. He told us that was "O.K."

At about 4:25 p.m., approximately 25 minutes after Neng's death and after Dr. Richard Millman had presumably left the ICU, one of his associates approached us and told us that they could not release the body immediately because the case would have to be investigated by the medical examiner's office. We asked him what the medical examiner was going to do because we were still

concerned about the issue of an autopsy. He told us that the medical examiner would need to investigate the file and examine his body to determine the cause of death. Again, we asked him what he meant when he said "examine" the body. He told us that the medical examiner would need to check the body on the exterior only. However, he also told us that the medical examiner might require an autopsy after the course of his/their investigation. At this point we made it clear to him, again, that we did not want an autopsy on Neng's body because our belief system does not allow it. We told him again that even if a minor one is required by the medical examiner we must be informed. He told us that was fine. We left the hospital several minutes after that with high expectations that an autopsy would not be performed.

We contacted the Juhlin Pearson Funeral Home on that day in the evening and told them to pick up the body. The funeral director was under the impression that an autopsy was not expected.

On Friday, December 25, 1987, we got a message from the funeral director that the body had not been released because it had not been investigated by the medical examiner due to the Christmas holiday. However, it would be possible to expect the body on Saturday, December 26.

On Saturday, December 26, 1987, we were told by the funeral director to go to the funeral home at 6:00 p.m. to dress him up, which we did. We were shocked and horrified when we found out that a major autopsy had been performed on the body.

We, Neng's family, are in a state of rage when we saw all the incisions that were made on Neng's body. Because we were under the impression that Neng's body would only be examined, we all had a sudden resentment towards the people who were responsible for breaking their commitment to us. Not only did they examine Neng's body, they incised an enormous Y mark on Neng's body.

The incision beginning from both the shoulders adjoining at the center of the rib cage and from there on his abdomen was dissected all the way to his private. Another surprise was presented to us immediately after this shock; there was another great incision made on Neng's head. The incision, beginning from the left side of his forehead, encircling around the back of his head, all the way to the right side of forehead. Why was Neng's brain examined when we were told that Neng died because his heart stopped functioning and so therefore there was not enough oxygen to his brain which caused the death of this brain?

For all of this anxiety and pain that we had to endure to watch our loved one all cut up for someone else's benefit, we had to endure one more pain. After making the incisions on Neng's body, the stitches were sewn on abruptly and carelessly. The stitches were about 1/2 inch for every stitch and it was so negligent that his internal skin was exposed. What a horrible sight for the family to see!

The family had never experienced this kind of violation of one's body before. The family was in agony when they saw their

loved one all dissected and carelessly sewn together. They are extremely frustrated and horrified because this could happen to anyone. The family did not want to dress Neng for his journey because he had been excluded from his right to be reincarnated. The family was in pain and grief because they had lost a loved one and that he had to leave them without all the he owned, all of his body parts. At the end, the family had to dress Neng for his journey. Now, they wait and pray that he will not be unhappy and that he will love his family enough not to come back and cause them unhappiness, too.

This violation against our religion was extremely serious. We believe that when a person dies, he/she must be buried with every part of their body. If this is not done, the person will come back spiritually and cause his family unhappiness, such as a curse.

Another fact that can make the curse more serious is the fact that Neng opposed autopsies. Prior to his death when he attended his cousin's wedding in North Carolina, he forbade anyone to perform an autopsy on his body if he ever died. He did not know that he was going to die, but he strongly opposed having it done on him or anyone that was close to him.

Now, this violation has greatly affected the Hmong community. The Hmong community feels that it has not been protected by the United States Constitution. This violation was made against our will and against our religion. We did not have

the right to practice our religion as guaranteed by the Bill of Rights.

America holds many opportunities. An important opportunity was freedom of religion. Why were we excluded from this right? If religion was not an issue here, why was it done against the family's will? Why did the doctor make the commitment that an autopsy would not be performed? Why were we not notified that an autopsy was performed on Neng's body until after when it was already done? Because of all the witnesses that were present when the doctor stated that they would only examine the body and not perform an autopsy, everyone was reassured that the doctor would keep his repeated commitment. It did not occur to us that this would happen. Neng's death was a shock to his family. Neng's family has been emotionally disturbed. Not only did they have to grieve for his sudden, unexpected death at age 23, they now have to grieve for another reason: the autopsy performed on his body. His family is frustrated. They had to face many difficulties when they were in the hospital and now they have to face many difficulties when they are out of the hospital. While Neng was still in the hospital, there was a lack of communication on the part of the doctors and the nurses that took care of Neng. They would not meet with his family or tell them what was going on until Neng's wife called Dr. Constantine.

And so, for two days and two nights, no one would discuss anything with the family. All that the doctors tried to do for Neng was kept a secret except for that they had given him three

doses of Phenobarbital, Dilantin, and Valium medication to stop his seizures and that they tested for some responses from his body. When Neng entered the hospital, the doctors diagnosed his condition as a "heart attack." This fact was not even given to the family. The third party, Dr. Constantine, had to contact Dr. Richard Millman in order for the family to find out what was happening to Neng. Dr. Constantine then told Neng's wife that Dr. Richard Millman would have a conference with the family on Wednesday. The family feels that if they had not contacted Dr. Constantine, they would not have known anything until Neng's death. After waiting for two days to find out what was happening to Neng, Neng's family wanted to ask why the doctors waited for so long to tell the family what was happening and why the wife was not allowed to stay with Neng during the daytime? The family feels that important information was kept from them. Is this a form of discrimination?

Another important aspect that is brought out by the family is that when Dr. Richard Millman told the family that Neng died, he said that the family could choose when to disconnect the machine. They asked for four to five more hours so that all of Neng's family could see him before the machine was disconnected. The doctor said any time. The doctor also said that he would be around so that if anyone had questions they could ask him. He said that it would only take 20 minutes for Neng's body to be completely dead after the machine was disconnected. He then also

said that as many people as the family wanted could be with Neng when the machine was disconnected.

Dr. Richard Millman disappeared shortly after this meeting with the family. After the disappearance, a man came to tell Neng's wife that they were only going to examine his body and not perform an autopsy. This can be verified by Pang Faua Yang who works at the Women and Infants Hospital. After the statement was made by the man, Neng's wife said, "No autopsy!" He then reassured her again that they would only examine the body.

When the machine was disconnected, not everyone was allowed to see Neng. Because of this, Neng's wife searched for Dr. Millman. She had questions to ask him but she could not find him. Where did Dr. Richard Millman go? Neng's body was not allowed to stay in the room for the four to five hours. It was taken out of the room immediately after he was officially dead. Not everyone could see him. Why did the body have to be taken so far after it was specified to the nurses that Neng was supposed to stay in the room for four to five hours?

The family wants to know where all of Neng's organs are and why was the family not notified that an autopsy was being performed on his body?

APPENDIX B

HMONG-LAO UNITY ASSOCIATION, INC.
A Non-Profit Organization
155 Niagara Street
Providence, Rhode Island 02907
Tel. (401) 461-7940

January 5, 1988

To Whom It May Concern:

My name is Ger V. Xiong. I am speaking on behalf of the Hmong-Lao Unity Association. I am emotionally disturbed by this outrage that has happened. I feel that I have disappointed the Hmong people in Providence because I taught them to trust the American society and to believe in individualism. I tried to lead my people in the positive direction. All that I have done and that my people have done to lead a better life was in vain.

This violation against our will and religion has brought us into the opposite direction, a negative direction. If we are to exist as humans, we are allowed to have a religion. Religion is the biggest part of our life. Religion is what we teach our children everyday so that they can carry it into the future. Now, that this has happened, we have doubts about the future. Right now, we are looking at a bleak future. A future in which we do not have the right to practice our religion.

We are humans, too. We are not savages. The Hmong people live all over the United States. We are American citizens, too. The only difference between us and the "other Americans" is that we have dark skin and dark hair. We have been in the United States for more than 10 years. We are peaceful people. What did we do to deserve this? Why was this autopsy performed against our will and especially when a commitment was already made that it was not going to happen? Why were we not notified when the autopsy was performed? We feel that it was done behind our backs. We never thought that this was going to happen to us.

This is a very important case that has greatly affected all the Hmong people in the United States. This has never occured before in our country, we came to America because we believed that we could continue our religion here, we never thought that this problem would arise one day, especially in America, where there is "freedom of religion".

Because of what has happened, we have lost trust in the hospital systems in the United States. If this continues in the future, we will not admit anyone to the hospital if we feel that they will die and we will not permit anyone who has died in the hospital to stay in the hospital after they are dead. We will send the dead body directly to the funeral home when they die at the hospital. We do not trust physicians anymore. We don't know what to think or what to do so that we can feel secure about the future again. Everyone is frightened that this will happen to them when they die. This is a great concern that involves all the Hmong people in the United States.

Because of all that has been stated, I , Ger Xiong, my Vice-President, Chue Toua Kue, and the Hmong-Lao Unity Association sympathize with Neng's family and pray that Neng's family will be happy again one day. We sincerely feel sorry for all that has happened to the family.

Sincerely yours:

Ger V. Xiong
Chue Toua Kue
President ~~and Vice-President~~
Hmong-Lao Unity Association

Senator KENNEDY. Our first panel consists of: Elder Dallin Oaks is a member of the Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints. A former law clerk for Chief Justice Warren, Mr. Oaks taught at the University of Chicago, served as president of Brigham Young University, then served on the Utah Supreme Court before being called to the Quorum, which is the highest governing body of the church.

Elder Oaks, you had a distinguished career in the law before devoting your life to your faith, and we are honored to have you with us here today.

Mr. Oliver Thomas is general counsel of the Baptist Joint Committee, which is the Public Affairs Office of the Tenth Baptist Conference of the United States. He is testifying on behalf of the Baptist Joint Committee and on behalf of the American Jewish Congress. Mr. Thomas, we are very pleased that you could join with us here today.

Prof. Douglas Laycock holds the Alice McKean Young Regents Chair at the University of Texas Law School and is a leading authority on freedom of religion under the Constitution. Professor Laycock, we are pleased to have you.

Mark Chopko is general counsel of the U.S. Catholic Conference. We are very glad to have you here.

Bruce Fein is an attorney practicing in Great Falls and a writer on legal topics, if you would be good enough to join us, too.

Senator HATCH. Senator, could I interrupt for a second?

Senator KENNEDY. Please.

Senator HATCH. I would like to introduce to the committee a great friend of mine and a tremendous leader, not only at the bar as he served so well as a professor at the University of Chicago, for the American Judicature group, and for all kinds of other distinguished groups at the bar, and who ultimately became president of the Brigham Young University and then one of the justices of the Utah State Supreme Court, and now is one of the 12 leaders of the Church of Jesus Christ of Latter-day Saints, one of the Twelve Apostles—Elder Dallin Oaks, a great friend of mine and a tremendous student of the law, well recognized before he ascended to his current ecclesiastical position.

And so we particularly want to welcome you and all of the rest of you here today, and we are very interested in your testimony and look forward to being enlightened by each and every one of you. We are certainly happy to have you here from Utah, Elder Oaks.

Senator KENNEDY. Thank you very much.

We will start with Elder Oaks, please.

65-604 0 - 93 - 2

STATEMENTS OF A PANEL CONSISTING OF DALLIN H. OAKS, QUORUM OF THE TWELVE APOSTLES, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, SALT LAKE CITY, UT; OLIVER S. THOMAS, GENERAL COUNSEL, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, WASHINGTON, DC; DOUGLAS LAYCOCK, PROFESSOR, UNIVERSITY OF TEXAS SCHOOL OF LAW; MARK E. CHOPKO, GENERAL COUNSEL, U.S. CATHOLIC CONFERENCE, WASHINGTON, DC; AND BRUCE FEIN, GREAT FALLS, VA

Mr. OAKS. Thank you very much, Senator Hatch, Mr. Chairman, Senator Kennedy. I am privileged to appear before you to testify in behalf of the Church of Jesus Christ of Latter-day Saints in support of congressional enactment of S. 2969, the Religious Freedom Restoration Act. I am here to present the official position of our 8-million-member church at the request of its highest governing bodies, the first Presidency and the Quorum of the Twelve Apostles, of which I am a member.

As a general rule, our church does not take positions on specific legislative initiatives pending in Congress or State legislatures. Our action in this matter is an exception to this rule. It underscores the importance we attach to this congressional initiative to restore to the free exercise of religion what a divided Supreme Court took away in *Employment Division* v. *Smith.*

The history of the Church of Jesus Christ of Latter-day Saints, sometimes called Mormon or LDS, in America illustrates the importance of requiring a compelling governmental interest before laws can be allowed to interfere with the free exercise of religion. I know of no other major religious group in America that has endured anything comparable to the officially sanctioned persecution that was imposed upon members of my church by Federal, State, and local government officials.

In the 19th century, our members were literally driven from State to State, sometimes by direct Government action, and finally expelled from the existing borders of the United States. On October 27, 1838, Missouri Governor Lilburn W. Boggs issued an order to the State militia that the Mormons must be treated as enemies and must be exterminated or driven from the State, if necessary, for the public good. Three days later, segments of the Missouri militia attacked a small Mormon settlement at Jacob Haun's mill. Seventeen men, women, and children were killed; 13 more were wounded. After a reign of terror that included the burning of homes, the seizing of private property, the beating of men, and the raping of women, over 10,000 Mormons were driven from that State.

In the 1840's, after founder and church President Joseph Smith was murdered by a mob while in State custody, Illinois State authorities supported or condoned the lawless element who evicted the Mormons from their cities and drove them across the Mississippi River to the West. This expulsion compelled the Mormons' epic migration to the Great Basin, which was then beyond the borders of the United States.

I have a personal feeling for these persecutions, since some of my forbearers came to America as refugees from religious persecution in their native lands, and most of my ancestors suffered with the Mormons in their earliest persecutions. For example, my third

great grandmother, Connecticut-born Catherine Prichard Oaks, was among the Mormons expelled from Missouri and later driven out of Illinois. Fleeing religious persecution, she died on the plains of Iowa, a martyr to her faith.

The persecutions continued. In the 1850's, the Government of the United States, too willing to believe lies about conditions in Utah, sent an army of several thousand Federal troops to subdue the supposedly rebellious Mormons. From the 1860's through the 1880's, Congress and some State legislatures passed laws penalizing the religious practices and even the religious beliefs of the Latter-day Saints. Under this legislation, the corporate entity of the Church of Jesus Christ of Latter-day Saints was dissolved and its properties were seized. Many church leaders and members were imprisoned.

People signifying a belief in the doctrine of my church were deprived of the right to hold public office or sit on juries, and they were even denied the right to vote in elections. Most of these denials of religious freedom received the express approval of the U.S. Supreme Court. It was a dark chapter in the history of religious freedom in this Nation.

I have a personal feeling for this chapter as well. My grandfather's oldest sister, my great aunt Belle Harris, was the first woman to be imprisoned during the polygamy prosecutions. In 1883 when she was 23 years of age, she refused to testify before a grand jury investigating polygamy charges against her husband. Sentenced for contempt, she served 3½ months in the Utah Territorial Penitentiary.

The conflict between individual rights to freely worship God and Government attempts to regulate or interfere with religious practices remains today. For decades, the U.S. Supreme Court adhered to the first amendment guarantee of free exercise by requiring the State to demonstrate a compelling Government interest before interference with religious freedom would be tolerated. This test struck an appropriate balance between the needs of Government to establish rules for the orderly governance of society and the rights of citizens not to be unduly restricted in their religious practices.

In those instances where elected officials approved laws which interfered with a specific religious practice, they had to sustain the burden of justifying their action by identifying a compelling Government interest or reason for doing so. They also had to demonstrate that they had interfered with the religious practice by the least restrictive means possible.

The compelling Government interest test provided an essential protection for the free exercise of religion. As the chairman said in his introductory statement, with the abandonment of the compelling governmental interest test in the case of *Employment Division* v. *Smith*, the Supreme Court has permitted any level of Government to interfere with an individual's religious practice or worship so long as it does so by a law of general applicability that is not seen as overtly targeting a specific religion. This allows Government a greatly increased latitude to restrict the free exercise of religion. We fear that the end result will be a serious diminution of the religious freedom granted by the U.S. Constitution.

I wish to point out that most of the court cases involving Government interference with religious liberty involve religious practices

that appear out of the ordinary to many. By their nature, elected officials are unlikely to pass ordinances, statutes or laws that interfere with large, mainstream religions whose adherents possess significant political power at the ballot box. But political power or impact must not be the measure of which religious practices can be forbidden by law.

The Bill of Rights protects principals, not constituencies. The worshippers who need its protections are the oppressed minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that principle. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members repeatedly fell victim to officially sanctioned persecution because of religious beliefs and practices. We have special reason to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless this is clearly required by a compelling governmental interest.

Mr. Chairman, the Church of Jesus Christ of Latter-day Saints commends the sponsors of S. 2969, the Religious Freedom Restoration Act, for their recognition of the importance of the free exercise of religion to the freedom and well-being of our pluralistic society. Although we would prefer that the Supreme Court reverse the *Smith* case and restore the full constitutional dimensions of the first amendment protection of freedom of religion, we believe that this statutory restoration of the compelling governmental interest standard is both a legitimate and a necessary response by the legislative branch to the degradation of religious freedom resulting from the *Smith* case.

For Mormons, this legislation implements in Federal law a vital principle of general application embodied in our church's 11th article of faith, written in 1842: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may."

Thank you, Mr. Chairman.

[The prepared statement of Mr. Oaks follows:]

STATEMENT OF ELDER DALLIN H. OAKS
QUORUM OF THE TWELVE APOSTLES
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS
S. 2969, THE RELIGIOUS FREEDOM RESTORATION ACT
SENATE COMMITTEE ON THE JUDICIARY
SEPTEMBER 18, 1992

INTRODUCTION

Mr. Chairman, I am privileged to appear before you to testify on behalf of The Church of Jesus Christ of Latter-day Saints in support of Congressional enactment of S. 2969, the Rellgious Freedom Restoration Act. I am here to present the official position of our eight million member church at the request of its highest governing bodies, the First Presidency and the Quorum of the Twelve Apostles, of which I am a member. As a general rule, our church does not take positions on specific legislative initiatives pending in Congress or state legislatures. Our action in this matter is an exception to this rule. It underscores the importance we attach to this Congressional initiative to restore to the free exercise of religion what a divided Supreme Court took away in Employment Division v. Smith (1990).

I have had considerable personal experience with the constitution and laws governing the free exercise of religion. Upon graduation from The University of Chicago Law School in 1957, I served as a law clerk to Chief Justice Earl Warren. For a decade I was a professor of law at The University of Chicago. During the last year of that service, I was also the executive director of the American Bar Foundation. For nine years I was president of Brigham Young University, the nation's largest church-related university. I then served for three and one-half years as a justice on the Utah Supreme

Court. I concluded that service in 1984 when I was called to full-time service as a member of the Quorum of the Twelve Apostles. My professional publications have included three books and numerous articles on the legal relationships between church and state.

HISTORY

The history of The Church of Jesus Christ of Latter-day Saints (sometimes called Mormon or LDS) in America illustrates the importance of requiring a "compelling governmental interest" before laws can be allowed to interfere with the free exercise of religion.

I know of no other major religious group in America that has endured anything comparable to the officially sanctioned persecution that was imposed upon members of my church by federal, state, and local government officials. In the nineteenth century our members were literally driven from state to state, sometimes by direct government action, and finally expelled from the existing borders of the United States.

On October 27, 1838, Missouri Governor Lilburn W. Boggs issued an order to the state militia that the Mormons "must be treated as enemies and must be exterminated or driven from the state, if necessary for the public good." Three days later, segments of the Missouri militia attacked a small Mormon settlement at Jacob Haun's mill. Seventeen men, women, and children were killed and thirteen more were wounded. After a reign of terror that included the burning of homes, the seizing of private property, the beating of men and the raping of women, over 10,000 Mormons were driven from that state.

In the 1840s, after founder and church president Joseph Smith was murdered by a mob while in state custody, Illinois state authorities supported or condoned the lawless element who evicted the Mormons from their cities and drove them across the Mississippi River to the west. This expulsion compelled the Mormons' epic migration to the Great Basin, which was then beyond the borders of the United States.

The experience of the Mormon pioneers is analogous to the compelled migration of many of this country's founding settlers--the Pilgrims, Separatists, Quakers, Catholics, and Puritans who fled England and Holland to escape religious persecution and to seek a sanctuary where they could practice their religion free from persecution.

I have a personal feeling for these persecutions, since some of my forbearers came to America as refugees from religious persecution in their native lands. And most of my ancestors suffered with the Mormons in their earliest persecutions. For example, my third great-grandmother, Connecticut-born Catherine Prichard Oaks, was among the Mormons expelled from Missouri and later driven out of Illinois. Fleeing religious persecution, she died on the plains of Iowa, a martyr to her faith.

Following the pattern set by William Penn, whose 1682 constitution for the Quaker Colony of Pennsylvania had a model provision for safeguarding the religious liberties of its citizens, leaders of my church drafted a constitution for the proposed State of Deseret that contained a strongly worded guarantee of religious freedom. This proposed state applied for admission to the Union in 1849, but in the Compromise of 1850, Congress organized the Mormon areas into the Territory of Utah.

The persecutions continued. In the 1850s, the government of the United States, too willing to believe lies about conditions in Utah, sent an army of several thousand federal troops to subdue the supposedly rebellious Mormons.

From the 1860s through the 1880s, Congress and some state legislatures passed laws penalizing the religious practices and even the religious beliefs of the Latter-day Saints. Under this legislation, the corporate entity of The Church of Jesus Christ of Latter-day Saints was dissolved and its properties were seized.[1] Many church leaders and members were imprisoned. People signifying a belief in the doctrine of my church were deprived of the right to hold public office or sit on juries[2] and they were even denied the right to vote in elections.[3]

Most of these denials of religious freedom received the express approval of the United States Supreme Court. It was a dark chapter in the history of religious freedom in this nation. I have a personal feeling for this chapter as well. My grandfather's oldest sister, my great aunt Belle Harris, was the first woman to be imprisoned during the polygamy prosecutions. In 1883, when she was 22 years of age, she refused to testify before a grand jury investigating polygamy charges against her husband. Sentenced for contempt, she served three and one-half months in the Utah territorial penitentiary.[4]

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[1] See The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890).

[2] Edmunds Act, ch. 47, sec. 5, 22 Stat. 30 (1882); Tucker Amendments, ch. 397, sec. 24, 24 Stat. 635 (1887).

[3] Davis v. Beason, 133 U.S. 333 (1890).

[4] In re Harris, 4 Utah 5, 5 P. 129 (1884).

THE COMPELLING GOVERNMENTAL INTEREST TEST MUST BE RESTORED

The conflict between individual rights to freely worship God and government attempts to regulate or interfere with religious practices remains today. For decades the United States Supreme Court adhered to the First Amendment guarantee of free exercise by requiring the state to demonstrate a "compelling governmental interest" before interference with religious freedom would be tolerated. This test struck an appropriate balance between the needs of government to establish rules for the orderly governance of our society and the rights of citizens not to be unduly restricted in their religious practices. In those instances where elected officials approved laws which interfered with a specific religious practice, they had to sustain the burden of justifying their action by identifying a compelling government reason or interest for doing so. They also had to demonstrate that they had interfered with the religious practice by the least restrictive means possible. The compelling governmental interest test provided an essential protection for the free exercise of religion. Such a protection is vital. There is nothing more private or personal than the relationship of an individual to his or her God. There is nothing more sacred to a religious person than the service or worship of God.

With the abandonment of the "compelling governmental interest" test in the case of Employment Division v. Smith, the Supreme Court has permitted any level of government to interfere with an individual's religious practice or worship so long as it does so by a law of general applicability that is not seen as overtly targeting a specific

religion. This allows government a greatly increased latitude to restrict the free exercise of religion.

If past is prologue, the forces of local, state and federal governmental power, now freed from the compelling governmental interest test, will increasingly interfere with the free exercise of religion. We fear that the end result will be a serious diminution of the religious freedom guaranteed by the United States Constitution.

You will hear from others today whose religious practices have already fallen victim to government interference under the Supreme Court's new standard. They will demonstrate the detrimental effects of the Smith decision in a manner more powerful than I could. I wish to point out, however, that most of the court cases involving government interference with religious liberty involve religious practices that appear out of the ordinary to many. By their nature, elected officials are unlikely to pass ordinances, statutes, or laws that interfere with large mainstream religions whose adherents possess significant political power at the ballot box. But political power or impact must not be the measure of which religious practices can be forbidden by law.

The Bill of Rights protects principles, not constituencies. The worshippers who need its protections are the oppressed minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that principle. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special reason to

call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless this is clearly required by a "compelling governmental interest."

When the Supreme Court determines that a right is guaranteed by the Constitution, it has routinely imposed the compelling governmental interest test to prevent undue official infringement of that right. It is nothing short of outrageous that the Supreme Court continues to apply this protection to words that cannot be found within the Constitution, such as the "right to privacy," and yet has removed this protective standard from application to the express provision in the Constitution's Bill of Rights that guarantees the free exercise of religion. The Constitution's two express provisions on religion suggest that protection of religious freedom was to have a preferred position, but the Smith case has now consigned it to an inferior one. That mistake must be remedied, and S. 2969 is appropriate for that purpose.

CONCLUSION

Mr. Chairman, The Church of Jesus Christ of Latter-day Saints commends the sponsors of S. 2969, the Religious Freedom Restoration Act, for their recognition of the importance of the free exercise of religion to the freedom and well-being of our pluralistic society. Although we would prefer that the Supreme Court reverse the Smith case and restore the full constitutional dimensions of the First Amendment protection of freedom of religion, we believe that this statutory restoration of the "compelling governmental interest" standard is both a legitimate and a necessary response by the legislative branch to the degradation of religious freedom resulting from the Smith case.

For Mormons, this legislation implements in federal law a vital principle of general application embodied in our church's eleventh Article of Faith, written in 1842:

> "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may."

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you.
Mr. Thomas.

STATEMENT OF OLIVER S. THOMAS

Mr. THOMAS. Thank you, Mr. Chairman, Senator Hatch. I am here today on behalf of the Baptist Joint Committee; the American Jewish Committee, which I want to commend for their leadership on this issue; and the Coalition for the Free Exercise of Religion that you have heard about that it has been my privilege to chair.

While I am grateful for the opportunity to be here today, Mr. Chairman, I am also puzzled. I am puzzled because both political parties and their Presidential candidates are falling all over themselves to appear religious. Yet, neither party appears to have seized the importance of the Religious Freedom Restoration Act. So it has been a bit ironic that while parties and candidates have been scurrying around looking for the right religious issue that the most important bill affecting religion, certainly, in our lifetimes has been languishing in the Congress.

So it is a real pleasure for me to be here today, and part of what I wanted to do today, although they are not here, was pay tribute to the two of you in the presence of your colleagues for the leadership that you have shown. Senator Hatch, you are a staunch defender of the rights of the unborn. Yet, you have never wavered from day one in your support of this legislation, and we are grateful for that.

Senator Kennedy, you are one of the busiest Senators here. We appreciate you making time in your busy schedule to take up this issue and fight this battle, and so we are here today to thank you for that as well.

You will hear from a disproportionate number of the critics today, and I say that with all due respect for my colleague seated to my left. But I say disproportionate because true proportionality would have about 10 witnesses for this bill for every single witness against.

Now, these critics will tell you that religiously based abortion claims have been made in the past and will be made under this bill, and for that reason you should vote against it. But, Mr. Chairman, they will not be able to cite one case, not one, where such a claim has stood up on appeal.

The support for this piece of legislation is, as Senator Kennedy has characterized it, extraordinary. Never have I seen a coalition quite like the Coalition for the Free Exercise of Religion—People for the American Way, on the one hand; the Traditional Values Coalition and Concerned Women for America, on the other; the American Civil Liberties Union, the Southern Baptist Convention, Agudath Israel, and the American Muslim Council; 54 organizations, Mr. Chairman, 54 organizations willing to set aside their deep political and ideological differences in order to unite in a common vision for the common good—religious liberty for all Americans. Let us face it. What else can Nadine Strossen, Paul Wyrick, Norman Lear, and Beverly LaHay agree on? [Laughter.]

I am a Southern Baptist and I can tell you that the members of my denomination don't agree on anything, but we do agree on this

bill. The so-called fundamentalists, conservatives, moderates, liberals, pro-life, pro-choice—whatever you want to choose, my board voted unanimously to support this bill, and we appreciate your sponsorship.

Mr. Chairman, I want to mention briefly—because you have a panel on abortion, in my remaining couple of minutes I want to mention briefly the other criticisms that have been raised about the bill and respond to them, if I might, just on behalf of the coalition.

One, you are going to hear that this bill creates broad new statutory rights, substantive rights beyond what was intended by the first amendment, and this gets into the debate about do we protect what is motivated by religion or what is compelled by religion. Let me suggest to you that the bill does nothing more than restore a time-honored constitutional standard.

RFRA protects conduct only when religion is the primary cause or reason for the conduct. It is not enough that religion contributes to a decision that is made largely for secular reasons. Both leading congressional sponsors and legal experts like Professor Laycock have pointed out that mere religious motivation in a sense that an act is simply consistent with one's religion is not sufficient to trigger the protections of this bill. Conduct must be caused by religion; it must be the reason for the conduct.

The second point you will hear is that RFRA will jeopardize the tax-exempt status of churches. Now, Mr. Chairman, I am an attorney for churches. I would not be here today representing major religious organizations if it were remotely possible that this bill could be used to challenge the tax-exempt status of churches. I would not have my job very long.

The courts have held that individual taxpayers do not have legal standing to challenge the exempt status of religious organizations. We, working with the congressional sponsors of this legislation, explicitly adopted that rule of standing in this bill, so that Article III standing applies under RFRA, and the *Arum* case that so many of us have talked about will still be good precedent under your bill.

The third point you will hear, Mr. Chairman, is that this bill will jeopardize Government partnerships with religious organizations in important social welfare programs. Again, the notion that religious organizations would support legislation that would disqualify them from participating in programs providing social welfare services to needy Americans is preposterous.

Many of the organizations, Mr. Chairman, supporting this bill engage in extensive social welfare services with the Federal Government. Moreover, as with tax exemption, the Supreme Court has never recognized free exercise standing to challenge such a program. The constitutionality of all such Government programs has been and will continue to be litigated under the establishment clause, which is unaffected by this bill. But you don't have to take my word for it. Your own Congressional Research Service has pointed out that each of these criticisms that you will hear today is unfounded.

I close with an appeal, Mr. Chairman. This is not just another bad Supreme Court decision that we can take our sweet time to correct. It is the Dred Scott of first amendment law. If they can do

this to one person's religion, as you heard Mr. Yang, they can do it to anybody's religion. No single religion is in a majority in every community in America. And, Mr. Chairman, if they can do it to religion, they can do it to speech, press, association, you name it.

While we have been haggling over a hypothetical abortion question, more than 50 cases have been decided against religious claimants. That is what we know. So please don't let your colleagues tell us that it is too late in the session. We have been knocking on the door for 2 long years. And please don't let them say to you we are waiting on the House of Representatives. After all, Mr. Chairman, this is the Senate; lead us.

And please, please don't let one of them say, but one of our colleagues may filibuster. Mr. Chairman, we will give you the support you need to vote those colleagues down. Just do it. We hope and pray and beg for you please to bring this bill to the floor during this Congress and restore the Nation's first liberty to its rightful preeminence.

Thank you, sir.

[The prepared statement of Mr. Thomas follows:]

Testimony of
Oliver S. Thomas

on behalf of the
Baptist Joint Committee[1]
and the
American Jewish Committee[2]

on
The Religious Freedom Restoration Act (S. 2969)

before the
Committee on the Judiciary
United States Senate

September 18, 1992

More than two years have passed since the Supreme Court wreaked havoc on religious liberty in Employment Division v. Smith. Since Smith was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned out of even commercial areas. Jews have been subjected to autopsies in violation of their families' religious faith. A Catholic shelter for the homeless was closed because it could not afford an elevator, even though the nuns said they would carry any disabled up the stairs. In time, every religion in America will suffer. (See App. II.)

Rarely has a case generated so much criticism in such a short time. Critical editorials in newspapers and magazines abound, most recently in the Atlanta Constitution. (See App. III.) More than 50 scholarly articles critical of Smith have been written. (See App. IV.)

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[1]For organizational identification and statement of interest, see Appendix I.

[2]For organizational identification and statement of interest, see Appendix I.

Experts throughout the country, ranging from the President of the American Civil Liberties Union to the Dean of Notre Dame Law School, have condemned Smith as a radical departure from settled principles of American constitutional law.

An extraordinarily diverse coalition of 54 religious and civil liberties groups has joined with congressional leaders to craft this legislative response to Smith. These organizations -- which range from People For the American Way to the National Association of Evangelicals, from the American Civil Liberties Union to the Southern Baptist Convention -- have been willing to lay aside their deep political and ideological differences to unite in a common purpose. While these organizations have labored long and hard, the session is almost over, leaving little time to pass this important bill. So today, on behalf of this extensive coalition, I thank you for conducting these hearings and urge you to help pass the bill this session.

Congress has the opportunity, indeed the responsibility, to repair the damage caused by Smith. Only religion now receives a lower level of constitutional protection than other portions of the Bill of Rights. The Religious Freedom Restoration Act (S. 2969) has been introduced to restore religion's judicial protection to the level enjoyed before the Smith decision.

S. 2969 would restore the time-honored compelling interest test and ensure its application in all cases where free exercise of religion is burdened -- nothing more, nothing less. The bill expresses no opinion on the merits of particular free exercise claims but rather leaves such decisions to the courts after consideration of all pertinent facts and

circumstances. The beauty of S. 2969 is its commitment to a principle -- religious liberty for all Americans.

Like the First Amendment itself, RFRA has its detractors. As chairman of the coalition that helped draft the bill and for 2 years has worked with the congressional sponsors, I would like to respond briefly to each of the criticisms that has been made.

I. RFRA creates broad new substantive rights beyond what was intended by the First Amendment.

This is not true. RFRA protects conduct only when religion is the primary cause or reason for the conduct. It is not enough that religion contributed to a decision made largely for secular reasons. Both lead congressional sponsors and legal experts have made clear that mere religious motivation -- in the sense that an act is "consistent" with one's religious faith -- is insufficient to trigger protection under RFRA. On the other hand, the test is not whether the believer's conduct was "compelled" by religion. As Congressman Solarz (D-N.Y.) and Professor Douglas Laycock of the University of Texas Law School made clear in the recent House Subcommittee hearings, a law that protects only religiously compelled acts would exclude many acts that are obviously religious. Most believers seek to do more than the bare minimum that God requires. Is prayer compelled? Only on occasion. Even court decisions hold that it is not. Is serving as a minister compelled? Not always. These acts would not be protected by the compulsion test. Clearly, they should be protected, and are, by RFRA.

II. RFRA will jeopardize the tax-exempt status of churches.

Not so. As an attorney representing several major religious organizations, I would not be testifying today on behalf of the BJC and AJC if it were remotely possible that RFRA could be used to challenge the tax-exempt status of religious groups. The courts have made clear that individual taxpayers do not have legal standing to challenge the exempt status of religious organizations. RFRA was amended to make explicit that the same rule of standing set forth by the Supreme Court under Article III of the Constitution is the rule of standing under RFRA. RFRA authorizes no one to come into court to challenge a religious organization's tax exemption.

III. RFRA will jeopardize government partnerships with religious organizations to provide social services to needy Americans.

Again, the notion that religious organizations would support legislation that would disqualify them from participating in programs providing social welfare services to needy Americans is preposterous. Many of the organizations supporting RFRA, including Jewish and Lutheran groups, engage in extensive social welfare activities. Yet, they wholeheartedly support RFRA. Moreover, as with tax exemption, the Supreme Court has never recognized free exercise standing for a taxpayer to challenge such programs. It is inconceivable that courts would allow or that RFRA would somehow authorize such suits. The constitutionality of all such government programs has been and will continue to be litigated under the establishment clause, which is unaffected by RFRA.

IV. RFRA will jeopardize pro-life interests by creating a new statutory right to abortion.

Nonsense. Leading pro-life scholars and most pro-life organizations now agree that RFRA is scrupulously neutral on abortion and will not jeopardize the interests of pro-life groups. The Senate need not take my word for it. Your own non-partisan Congressional Research Service has confirmed RFRA's abortion neutrality. There are many pro-life groups in the coalition supporting RFRA: Christian Legal Society, Coalitions for America, National Association of Evangelicals, Southern Baptist Convention, Traditional Values Coalition and many more. We implore you not to allow a relatively small group of pro-life advocates to hold religious liberty hostage until RFRA is rendered "politically correct".

The recent memo by the Congressional Research Service makes clear that: (1) the nation is suffering a free exercise crisis; (2) Congress has the power to do something about it; (3) the Religious Freedom Restoration Act is a proper vehicle, and (4) the amendments proposed by the National Right to Life Committee and the Catholic Conference are superfluous, mischievous and inappropriate. Any remedial legislation must maintain its posture of strict neutrality on all specific free exercise questions including abortion.

We implore the Senate to act swiftly to restore the nation's first liberty to its rightful preeminence.

Respectfully submitted,

Oliver S. Thomas, General Counsel
Baptist Joint Committee

Appendix I

The Baptist Joint Committee is the Public Affairs office for 10 Baptist Conventions and Conferences in the United States. Its program assignment is religious liberty and the separation of church and state. Its Board of Directors is composed of representatives of the following conventions and conferences: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference and various Southern Baptist conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to represent or speak for all Baptists.

The American Jewish Committee was founded in 1906 to protect the civil and religious rights of Jews. It is the American Jewish Committee's conviction that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports a broad interpretation of the Free Exercise Clause of the First Amendment. One corollary of this principle is that only when justified by a compelling interest of society may the government bar a faith group from carrying out a practice dictated by its religious beliefs.

APPENDIX II

MEMORANDUM

TO: NCC Religious Liberty Committee
FROM: J. Brent Walker
DATE: February 1, 1991 (revised 6/15/92)
RE: Post-Smith free exercise cases

The following is a summary of cases which rely on Smith one way or another. It does not include every issue in each case listed, nor is the list of cases necessarily exhaustive. However, I have included all that I could find. Those with access to Lexis or Westlaw may want to seek to obtain an even more comprehensive, up-to-date list.

Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990). The Supreme Court of Minnesota ruled that the Amish had a free exercise right to refuse to display fluorescent orange triangular emblems on their horse-drawn buggies (444 N.W.2d 282). The U.S. Supreme Court granted certiorari. After Smith was decided, the Court remanded Hershberger to the Minnesota Supreme Court to be reconsidered in light of Smith. The court did so and ruled for the Amish -- but on state constitutional grounds.

Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990). The state medical examiner ordered an autopsy performed on plaintiff's son after he was killed in an automobile accident. Plaintiff, who was Jewish, alleged that performance of the autopsy violated her free exercise rights. The court held that the generally applicable, religiously neutral autopsy law was reasonably related to a proper police-power interest and, therefore, under Smith, did not violate plaintiff's rights.

The court distinguished You Vang Yang v. Sturner, 728 F. Supp. 845 (D.R.I. 1990), a case involving the Hmong religious objection to autopsy, because it had been decided prior to Smith. After Smith, the court in Sturner recalled its earlier decision and "regretfully" dismissed the case in light of Smith's new teaching. 750 F. Supp. 558 (D.R.I. 1990).

Intercommunity Center for Justice and Peace v. INS, 910 F.2d 42 (2d Cir. 1990). Plaintiff and six Catholic nuns sought a religiously based exemption from the Immigration Reform and Control Act of 1986. The court ruled that the plaintiffs were obliged to comply with the employer verification and sanctions provision of the Act. The court relied on Smith but then went on to say that, even without Smith, it would have found a compelling interest under U.S. v. Lee.

Ohio v. Flesher, No. 89-P2084 (Ohio App. 1990). An Ohio appellate court ruled against a religiously based justification for the use of marijuana. The court held that the state no longer needed to show a compelling interest to justify its acts and observed that, after Smith, the free exercise clause is no more than a "puff of smoke."

Moore v. Trippe, 743 F. Supp. 201 (S.D.N.Y. 1990). Plaintiffs, Zen Buddhists, complained that the city's requirement of prior site plan approval only for non-residential properties, such as churches, located in residential areas prevented them from freely practicing their religion. The court ruled that the plaintiff's complaint stated a cause of action. Noting that Smith was decided after argument on the motions, the court observed, "The extent to which this decision may impact on the issues presented in the case at bar is unclear, but need not be presently resolved." Id. at 208.

Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990). The Salvation Army had residence facilities and programs which failed to comply with New Jersey's Rooming and Boarding House Act. The Salvation Army claimed a free exercise exemption from licensure. The court disagreed, based on Smith. The court rejected the argument that Smith should be limited to criminal cases and failed to find a "hybrid" claim under the facts.

U.S. v. Philadelphia Yearly Meeting of Religious Society of Friends, 753 F. Supp. 1300 (E.D. Pa. 1990). Defendant objected to I.R.S. levy for taxes which two of its employees refused to pay because of religious opposition to war. The court reluctantly ruled against the Friends on a motion for summary judgment, citing Smith. The court wrote, "It is ironic that here in Pennsylvania, the woods to which Penn led the . . . Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so. More than 300 years after their founding of Pennsylvania . . . it would be a 'constitutional anomaly' to the Supreme Court, [citing Smith], if the . . . Friends were allowed to respect decisions of their employees-members bearing witness to their faith."

Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990). Muslim inmate sued prison officials complaining about service of meals containing pork. The Seventh Circuit reversed the trial court's dismissal and remanded for further proceedings. However, the court noted that Smith (decided after the appeal had been taken) "cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." Id. at 48.

Salaam v. Lockhart, 905 F.2d 1168 (8th Cir. 1990). Inmate, who changed his name after converting to the Muslim faith, sought relief from prison's name policy on free exercise grounds. The court held that the policy of using only committed names on records and clothing and in the mail room was an unreasonable restraint on free

exercise. The court then noted: "We do not believe that the Supreme Court's recent decision in . . . Smith affects our analysis. Smith does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners." Id. at 1171. Certiorari denied 1/17/91.

Friend v. Kolodzieczak 923 F.2d 126 (9th Cir. 1991). Prisoner challenged a ban on possession of rosaries and scapulars. The court analyzed the claim under the "reasonableness" standard as established in Turner v. Safley and ruled against the prisoner's free exercise claim. The court failed to reject the argument that Smith had the effect of lessening even the meager Turner standard.

Presbyterian Church v. United States of America 752 F.Supp. 1505 (D. Ariz. 1990). This was a challenge to the infiltration of church worship services by the government as a part of the investigation of the sanctuary movement. The court, curiously, employed the compelling state interest standard in ruling for the plaintiffs even after Smith.

Welsh v. Boy Scouts of America 742 F.Supp. 1413 (N.D. Ill. 1990). Plaintiff alleged that Boy Scouts violated Title II in denying him admission because he refuse to take the "Duty to God" oath. Among other things, the Scouts argued that to require them to admit those who denied a belief in God violated their free exercise rights. Citing Smith, the court dismissed the Scouts' argument.

South Ridge Baptist Church v. Industrial Commission of Ohio, 911 F.2d 1213 (6th Cir. 1990). Church alleged that its inclusion in the workers' compensation statutory scheme was unconstitutional. The court held such inclusion did not violate the free exercise clause. The concurring opinion cited Smith, noting an apparent abrupt departure from Sherbert jurisprudence outside the unemployment compensation context. Certiorari denied 1/14/91.

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). The church sued the city, claiming that a zoning ordinance (excluding churches from commercial and industrial zones) violated the church's free exercise rights. The trial court granted the city's motion for summary judgment, citing Smith. (740 F.Supp. 654) The Eighth Circuit affirmed the dismissal of the free exercise claim, but did suggest a "hybrid" claim could be argued on remand. The case later settled.

First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 789 P.2d 1352 (1990). The court found that the Landmark Preservation Ordinance as applied to churches violated the free exercise clause. Since the case was decided before Smith, the court did a strict scrutiny analysis. The U.S. Supreme Court granted certiorari, vacated the judgment and remanded to the Supreme Court of Washington for further consideration in light of Smith.

Society of Jesus v. Boston Landmarks Commission, 409 Mass. 38, 564 N.E.2d 571 (1990). The Supreme Judicial Court of Massachusetts held that the application of the landmarking statute to the interior of the church violated the free exercise clause of the Massachusetts constitution. The court avoided, and did not cite, the Smith case.

Saint Bartholomew's Church v. City of New York and Landmarks Preservation Commission, 914 F.2d 348 (2d Cir. 1990). The court ruled against Saint Bartholomew's free exercise argument in response to the application of landmarking ordinances to buildings owned by the church. The court relied heavily on Smith. Certiorari denied 3/4/91.

Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990). This was a free speech case involving nude dancing. A concurring opinion stated, in dicta, that "the principle derived from the free-exercise clause of the First Amendment that government must accommodate its laws of general applicability to the special needs of religious minorities, . . . is moribund after Employment Division v. Smith." Id. at 1102-1103.

Zummo v. Zummo, 574 A.2d 1130 (Pa. 1990). The trial court prevented a father from tak ing children to religious services contrary to the mother's faith during periods of custody or visitation. The appellate court reversed, at least where the mother failed to demonstrate that the father's religion substantially threatened the children. The court treated this case as a parental right/free exercise hybrid, requiring strict scrutiny.

OSHA Notice CPL 2. (Nov. 5, 1990) This is a notice issued by OSHA canceling an exemption from wearing hard hats previously extended to Old Order Amish and Sikhs, in light of Smith. This directive was later withdrawn (July 24, 1991).

United States v. Board of Education for the School District of Philadelphia 911 F.2d 882 (3rd Cir. 1990). Muslim teacher sought relief from a Pennsylvania "garb statute," claiming a violation of Title VII. The court ruled against the teacher, reasoning that since the garb statute was not a law of general applicability, but was rather aimed at religion, Smith did not apply. Therefore, the court engaged in the compelling interest analysis. However, the court did note that "the Smith decision may represent a considerable shift in the Court's direction in free exercise jurisprudence... " Id. at 888, fn. 3.

Vandiver v. Hardin County, 925 F.2d 932, (6th Cir. 1991). Free exercise clause did not prevent school district from requiring a home-schooled transfer student to take an equivalency exam. The policy applied to all transfers from non-accredited schools. Citing Smith, the court ruled against the free exercise claim. The court examined and rejected "hybrid" and "individual exceptions" arguments.

Prince v. Firman, 584 A.2d 8 (D.C. App. 1990). The trustees of a church sued alleging that the assets were not properly distributed following the dissolution of the church. The Court of Appeals held that the statute, which required reversion of property back to the original grantors upon dissolution, did not violate principles of church autonomy or the free exercise clause. The court cited Smith, reasoning that after dissolution of the church, "its essentially religious function has presumably come to an end."

Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance, 463 N.W.2d 76 (Iowa 1990). The church appealed an assessment of taxes on consumer items (e.g. crosses, hymnals, tracts) purchased from out of state suppliers. The church, among other things, made a free exercise challenge. Citing Swaggart and Smith, the court found that there was no substantial burden on free exercise and ruled that "compliance with such a tax is no different from compliance with other generally-applicable laws and regulations, such as health and safety regulations." Id. at 82. Certiorari denied 4/12/91.

Hill-Murray Federation of Teachers v. Hill-Murray High School, C3-90-2617, ____ N.W.2d ____ (Minn. 1992). State certification of exclusive bargaining representatives for lay employees of a parochial school under the Minnesota Labor Relations Act was held not to violate the establishment clause (excessive entanglement). The court held that Smith bars a free exercise challenge, even under a "hybrid" claim. The court applied strict scrutiny under the Minnesota Constitution but ruled against the school. It found no significant burden on free exercise and that the state had demonstrated a compelling state interest.

Black v. Snyder, 471 N.W.2d 715 (Minn. App. 1991). Female associate pastor filed discrimination suit against pastor and church charging, among other things, breach of contract, defamation and sexual harassment. The court, citing Smith, rejected the church's free exercise argument. However, it concluded that the church autonomy doctrine barred all of plaintiff's claims except the one for sexual harassment.

Cooper v. French, 460 N.W.2d 2 (Minn. 1990). Landlord refused to rent house to tenant who intended to cohabitate with her fiance before marriage. Landlord's decision was motivated by religious conviction. The court ruled that the landlord's free exercise rights under the Minnesota Constitution outweighed any interest of tenant to cohabitate under the Minnesota Human Rights Act. The court specifically avoided Smith and relied squarely on the state constitution. Accord, Donahue v. FEHC, 2 Cal. Rptr. 2d 32 (Cal. App. 2 Dist. 1991).

National Labor Relations Board v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991). Union sought to represent certain non-teaching workers at school associated with Catholic Church. The court held that the National Labor Relations Act applied to the employees in question and distinguished the Supreme Court's decision in Catholic Bishop as applying only to teachers in church-operated schools. The court dispensed

with the school's free exercise argument on the basis of Smith but went on to opine that its decision would have been the same under pre-Smith jurisprudence. Certiorari denied 6/15/92.

State of Florida v. Jackson, 576 So.2d 864 (Fla. 3d DCA 1991). Department of Legal Affairs sought to subpoena records of a solicitor of charitable contributions. He had solicited charitable contributions in exchange for winning lottery numbers purportedly revealed to him by God. Citing Smith, the appellate court upheld the subpoenas despite a free exercise argument.

Church of Scientology v. Clearwater, 756 F. Supp. 1498 (M.D.Fla. 1991). Church challenged the constitutionality of municipal ordinance which sought to regulate charitable solicitations. The ordinance required charitable organizations to file registration statements and disclose other private information. The court upheld the constitutionality of the ordinance, citing, among others, Smith: "The compelling government interest test is no longer required when the government action involves a religion-neutral criminal law." Id. at 1515.

Lukaszewski v. Nazareth Hospital 764 F.Supp. 57 (E.D. Pa. 1991). Catholic hospital sought to preclude application of Federal Age Discrimination Employment Act. The court rejected the hospital's free exercise argument citing Smith. Unlike Catholic Bishop, the employee here held a "secular" position with the hospital.

Munn v. Algee 924 F.2d 565 (5th Cir. 1991). This is a wrongful death case filed on behalf of a Jehovah's Witness who was injured as a result of the defendant's negligence and who died allegedly because she refused a blood transfusion on religious grounds. Plaintiff contended that the application of a rule of law stating that religion may not justify a failure to mitigate damages violates the free exercise clause. The court rejected that argument relying in part on Smith. Certiorari denied 10/7/91.

Peyote Way Church of God v. Thornburgh 922 F.2d 1210 (5th Cir. 1991). Church members sought to use peyote in religious worship. Texas and federal law exempted its use in Native American worship, but not otherwise. Relying on Smith, the court summarily dismissed the free exercise claim, even though it had earlier considered it to have some merit under the compelling interest test.

American Friends Service Committee v. Thornburgh 941 F.2d 808 (9th Cir. 1991). Quaker organization challenged "employer sanction" provision of Immigration Reform and Control Act which requires employers to verify immigration status of employees. The court ruled against plaintiffs free exercise claim, holding that it "falls squarely within the rule announced in Smith" which "dramatically altered" the law. Id. at 810. The court rejected arguments for a "hybrid claim" and "individualized assessment" exception.

Christ College v. Board of Supervisors No. 90-2406 unpublished (4th Cir. 1991). Christian school alleged, among other things, free exercise violation when it was denied exemption to locate in residential zone. It asserted a hybrid claim and individualize treatment exception to Smith. The Fourth Circuit ruled against the school finding no constitutionally significant burden in the first instance. The court suggested in dicta that Smith applies only in criminal context. Certiorari denied 2/24/92.

State v. Venet 103 Or. App. 363, 797 P.2d 1055 (Or. App. 1990). The Oregon court held that the defendant' conviction for manufacturing marijuana did not violate his free exercise rights despite evidence that defendant's church consumed marijuana as a sacrament. The court relied squarely on Smith.

People v. DeJonge 470 N.W.2d 433 (Mich. App. 1991). Court held that the state's requirement that nonpublic schools use state certified teachers did not violate defendant's free exercise rights. The court applied the compelling interest test under the hybrid claim exception (i.e., free exercise and the right of parents to direct the education of their children), but nevertheless ruled against claimant.

State v. DeLaBruere 577 A.2d 254 (Vt. 1990). Parents were charged with violating truancy statute for child's failure to attend a school that met the requirements of Vermont law. Supreme Court of Vermont denied parents' free exercise claim, and declined to find additional protection in the Vermont Constitution. The court applied the compelling interest test, notwithstanding Smith, because of the hybrid nature of the case.

Living Faith Inc. v. Commissioner No. 90-3626, ___F.2d___ (7th Cir. 1991). The court cited Smith in affirming tax court's decision revoking tax exemption. The record demonstrated that the I.R.S. applied nondiscriminatory neutral guidelines in deciding whether there was an exempt purpose.

Health Services Division v. Temple Baptist Church 112 N.M. 262, 814 P.2d 130 (1991). Church alleged that licensing requirement for child care center (i.e., rule prohibiting spanking) violated free exercise clause. The court denied the claim under Smith finding no hybrid rights or discriminatory treatment. The court declined to consider whether the New Mexico state constitution afforded greater protection because it had not been properly raised below.

Calderon v. Witvoet 764 F.Supp. 536 (C.D. Ill. 1991). Citing Smith, the court disallowed farm employer's free exercise defense to failure to comply with various requirements under Migrant and Seasonal Agricultural Workers' Protection Act because it was a facially neutral generally applicable law. The court also expressed doubt that the claim would have been upheld even under strict scrutiny.

Elsaesser v. City of Hamilton 61 Ohio App. 3d 641, 573 N.E. 2d 733 (Ohio App. 1990). Homeowner sought to enjoin enforcement of a setback requirement which had the

effect of preventing homeowner from erecting crosses in her front yard. Citing Smith, the court denied the religious claim because the ordinance was a neutral law of general applicability and reasonably related to a proper police power purpose.

Ryan v. United States 950 F.2d 458 (7th Cir. 1991). An F.B.I. agent refused for religious reasons to be involved in a domestic security and terrorism investigation. After he was discharged he sought relief under Title VII and the free exercise clause. The court denied his Title VII claim holding that the F.B.I. had sought reasonable accommodation. As to his free exercise claim, the court ruled that, "After Smith, Title VII requires of the F.B.I. more than the Constitution in its own right." The court thus denied the free exercise claim as well.

Murray v. City of Austin 947 F.2d 147 (5th Cir. 1991). Plaintiff claimed that the city's insignia bearing a cross violated the free exercise clause because there was at least "subtle coercion... to adhere to the majoritarian faith symbolized by the cross in the seal." Citing Smith, the court ruled that the claimant had failed to "articulate a sufficient burden or restriction imposed on the free exercise of his religion."

United States v. Boyll 774 F.Supp. 133 (D.N.M. 1991). A non-Indian member of the Native American Church was indicted for importing peyote through the mail and possessing it with the intent to distribute. The district court dismissed the indictment, rejecting the government's claim that the federal exemption for peyote applied only to American Indian members of the Native American Church. The court employed the "compelling interest" test because, according to the court, the federal exemption for peyote targets religious practice and therefore is within an exception to Smith. Moreover, the very existence of the exemption shows that the federal government has no compelling interest in the prosecution of religious use of peyote.

Society of Separationists Inc. v. Herman 939 F.2d 1207 (5th Cir. 1991). A prospective juror, who was an atheist, was held in contempt for refusing to swear or affirm to tell the truth because of her conviction that the affirmation was rooted in religion. The court ruled that the contempt order violated the juror's free exercise rights. The court distinguished Smith, holding that this was a religion-plus-speech hybrid case that did not fall within the attenuated Smith rule.

Greater New York Health Care Facilities Association Inc. v. Axelrod 770 F.Supp. 183 (S.D.N.Y. 1991). The court upheld state regulations that restricted the services volunteers could render in nursing homes, such as feeding patients, etc. On cross motions for summary judgment the court held that the religious claimants had failed to come forward with evidence supporting their claimed beliefs and went on to opine, in dicta, that the claim would have been barred by Smith in any case.

Rupert v. City of Portland, 605 A.2d 63 (Me. 1992). Member of the Native American Church sued to have his marijuana pipe returned after it was seized by the city. He

argued that he used marijuana in his religious exercise. Plaintiff argued that the Drug Paraphenalia Act, under which the pipe was seized, violates his free exercise rights under the Maine and United States Constitution. The court held that the Maine Constitution requires strict scrutiny on a free exercise claim. The court ruled that Maine had a compelling interest in preventing the distribution and use of illegal drugs and that it had adopted the least restrictive means to achieve that interest. Accordingly, the court ruled against the plaintiff under the Maine Constitution. Having survived strict scrutiny under the Maine Constitution, the court likewise upheld the Maine statute under the more permissive Smith rule governing the free exercise clause in the United States Constitution.

APPENDIX 3

Public Party . Atlanta Const. 9-9-92, Guest

Restore religious free-exercise right

In his effort to ingratiate himself with the religious right, George Bush has represented the Democratic Party as godless. But it is the Reagan-Bush Supreme Court that has endangered the right of Americans to worship God according to the dictates of their conscience.

In its Smith decision two years ago, the court seriously undermined the First Amendment's ban on laws prohibiting the free exercise of religion. No longer does the government have to demonstrate a "compelling state interest," such as protecting life or public safety, in order to restrict a religious practice. As long as there is no specific intent to infringe upon religion, any generally applicable law is all right.

What this means, for example, is that Jews need not be excused from taking public school exams on their High Holidays, that a Sikh can be required to take off his headgear in order to run for public office, that churches can be excluded from communities by zoning ordinance. Nor are these examples hypothetical. All have taken place since Smith.

To remedy this situation, Rep. Steven Solarz (D-N.Y.) has introduced the Religious Freedom Restoration Act, which would impose by statute the "compelling state interest" test that the court rejected in Smith.

The Solarz bill has the support of as wide a coalition as has ever existed on a religious issue, running from the American Civil Liberties Union and People for the American Way all the way to the Christian Life Commission of the Southern Baptist Convention and the Mormon Church.

The one notable exception to this united front has been the Roman Catholic bishops, who have held back for fear that the bill would give an opening to abortion-rights advocates. They seem worried lest a woman claim a right to have an abortion on religious grounds.

This concern is not, however, shared by the group of strongly anti-abortion churches that have joined the coalition. Indeed, after the court's recent affirmation of a fundamental abortion right on other grounds, there seems to be less reason than ever to worry about such a hypothetical claim.

As of now, the bill is awaiting certain passage by the House Judiciary Committee; Senate Judiciary has scheduled hearings in a couple of weeks. Given the number of co-sponsors, passage by the full Congress seems assured.

But thus far, the Bush administration has done nothing but mutter opposition. Why? Does the president favor allowing government to intrude more easily between individuals and their God?

APPENDIX IV

Babner, The Religious Use of Peyote After Smith II, 28 Idaho L. Rev. 65 (1991)

Ball, Freedom of Religion -- The Unfree Exercise of Religion, 20 Cap. U.L. Rev. 39 (1991)

Carmella, A Theological Critique of Free Exercise Jurisprudence, 60 Geo. Wash. L. Rev. 782 (1992)

Clark, Religious Accommodation and Criminal Liability, 17 Fla. St. U.L. Rev. 559 (1990)

Delaney, Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of *Oregon v. Smith*, 25 Ind. L. Rev. 71 (1991)

Gaffney, How the Court Went Astray in the Peyote Case, 103 LA Daily J 6 (1990)

Glendon, Law, Communities, and the Religious Freedom Language of the Constitution, 60 Geo. Wash. L. Rev. 672 (1992)

Gordon, Free Exercise on the Mountaintop, 79 Cal. L. Rev. 91 (1991)

Kohler, Neutral Laws, Incidental Effects and the Regulation of Religion and Speech, 40 Drake L. Rev. 255 (1991)

Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841 (1992)

Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1

Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990)

Laycock, The Supreme Court's Assault on Free Exercise, and the *Amicus* Brief That Was Never Filed, 8 J.L. & Religion 99 (1990)

Lupu, The Trouble with Accommodation, 60 Geo. Wash. L. Rev. 743 (1992)

Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Pa. L. Rev. 555 (1991).

Mawdsley, Has *Wisconsin v. Yoder* Been Reversed? Analysis of *Employment Division v. Smith*, 63 W. Educ. L. Rep. 11 (1990)

McConnell, Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion? 15 Harv. J.L. & Pub. Pol'y 181 (1992)

McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685 (1992)

McConnell, A Response to Professor Marshall, 58 U. Chi. L. Rev. 329 (1991)

McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109 (1990)

McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990)

Rhodes, Am American Tradition: The Religious Persecution of Native Americans, 52 Mont. L. Rev. 13 (1991)

Sherwin, Rhetorical Pluralism and the Discourse Ideal: Countering *Division of Employment v. Smith*, A Parable of Pagans, Politics, and Majoritarian Rule, 85 Nw. U.L. Rev. 388 (1991)

Smith, The Criminalization of Belief: When Free Exercise Isn't, 42 Hastings L.J. 1491 (1991)

Strossen, *Michigan Department of State Police v. Sitz*: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights, 42 Hastings L.J. 285 (1991)

Tepker, Hallucinations of Neutrality in the Oregon Peyote Case, 16 Am. Indian L. Rev. 1 (1991)

Thomas, Freedom of Religion -- Restoring Free Exercise and Preventing Religious Fraud: A Response to Milner Ball, 20 Cap. U.L. Rev. 67 (1991)

Williams & Williams, Volitionalism and Religious Liberty, 76 Cornell L. Rev. 769 (1991)

Witte, The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay, 40 Emory L.J. 489 (1991)

Note, *Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine, 40 Am. U.L. Rev. 1431 (1991)

Note, *Employment Division v. Smith*: Free Exercise Clause Loses Balance on Peyote, 43 Baylor L. Rev. 577 (1991)

Note, *Employment Division v. Smith*: A Giant Step Backwards in Free Exercise Jurisprudence, 1991 B.Y.U. L. Rev. 1331

Note, Can Religious Practice be Given Meaningful Protection After *Employment Division v. Smith*? 62 U. Colo. L. Rev. 687 (1991)

Note, Free Exercise -- or the Lack Thereof? *Employment Division v. Smith*, 24 Creighton L. Rev. 239 (1990)

Note, Free Exercise of Religion: A Luxury Our Nation Can No Longer Afford? -- *Employment Division v. Smith, 110 S.Ct. 1595 (interim ed. 1990)*, 16 U. Dayton L. Rev. 435 (1991)

Note, The Peyote Case: A Return to *Reynolds*, 68 Denver U.L. Rev. 91 (1991)

Note, *Employment Division, Department of Human Resources v. Smith*: The Supreme Court Deserts the Free Exercise Clause, 25 Ga. L. Rev. 567 (1991)

Note, Free Exercise of Religion: *Employment Division, Department of Human Resources v. Smith)*, 110 S.Ct. 1595 (1990), 14 Harv. J.L. Pub. Pol'y 282 (1991)

The Supreme Court 1989 Term, 104 Harv. L. Rev. 198

Note, *Employment Division, Department of Human Resources v. Smith*: A Hallucinogenic Treatment of the Free Exercise Clause, 17 J. Contemp. L. 359 (1991)

Note, *Employment Division v. Smith*: Overlooking the Middle Ground in Free Exercise Analysis, 80 Ky. L.J. 531 (1992)

Note, Constitutional Law -- The "Hollow Promise" of the Free Exercise Clause: Denying the Right to Peyote Use in the Native American Church, *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990), 26 Land & Water L. Rev. 323 (1991)

Note, *Employment Division, Department of Human Resources v. Smith*: What Remains of Religious Accommodation Under the Free Exercise Clause? 52 La. L. Rev. 231 (1991)

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Note, Free Exercise: A "Hollow Promise" for the Native Americans in *Employment Division, Department of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990), 42 Mercer L. Rev. 1597 (1991)

Note, The Illusory Enforcement of First Amendment Freedom: *Employment Division, Department of Human Resources v. Smith* and the Abandonment of the Compelling Governmental Interest Test, 69 N.C. L. Rev. 1332 (1991)

Note, *Employment Division, Department of Human Resources of Oregon v. Smith*: Does the Constitutionally Compelled Free Exercise Exemption Have a Prayer? 22 Pac. L.J. 1415 (1991)

Note, The Free Exercise Clause Gets a Costly Workout in *Employment Division v. Smith*, 18 Pepperdine L. Rev. 163 (1990)

Comment, The Free Exercise Clause: *Employment Division v. Smith*'s Inexplicable Departure from the Strict Scrutiny Standard [*Employment Division, Dep't of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990)], 6 St. John's J. Legal Comment 117 (1990)

Note, The Melting of *Sherbert* Means a Chilling Effect on Religion [*Employment Division, Department of Human Resources v. Smith*, 110 .Ct. 1595 (1990)], 26 U.S.F. L. Rev. 149 (1991)

Note, Constitutional Law -- First Amendment -- Ingestion of Illegal Drugs for Religious Purposes Is Not Protected by the Constitution -- *Employment Division, Department of Human Resources v. Smith*, 110 S.Ct. 1595 (1990), 21 Seton Hall L. Rev. 111 (1990)

Note, *Employment Division, Department of Human Resources of Oregon v. Smith*: Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections, 36 S.D. L. Rev. 358 (1991)

Note, Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration, 25 Val. U.L. Rev. 455 (1991)

Constitutional Law -- Liberty or Luxury? The Free Exercise of Religion in the Aftermath of *Employment Division, Department of Human Resources v. Smith*, 26 Wake Forest L. Rev. 1245 (1991)

Note, The Undoing of Mandatory Free Exercise Accommodation: *Employment Division, Department of Human Resources v. Smith*, 110 S.Ct. 1595 (1990), 66 Wash. L. Rev. 587 (1991)

Note, Secondary Right: Protection of the Free Exercise Clause Reduced by *Employment Division v. Smith*, 27 Willamette L. Rev. 173 (1991).

See also

Dorsay & Easton, *Employment Division v. Smith*: Just Say "No" to the Free Exercise Clause, 59 U.M.K.C. L. Rev. 555 (1989)

Firmage, Free Exercise of Religion in Nineteenth Century America: The Mormon Cases, 7 J.L. & Religion 281 (1989)

Galloway, Basic Free Exercise Analysis, 29 Santa Clara L. Rev. 865 (1989)

Pepper, A Brief for the Free Exercise Clause, 7 J.L. & Religion 323 (1989)

Pepper, Taking the Free Exercise Clause Seriously, 1986 B.Y.U. L. Rev. 299

Weisbrod, Comment on Curry and Firmage Articles, 7 J.L. & Religion 315 (1989).

Senator KENNEDY. Are you ready to go, Orrin? [Laughter.]
Senator HATCH. I have been ready for a long time.
Senator KENNEDY. Thank you very much.
Professor Laycock.

STATEMENT OF PROF. DOUGLAS LAYCOCK

Mr. LAYCOCK. Thank you, Mr. Chairman, Senator Hatch. I am testifying at Senator Biden's invitation in my personal capacity as a scholar. I have studied these issues for 15 years. Obviously, the University of Texas takes no position.

The Religious Freedom Restoration Act would do much to correct the errors of *Smith,* and those errors affect not only minority or immigrant religions that are well outside the mainstream, but also mainstream faiths. In a pervasively regulated society, *Smith* means that churches and religious believers will be pervasively regulated because every generally applicable that applies to anybody else applies to the churches.

In a society where regulation is driven by interest groups, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. They will be in here on every bill trying to get an exemption to protect their religious practice bill by bill because otherwise they will be subject to everything that is ever enacted. And they will often fail, so that in the most pluralistic society on earth *Smith* means that Americans will suffer for conscience.

Religious liberty is one of our great contributions to civilization, but there is also a counter-tradition in American history. We have not always been religiously tolerant. There have been religious persecutions in America. Elder Oaks described in detail one of the worst. Let me mention very briefly some of the others.

Slave owners in the ante-bellum period systematically eliminated African religion. One historian has called it the African spiritual holocaust. Catholics have been the victims of mob violence and church burnings. In this century, the Ku Klux Klan pushed through a law in Oregon that would have shut down every Catholic school in the State. The Mormons, of course, were driven from State to State and persecuted in large numbers. Jehovah's Witnesses were persecuted for refusing to salute the flag, and when the Supreme Court initially upheld those persecutions, that decision triggered a nationwide outbreak of violence against the Witnesses.

But the real point I want to make about these examples is not just that they happened and that they were terrible, but that a formally neutral, generally applicable law was central to each of them—the public school law in Oregon to close down the Catholic schools, the polygamy law that was central to the persecution of the Mormons, and the flag salute laws that triggered much of the hostility against Jehovah's Witnesses. None of them mentioned religion by name. Each of them is the kind of law that would be upheld under *Smith.* Those three formally neutral, generally applicable laws were central to three of the worst persecutions in our Nation's history.

There is a simple reason why formally neutral laws sometimes lead to religious persecution, because once Government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point. Sometimes, the Government will back off and create an exemption, but often the bureaucracy will grind forward and persecution will be the result.

Today, churches and religious believers are losing the right to practice their faith for a whole range of reasons; sometimes, intolerance, but oftentimes other reasons—the indifference of bureaucrats, legislative ignorance about small faith groups that you have never heard of, the absolutism of secular interest groups that don't want any exceptions to their bills.

The contemporary examples span the range of religious faiths and practices. Gay rights suits against Catholics, Orthodox Jews and Conservative Protestants are going on all over the country, and the churches are often losing those cases. Mainstream churches have been zoned out of town and quite literally left with no place to worship. You have heard today about unnecessary autopsies on Jewish and Hmong decedents. There is a terrible case of a bigoted attack on the beliefs of black Jehovah's Witnesses in a Mississippi wrongful death suit.

The list goes on and on, and the Congress and the State legislatures cannot possibly solve those problems with individual exemptions enacted one statute at a time. That approach will lead to an endless series of political battles between religious and secular groups over and over, year after year, at every level of government, and only the largest, most organized, most powerful religious groups would succeed in getting exemptions.

In that kind of individualized exemption process, the mainstream faiths would not always win, but they would at least be advantaged and the minority faiths would be terribly disadvantaged. That is why the Religious Freedom Restoration Act is the only solution. It would legislate all at once; it is across the board. It is a right to argue for religious exemptions in the courts under a uniform standard. The uniform standard applies equally to every faith group. It plays no favorites; it applies equally to every Government program and every Government interest. The standard is the compelling interest test that comes out of the earlier Supreme Court case law.

The amendments that have been offered to the bill violate that principle of across-the-board neutrality toward all faiths and all Government claims. It puts three sets of claims outside the compelling interest standard and leaves them subject to *Smith* and, in addition, injects into this legislation three of the most divisive issues of our time—abortion, tax support for religious institutions, and tax exemption.

If I had set out to draft amendments that would kill this bill, I could not have done any better than my friend, Mark Chopko's, three proposed amendments. They are designed to kill the bill, and they are almost entirely symbolic. They aren't going to affect anything. They address issues that have always been resolved under other clauses of the Constitution.

The tax exemption issue and the financial support are, always have been, and always will be establishment clause issues. The abortion issue is a constitutional matter, always has been and will

be a substantive due process or ninth amendment issue, and if it becomes statutory, it will become statutory in the Freedom of Choice Act and not in the Religious Freedom Restoration Act, which says nothing about abortion.

For all practical purposes, a free-exercise right to abortion was rejected in *Harris* v. *McRae* in 1978. The standing rule in *Harris* requires each individual woman to testify and show how her religious beliefs motivate her abortion, and that standing rule precludes any kind of broad-based Religious Freedom Restoration Act or free exercise challenge to abortion. Any challenge would have to proceed one woman at a time with judicial examination of her individual beliefs.

Moreover, it wouldn't make the slightest difference anyway unless the Supreme Court overrules *Roe* and *Casey,* and if they overrule *Roe* and *Casey,* then preserving unborn life will be a compelling interest and a compelling interest is a complete defense to any claim under the Religious Freedom Restoration Act. The interest in unborn life will be compelling even if *Roe* and *Casey* were overruled on the grounds that the constitutional right to privacy does not extend to abortion.

Why wouldn't it extend to abortion? The Court, in *Casey,* is quite clear about this. What makes abortion different from birth control or the right to marry or the right to have children? It is different because the life of the unborn child is at stake. That is the only reason it is different, and if the Court draws a line, that will be the reason for the line.

So successful abortion claims under RFRA are imaginary, but other cases are not imaginary. *St. Agnes Hospital,* where a Catholic hospital loses its accreditation because it won't do abortions, is a real case. Pro-life doctors and nurses and residency programs forced out of ob-gyn are not imaginary. Catholic money supporting student gay rights groups at Georgetown is a real case. Unwed mothers suing the church for the right to teach in their elementary schools is a real case. Mother Teresa's shelter for the homeless shut down by bureaucrats under a law that couldn't be challenged after *Smith*—that is a real case. In my testimony in the House, I submitted a list of two dozen cases involving Catholics alone, and every other denomination, every other faith group, has been affected.

So this bill is needed. This bill is not subject to criticism for the reasons that you are about to hear about, and I join by brother Thomas in urging you to move this bill.

[The prepared statement of Mr. Laycock follows:]

Summary of Statement of Douglas Laycock

I urge adoption of the Religious Freedom Restoration Act. RFRA is needed because of the Supreme Court's decision in *Employment Division v. Smith*, which held that religious exercise is fully subject to formally neutral and generally applicable laws.

In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience. Both mainstream churches and religious minorities suffer from regulatory interference, from bureaucratic indifference, and occasionally from simple religious bigotry.

RFRA can work only if it is as broad as the Free Exercise Clause, enacting the fundamental principle of religious liberty and leaving particular disputes to further litigation. The amendments proposed by the bill's opponents would violate this principle, and they are not necessary to achieve their purposes. They should be rejected.

The express Congressional purpose to restore the compelling interest test of *Wisconsin v. Yoder* and *Sherbert v. Verner* should be retained in the statutory text. To avoid ambiguity in § 6(b), references to "Federal law" should be changed to "Federal statutes."

Congress has power to enact this bill under section 5 of the Fourteenth Amendment. This Committee should find the following facts: formally neutral and generally applicable laws have been used as active instruments of religious persecution; enacting separate religious exemptions in every federal, state, and local statute is not a workable means of protecting religious liberty; and litigating government motive is not a workable means of protecting religious liberty.

Statement of Douglas Laycock
Professor of Law, The University of Texas
September 18, 1992

My name is Douglas Laycock, and I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin. I have studied, taught, and written about religious liberty for fifteen years. I am testifying in my individual capacity as a scholar; The University of Texas takes no position on this bill.

I appear to urge adoption of S.2969, the Religious Freedom Restoration Act. This bill is urgently needed to protect the free exercise of religion from the Supreme Court's decision in *Employment Division v. Smith*.[1] That case held that federal courts can not protect religious exercise from formally neutral and generally applicable laws. In effect, the Court held that every American has a right to believe his religion, but no right to practice it. Religion cannot be singled out for discriminatory regulation, but religion is fully subject to the entire body of secular regulation.

In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that sometimes claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience.

The Religious Freedom Restoration Act would greatly ameliorate these consequences. The bill would enact a statutory replacement for the Free Exercise Clause. The bill can work only if it is as broad as the Free Exercise Clause, enacting the fundamental principle of religious liberty and leaving particular disputes to further litigation.

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[1] 494 U.S. 872 (1990).

In this statement I review historical and contemporary examples that illustrate the need for this bill, describe the dynamic of interest group politics that is the greatest threat to religious liberty under *Smith*, explain the compelling interest test that is central to the bill, explain why RFRA is far superior to the competing bill, and explain why the bill is within the power of Congress to enforce the Fourteenth Amendment.

I also urge the Committee to make specific findings of fact in support of the bill: that formally neutral, generally applicable laws have historically been instruments of religious persecution, that enacting separate religious exemptions in every statute is not a workable means of protecting religious liberty, and that litigation about governmental motives is not a workable means of protecting religious liberty.

I. Some Relevant History

The founding generation of Americans had a vision of a society in which religion would be entirely voluntary and entirely free. People of all faiths and of none would be welcome. Minority religions would be entitled not merely to grudging toleration, but to freely and openly exercise their religion. Even in their largely unregulated society, the Founders understood that the free exercise of religion sometimes required religious exemptions from formally neutral laws.[2] Guarantees of free exercise and disestablishment were written into our fundamental law in state and federal constitutions. The simultaneous American innovation of judicial review made those guarantees legally enforceable.

The religion clauses represent both a legal guarantee of religious liberty and a political commitment to religious liberty. The religion clauses made America a beacon of hope for religious minorities throughout the world. The extent of religious pluralism in this country, and of legal and political protections for religious minorities, is probably unsurpassed in

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[2] Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990).

human experience. Religious liberty is one of America's great contributions to civilization.

But a counter-tradition also runs through American history. We have not always lived up to our ideals. There has been religious intolerance in America; there have even been religious persecutions in America. The New England theocracy expelled dissenters, executed Quaker missionaries who returned, and most infamously, perpetrated the Salem witch trials. Colonial Virginia imprisoned Baptist ministers for preaching without a license. American slaveowners totally suppressed African religion among the slaves, in what one historian has called "the African spiritual holocaust."[3]

Hostility to Catholics produced anti-Catholic political movements, mob violence, and church burnings in the 19th century. Catholic children were beaten for refusing to read the Protestant Bible in public schools. In the 1920s, the Ku Klux Klan and other Nativist groups pushed through a law in Oregon requiring all children to attend public schools; the effect would have been to close the Catholic schools.

The Mormons fled from New York, to Ohio, to Missouri, to Illinois, to Utah. They were driven off their lands in Missouri by a combination of armed mobs and state militia. Their prophet was murdered by a mob while in the custody of the state of Illinois. The federal government prosecuted hundreds of Mormons for polygamy, it imposed test oaths that denied Mormons the right to vote, and finally it dissolved the Mormon Church and confiscated its property. The Supreme Court upheld all of these laws in a series of cases in the late nineteenth century.[4]

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[3] Jon Butler, *Awash in a Sea of Faith* 129-63 (1990).

[4] *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

From the late 1930s to the early 1950s, towns all over America tried to stop the Jehovah's Witnesses from proselytizing. These towns enacted a remarkable variety of ordinances, most of which were struck down. The Supreme Court's decision in *Minersville School District v. Gobitis*,[5] upholding the requirement that Jehovah's Witnesses salute the flag, triggered a nationwide outburst of private violence against the Witnesses. Jehovah's Witness children were beaten on American school grounds.[6]

This thumbnail sketch of religious tolerance and intolerance in American history is relevant to the Religious Freedom Restoration Act for two reasons. Most obviously, history shows that even in America, government cannot always be trusted to protect religious liberty. Judicial enforcement of free exercise is not foolproof either, but it is an important additional safeguard.

This history of religious intolerance is also relevant in a more specific way. The law that would have closed all the Catholic schools in Oregon was a formally neutral, generally applicable law. The polygamy law that underlay much of the Mormon persecution was a formally neutral, generally applicable law. The flag salute law invoked against Jehovah's Witnesses was a formally neutral, generally applicable law. These formally neutral, generally applicable laws were central to three of the worst religious persecutions in our history.

The Court upheld the polygamy law in *Reynolds v. United States*.[7] It upheld the flag salute law in *Gobitis*, although it later struck down a similar law under the Free Speech Clause.[8] *Reynolds* and *Gobitis* are the two precedents principally relied on in *Smith*; the Court was simply oblivious

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[5] 310 U.S. 586 (1940).

[6] Peter Irons, *The Courage of Their Convictions* 22-35 (1988).

[7] 98 U.S. 145 (1878).

[8] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

to the shameful historical episodes of which these cases were a part. The law closing Catholic schools was struck down in *Pierce v. Society of Sisters*,[9] a decision cast in serious doubt by *Smith*. If *Pierce* survives, it rests on an unenumerated right of parents to educate their children, and that is a precarious base indeed.

In only one of these three episodes was the formally neutral law originally enacted for the *purpose* of persecuting a religious minority. The law closing private schools in Oregon was enacted to get the Catholics. But polygamy laws were not enacted to get the Mormons, and flag salute laws were not enacted to get the Jehovah's Witnesses. They were originally enacted for legitimate reasons, but when they were enforced against religious minorities, they fanned the flames of persecution.

This Committee can find as a fact that formally neutral, generally applicable laws have repeatedly been the instruments of religious persecution, even in America. Formally neutral laws can lead to persecution for a simple reason: Once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point to that demand. Conscientious resistance by religious minorities sometimes inspires respectful tolerance and exemptions, but sometimes instead it inspires religious hatred and determined, systematic efforts to suppress the religious minority.

II. Some Contemporary Examples

I mention the history of religious persecutions because that possibility cannot be assumed away. But deliberate persecution is not the usual problem in this country. Churches and religious believers can lose the right to practice their faith for a whole range of reasons: because their practice offends some interest group that successfully insists on a regulatory law with no exceptions; because the secular bureaucracy is indifferent to their needs; because the legislature was unaware

[9] 268 U.S. 510 (1945).

of their existence and failed to provide an exemption. Some interest groups and individual citizens are aggressively hostile to particular religious teachings, or to religion in general. Others are not hostile, but are simply uncomprehending when confronted with religious needs for exemption. But whether regulation results from hostility, or indifference, or ignorance, the consequence to believers is the same.

All of these problems are aggravated by the reaction to *Smith* in the lower courts, in government bureaus, and among secular interest groups. Many judges, bureaucrats, and activists have taken *Smith* as a signal that the Free Exercise Clause is largely repealed, and that the needs of religious minorities are no longer entitled to any consideration. Let me briefly review a few contemporary examples:

Culturally conservative churches, including Catholics, conservative Protestants, Orthodox Jews, and Mormons, are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior. The most aggressive elements of the pro-choice, gay rights, and feminist movements are not content to prevail in the larger society; they also want to impose their agenda on dissenting churches. Sometimes they succeed. For example, St. Agnes Hospital in Baltimore had a residency program in obstetrics and gynecology. That program lost its accreditation, because it refused to perform abortions or teach doctors how to do them.[10] There has been recurring litigation between churches and gay rights organizations, with mixed results. But the opinion in *Smith* is reasonably clear: any well-drafted gay rights ordinance is a facially neutral law of general applicability, and the Free Exercise Clause does not exempt churches or synagogues. These recurring conflicts over sexual morality are the most obvious example of interest group attacks on religious liberty.

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[10] *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

The problem of bureaucratic inflexibility is illustrated by one of the saddest cases since *Smith*, a case involving an unauthorized autopsy. I believe the Committee has heard about this case from one of the victims. Several minority religions in America have strong teachings against the mutilation of a human body, and they view autopsies as a form of mutilation. Faith groups with such teachings include many Jews, Navajo Indians, and the Hmong, an immigrant population from Laos. The Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free.

In *You Vang Yang v. Sturner*,[11] a distressed district judge held that *Smith* left him powerless to do anything about an unnecessary autopsy performed on a young Hmong man. The judge movingly describes the deep grief of the victim's family, the obvious emotional pain of the many Hmongs who came to witness the trial, and his own deep regret at being forced to uphold a profound violation of their religious liberty. He describes an autopsy done largely out of medical curiosity, with no suspicion of foul play, with no authorization in Rhode Island law, and without the slightest regard for the family's religious beliefs. But under *Smith*, the state does not need a good reason, or even any reason at all. There simply is no substantive constitutional right to religious liberty any more.

An example of old-fashioned religious prejudice is *Munn v. Algee*,[12] a suit for the wrongful death of Mrs. Elaine Munn. Mrs. Munn was killed in an automobile accident in which the other driver admitted fault. In accord with her Jehovah's Witness faith, Mrs. Munn refused a blood transfusion; the doctors disagreed sharply over whether a transfusion would have done any good. The other driver's insurance company successfully argued that she was responsible for her own death, because she refused the blood transfusion. Citing *Smith*, the

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[11] 750 F. Supp. 558 (D.R.I. 1990).

[12] 924 F.2d 568 (5th Cir. 1991).

court of appeals held that she had no right to refuse a blood transfusion.

Even worse, the insurance company was permitted to attack a wide range of other Jehovah's Witness teachings as unpatriotic, narrow-minded, or strange. The insurance company forced her husband to testify about the Jehovah's Witness belief that Christ returned to earth in 1914, their belief that the world will end at Armageddon and that only Jehovah's Witnesses will be spared destruction, their belief that there is no hell, and their conscientious refusal to serve in the military or salute the flag. This case was tried to a mostly white Mississippi jury at the height of the political controversy over flagburning. The Munn family is black, and the insurance company had successfully excluded all but one of the black jurors. The jury awarded no damages for Mrs. Munn's death, and only token damages for Mr. Munn's injuries and for Mrs. Munn's pain and suffering prior to death.

Astonishingly, the court of appeals upheld the jury's verdict. One judge thought the attack on Jehovah's Witness teachings was relevant and entirely proper. A second judge thought these attacks were so obviously irrelevant that they could not have affected the jury's deliberations. For these wholly inconsistent reasons, the Munns were left with only token compensation. This trial was surely unconstitutional even after *Smith*, but the Supreme Court denied certiorari. The case illustrates the symbolic consequences of *Smith*: there is a widespread impression that religious minorities simply have no constitutional rights any more.

These cases also illustrate another important point. The Munns were black; the Yangs were Hmong. Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice.

Not even mainstream churches can count on sympathetic regulation. Cornerstone Bible Church in Hastings, Minnesota was zoned out of town, left with no place to worship. The

district court upheld the exclusionary zoning, applying *Smith* and equating the zoning rights of churches with the zoning rights of pornographic movie theatres.[13] The court of appeals said that Cornerstone is entitled to a new trial, but that opinion did not solve either Cornerstone's problem or the zoning problems of other churches. The *Cornerstone* case says that cities need only have a rational basis for excluding churches from town; even with clear evidence of discrimination against churches, the court refused to restore the compelling interest test.[14]

Cornerstone's problem with hostile zoning is not unique. Restrictive zoning laws are often enforced with indifference to religious needs and sometimes with outright hostility to the presence of churches. Zoning laws have been invoked to prevent new activities in existing churches and synagogues, to limit the architecture of churches and synagogues, to exclude minority faiths such as Islam and Buddhism, and to prevent churches and synagogues from being built at all in new suburban communities.[15] Most major American religions teach some duty to feed the hungry, clothe the naked, and shelter the homeless, but when a church or synagogue tries to act on such teachings, it is likely to get a complaint from the neighbors and a citation from the zoning board.

Note that in the zoning cases, the problem is not that the church has a doctrinal tenet or moral teaching that directly conflicts with the policy of the law. Rather, the problem is simply that the law restricts the church's ability to carry out its mission. Religious exercise is not free when churches cannot locate in new communities, or when existing churches cannot

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[13] *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654, 663 (D. Minn. 1990).

[14] *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991).

[15] For accounts of these cases, see R. Gustav Niebuhr, *Here Is the Church; As for the People, They're Picketing It*, Wall St. J. Nov. 20, 1991, p. A1, col. 4.

define their own mission. The exercise of religion must be understood to include the churches' management of their own internal affairs and the churches' definition and pursuit of their religious missions.

III. The Dynamic of Interest Group Politics

The Supreme Court says that legislatures may exempt religious exercise from formally neutral laws. If those exemptions must be obtained piecemeal, one statute at a time, they are not a workable means of protecting religious liberty. In every such request for a legislative exemption, churches are likely to find an aroused interest group on the other side, and they will be trying to amend that interest group's statute. These battles can be endless; the fight over student gay rights groups at Georgetown University has so far resulted in ten published judicial orders and two Acts of Congress.[16]

Churches have to win these fights over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissioners, by the city council, and by the administrative agencies at each of those levels. They have to avoid being regulated this year and next year and every year after that. If they lose in any forum in any year, they have lost; their religious practice is subject to regulatory interference. That is not a workable means of protecting religious liberty.

It is important to understand that every religion is at risk. Every church offends some interest group, and many churches offend lots of interest groups. No church is big enough or tough enough to fight them all off, over and over, at every level of government.

The situation is even more hopeless for individual believers with special needs not shared by their whole denomination. Consider the case of Frances Quaring, a

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[16] The judicial and legislative history is summarized in *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990).

Pentecostal Christian who studied the Bible on her own and understood the Commandment against graven images with unusual strictness.[17] Mrs. Quaring would not allow a photograph in her house. She would not allow a television in her house. She removed the labels from her groceries or obliterated the pictures with black markers. For Mrs. Quaring, it was plainly forbidden to carry a photograph on her driver's license. When the legislature required photographs, she could not get a driver's license.

It is impossible for a legislature to know about a believer like Mrs. Quaring and enact an exemption for her. The Mrs. Quarings of the world cannot hire lobbyists to monitor the legislature and protect their religious liberty from any bill that might interfere with their little known belief. The only way to provide for such unforeseeable religious claims is with a general provision guaranteeing free exercise of religion. The Free Exercise Clause was such a provision, but *Smith* says that it is not. The Religious Freedom Restoration Act would restore such a provision to the United States Code.

RFRA would solve the problem of perpetual religious conflict with interest groups and also the problem of religious minorities too small to be heard in the legislature. It would do so by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions. RFRA has a chance to work because it is as universal as the Free Exercise Clause. It treats every religious faith and every government interest equally, with no special favors for any group and no exceptions for any group. That is the only hope to rise above the paralysis of interest group politics and restore protection for religious liberty.

Religious liberty is popular in principle, but in specific applications it quickly gets entangled in other issues. No

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[17] Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided court*, 472 U.S. 478 (1985).

government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated. Few interest groups admit that they are against religious liberty, but almost every interest group thinks its own agenda is so important that no religious exception can be tolerated. The religious community itself is divided on many issues raised by secular interest groups, and denominations sometimes find it hard to speak out when a bill pits their commitment to religious liberty against their commitment to some other principle. RFRA's across-the-board feature attempts to cut through all this special pleading.

In most of these conflicts between religious liberty and secular interest groups, an exemption for religious liberty does little or no damage to any legitimate secular goals. The interest group that succeeds in enacting a bill gets its way in 95 or 98 or 99.9% of the cases, and the religious exemption creates a small enclave of conscience for religious dissenters. But to get those exemptions statute by statute requires legislative battles that can be enormously divisive and expensive.

Congress is the greatest expert on the legislative process; Congress knows these problems far better than I do. This Committee can find as a fact that specific exemptions enacted one statute at a time are not a workable means of protecting the free exercise of religion.

IV. The Compelling Interest Standard

RFRA would permit religious liberty to be burdened only when that is the least restrictive means to serve a compelling interest. The compelling interest test takes meaning from the Court's earlier cases, and especially from the Congressional purpose in § 2(b)(1) "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." That statement of purpose is important to the bill. It should not be left to legislative history, because the Court is increasingly resistant to even reading legislative history.

Even before *Smith*, the Court had been criticized for excessive deference to governmental agencies. But most deferential decisions were not decided under the compelling interest test at all, either because the Court found no burden on religious exercise,[18] or because the Court created exceptions to the compelling interest test.[19] These cases cast no light on the meaning of the compelling interest test.

It is not every or even most legitimate government interests that are compelling. "Compelling" does not merely mean a "reasonable means of promoting a legitimate public interest."[20] Compelling does not merely mean "important."[21] Rather, "compelling interests" include only those few interests "of the highest order,"[22] or in a similar formulation, "[o]nly the gravest abuses, endangering paramount interests."[23] The Supreme Court explains "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served,"[24] if "no alternative forms of regulation would combat such abuses,"[25] if the challenged law is "the least restrictive means of achieving" the compelling interest,[26] and if the government pursues its alleged interest uniformly across the full range of

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[18] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986).

[19] *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons).

[20] *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

[21] *Thomas v. Review Board*, 450 U.S. 707, 719 (1981).

[22] *Smith*, 494 U.S. at 888; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

[23] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

[24] *Yoder*, 406 U.S. at 215.

[25] *Sherbert*, 374 U.S. at 407.

[26] *Thomas v. Review Board*, 450 U.S. at 718.

similar conduct.[27] Even *Smith* cautions against watering down the test: "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test."[28]

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, invalidating Wisconsin's compulsory education laws as applied to Amish children.[29] The education of children is important, and the first two years of high school are basic to that interest. But the state's interest in the first two years of high school was not sufficiently compelling to justify a serious burden on free exercise.

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate. But it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualified them from employment.[30]

Moreover, it is not enough for government to point to unconfirmed risks or fears. Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life."[31] The Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they were "doomed to become burdens on society." Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute

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[27] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

[28] 494 U.S. at 888.

[29] 406 U.S. at 219-29.

[30] *Sherbert*, 374 U.S. 398, 406-09 (1963).

[31] 406 U.S. at 224.

unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But the Supreme Court rejected them all for lack of evidence that they were really happening.[32]

The lesson of the Court's cases is that government must show something more compelling than saving money, more compelling than educating Amish children. That is the compelling interest test of *Sherbert* and *Yoder*.

The Supreme Court has found a compelling interest in only three free exercise cases. In each of these cases, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to national survival or to express constitutional norms: national defense,[33] collection of revenue,[34] and racial equality in education.[35]

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text.[36] The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. RFRA makes the exception explicit rather than

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[32] *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

[33] *Gillette v. United States*, 401 U.S. 437 (1971).

[34] *United States v. Lee*, 455 U.S. 252 (1982).

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

[36] Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights* (Book Review), 99 Yale L.J. 1711, 1744-45 (1990).

implicit, but the standard for satisfying the exception should not change.

V. The Abortion, Tax, and Funding Objections

Some of RFRA's opponents want provisos to state that the bill would create no cause of action to challenge laws restricting abortion, the use or disposition of public funds or property, or the tax status of any other person. These proposed amendments would inject into the bill highly divisive and mostly irrelevant controversies over abortion, public funding of religious institutions, and tax exemptions for religious institutions. These amendments should be rejected. If I had deliberately set out to draft amendments that would prevent the enactment of any bill, I could not have done better than these three amendments.

The principle of RFRA is that it enacts a statutory version of the Free Exercise Clause. Like the Free Exercise Clause itself, RFRA is universal in its scope. It singles out no claims for special advantage or disadvantage. It favors no religious view over any other, and it favors no state interest over any other. It simply enacts a universal standard: burdens on religious exercise must be justified by compelling interests.

Limiting the bill to enactment of the standard is a principled solution to the practical problem of disagreement over particular claims. If we try to resolve every possible religious claim and governmental interest in RFRA, we will be caught up in the same morass of endless political conflict that we will face if RFRA is not enacted. A bill limited to a statement of universal principle is neutral on all possible claims, including claims about abortion, tax exemption, and public funding. It leaves all such claims just where they would be under the Free Exercise Clause if *Smith* had not so greatly reduced protection for religious practice. It leaves each side to make the arguments they would have made if *Smith* had never happened.

The proposed amendments would take a very different approach. The proposed amendments would say that *Smith* was a good decision insofar as it cut off the last shred of argument

for certain claims that supporters of the amendments do not like. The amendments would say that most religious claims are restored to where they would have been under the Free Exercise Clause, but that three sets of claims are left subject to *Smith*. Whatever the merits of these amendments, they cannot be defended on the ground that they are neutral toward the three excluded sets of claims.

These three amendments are enormously divisive, but the divisions are almost entirely symbolic. Each of the three amendments relates to an issue that has always been litigated and decided under some other clause of the Constitution. The right to abortion has been principally litigated under the Due Process Clause; most challenges to church tax exemption and to public funding for churches have been brought under the Establishment Clause. In each case, free exercise theories have been around for a long time, but the Supreme Court has rejected them.

As the Court has become more and more conservative, challenges to abortion laws, church tax exemptions, and public funding for religious agencies have gotten an increasingly hostile reception under any clause. The litigants who bring these challenges became increasingly desperate, they experimented with alternative legal theories, and they were unwilling to give up on any theory, however long its odds of success. To everyone's great surprise, pro-choice forces won a dramatic victory in *Planned Parenthood v. Casey*.[37] But win or lose, the reality is that changing the legal theory in their pleadings is not going to make the Court any more or less receptive to their claims. With or without *Smith*, putting a free exercise label on a warmed over abortion claim or Establishment Clause claim is quite unlikely to make any difference.

The tax exemption issues are largely resolved by cases already decided; the public funding issues will continue to be litigated under the Establishment Clause with or without RFRA;

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[37] 112 S. Ct. 2791 (1992).

and abortion is being fought out in continuing abortion litigation, in legislative debate over the pending Freedom of Choice Act, and in the Presidential campaign. If the Court overrules *Casey* and *Roe v. Wade*,[38] it will be because of a fundamental jurisprudential judgment that the abortion issue is not appropriately resolved by judges -- that "the answers to most of the cruel questions posed are political and not juridical."[39]

A. Abortion

With respect to abortion, parts of the pro-choice movement have persistently asserted that restrictions on abortion violate the religion clauses of the First Amendment. Predictions about the future of abortion law have changed dramatically in the last three months, but the issue for RFRA has not changed. Questions about the right to abortion will be decided on their own terms, and not under RFRA.

Planned Parenthood v. Casey is an emphatic reaffirmation of the basic right to abortion. For the forseeable future, there is a constitutional right to abortion and nothing in RFRA will affect that. If pro-life Senators kill RFRA, they will be compounding their defeat on abortion with a terrible defeat for religious liberty. Even from a single-issue pro-life perspective, RFRA is now more necessary than before, to protect pro-life hospitals and medical personnel from being forced to participate in abortions.

The bitterly divided opinions in *Casey* make the longer term future of abortion law dependent on future appointments to the Court. The four dissenters will probably adhere to their dissent, and perhaps some future justice will provide the fifth vote to overrule *Casey* as well as *Roe*. Or perhaps they will never get a fifth vote, and the constitutional right to abortion

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[38] 410 U.S. 113 (1973).

[39] *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

will be a permanent part of our law. In either case, RFRA can add nothing to the right to abortion.

The groups demanding an abortion amendment to RFRA are worried about a most unlikely sequence of events: they fear that the Court might overrule *Casey* and *Roe*, and then re-create abortion rights as a matter of free exercise under the Religious Freedom Restoration Act. For several reasons, I believe that these fears are groundless.

First, religion clause objections to restrictions on abortion are not new. They were presented to the Supreme Court in *Harris v. McRae*.[40] The Court rejected the claim that abortion laws that coincide with religious teachings violate the Establishment Clause. It also held that no plaintiff in that case had standing to assert a free exercise claim, because no plaintiff alleged that her religious beliefs compelled or motivated her desire for an abortion. The Court also held that a free exercise claim to abortion would depend on the religious beliefs of individual women, and that such a claim could not be asserted by an organization.

In the twelve years since *Harris*, there has been no judicial movement toward a free exercise right to publicly funded abortions. If free exercise were a viable route for evading decisions upholding restrictions on abortion, someone should have come forward with plaintiffs who could satisfy the standing requirements laid down in *Harris*. Even though *Harris* does not formally resolve the free exercise issue, it has effectively resolved the larger issue: the Court does not recognize any constitutional right to public funding for abortions. A decision overruling *Casey* and *Roe* would just as effectively resolve the larger issue of any right to abortion.

The standing rule in *Harris* is also a major victory for pro-life forces and a serious obstacle to pro-choice forces. The rule that organizations lack standing to bring free exercise

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[40] 448 U.S. 297, 318-21 (1980).

claims would logically apply to RFRA claims, and it would preclude broad-based RFRA challenges to abortion laws. Any RFRA challenge would have to proceed one woman at a time, with judicial examination of her individual beliefs.

Second, a decision overruling *Casey* and *Roe* would almost certainly preclude a right to abortion under the Free Exercise Clause or the Religious Freedom Restoration Act. If *Casey* and *Roe* are overruled, the reason will be the government's interest in protecting unborn life. If the state's interest in protecting unborn life overrides reproductive liberty under the Due Process Clause, I believe that interest will be equally compelling under the Religious Freedom Restoration Act. Thus, even if the Court were to hold that abortion can sometimes be religious exercise, the states' compelling interest would override that right.

It makes no difference if the Court says that the Constitution simply does not protect the right to choose abortion, thus distinguishing abortion from other constitutionally protected choices about family, reproduction, or bodily integrity. The basis for such a distinction could not be that abortion has nothing to do with reproduction or bodily integrity. Rather, the only plausible reason for distinction is that the state's interest in unborn life changes everything. The four dissenters in *Casey* were explicit about this:

> Unlike marriage, procreation and contraception, abortion "involves the purposeful termination of potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). The abortion decision must **therefore** "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh v. American*

College of Obstreticians and Gynecologists, 476 U.S. 747, 792 (White, J., dissenting).[41]

It has been suggested that the Court might read the Religious Freedom Restoration Act as codifying the rule that the interest in unborn life is not compelling, on the ground that that was the law at the time Congress acted. This outcome is implausible as well. The bill takes no position on whether any particular government interest is compelling. This silence is appropriate; Congress should not attempt to resolve particular controversies in a bill about religious exercise generally.

If Congress is going to codify anything about abortion, it will be in the Freedom of Choice Act. The Court knows full well that Congress is divided over abortion just as the American people are divided. It would be absurd to read a statute that never mentions abortion as somehow codifying the law of abortion. That RFRA has both pro-life and pro-choice sponsors would make it even more absurd. A bill supported by a broad range of pro-life groups cannot sensibly be read as creating a right to abortion.

If I were a pro-life Senator, I would turn out the largest possible pro-life vote for RFRA, and the largest possible pro-life vote against the Freedom of Choice Act, and in that way I would unambiguously make the record that the two bills are very different -- that one takes a position on abortion and the other does not. And in working to turn out the pro-life vote on RFRA, I would emphasize one simple point: *St. Agnes Hospital* is a real case.[42] Pro-life doctors and nurses and even whole hospitals are being forced out of obstetrics and gynecology. That is real, and RFRA would protect those people. Successful abortion claims under RFRA are imaginary. They are a

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[41] 112 S. Ct. at 2859 (Chief Justice Rehnquist, C.J., dissenting, joined by Justices White, Scalia, and Thomas) (boldface added).

[42] *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

theoretical possibility that depends on an extraordinarily unlikely combination of circumstances.

Pro-life Senators must also understand that not all resistance to an abortion amendment comes from the pro-choice side. Agudath Israel, the Orthodox Jewish group that has been an active part of the pro-life movement, insists that Jewish teaching mandates abortion in certainly narrowly defined and exceptional cases. Any state prohibitions of abortion likely to be enacted will have exceptions for the cases that matter to Agudath Israel; they do not expect to rely on RFRA. But neither can they accept Christian coalition partners dismissing their sincere religious teachings as officially unworthy of respect. Their loyal support for the pro-life movement, over the objection of most other Jewish organizations, entitles them to consideration in return from pro-life Senators. Their counsel has done a careful analysis identifying other ways in which the three amendments might be counterproductive even to their intended purposes, and I commend that analysis to the Committee.

Even though I believe that there is little merit to claims of a free exercise right to abortion, there are pro-choice groups supporting the bill. They cannot be forced to accept language precluding their argument, any more than they can force pro-life groups to accept language precluding pro-life arguments. The way for the bill to be abortion-neutral is not to mention abortion at all. The legislative history should simply say: 1) that the pro-life side can make its arguments that no abortions are religiously motivated and that in a world without *Casey* and *Roe*, protecting unborn life is obviously a compelling interest; 2) that the pro-choice side can make its arguments that at least some abortions are religiously motivated and that protection of potential life is not a compelling interest; and 3) that Congress has merely enacted the standard for decision and has not codified either set of answers.

In a world with *Casey* and *Roe*, those arguments are irrelevant. In a world without *Casey* and *Roe*, the pro-life side will win those arguments; I have no doubt of that. But neither side should be able to say that Congress codified its position.

The bill as drafted is abortion neutral, and I urge you to keep it that way.

B. Tax Exemption

With respect to tax exemption, the law is relatively settled. Religious organizations cannot be given tax exemptions exclusively for religion, but they can be included in broader tax-exempt categories, such as the religious, charitable, scientific, and educational organizations mentioned in the Internal Revenue Code.[43]

With respect to any particular organization's eligibility for a tax exemption, I think it a safe generalization from the cases that no plaintiff has standing to litigate the tax liability of another taxpayer.[44] Cases challenging tax exemptions of churches, schools, and hospitals have had multiple plaintiffs with resourceful lawyers; if none of them could find a plaintiff with standing, I do not think it can be done. The Second Circuit's opinion in *U.S. Catholic Conference* holds out the possibility of an exception some day,[45] but that theoretical possibility would not be a free exercise exception and it is not relevant to RFRA. The *U.S. Catholic Conference* litigation imposed an enormous burden on the Catholic Church; I joined with other lawyers in filing an amicus brief supporting the Church; and I fully support the Church's desire never to repeat that experience. But the fact is that the Church won, and there is no need to refight that war. The opinions that so burdened the Church in that litigation relied on the Establishment Clause and the Equal Protection Clause; no court at any stage of that litigation relied on the Free Exercise Clause. RFRA would not be a basis for litigation over tax exemptions.

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[43] *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

[44] *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989).

[45] 885 F.2d at 1031.

C. Public Funding

Challenges to public funding of religious institutions have always been litigated under the Establishment Clause. The Establishment Clause directly addresses the funding issue, and the Court has created a special standing rule for Establishment Clause claims to facilitate that litigation.[46] An occasional litigant has asserted in the alternative that such expenditures also violate the Free Exercise Clause, and the Supreme Court has twice summarily rejected those claims.[47] The Court considered an analogous claim at greater length in *United States v. Lee*, and held unanimously that the Free Exercise Clause gives taxpayers no right "to challenge the tax system because tax payments were spent in a manner that violates their religious belief," and that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[48] This conclusion was based on the compelling interest test, the same defense that is written into RFRA.

The argument for a public funding amendment is therefore even more bizarre than the argument for an abortion amendment. The Court has repeatedly limited public funding to religious bodies under the Establishment Clause; it has squarely rejected Free Exercise complaints about the expenditure of tax funds to support religion or any other program to which a taxpayer has religious objections. The fear is that the Court will change its mind -- on both issues -- in opposite directions. Maybe the Court will overrule its Establishment Clause cases and permit more public funding for religious bodies, and also overrule its Free Exercise cases and say that RFRA forbids the public funding that the Court just permitted under the Establishment Clause. It is hard to imagine a less plausible pair of doctrinal developments.

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[46] *Flast v. Cohen*, 392 U.S. 83 (1968).

[47] *Tilton v. Richardson*, 403 U.S. 672, 689 (1971); *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968).

[48] 455 U.S. 252, 260 (1982).

D. The Establishment Clause Proviso

The bill's opponents have also objected to RFRA's § 7, which provides that nothing in the bill "shall be construed to affect, interpret, or in any way address" the Establishment Clause. The reason for this proviso is the same as the reason for not saying anything about particular free exercise claims. The supporters of the bill agree on the principle of free exercise, but disagree on particular applications, and disagree even about the basic principle of the Establishment Clause. Those disputed issues are carefully excluded from a bill designed simply to enact the one fundamental principle on which nearly everyone agrees.

All sides to Establishment Clause disputes can continue to argue their position. Those so inclined can continue to argue that the Establishment Clause is merely a redundant appendage to the Free Exercise Clause. This bill does not reject that argument any more than it rejects the argument of strict separationists. This bill is quite explicit; it says nothing about the Establishment Clause.

The fear that this proviso will codify current interpretations of the Establishment Clause borders on the irrational. That is plainly not what § 7 says; a bill cannot codify something that it neither affects, interprets, or addresses. The key verbs were drafted by Mark Chopko, who is now opposing the bill. When it became publicly known that Mark had drafted this language, he wrote me that the real problem was with the object of the verbs: with the phrase "that portion of the First Amendment prohibiting laws respecting the establishment of religion."

I cannot imagine that it makes any difference how the bill refers to a clause that it is not affecting or addressing. But if it would help pass the bill, I think the Committee should be willing to accept any plausible means of referring to the Establishment Clause. I have suggested that the reference be put in quotation marks, amending § 7 to read:

> Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment that reads: "Congress shall

make no law respecting the establishment of religion."

VI. Congressional Power

Congress has power to enact this bill under section 5 of the Fourteenth Amendment. Repeated majorities of the Supreme Court have upheld analogous exercises of Congressional power to enforce the reconstruction amendments. I have reviewed the cases interpreting section 5 in some detail in the record of last year's hearings in the House, and I refer the Committee to that analysis.[49] I summarize the most important points again here.

Section 5 gives with respect to the Fourteenth Amendment "the same broad powers expressed in the Necessary and Proper Clause" with respect to Article I.[50] Power to enforce the Fourteenth Amendment includes power to enforce the Free Exercise Clause and other provisions of the bill of rights that are applied to the states through the Fourteenth Amendment. Congress has enacted other legislation to enforce the provisions of the bill of rights, most obviously in 42 U.S.C. §§ 1983 and 1988, and these provisions have been used to enforce the First, Fourth, Fifth, and Eighth Amendments, as incorporated through the Fourteenth, in thousands of cases. The Supreme Court has routinely decided these cases, usually without noting the source of Congressional power. It did note the source of Congressional power in *Hutto v. Finney*,[51] an Eighth Amendment case in which the Court relied on Congress's section 5 power to override state sovereign immunity.

The express Congressional power to "enforce" the amendment is independent of the judicial power to adjudicate cases and controversies arising under it. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge

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[49] *Religious Freedom Restoration Act of 1990*, Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary 72 (Serial No. 150; Sept. 27, 1990).

[50] *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

[51] 437 U.S. 678, 693-99 (1978).

unconstitutional."[52] Thus, Congress may sometimes provide statutory protection for constitutional values that the Supreme Court is unwilling or unable to protect on its own authority. The Court agreed unanimously on that point in *Metro Broadcasting, Inc. v. FCC*.[53]

The most familiar illustration of this power is the various Voting Rights Acts, in which Congress has forbidden discriminatory practices that the Supreme Court had been prepared to tolerate. Similarly, much of the law of private racial discrimination depends on Congress's analogous powers under section 2 of the Thirteenth Amendment.

RFRA is well within the three limits on section 5 power. First, Congress may not "restrict, abrogate, or dilute" the protections of the bill of rights in the guise of enforcing them.[54] Second, section 5 does not necessarily override other express allocations of power in the Constitution.[55] Third, Congress may not assert its section 5 powers as a sham to achieve ends unrelated to the Fourteenth Amendment. That is, Congress may not act under section 5 where neither Congress nor the Court believes that a constitutional right is at stake. "Congress may act only where a violation lurks."[56]

The Religious Freedom Restoration Act does not run afoul of these limitations. First, there is no plausible claim that the Act would violate the Court's interpretation of the Free Exercise Clause or any other right incorporated into the Fourteenth Amendment. *Smith* reaffirms that legislative exemptions to protect religious exercise are "expected . . .

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[52] *Katzenbach*, 384 U.S. at 659.

[53] 110 S. Ct. 2997 (1990).

[54] *Katzenbach*, 384 U.S. at 651 n.10.

[55] *Oregon v. Mitchell*, 400 U.S. 112, 124-31, 154-213, 293-96 (1971) (three opinions joined by Justices Black, Harlan, Stewart, Burger, and Blackmun).

[56] *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (1983) (dissenting opinion of Burger, Powell, Rehnquist, and O'Connor).

65-604 O - 93 - 4

permitted, and even . . . desirable."[57] The Court unanimously rejected an Establishment Clause challenge to legislative exemptions in *Corporation of the Presiding Bishop v. Amos*.[58]

Second, the Act would not interfere with any other express allocation of power in the Constitution. The federal Constitution does not recognize or preserve any specific state power to regulate religion. The state regulatory powers that would be affected by the proposed Act are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

Third, the Act does not assert Fourteenth Amendment power where there is no plausible Fourteenth Amendment claim. For some members of Congress, this is a critical distinction between RFRA and the proposed Freedom of Choice Act. If you believe that the Constitution properly interpreted protects a woman's right to choose abortion, then both RFRA and the Freedom of Choice Act are within Congressional power under section 5. But if you believe that the Constitution properly interpreted simply says nothing about abortion, or that the Constitution protects the unborn child's right to life, then you believe that there is no Fourteenth Amendment violation lurking for Congress to address in the Freedom of Choice Act. Thus, pro-life Senators can with complete intellectual consistency support the Religious Freedom Restoration Act and oppose the Freedom of Choice Act on constitutional grounds.

There *is* a constitutional violation to be remedied by the Religious Freedom Restoration Act. RFRA would enforce the constitutional rule against laws prohibiting the free exercise of religion. Congress can act on the premise that the exercise of religion includes religiously motivated conduct. Even the Supreme Court recognizes that much. The Court interprets the Constitution of its own force to protect religiously motivated acts from regulation that discriminates against religion and from regulation motivated by hostility to religion in general or to a particular religion. "[T]he exercise of religion often involves

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[57] 494 U.S. at 890.

[58] 483 U.S. 327 (1987).

not only belief and profession but the performance of (or abstention from) physical acts."[59]

From the perspective of a believer whose religious exercise has been prohibited, it makes little difference whether the prohibition is found in a discriminatory law or in a neutral law of general applicability. Either way, he must abandon his faith or risk imprisonment and persecution. Either way, it is undeniably true that his religious exercise has been prohibited. RFRA would protect the right to free exercise against inadvertent, insensitive, and incidental prohibitions as well as against discriminatory and hostile prohibitions.

Thus RFRA parallels important provisions of the Voting Rights Acts under section 5. The Supreme Court construed the constitutional protection for minority voting rights to require proof of overt discrimination or racial motive on the part of government officials. Congress dispensed with the requirements of overt discrimination or motive, and required state and local governments to justify laws that burden minority voting rights. Similarly here, the Court requires proof of overt discrimination or anti-religious motive to make out a free exercise violation; RFRA would dispense with those requirements and require government to justify any burden on religious practice. RFRA is within the scope of Congressional power under section 5 for the same reasons that the Voting Rights Acts are within the scope of Congressional power.

This Committee can find as a fact that judicial review of legislative motive is an insufficient protection against religious persecution by means of formally neutral laws. Legislative motive is often unknowable. Legislatures may be wholly indifferent to the needs of a minority faith, and yet not reveal overt legislative hostility. When a religious minority opposes a bill, or seeks an exemption on the ground that a bill requires immoral conduct, it is hard to distinguish religious hostility from political conflict. Even when there is clear religious hostility, courts are reluctant to impute bad motives to legislators. Religious minorities are no safer than racial minorities if their

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[59] *Smith*, 494 U.S. at 877.

rights depend on persuading a federal judge to condemn the government's motives.

In the Voting Rights Acts, Congress found that facially neutral laws could be used to deprive minorities of the right to vote or to dilute their vote, and that legislative motives were easily hidden so that proof of discriminatory motive was not a workable means of protecting minority voting rights. Similarly here, Congress can find that facially neutral laws are readily used to suppress religious practice, that at times such laws have been instruments of active religious persecution, that proof of anti-religious motive is not a workable means of protecting religious liberty, and that legislating individual exemptions in every statute at every level of government is not a workable means of protecting religious liberty.

The Supreme Court's reason for not requiring government to justify all burdens on religious practice is institutional. The opinion in *Smith* is quite clear that the Court does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which *judges* weigh the social importance of all laws against the centrality of all religious beliefs."[60] To say that an exemption for religious exercise "is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned *by the courts*."[61]

These institutional concerns do not apply to the Religious Freedom Restoration Act. Congress, rather than the Court, will make the decision that religious exercise should sometimes be exempted from generally applicable laws. And Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of that decision.

Of course the courts would apply the compelling interest test under the Act, and these decisions would require courts to balance the importance of government policies against the burden on religious exercise. But striking this balance in the

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[60] 494 U.S. at 890 (emphasis added); *see also id.* at 889 n.5.

[61] *Id.* at 890 (emphasis added).

enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.

Thus, the Act would protect the religious exercise that the Court felt unable to protect on its own authority, and the Act would solve the institutional problem that inhibited the Court from acting independently. The difficulties the Court identified in *Smith* are a perfect illustration of why there is need for independent power to enforce the bill of rights in both the judiciary and the Congress.

By creating judicially enforceable statutory rights, Congress can call on the powers of the judiciary that the Court feared to invoke on its own. Because the rights created would be statutory, Congress can retain a voice that it could not have retained if the Court had acted on its own. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress can reduce the danger that it will not respond to the needs of small faiths. If Court and Congress cooperate in this way, then the oppression of small faiths need not be, as the Court feared, "an inevitable consequence of democratic government."[62] One function of section 5 of the Fourteenth Amendment is to provide for just such interbranch cooperation.

VII. A Technical Amendment

There is an ambiguity in § 6(b) that should be clarified. Section 6(b) enacts a rule of construction, in recognition of the obvious fact that this Congress cannot bind future Congresses. Future Congresses can override RFRA, but the rule of construction is that RFRA controls unless Congress overrides it explicitly. The model here is the similar provision in the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), which has worked successfully since 1948.

Given its purposes, it should be plain that § 6(b) refers only to future federal statutes. But it says "Federal law," and is

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[62] *Id.* at 890.

easily read to include all sources of federal law. Professor Ira Lupu argues in a forthcoming article in the Virginia Law Review that § 6(b) as currently drafted would authorize federal agencies to routinely override RFRA with a boilerplate provision in every future regulation. That is plainly not the purpose of § 6(b), and it could wholly defeat the intention of Congress.

This problem can be solved by the following amendments to § 6(b):

In the first line, before "Federal" insert "Any"

In the first line, delete "law" and substitute "statute"

In the third line, delete "law" and substitute "statute"

The section would then read:

> Any Federal statute adopted after the date of the enactment of this Act is subject to this Act unless such statute explicitly excludes such application by reference to this Act.

Senator KENNEDY. Mr. Chopko, you have been introduced a couple of times today. [Laughter.]

STATEMENT OF MARK E. CHOPKO

Mr. CHOPKO. What more can I say? I defer to my colleagues. But I do thank the committee for the opportunity to testify on behalf of the U.S. Catholic Conference, and I am pleased to be here among these men whom I respect and like very much.

It has not been an easy process for me personally to be in the middle of this debate, but as the chief legal adviser to the Nation's Roman Catholic bishops, it falls to me to outline what I think are the risks, benefits, approaches, and alternatives that they have, and it falls to them to give me guidance. I am here on their behalf.

I ask that my written statement be accepted for the record, and I will also ask that a detailed analysis of the question of legislative remedies after *Smith* which I would like to submit would also be accepted.

Senator KENNEDY. They will all be printed in their entirety in the record.

Mr. CHOPKO. Let me just make a few brief points. First, as a matter of judicial process, *Smith* is wrongly decided. In the case now pending before the Court in *Church of Lacumo Boboluai* v. *City of Hialeah,* the conference has respectfully asked the Court to reconsider and abandon *Smith.* The Court reached an issue there that was not presented by the parties in the briefs and we were shocked, like our brothers and sisters in other denominations, at the ease in which the Court took that step.

It is important to note that the compelling interest test which would be added in the Religious Freedom Restoration Act had not been routinely applied by the Supreme Court in every case. Even when it was applied in cases, as John Noonan noted—a respected scholar, now a jurist in the Ninth Circuit—in most cases, in his list of cases in 1988, 65 of 72 court of appeals cases, the test allowed the Government to win anyway. Perhaps, therefore, the majority found it a small step to take to eliminate the compelling interest test altogether. For us, and for all of us who care about religion in the United States, the implications loom large.

The second point: The Court seems to defer—this Court especially seems to defer to the political process, and we are not writing the constitution. We are writing a statute, and this Court will construe that statute, whether it agrees with the results or not, according to the intent that this Congress gives it. So, for us, it has become extraordinarily important to spell out what this statute means.

Senator KENNEDY. Do you remember what Justice Scalia said about congressional intent during his confirmation hearings?

Mr. CHOPKO. But there are other examples in which Justice Scalia defers to the process, even when he expressly notes that he disagrees with the result.

Senator HATCH. There are other Justices, too.

Mr. CHOPKO. That is true.

The third point is that I think the only avenue for restoration is through the Court, and I think that that point has already been made. I won't elaborate on that.

As superiors of large and complex institutions, the bishops of the United States are involved in a number of areas—health care, education, social welfare. They enjoy tax exemption, and they speak to the core issues in U.S. life—abortion, nuclear war, the evils of racism, economic injustice. And we are legitimately concerned about freighting governmental power too much with the opportunity to overregulate.

But yet—my next point—we do have concerns borne of long, sometimes bitter, and always invariably expensive experience in the public arena, and those areas I would isolate into two issues. One is the issue of protecting unborn life. I am not here to tell you that our concern is about reversing *Casey* and *Roe*. I am here to talk to you in light of the constitutional law after *Planned Parenthood* v. *Casey* and whether RFRA can be used to upset even moderate abortion regulation.

Casey makes plain what happens when you change the standard of review. When the standard of review for constitutional terms is an undue burden or some other basis, moderate regulations that are important for the life of the unborn, like informed consent, 24-hour waiting, parental involvement, are all sustained. When the standard was strict scrutiny for constitutional abortion, as it was in *Akron* and *Thornburgh,* the same rules fail. RFRA puts back into the law a compelling interest test that, by its terms, applies to all cases brought under the act. I submit that there can be no clearer example to illustrate the difference of changing the standard of review, and that is what our concern is based upon.

Second is whether RFRA will be used to attack beneficial participation of religious groups and religious exemptions in Government programs. The details are in this written statement and commentary that I submit for the record. But, in brief, the central theme is that RFRA, because of the standard of review, will become the preferred mode of attack. Because of the stringent test, I think, and the fairly broad remedial nature of this statute, it becomes an easy way to state a case and it becomes an easy way to have your case heard, and it will be heard under a standard that heretofore had not been applied to adjudicate these claims. It is simply not restoration, therefore, to apply this test to a class of claims in which it had never been applied before.

So my concluding point, therefore, is the conference has joined the search for a legislative solution because of our concern about *Smith,* but we are concerned that, without amendments—and there are different ways to do this, and perhaps we will have that opportunity after this Congress to further explore this with the coalition and my colleagues to my right, but not this bill and not now.

Thank you.

[The prepared statement of Mr. Chopko follows:]

Testimony

of

Mark E. Chopko, General Counsel

on behalf of

The United States Catholic Conference

before the

Judiciary Committee

of the

United States Senate

on S. 2969, the Religious Freedom Restoration Act of 1992

September 18, 1992

Thank you, Mr. Chairman, for the opportunity to present the views of the United States Catholic Conference ("Conference") on the Religious Freedom Restoration Act of 1992 (S. 2969). As leaders of a major religious denomination in this country, the Catholic Bishops deeply appreciate the critical need to protect the right of individuals and religious organizations to practice their religion free of unwarranted governmental intrusion at any level. Embodied in the Religion Clauses of the First Amendment, this principle is at the core of our American heritage and has served our country well since the beginning of the Republic.

We shared the concern of those in the religious community when the U.S. Supreme Court rendered its decision in Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990). In its majority opinion the Court declined to use the strict scrutiny/compelling state interest test in a case in which it was plainly applicable. There, an Oregon criminal statute prohibited a core religious practice -- the sacramental use of peyote by Native Americans. Rather than confine its ruling to the criminal statute before it, the Court went out of its way to suggest that in most cases government need only demonstrate a rational basis to sustain a generally applicable regulation or restriction that infringes on religious practice. As the April 17, 1992 Report for Congress prepared by the Congressional Research Service indicates, many lower courts have followed the Court's suggestion and applied the Smith analysis to a variety of civil statutes. The result in these cases generally

is that the religious claim loses.

While the reaction of the religious community to Smith was generally negative, we must nonetheless acknowledge that religious claims brought under the Free Exercise Clause prior to Smith generally had not fared well either. In the years prior to Smith, the Court had not used the compelling state interest test in a number of cases. Even when it employed a strict scrutiny analysis, religious claims still failed before the Court in several cases, particularly where federal statutes were involved. The track record for religious claims in the lower courts was even worse, as Judge John Noonan aptly demonstrated in his dissenting opinion in EEOC v. Townley Engineering, 859 F.2d 610, 622-25 (9th Cir. 1988). In an appendix to his opinion, Judge Noonan listed seventy-two decisions by the federal circuit courts of appeals, sixty-five of which were decided against the religious claimant.

There is general agreement in the religious community that Smith is troublesome. There is, however, no consensus at this time on the appropriate legislative response. There are longstanding differences in the religious community over the proper interpretation of the Religion Clauses of the First Amendment. Religious freedom and how best to protect it are complex issues that do not lend themselves readily to simple solutions. A major problem with Smith is that it seemed to adopt a uniform single test to be applied to a multitude of situations.

In this respect S. 2969 suffers from the same defect as the Smith decision.

While S. 2969 has the potential to accomplish much good in protecting religious practices, it also has the potential to create much - albeit perhaps unintended - mischief. Under the appealing rubric of "restoration," S. 2969 purportedly would return the state of the law to the status quo prior to Smith by guaranteeing the application of the compelling governmental interest test in every instance in which a plaintiff claims that his or her experience of religion has been burdened in any way or to any extent. Simply put, this was not the case prior to Smith. The Court had not used the compelling interest test in all cases, as the CRS Report confirms. Not surprisingly, the Court in its constitutional jurisprudence had not locked itself into a single test to determine all free exercise claims. Yet, this is precisely what S. 2969 attempts to accomplish legislatively. In this sense, "restoration" does not accurately describe what will occur.

In addition, because statutes by their nature are different than constitutional provisions, it is impossible for a statute enacted by Congress to restore interpretations of constitutional law by the Supreme Court. It must be emphasized that we are not writing or even rewriting the Constitution here, but rather attempting to enact a new statute. Courts, particularly this Supreme Court, often defer to legislative decisions, even when

they disagree with the decision. Thus, it is critical that Congress carefully consider and avoid the potential adverse applications of any legislation that it might enact, in this case S. 2969.

Because further clarification or direction from the Court on the meaning of Smith or the importance of the Free Exercise Clause is not foreseeable in the short term, the Conference has favored and still favors a legislative response to Smith. We are concerned, however, that the rigid single test approach of S. 2969 can produce significant adverse results, if applied to all claims at all times. More specifically, we are concerned that S. 2969, if enacted, will provide a powerful procedural litigation advantage for some, not for the protection of religion from unwarranted governmental intrusion, but to attack the rights and interests of other individuals and religious groups. When taken seriously, as S. 2969 says it must be, the compelling interest test is a very difficult procedural hurdle for government to overcome. Justice Scalia described it in Smith as creating a presumption of invalidity. And the Court itself recognized long ago in Speiser v. Randall, 357 U.S. 513, 520 (1958), that the outcome of litigation, and the resulting vindication of legal rights, depends very often on the procedures by which cases are adjudicated. Before enacting broad remedial legislation, such as S. 2969, that intends to fuel litigation, Congress has the responsibility to anticipate, and avoid if possible, the potential use of the legislation to produce negative results

contrary to the public interest.

The Conference has legitimate concerns that S. 2969 will be utilized to attempt to promote the destruction of innocent unborn human lives, and to pit religious groups and individuals against one another in disputes over a variety of social and education programs as well as tax exempt status. These concerns are based on years of experience in the public arena.

There is now no question that, from the beginning of the drafting process, S. 2969 was intended to include religiously based abortion claims. Supporters of the legislation, including those directly involved in the drafting process, acknowledged this, but they suggested that these claims would be limited to a handful of situations in which the life of the mother is seriously threatened. In any event, the argument continued, the Supreme Court would eventually overturn Roe v. Wade by finding a compelling interest in protecting unborn life throughout pregnancy. Therefore, they said, most abortion claims brought under S. 2969 would be outweighed by a compelling state interest.

We were never reassured by this analysis. First, past and current litigation demonstrated that religiously based abortion claims are framed far more broadly than the rare life-threatening situation. Reasons will include the age of the mother, potential defects in the unborn, family and economic concerns, mental

health and others - in short, the gamut of interests framed by Roe v. Wade and Doe v. Bolton. In the litigation challenging Utah's abortion statute the plaintiff stated, in support of her religious claim, that she "could not, morally, continue in school and have too little time to devote to a newborn." S. 2969 does not distinguish between these kinds of claims and a life-threatening situation; both would be subjected to strict scrutiny. In addition, courts adjudicate claims on the basis of the sincerely held religious beliefs of the individual involved, which need not be in conformity with the teachings of any particular denomination. Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989). The range of possible claims is extensive.

Second, prior to Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), it was clear to me that one cannot presume that the Supreme Court will overturn Roe v. Wade by finding a compelling interest in unborn life throughout pregnancy.1/ In fact, in the recent abortion decision, the Court applied an undue burden test, rather than strict scrutiny/compelling interest, in upholding Pennsylvania's parental consent, informed consent and 24 hour waiting provisions. For the foreseeable future, constitutional challenges to abortion regulations will be subjected to the less stringent undue burden test. On the other hand, challenges to

1/ Chopko, Webster v. Reproductive Health Services: A Path Toward Constitutional Equilibrium, 12 Campbell L. Rev. 181, 214-16 (1990).

abortion regulations under S. 2969 must be subjected to a compelling interest analysis, the strictest of judicial tests that has provided no protection for the unborn for twenty years. Under strict scrutiny, the same abortion regulations (informed consent and 24 hour waiting period) upheld in Casey, failed! Compare Casey, 112 S. Ct. at 2822-26, with Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759-64 (1986) (informed consent), and Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 450 (1983) (24 hour waiting period). If you were an abortion advocate, which route would you choose to litigate?2/

Third, under the current state of the legislative record, abortion claims brought under S. 2969 could succeed. As a matter of constitutional construction, we would agree with constitutional commentators that the Court is not likely to re-create

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2/ The April 17, 1992 Congressional Research Service analysis of H.R. 2797 (at p. 20) concluded that "it seems doubtful that most such [abortion] claims would have any likelihood of success." This conclusion was based on an assumption that the Court would overrule Roe v. Wade "on the basis that government has a compelling interest in fetal life before as well as after viability." The Casey decision proved this assumption to be erroneous. The CRS analysis is irrelevant to a post-Casey situation in which RFRA mandates a compelling interest test as compared to the less stringent undue burden test under Casey. The CRS analysis of RFRA's abortion issue is flawed in another respect. It implicitly assumes RFRA abortion claims would be limited to situations in which an individual's religion compels or mandates an abortion. RFRA does not contain a compulsion standard and both Congressman Solarz, the House chief sponsor, and the coalition supporting the RFRA do not understand it to incorporate a compulsion standard.

constitutional abortion under a different right if it reverses Roe v. Wade. If there is no privacy right, it is unlikely there will be a constitutional free exercise right to abortion. Whether the Supreme Court allows abortion claims under S. 2969, however, depends on legislative intent, not judicial predilections. We are writing a statute, not the Constitution. This Court defers to legislatures, especially when it says these issues belong in the political realm anyway. See Webster v. Reproductive Health Services, 492 U.S. 490, 520-21 (1989). In his testimony on the House version of the legislation, H.R. 2797, Congressman Solarz acknowledged that religiously based abortion claims were within the scope of the bill. Even if only a few challenges to abortion regulations do succeed under S. 2969, what restraint will remain on district and state attorneys to apply regulations to others who offer affidavits conforming their claims, beliefs, and motions to the prior successful claims? These claims can be both numerous and far-reaching in their impact.

Finally, it is sometimes said that S. 2969 says nothing about abortion, but simply throws the matter to the judiciary. If Congress says absolutely nothing about this matter, the only two significant abortion cases in which free exercise abortion claims have been decided on the merits provide a stark contrast that illustrates the risk to the unborn embodied in S. 2969. In 1980, a federal district court held that the Hyde Amendment's restriction on abortion funding violated the Free Exercise

Clause. This holding was later reversed on procedural grounds. In 1992, the Utah federal district court, relying solely on Smith, rejected plaintiffs' free exercise challenge to the Utah abortion statute. The conclusion invited by these two cases is that constitutional free exercise claims are not now likely to succeed. Statutory claims brought under S. 2969 could expand the grounds available to challenge legitimate abortion regulations.

The lives of the unborn are too important to be put at risk under S. 2969. If, as we foresee, S. 2969 creates a detour around the Court's abortion jurisprudence for those who favor abortion on demand but do not accept Casey's validation of state authority to regulate abortion, an amendment is needed. If, as some supporters of S. 2969 so confidently insist, these abortion claims are doomed to failure anyway, there is no reason why they cannot be eliminated from the bill.

Another area where S. 2969 could cause great harm is in the operation of government programs. For more than forty years, litigants have repeatedly used the Free Exercise Clause as well as the Establishment Clause to challenge the involvement of religious organizations in public programs. Such claims have been made expressly in litigation challenging the involvement of children attending religiously affiliated schools in federal and state education programs, the extension of tax deductions and credits to parents, the participation of colleges and universities in education programs, and the participation of religiously

affiliated social service organizations in public welfare programs such as the Adolescent Family Life Act. As recently as 1989, testimony submitted to a committee of the House of Representatives threatened First Amendment litigation over the involvement of religious providers in the successful Head Start program (42 U.S.C. § 9831 et seq.) as well as the recently enacted Child Care and Development Block Grant program (42 U.S.C § 9858 et seq.).

Religious groups and others have long disagreed over the amount of interaction between religion and government in public programs permitted by the Religion Clauses. Some argue for absolute separation of church and state - contending that religious liberty is infringed if any tax money is used in any way that may benefit a religious group directly or indirectly. This absolutist approach has consistently been rejected by the Supreme Court and the Congress, as evidenced by the wide variety of federal programs in which the government and religiously affiliated agencies cooperate in the delivery of social, health, education and other services to those in need. No one's practice of his or her own religion is actually impeded by the operation of such programs. Yet arguments and litigation contending that they violate religious liberty persist. The constitutional law under the Free Exercise Clause is unsettled. S. 2969 resolves the doubt in favor of litigating the claim, under circumstances in which it will be difficult for the government to prevail.

This basic disagreement over the meaning of religious liberty characterizes the dispute over the potential use of S. 2969 to disrupt public programs. Anticipating that the Supreme Court is becoming more accommodationist in its Establishment Clause jurisprudence, we would be naive if we did not point out that those who would champion absolute separation will use every alternative means available, including S. 2969, to attempt to exclude religious organizations from participating in public programs. Congress should not provide a new federal statute that would permit one person or group to sue the government to exclude some other person or group from participating in a public program. There is simply no need for another vehicle for this kind of third party litigation, as S. 2969 would provide.

The threat of litigation in this area is real, and the basis for predicting success or failure is untested. We are not aware of any case that has applied the compelling state interest/least restrictive means analysis to these kinds of programs prior to Smith. Yet S. 2969 explicitly requires the compelling interest test in every case brought under it. It is hardly "restoration" to require the application of the test to situations where it had never been applied in the past. In any event, challenges brought under S. 2969 could seriously disrupt a myriad of federal and state programs where legislatures, including the Congress, have wisely concluded that the participation of religious providers contributes to the successful operation of government programs and thus to the public good.

In the end it is the individual beneficiaries of government services who will suffer from the disruption of these programs. It is ironic indeed that S. 2969, a bill intended to protect religious liberty, could be used to harm religious organizations and the many needy individuals they serve. This is a risk that Congress need not include in this legislation.

Finally, the Conference is concerned that S. 2969 could provide a mechanism by which groups or organizations will be able to challenge another organization's tax exempt status. The Conference was subjected to this kind of litigation for eight years in the 1980's. From firsthand experience, I can assure you that such litigation is very expensive to defend. Whether a litigant could actually win is not the only issue - - the prospect of any church being compelled to submit to rampant discovery requests for sensitive internal documents and for the depositions of its leaders from all parts of the country is frightful. After our successful defense to this litigation, Establishment Clause standing for these kinds of claims is less likely. But that litigation did not plainly resolve the issue of Free Exercise standing. I believe Article III standing is debatable, but allowing the debate at all seems a waste of the Congress's time. The constitutional standard is not the issue -- we are writing a statute here. Standing to bring this kind of litigation should be precluded under any legislative response to Smith. On this point, there is no serious disagreement among

religious groups. There were calls in testimony in the House for such an amendment, even by RFRA supporters. We are aware that section 3(c) of S. 2969 attempts to accomplish this, but we do not feel that it does the job adequately. If there is no free exercise standing to challenge another's tax exemption anywhere, as our critics insist, what harm is there to say it in the legislation? This would remove any doubt and would benefit all religious groups, and have the effect of moving the Conference closer to support.

In summary, the Conference can support an appropriate legislative response to Smith but we do not agree that S. 2969 is that legislation. We cannot support legislation that will jeopardize state abortion regulations intended to protect unborn life. Nor do we think it wise to enact legislation that will encourage third party litigation by one person or group to challenge the way the government is treating another person, e.g., by allowing someone else to participate in a program or by granting an exemption. Religious groups and others have litigated with each other and with the government for years over the participation of religious groups in government programs. Those claims can and should be litigated under the Establishment Clause which is supposedly unaffected by S. 2969. It does not serve the public interest to expand the potential for disruption of public programs as S. 2969 would.

Many of the issues discussed here are explained in more detail in the May 24, 1991 Commentary on Legislative Remedies to Smith prepared by my Office which I submit for inclusion in the record.

Again, I thank you for this opportunity to present the Conference's views on the Religious Freedom Restoration Act of 1992.

Senator KENNEDY. Thank you very much.
Mr. Fein.

STATEMENT OF BRUCE FEIN

Mr. FEIN. Thank you, Mr. Chairman, Senator Hatch. I would like to raise some issues that have not been broached previously. One that is central in my mind is the issue of federalism; that is, what power does Congress possess to impose upon the State and local governments a standard for enforcing secular law against those who are religiously motivated that is not dictated by the free exercise clause of the first amendment. I don't think the Supreme Court has ever accepted the idea that Congress may invade State sovereignty simply because a majority may disagree with a Supreme Court interpretation of a constitutional right.

I am very dubious that even given the greatest latitude to some of the previous Supreme Court decisions addressing this issue in the context of racial discrimination that this Court would uphold congressional power under section 5 of the 14th amendment, seeking to enforce the free exercise clause as applied to the States under the due process clause of the 14th amendment. I don't see that Congress has made findings or could make findings that would enable this body to proceed under the commerce clause.

I think I would like to highlight the ramifications of this authority by suggesting that if this bill is constitutional as applied to States, it would seem Congress could prohibit States from enacting capital punishment laws on the theory that the Congress disagrees with the Supreme Court decisions upholding capital punishment against eighth amendment attacks. Or it could insist that States provide greater compensation when they take private property for regulatory purposes than is required under the takings clause of the fifth amendment, under the theory that Congress believes the Supreme Court is not guarding private property sufficiently enough.

Indeed, it is difficult to conceive of any aspect of State sovereignty that couldn't be invaded by Congress on the theory that the Supreme Court isn't interpreting the Constitution correctly and we wish to go further than the Supreme Court has dictated. But putting aside that constitutional issue, which applies only to State and local laws—it would not apply to the act regarding the enforcement of Federal laws—I still think that despite its benevolent purpose, it creates more problems than it solves.

The bill is basically standardless, in my judgment, in informing judges and prosecutors and enforcing officials as to what interests are "compelling," what are the least restrictive means of burdening a religion, and what is essential to enforcing a compelling Government interest.

I think at least you get a hint of this by the Supreme Court's own honoring the compelling interest test before it was abandoned in *Smith* more in the breach than in the observance. In *Goldman* v. *Weinberger*, for instance, which concerned the right of a Jewish person in the Defense Department to wear a yarmulke, the Court upheld the requirement that the yarmulke not be worn because it

would distract from uniformity in head gear. It did so without really applying the compelling State interest test.

Senator Hatch has noted that one of the reasons why he supports this bill is thinking that the compelling State interest would enable school children to wear yarmulkes in public schools. Well, under the *Goldman* test it wouldn't win anyway because I think the Court recognized that the standard was really unworkable.

Sandra Day O'Connor, who protested against the abandonment of the compelling State interest test in *Smith* itself, went ahead and agreed with the outcome by doing what? By abandoning the compelling interest test as applied in the case. Remember, in *Smith* what was at issue was the religious use of peyote by native American Indians, and Sandra Day O'Connor writes that there are two interests of the Government in prohibiting this kind of drug use; one, possible health hazards; and, second, possible contribution to drug trafficking.

But when she applied the test to the particular native American Indians who were affected by the Oregon law, she didn't require any particular proof that these native American Indians might imperil public health, didn't require any proof that the religious use of peyote was at all possibly connected to drug trafficking. The idea that the compelling State interest test is one that can be easily applied because it was done so since the *Sherbert* v. *Verner* decision in 1963, almost 30 years until *Smith* was decided, I think is illusory because the Court itself never really applied the test.

I also think the bill is unworkable because it would inject, I think, religious claims into almost any enforcement proceeding. In the *Seeger* case in 1965, the Supreme Court recognized that in applying religious types of exemptions that you cannot limit them only to those based upon creeds of established religions; that anyone who has a set of beliefs that plays the same role in their lives that a belief in a supreme being or otherwise plays in the life of someone who belongs to an established religion must be accorded the same kind of treatment under exemption laws as others. The particular case in *Seeger* concerned conscientious objection.

I think under this bill anyone in an enforcement proceeding could claim a religious motivation, and testing its sincerity would be an endless process. How do you get into someone's mind and cross-examine them on whether their set of beliefs that justified the particular act that violated a civil or criminal law was not sincerely motivated, or that the belief did not play the role in their personal lives as, say, a belief in a supreme being plays in the life of a Moslem or a Jew or a Christian? This would elongate already lead-footed justice, and I don't think it would be something that could be readily pushed aside.

Moreover, the standard would create the possibility of this situation: Operation Rescue participants could claim, in my judgment, a religious motivation for picketing and seeking to prevent those desiring abortions from entering abortion clinics. Those who wish to enter abortion clinics to obtain abortions could seem to claim an equal right under this same bill that their choice to abort is religiously motivated, and therefore they have a right under the bill to have access to the abortion clinic. What happens in that situation under the law? Do we resort to the law of the jungle and just ev-

eryone can do what they want because it's religiously motivated? You have crusaders against those involved in a holy jihad? Those things can't be brushed aside because they are very genuine problems that could arise in these circumstances.

I think Mr. Laycock pointed out one possible problem that might be of concern to some. He referred to the polygamy laws of the late 1800's that were used against Mormons, perhaps others, and he suggested that, clearly, you could not have a polygamy enforcement that satisfied the compelling State interest under his view. It is not clear to me whether this bill is intended to outlaw any State or local government's ability to enact a polygamy law. There are unanswered questions there.

There is also a genuine problem with regard to income tax payments. Not many years ago, the Amish claimed a free exercise right to avoid paying Social Security taxes. They said they didn't believe that it was consistent with their religious creed to pay taxes. They claimed a religious motivation for withholding the tax payments. They said they would not, under their own religion, accept Social Security payments that would be supported by these taxes, and that claim was rejected by the High Court.

But I would think under this bill the claim probably would have to be accepted. We are running $350, $400 billion budget deficits. A claimant comes in and says, well, how can my $1,000 be at all contributory to the deficit problem? Moreover, the claimant could say, I will refuse to accept certain kinds of benefits so there won't be a net drain on the total Federal budget.

It would seem under this bill that the Government could not prove a compelling interest to collect taxes, and all sorts of tax claims like this might arise. There are many, some based upon religious motivation, who seek to resist paying certain portions of the taxes that they think are devoted to the Defense Department budget, and it would seem difficult to claim that enforcing the income tax laws against those persons by itself would create a great danger to the solvency of the United States of America. The solvency danger is already there.

Once you establish some kind of tax privilege or exemption, the likelihood of persons flocking to that religion is very great. As you all know, historically, religions, Moslems and others, have used tax exemptions to encourage others to convert. The tax problem is simply an example of what I think could be created by this bill.

Senator KENNEDY. I will give you another minute or two to just wind up.

Mr. FEIN. I would just like to conclude by suggesting that Justice Scalia's standard, I think, is not a perfect one. There is a great problem in reconciling the establishment clause of the first amendment with the free exercise clause.

You remember when Jesus stated, you know, render unto Caesar the things that are Caesar's and unto God the things that are God's. He posed the problem, but he didn't answer it because it is a very, very difficult dilemma to confront in any society that seeks both to respect the need for secular authority as well as the need to accommodate religious practice and belief. And although Justice Scalia's standard is not flawless, I would submit that it is better than any other that has been devised in many hundreds of years.

Thank you, Mr. Chairman.
[The prepared statement of Mr. Fein follows:]

STATEMENT OF

BRUCE FEIN

REGARDING S.2969,

THE RELIGIOUS FREEDOM

RESTORATION ACT

BEFORE THE

SENATE JUDICIARY

COMMITTEE

SEPTEMBER 18, 1992

Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to elaborate my views on S.2969, the Religious Freedom Restoration Act of 1992. The bill, in my judgment, is twice-flawed: it unconstitutionally invades the power of states to regulate religiously-motivated conduct in ways the free exercise clause of the First Amendment sanctions; and, it would establish an injudicious and unworkble statutory standard regarding the enforcement of evenhanded state or federal laws.

In Employment Division of Oregon v. Smith, 110 S. Ct. 1595 (1990), Justice Antonin Scalia, writing for the majority, declared that the free exercise of religion protected by the First Amendment suffers no unconstitutional impairment by the evenhanded application of criminal or other laws with secular purposes, even if a religious practice is fortuitously prohibited, such as the use of peyote. In contrast, S.2969 would prohibit any arm of government from enforcing any law that burdens any person's practice of religion absent a demonstration by the government that enforcement against that individual is both "essential" and the "least restrictive means" of furthering a "compelling government interest." In other words, the bill would prohibit state regulation of religiously-motivated conduct even when the regulation is constitutionally permissible under the Smith decision. For instance, a state probably could not enforce an anti-polygamy law against Moslems or other adherents to religions that authorize the practice, although

such prohibitions pass constitutional muster under the precedent of Reynolds v. United States, 98 U.S. 145 (1879).

It speaks volumes that the Religious Freedom Restoration Act cites no constitutional authority for its application to states. The bill seems to proceed on the haughty assumption that Congress is omnipotent over the states, and that the constitutional vision of a national legislature with limited powers can be disregarded as antediluvian.

But the absence of constitutional scholarship is not fatal to congressional enactments. The Supreme Court arguably might find authority for the RFRA in either section 5 of the Fourteenth Amendment or the commerce clause. Section 5 empowers Congress to enforce the Amendment "by appropriate legislation." In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court upheld the power of Congress, acting under that section, to prohibit states from denying the franchise to persons unable to understand English if they had successfully completed sixth grade in a Puerto Rican school using a non-English language. The Court reasoned that even if disfranchisement for failure of English literacy was inoffensive to the equal protection clause, Congress, nevertheless, enjoys authority under section 5 to determine what type of legislation is appropriate or plainly adapted to advancing the aims of the clause. The Court noted that Congress could rationally conclude that expanding the franchise of the Puerto Rican community would enhance

their political power and thereby help them obtain nondiscriminatory treatment in public services. It would thus assist Puerto Ricans in obtaining equal protection of the laws. The High Court further reasoned that Congress might rationally have concluded that English literacy tests as a condition to voting worked invidious discrimination against the Spanish-speaking. That non-fanciful interpretation of equal protection provided an independent foundation for the congressional action.

The precedential value of Morgan is questionable in light of Oregon v. Mitchell, 400 U.S. 112 (1970), which denied Congress section 5 power to require states to enfranchise for state elections all persons eighteen years or older. The multiplicity of opinions in Oregon, however, provided no majority rationale for its section 5 holding.

Even assuming Morgan is unscathed by Oregon, the former would not justify the RFRA. The bill neither seeks to rectify or to safeguard against equal protection violations. Further, Congress has neither made findings that states are violating constitutionally protected religious freedoms, nor found that evenhandedly applied state laws designed to achieve secular goals are mere pretexts for denying religious freedom. Thus, there is no plausible remedial justification for the RFRA. In addition, the bill does not embrace a plausibly correct interpretation of the free exercise clause because its standard for protecting

religiously-motivated conduct was explicitly rejected in Smith.

The RFRA might arguably find a constitutional anchor in the commerce clause. In Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), the Court upheld congressional power to prohibit racial discrimination in any place of public accommodation that affects commerce, either by serving transient guests or interstate travellers, or by purchasing or serving products that have moved in interstate commerce. Interstate commerce is depressed, the Court reasoned, if blacks are deterred from travel because of discrimination, and the commerce clause empowers Congress to remove that depressant.

But Heart of Atlanta Motel would not seem to save the RFRA. Congress has made no findings that laws that burden religion retard interstate commerce, and such findings probably could not be made. Neither is there an intuitive foundation to conclude that the bill is reasonably necessary to facilitate interstate commerce.

The RFRA is thus sustainable only by construing section 5 of the Fourteenth Amendment to empower Congress to fasten on the states its interpretations of constitutional rights which avoid impairing those rights as declared by the Supreme Court. Under that theory, Congress could prohibit states from outlawing nude dancing, although such prohibitions were held constitutional in Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991); Congress could prohibit

states from prescribing capital punishment, or good faith exceptions to the exclusionary rule, or non-unanimous jury verdicts, or a host of other constitutionally acceptable criminal justice rules; Congress could require states to compensate property owners in circumstances beyond what is mandated by the just compensation clause of the Fifth Amendment, or to protect contract rights beyond those constitutionally secured by the Contracts Clause, Article I, section 10; and, Congress could prohibit state durational requirements for divorce to bolster the constitutional right of interstate travel, although such requirements were held constitutional in Sosna v. Iowa, 419 U.S. 393 (1975).

It seems difficult to conceive of any constitutional theory that would validate the RFRA yet avoid sounding the death knell of federalism. But the Supreme Court last June refused an epitaph for federalism in New York v. United States, 112 S. Ct. 2408 (1992).

Putting aside constitutional questions, S.2969 would wreak havoc in the enforcement of federal and state laws. It would require in every civil or criminal enforcement proceeding the acceptance of a religious-motivation defense unless the government shoulders the burden of proving that enforcement against the defendant is "the least restrictive means" of burdening religion and "essential" to furthering a "compelling governmental interest." A religious-motivation defense would not be limited to those whose behavior

followed a recognized religious creed. The defense would also seem to be available to persons whose questioned conduct was motivated by a system of beliefs which occupy in their lives a role parallel to that filled by the creeds of established religions, such as Roman Catholicism or Islam. See United States v. Seeger, 380 U.S. 163 (1965). Thus, the religious-motivation defense recognized in S.2969 could be plausibly raised in virtually every enforcement proceeding. The evidentiary problems of discrediting the claim of religious motivation would be formidable, and require prolonged inquiry into the defendant's past beliefs, upbringing, and practices. Lead-footed justice would be further slowed to the testudinate.

S.2969 offers no guidance for determining whether an enforcement proceeding furthers a compelling governmental interest. What interests qualify as "compelling"? Do laws that further interests in morality qualify, such as prohibitions on polygamy, obscenity, public nudity, or animal torture? Even if the answer is affirmative, how would the government prove that the moral standards of the community would be imperiled by granting an exemption for the individual defendant -- in other words that the enforced proceeding is "essential"? Would the notoriety of the defendant or the publicity or televising of the case be pertinent? Would the number of similar and reasonably contemporaneous offenses be relevant? Would expert witness be required to testify regarding the likelihood of the defendant's recidivision absent punishment,

or the reduced deterrent on the community in general if a prosecution was dismissed? Do retribution goals count as compelling? S.2969 offers no clue as to how these legal conundrums should be answered. As a consequence, enforcement proceedings will be transformed into elongated philosophical debates and conjectures regarding the purposes and deterrent effects of a particular law enforcement proceeding. Charles Dicken's parody of the law in the apocryphal case of Jaryndice v. Jaryndice in Bleak House will seem like a summary judgement proceeding in comparison.

In Smith, Justice Sandra Day O'Connor, the brainchild of the S.2969 religious-motivation defense borrowed from her concurring opinion, tacitly conceded its unworkability. She voted to uphold the punishment of religious peyote use by members of the Native American Church. The state has a compelling interest in prohibiting all peyote use, O'Connor reasoned, because of its potential adverse health effects or contribution to drug trafficking. She refused to require the government to make a case-by-case showing that each peyote use by a Native American Church member either caused ill health, fostered drug trafficking, or otherwise impaired a compelling government interest.

In addition to its unworkability, S.2969 would create a legally privileged status for religious-motivated criminal conduct that would seem to violate the constitutional norm of religious neutrality ordained by the establishment clause of the First

Amendment. For example, in a prosecution for polygamy motivated by religious creed, the government would be required to prove both that anti-polygamy laws serve compelling interests, and, that leaving the accused unpunished would directly subvert that interest. But neither element of proof would be required to convict a polygamist unmotivated by religion. Such intentional legal favoritism for religiously motivated crime seems no more constitutionally justified than would be a statute that granted a legal exemption for Mormons or Moslems to practice polygamy.

The RFRA would be an endless fountain of litigation. For instance, it is unclear whether government employees subscribing to the Moslem faith would be entitled to leaves of absence to make a haj to Mecca irrespective of personnel policies or whether Moslem husbands would be entitled to divorce by simple oral renunciation of wives. Would those who believe in the inerrancy of the Bible be entitled to insist in scholastic tests, pertinent to state college admissions, that the earth is 6,000 years old?

In sum, whatever may be said against the free exercise standard of Justice Scalia in Smith, it pales in comparison to the infirmities of S.2969.

Senator KENNEDY. I would just like to go through two areas briefly. One which I think will continually be raised is the authority under the Constitution to pass a statute to restore the test. Mr. Laycock, do you want to comment on that? I think you went over it a bit in your own testimony.

Mr. LAYCOCK. In my written statement for the record, Mr. Chairman, there is a fairly detailed analysis of the source of authority under section 5, and I will just summarize it here. This bill is quite analogous to the various voting rights acts that the Congress has passed under section 5, and indeed the political origin is entirely parallel. The origin of the voting rights acts was a Supreme Court case that said literacy tests do not violate the voting rights of black citizens or others; they are OK under the Constitution. And the Congress said, no, they are not OK. Congress, in the Voting Rights Act, excluded the use of literacy tests in certain States and the Court upheld that.

Similarly, through a whole series of the more recent voting acts, time after time the Congress has responded to Supreme Court decisions and, in effect, said we can't change what the Court thinks about the Constitution, but we will enact an statute that effectively reverses the result.

In those voting rights cases and in *Smith*, what the Court said was we don't think there is a constitutional violation unless you can show open discrimination on the face of the statute or openly discriminatory motive, and Congress responded quite sensibly, I think, that that is not sufficient to protect civil rights and civil liberties in a pervasively regulated society; we will dispense with the requirement of showing discriminatory motive and we will protect any minority whose voting rights or whose religious practices are seriously burdened.

I suggest that the committee make three findings of fact that I think are amply supported in the record to explain why the Congress believes that this bill is necessary to enforce the free exercise clause. One is that our history shows generally applicably, facially neutral laws are often instruments of religious persecution. Two—Congress is certainly the expert on this—the Congress can find that trying to legislate exemptions bill by bill in every statute at every level of Government is not a workable means of protecting religion; and, three, that litigating governmental motive in every case is not going to be a workable means of protecting religious liberty. Therefore, the free exercise rights that were at issue in *Smith* will not be protected by the Court's standard.

Let me note one other thing, which is the Court itself in *Smith* agrees that religiously motivated conduct is the exercise of religion. That is not at issue. Both branches of Government believe that religious exercise is at stake here. The question is largely institutional capacity to protect it. The Court said we don't want to apply the compelling interest standard on our own authority, but legislatures are free to enact exemptions, and that is what RFRA does. It enacts an exemption across the board so that this exemption fight doesn't clutter the legislative docket with every future bill.

Senator KENNEDY. Elder Oaks, a point is made that this statute would be difficult to enforce because it has such a broad sweep. You have been a distinguished justice. You have interpreted stat-

utes, also, as a law clerk to a distinguished Justice. What is your own sense? If this were to become law, do you think it is enforceable? Do you think it establishes sufficient criteria where it would establish a clear pattern of law?

Mr. OAKS. I believe it would, Senator, and weighed against the alternatives, I think the difficulties that follow from enacting this legislation are far less taxing on government and on liberty than the difficulties that we are experiencing now without such legislation.

Senator KENNEDY. Senator Hatch.

Senator HATCH. Thank you. I have really enjoyed all of your testimony. I think it has been very interesting. Let me just ask you something, Mr. Thomas. What would be the proper analysis of a claim under this bill that a woman is entitled to obtain an abortion based upon her sincere religious beliefs, notwithstanding an otherwise applicable statutory restriction or prohibition on abortion, and what is the impact of the recent *Casey* decision on your analysis?

Mr. THOMAS. Thank you for that question, Senator. I think, first of all, the bill would not open up—it is really a bit of a moot question now as long as the core holding of *Roe* remains, which the Court told us in *Casey*. So we are really arguing about something that is highly speculative.

But as to the question of what would happen if *Roe* were overturned and RFRA were on the books, I tend to agree with the opinions of Michael McConnell and Professor Laycock and other professors that have—Cole Durham of Brigham Young, and others who have suggested that it just doesn't make any sense at all to think that a Supreme Court which would make the tough, in one very real sense, political choice to decide that the autonomy privacy claim of a woman is not going to prevail in the face of State abortion regulation—that a court that makes that very difficult decision would then turn around and recreate access to abortion through a similar constitutional theory, although this one is codified in statute.

There has been discussion, Senator, about this being remedial legislation, and therefore being different. But if one reads the statement of purpose in this bill, it is crystal clear that the bill does nothing more than establish a constitutional standard. So, Senator Hatch, I think the chances of a woman successfully challenging an abortion restriction on the basis of this statute are nil, and I can tell you that many of my constituents are pro-life and I would not be here today if we thought otherwise.

Senator HATCH. Well, this is, of course, a statute that we would be enacting if we do.

Mr. THOMAS. It is.

Senator HATCH. So what would be your response to the argument that whether a State's interest in the life of the unborn child is compelling under this bill will turn on the state of the laws that exist on the date of the bill's enactment, as well as the bill's specific legislative history?

Mr. THOMAS. Well, Congress has made clear, I think, that it is expressing no opinion whatsoever on whether a particular governmental interest is compelling. A court is not—in fact, Professor McConnell, in a conversation to me, described as ludicrous the notion

that a court would look back at the time the legislation was enacted to determine whether the Supreme Court had decided the State's interest in protecting unborn life was compelling.

So, no, I do not think that this statute in any way codifies an opinion of Congress on whether or not the State's interest in protecting fetal life is compelling. If *Roe* goes down, then this statute is not going to be a successful tool to challenge an abortion regulation. All a State legislature would have to do is, in its findings, find that the protection of fetal life, in their opinion, is compelling. So I think, Senator, that there is very little risk of a court misinterpreting what Congress intends.

Senator HATCH. Well, let us suppose that the Court, just hypothetically, overrules *Roe* v. *Wade* on the basis that a woman's interest in terminating her pregnancy is simply a liberty interest rather than a fundamental right, OK?

Mr. THOMAS. Right.

Senator HATCH. Now, this would mean—at least I believe this would mean that a State needs only a rational basis for prohibiting abortions. Now, in those type of circumstances, would she be able to challenge successfully an abortion restriction on the basis of this bill?

Mr. THOMAS. Senator, I absolutely do not think so. Now, one of the authorities that I have cited as one of the persons in the field that I look to, because while I teach as an adjunct professor at Georgetown Law School, that is not my major profession—I am a practitioner, but we have a person that I consider to be, and many in the field—in fact, he is probably more cited by the Supreme Court in this area than any other law professor. He is seated to my left and I would like to ask him what he—I have given you my opinion.

Senator HATCH. And we would be happy to have any of your comments.

Mr. THOMAS. Professor Laycock?

Mr. LAYCOCK. Much has been made of this possibility that there are two different ways to overrule *Roe* v. *Wade,* if the Court ever does it. One way would be to say, yes, there is a fundamental interest in securing an abortion, but that interest is outweighed by the compelling interest in saving the life of the unborn. And the other way to explain it is there is no fundamental constitutional interest in procuring an abortion in the first place.

The Justices who have been eager to overrule *Roe* v. *Wade* have put it in both formulations. They are simply two different ways of saying the same thing, and the reason they are two different ways of saying the same thing is this. The entire Court, even its most conservative members, even Justice Scalia and Justice Rehnquist, are quite clear that the Constitution does protect some right of family and sexual privacy. They unanimously upheld that there was a constitutional right to marry, for example.

It is inconceivable that they would say there is no constitutional right to bear children, as opposed to aborting children. So none of the Justices on the Court are prepared to say this whole line of cases is just wrong; there is no constitutional protection for matters of sexual and family and reproductive privacy.

What they do say is the question of abortion is fundamentally different from all those other matters of reproduction, sex, and family. Well, how is it different? It is not because it doesn't have to do with reproduction, sex, or family. It is different, they say, because only in the abortion question is the life of an unborn child at stake.

So when they say we cut off the liberty interest here and the liberty interest doesn't reach as far as abortion, their explicit reason—and you can quote it out of the dissents in *Casey*; in fact, I did in my written statement—their explicit reason is protecting the life of the unborn child. So whether they use the liberty formulation or the compelling interest formulation, they are simply two different ways of explaining the same thing, and it is the compelling need to save the unborn child that will be the reason.

Mr. CHOPKO. If I may, not to extend this debate unduly, but with respect to *Casey*, the four Justices who joined the dissenting opinion indeed said that they would defer to a compelling interest. They would also defer to a statute in which a State decided to expand rights to have abortion. So at least in the dissent, it is not so much that they are choosing to protect life; they are choosing to protect determination of the legislative process.

The second point I would make—and, again, this is unfortunately, because of the law after *Casey*, hypothetical, but I do think that if the Court does what we said prior to *Casey* it would do—namely, take abortion out of the rank of fundamental rights and treat it in some other different way and subject it to a lower standard of constitutional scrutiny—if I were litigating this claim, I would use RFRA as my preferred route of attack because it does bring back a strict scrutiny analysis to an area of the law that, in constitutional terms, would be different.

Now, that is different, I submit, than conducting constitutional litigation about abortion because I would think that the Court would still try to harmonize the various constitutional components. But in a statutory process, in my opinion, it would be entirely different.

Senator HATCH. Let me just ask a couple of other questions unrelated to abortion.

Mr. LAYCOCK. Senator, could I take just a minute to note one other point about *Casey* which is not in any of the written statements? Mr. Chopko said maybe, even with *Casey* on the books, RFRA could be used to attack regulations like those from Pennsylvania—24-hour waiting period, informed consent, and so forth. That is a new argument, but the obvious response is I cannot imagine any court being persuaded that a woman's religion forbids her to wait 24 hours, or forbids here to take some additional information. The objection to those moderate regulations, already upheld, cannot conceivably, in my view, get to the threshold standard of being a religious claim to start with.

Senator HATCH. That is very interesting. For each of you witnesses, and we will start with you, Mr. Fein, first, do you believe that the Supreme Court would find that a State has a compelling interest in prohibiting use of drugs such as peyote and marijuana, just to use two, even in the face of a religious liberty claim?

Mr. FEIN. That is how Justice Sandra Day O'Connor applied the compelling interest test in the *Smith* decision itself.

Senator HATCH. I didn't think she was that definitive.

Mr. FEIN. Well, she wrote a separate concurring opinion in which she said, I will apply a compelling interest test and come out the same way that Justice Scalia did.

Senator HATCH. Mr. Chopko?

Mr. CHOPKO. I agree with that analysis.

Senator HATCH. Do you all of you agree?

Mr. LAYCOCK. Yes, sir.

Mr. OAKS. I think so, yes.

Senator HATCH. Is it your view, then, that a claim to use such drugs based on this bill, if enacted—that that claim would fail?

Mr. FEIN. It is unclear whether or not, in my judgment, the Court would interpret the statute to apply identically as one Justice of the Supreme Court applied the compelling State interest test in *Smith*. Remember, Sandra Day O'Connor was the only Justice that concluded that the compelling State interest test, as applied to the religious use of peyote, was satisfied. The dissenters, sticking with the *Sherbert* v. *Verner* formulation, dissented and said the test isn't satisfied.

I don't know how the Supreme Court or a lower court would interpret this statute, given that divided position on application of the compelling State interest test in *Smith* itself. We don't know how the four in the majority would have come out applying the compelling interest test because they didn't apply it.

Senator HATCH. Justice Kennedy might surprise us on this as well. [Laughter.]

What is the response of all of the witnesses supporting the bill to the claims that it will enable taxpayers to challenge the following practices: Church and synagogue participation in public programs, tax exemptions for churches and synagogues? We will start with you, Mr. Laycock, Mr. Thomas, and then Elder Oaks.

Mr. LAYCOCK. Those claims under this bill—if it is possible to be more implausible than the abortion claim, those are more implausible. The current case law on challenges to funding for religiously affiliated institutions is no one can challenge that funding under the free exercise clause and any taxpayer can challenge it under the establishment clause.

For RFRA to possibly make a difference, the Court would have to overrule both of those lines of cases. It would have to get rid of the establishment clause rule so that the issue wouldn't be decided under the establishment clause, and then it would have to find a free exercise claim that it has never found at any time in our history. Funding is an establishment clause issue, has been since James Madison in the "Memorial on Remonstrance" in 1785. It is going to continue that way and it will not be a RFRA issue.

Secondly, on tax exemption, I joined with others in filing a brief in support of the bishops in their tax exemption case. They have won that issue. There were lots of creative lawyers on the other side. If there was anybody in the world that has standing to challenge tax exemptions, they would have found that person. The tax exemption issue, I think, is solved and RFRA is not going to reopen that either. Even if there were standing, in *United States* v. *Lee*,

the Court held by a fairly lopsided vote that the Government interest in collecting the revenue is compelling.

Now, I have often criticized the Court for not taking the compelling interest test seriously enough, but I think they are right about that. The incentive to mass tax evasion is just too strong. So I don't think there is standing to challenge tax exemption, and I don't think there is a claim on the merits if we get that far.

Mr. FEIN. If I could just disagree with his examination of *United States* v. *Lee*, the test under the bill isn't just whether there is a compelling interest in collecting taxes, which most would agree with. It is whether or not, conceding the compelling interest, does applying the law to the particular claimant, period, without looking beyond the claimant, advance a compelling State interest. It seems to me that is a very difficult argument to make as applied to one taxpayer out of hundreds of millions, and paying into a budget that is now $1.5 trillion or something of that sort, to say the compelling interest with regard to this taxpayer alone justifies the requirement of payment.

Mr. THOMAS. Senator, I think you asked a question about tax exemption of organizations rather than payment of taxes by Amish employers and others. I think that is the question you are seeking, because that is one of the major criticisms that has been raised.

Senator HATCH. Right.

Mr. THOMAS. Senator, it was my pleasure and privilege to work with the House sponsors back from 2 years ago when this issue was first raised, and we made a response specifically in response to this concern by putting a provision in the bill that you and Senator Kennedy adopted when you introduced the Senate version that adopts the rule of standing that was set forth in the Arum litigation that ensures that this kind of thing will not happen. Taxpayers simply do not have standing under current law to challenge the exempt status of religious organizations under article III. That rule has been incorporated.

On the participation in government programs, Professor Laycock has pointed out that the only rule of standing is under the establishment clause. We all have heard of the decision of *Flast* v. *Cohen*. It does not apply to free exercise claims. I think *Frothingham* v. *Mellon* is still the standing law under free exercise claims. Again, Professor Laycock, I think, is correct.

Finally, to just part company with Mr. Fein on the result in *Smith*, if it comes up again at this Court under this bill, you have made crystal clear in this bill that it does nothing more than reestablish a constitutional standard. Under this Court, there are only three votes that would have gone the other way in *Smith* and upheld the rights of native Americans.

Mr. LAYCOCK. Two of them are gone.

Mr. THOMAS. Two of them are gone. Some of our coalition debate over that point, but the simple fact is you haven't changed anything in that case. You are putting in a time-honored test that we have been living with for 30 years.

Senator HATCH. Elder Oaks, we will conclude with you, and I will submit any other questions.

Mr. OAKS. I agree with what my brethren have said.

Senator HATCH. Well, we appreciate the testimony of all of you. I think it has been very enlightening here. It has been very interesting to me, and we appreciate the time you have put in.

Senator KENNEDY. I want to thank you very much. You know, the legislation is not designed to determine the outcome in any particular case.

Senator HATCH. Right.

Senator KENNEDY. We have tried to make that very clear with the legislative history.

It has been enormously informative and very, very helpful, and we thank all of you very much for coming.

Mr. CHOPKO. Thank you, Mr. Chairman.

Mr. THOMAS. Thank you.

Senator KENNEDY. On our next panel is Forest Montgomery, counsel for the office of public affairs of the National Association of Evangelicals. Mr. Montgomery, we welcome you to the committee and we appreciate all the work you have done on behalf of the legislation.

Michael Farris is president of the Home School Legal Defense Association. Mr. Farris, we are pleased that you could be here today.

Nadine Strossen is president of the American Civil Liberties Union, and professor of law at New York Law School. Professor Strossen, we are glad to have you, and Mr. James Bopp, who is general counsel of the National Right to Life Committee.

Just so that we all have an understanding, I have to be out by 12:35. We are going to have a vote; that takes us about 5 or 6 minutes, so we want to try and give everyone a fair chance and then leave time for the vote, unless, Senator Hatch, you can stay.

Senator HATCH. I am up on the floor with the amendments as soon as this vote is over. I apologize.

Senator KENNEDY. Why don't we try and stick to 5 or 6 minutes? We don't want to interrupt you, and then we will come back to some questions.

Thank you.

Mr. Montgomery.

STATEMENTS OF A PANEL CONSISTING OF FOREST D. MONTGOMERY, COUNSEL, OFFICE OF PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS, WASHINGTON, DC; MICHAEL P. FARRIS, PRESIDENT, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, PAEONIAN SPRINGS, VA; NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION; AND JAMES BOPP, JR., GENERAL COUNSEL, NATIONAL RIGHT TO LIFE COMMITTEE, INC., WASHINGTON, DC

Mr. MONTGOMERY. Thank you, Mr. Chairman, Senator Hatch. I would like my entire written statement submitted for the record, together with a statement of the Christian Action Council.

Senator KENNEDY. They will be so included.

Mr. MONTGOMERY. On behalf of the National Association of Evangelicals, I want to express our deep appreciation for the opportunity to testify before this distinguished committee. Quite simply, the Religious Freedom Restoration Act is the most important bill

relating to religious liberty ever considered by Congress. Congress needs to overrule the Supreme Court's dreadful decision in *Employment Division* v. *Smith*. *Smith* has gutted the free exercise clause of the first amendment.

This was the rule of law before *Smith:* Laws of general applicability could constitutionally burden religious practice only if the Government demonstrated a compelling interest and used the least restrictive means to further that interest. This test involved balancing the Government's interest against the individual's religious liberty interest in the context of each case.

This is the new rule of law: If prohibiting the exercise of religion is, in Justice Scalia's words, "merely the incidental effect of a general applicable and otherwise valid provision, the First Amendment has not been offended." But this new rule of law does offend the first amendment. In subjugating our first liberty to the will of legislative majorities, the Supreme Court has abdicated its role as guardian of those rights declared unalienable in the Declaration of Independence and heretofore secured in the Bill of Rights. The Court has metamorphosed the free exercise clause from fundamental right to hollow promise.

To add insult to injury, the majority opinion characterized the compelling interest test as a luxury which we as a people can ill afford. But what we can ill afford is a Court that considers religious freedom, our legacy, a luxury.

The Court apparently does not want to be bothered with balancing government's interest against the religious liberty interests of individuals. No religious Americans need apply. According to Justice Scalia, applying the compelling interest test to all actions thought to be religiously commanded would be "courting anarchy." Yet, the societal disarray Justice Scalia darkly envisions has failed to materialize in 200 years under the Bill of Rights.

Justice Scalia concedes that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in. This result, he says, is the "unavoidable consequence of democratic government." But the Bill of Rights was designed precisely to secure fundamental human rights from what would otherwise be the unavoidable consequence of democratic government.

Contrast Justice Scalia's aberrant view with that of the Supreme Court in an earlier and more enlightened day. This is, of course, from the second flag salute case, *West Virginia* v. *Barnette:*

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.

That is, not by the political process.

Religious liberty remains a God-given right, as the Declaration of Independence states, but it is no longer secured by the Constitution, as currently interpreted. It is now to be bestowed by a beneficent majority, if it so chooses, or denied by a tyrannical majority unmoved by the pleas of a religious minority. The free exercise of religion is no longer a matter of God's grace, but legislative grace. As Evangelicals, we will not rest until *Smith's* egregious affront to the Bill of Rights is rectified.

Some have argued that RFRA could be successfully used to support a right to abortion. That contention was far-fetched before the *Casey* case. After *Casey,* it is untenable. *Casey* reaffirmed the core holding of *Roe* v. *Wade* that a woman has a constitutional right to abortion. Thus, there is no need to assert a religiously based right to abortion. Nor can RFRA be considered as creating a statutory right to abortion if *Casey* and *Roe* v. *Wade* are ever overturned.

It is unthinkable that the Supreme Court would reject a woman's right to abortion under one constitutional argument—that is, the right to privacy—only to recreate that right on the basis of religion. This explains why many pro-life organizations which I list in my written statement support RFRA.

In closing, we are pleased to note that Governor Clinton has indicated his support of RFRA. We would also welcome a show of support from President Bush for this bipartisan bill. Needless to say, Evangelicals consider religious faith a preeminent family value.

We applaud this bipartisan bill introduced by you two Senators, and we would like to conclude by saying the Religious Freedom Restoration Act would simply restore the balancing process which formerly prevented Government from running roughshod over religious freedom. The first freedom of the American people is in your hands.

Thank you.

[The prepared statement of Mr. Montgomery follows:]

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STATEMENT OF FOREST D. MONTGOMERY

Counsel, Office of Public Affairs

NATIONAL ASSOCIATION OF EVANGELICALS

on

S. 2969, THE RELIGIOUS FREEDOM RESTORATION ACT

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

September 18, 1982

Mr. Chairman and Members of the Committee:

On behalf of the National Association of Evangelicals (NAE) I want to express our deep appreciation for the opportunity to testify before this distinguished Committee on the pressing need for enactment of S. 2969, the Religious Freedom Restoration Act (RFRA). Quite simply, this is the most important bill relating to religious liberty ever considered by Congress.

NAE includes some 45,000 churches from 74 denominations. Through its commissions and affiliates, such as the National Religious Broadcasters and World Relief, NAE serves an evangelical constituency of approximately 15 million people. At its 1991 convention, NAE passed a resolution urging Congress "to pass bipartisan remedial legislation, such as the 'Religious Freedom Restoration Act,' which will restore the traditional 'compelling interest' test and thus protect the free exercise of religion."

We have frequently appeared before congressional committees to give testimony on religious issues. NAE has also been involved as amicus curiae in many religious liberty cases considered by the Supreme Court. But our previous involvements pale by comparison to the present hour. We are here today to speak about the need to legislatively overrule the Supreme Court's dreadful decision in Employment Division v. Smith (April 1990). In Smith, five Justices of the Supreme Court gutted the Free Exercise Clause of the First Amendment. In the post-

Smith world, government no longer needs to demonstrate a compelling governmental interest to justify an erosion of religious freedom. Now all that is needed to restrict religious exercise is a neutral law of general applicability. Our ability to put our faith into action is at the mercy of majoritarian rule.

The issue in Smith was whether the sacramental use of peyote by members of the Native American Church was protected under the Free Exercise Clause. Reversing the state supreme court, the U.S. Supreme Court ruled that Oregon could deny unemployment benefits to persons discharged from their jobs for sacramental peyote use. If that is all the Court had done, we would not be here today. But the Court, on its own volition, and without benefit of briefing or argument, discarded decades of precedent and announced a sea change in First Amendment law.

This was the rule of law before Smith: Laws of general applicability could constitutionally burden religious practice only if the government demonstrated a compelling governmental interest and used the least restrictive means to further that interest. This test involved balancing the government's interest against the individual's religious liberty interest in the context of each particular case.

This is the new rule of law: If prohibiting the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." With all due respect to Jusice Scalia, the author of Smith, this new

rule of law does offend the First Amendment. Indeed, in subjugating our First Liberty to the will of legislative majorities, the Supreme Court has abdicated its role as guardian of those rights declared unalienable in the Declaration of Independence and heretofore secured in the Bill of Rights.

Smith was thought to present a narrow question of constitutional law: Whether the State of Oregon had a compelling interest in regulating illegal drugs that overrode free exercise rights in the sacramental use of peyote. That was the issue briefed; that was the issue argued. This was thought to be a routine Free Exercise case which would no doubt be decided within the parameters of well-established precedent.

Thus we were stunned when the Court used this seemingly innocuous case to announce a complete overhaul of established First Amendment law. No liberty is more precious in the American experience than religious liberty -- our First Freedom. Yet the Supreme Court, the very guardian of our liberties, metamorphosed the Free Exercise Clause from fundamental right to hollow promise.

Justice O'Connor is right on target when she says the Court's holding "not only misreads settled First Amendment precedents," but also "appears to be unnecessary to this case."

To add insult to injury, the majority opinion callously characterizes the compelling governmental interest test as a "luxury" which

we as a people can ill afford. But what we can ill afford is a Court that considers religious freedom, our legacy, a luxury. Abundant scholarship on the origins and historical understanding of the Free Exercise Clause indicates that religious liberty was to be a preferred freedom, a fundamental right not to be submitted to rule by legislative majorities.

As matters stand now, the free exercise of religion cannot be used as an effective defense against unwarranted governmental action. The Court apparently does not want to be bothered with balancing government's interest against the religious liberty interests of individuals. No religious Americans need apply.

According to Justice Scalia, applying the compelling interest test to all actions thought to be religiously commanded would be "courting anarchy." Yet the societal disarray Justice Scalia darkly envisions has failed to materialize in 200 years under the Bill of Rights.

Justice Scalia concedes that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." He shrugs off this concession with the comment that this result is the "unavoidable consequence of democratic government." But the Bill of Rights was designed precisely to secure fundamental human rights from what would otherwise be the "unavoidable consequence of democratic government."

5

Contrast Justice Scalia's aberrant view with that of the Supreme Court in an earlier and more enlightened day: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

This familiar quotation is from West Virginia State Board of Education v. Barnette, the famous flag salute case decided on Flag Day, 1943. The Court held that school children could not be forced, against their religious beliefs, to salute the flag. Besides ignoring the teaching of Barnette, Justice Scalia unaccountably relies on the Gobitis case which was expressly overruled in Barnette. Incredibly, in citing and relying on Gobitis, the majority opinion did not even note that it had been expressly overruled.

In his able dissenting opinion, Justice Blackmun pointedly observes that the majority opinion "effectuates a wholesale overturning of settled law" concerning the Free Exercise Clause, and expresses the hope that the majority is "aware of the consequences." Let's look at some of those consequences.

Must autopsies be performed which violate religious faith?

6

Can students who believe the flag is a graven image be forced to salute it?

Must a church get permission from a landmarks commission before it can relocate its altar?

Can orthodox Jewish basketball players be excluded from inter-scholastic competition because their religious belief requires them to wear yarmulkes?

Can the Roman Catholic Church be forced to ordain female priests?

Are public school students going to be required to attend sex education classes that teach views antithetical to their religious beliefs and practices?

Are young women to be forced to comply with gym uniform requirements contrary to their religious tenets of modesty?

Are the Amish to be forced to display an orange triangle on their horse-drawn buggies when silver reflective tape would suffice?

These are but a few of the consequences which Smith would apparently visit on the religious community. The worst, of course, is that government officials who were formerly under obligation to be reasonable and attempt, if possible, to accommodate religious practice, are

now free to impose laws without any regard for the religious sensibilities of minorities.

Justice Scalia, we have to believe, does not realize the full import of his ruling. We are speaking today about religious practice. For high-demand religions, there are practices that are immutable.

When it comes down to obeying God or Caesar, the devout have no choice. Which is to say that Employment Division v. Smith -- unless rectified -- will inevitably lead to civil disobedience. While we concede that free exercise is not an absolute, and that it must yield to compelling governmental interest, we cannot but remonstrate against the present rule which requires virtually no justification whatsoever for the abridgement of religious freedom.

Religious liberty remains a God-given right, as the Declaration of Independence states, but it is no longer secured by the Constitution as interpreted by the 5-4 majority. It is now to be bestowed by a beneficent majority if it so chooses, or denied by an unsympathetic majority unpersuaded by the pleas of a religious minority. The free exercise of religion, that fundamental human right, is no longer a matter of God's grace, but legislative grace. As evangelicals, as Americans, we cannot, we will not, rest until Smith's egregious affront to the Bill of Rights is corrected.

A word about the abortion "issue." Some have argued that RFRA

could be used successfully to support a right to abortion. That contention was farfetched before the Supreme Court's recent decision in Planned Parenthood v. Casey; after Casey it is untenable. Casey reaffirmed the core holding of Roe v. Wade -- that a woman has a constitutional right to abortion. Thus there is no need to assert a religiously based right to abortion.

Nor can RFRA be considered as creating a statutory right to abortion if Casey and Roe v. Wade are ever overturned. It is unthinkable that the Supreme Court would reject a woman's right to abortion, under one constitutional argument (the right to privacy), only to recreate that right on the basis of religion. This explains why many pro-life organizations support RFRA. Among them are the National Association of Evangelicals, the Christian Life Commission of the Southern Baptist Convention (representing some 15.2 million Baptists nationwide) Agudath Israel, Church of Jesus Christ of Latter-Day Saints, Coalitions for America, Christian Action Council, Traditional Values Coalition, Concerned Women for America, Christian Legal Society and the Home School Legal Defense Association. These groups would not support RFRA if abortion interests would be advanced by it.

In closing, we are pleased to note that Gov. Bill Clinton, in a September 9 address to B'Nai B'Rith, indicated his support of the Religious Freedom Restoration Act. We would also welcome a show of support from President Bush for this bi-partisan bill. Needless to say, evangelicals consider religious faith a preeminent family value.

9

We applaud the bipartisan bill introduced by Senators Edward Kennedy and Orin Hatch. The Religious Freedom Restoration Act would simply restore the balancing process which formerly prevented government from running roughshod over religious freedom.

The First Liberty of the American people is in your hands.

Senator KENNEDY. Thank you.
Mr. Farris.

STATEMENT OF MICHAEL P. FARRIS

Mr. FARRIS. Thank you, Senator Kennedy and Senator Hatch. On behalf of the 26,000 families that are members of the Home School Legal Defense Association, I want to say it is an honor to be invited to testify before this committee.

Although a majority of our members are Evangelical Christians, we represent families from virtually every religious group in America—Jewish, Christian, Eastern religions, and others. The commitment of our organization is to religious freedom for everyone. It is that commitment which has brought us to fully support the Religious Freedom Restoration Act.

The bulk of my 16 years of legal practice has been as a free exercise litigator for legal foundations, principally Concerned Women for America, and also in private practice. This experience led me to participate actively in the coalition supporting this bill as the co-chairman of the drafting committee.

It was unusual for me, but a gratifying experience, to work side by side with attorneys from organizations I have often faced in the courtroom. We disagree on the outcome of many, many cases, and on a lot of issues, especially religious freedom, but we share an unwavering commitment to the principle of the free exercise of religion and that it should be treated as a fundamental freedom. This is one of those bedrock principles that virtually all Americans share, regardless of our political or religious affiliations.

The coalition supporting this legislation couldn't stay together if the bill determined the outcome of any particular case. The reason a widely divergent group supports the bill is because it stands for a principle, and a principle alone, and does not invade the province of making judicial decisions, which, of course, properly belong to the courts.

The only material dissension that has arisen concerning this bill relates to the issue of abortion, but it would be erroneous to say that the lines have been drawn between the pro-life and the pro-choice communities on this bill. I am personally pro-life. I have three of my eight children with me here today. I am politically pro-life. I have handled litigation on behalf of many pro-life causes. I have represented a number of ardently pro-life organizations, including Concerned Women for America.

A substantial number of pro-life organizations which are listed in the testimony—and a formal attachment to my testimony is included listing a number of them—all support this legislation. When I speak for the remainder about the abortion issue, I want to make it clear that I am speaking on behalf of pro-lifers in the coalition, not the coalition as a whole.

The pro-life members of this coalition recognize that people can and will file lawsuits under this legislation, and that we will oppose these kinds of lawsuits. However, after careful study by the attorneys for these pro-life organizations, it is our collective judgment that there is no realistic chance that a pro-choice argument

could be successfully made if *Roe* v. *Wade* is ever reversed. Until that happens, it really doesn't make much difference.

Very, very few women could ever get past the first step required to make a claim under this bill. It is not enough to show that a woman's religion permits her to have an abortion. The required showing is that a religion compels such a decision. Even if that step is satisfied, the State would still have the ability to demonstrate that its interest in the protection of life is a compelling State interest.

The underlying decision a State makes when it chooses to protect life is that an unborn baby is a person. If the Supreme Court reverses *Roe,* it will do so on the basis that the political branches, not the judicial branches, should define when life begins and is therefore deserving of protection. Once the State is empowered to define the beginning of human life, there can be no legitimate debate over the ultimate result. The protection of life is a compelling State interest. If the Supreme Court yields jurisdiction over the issue of when life begins to the political branches, the protection of life as so defined will not be disturbed by this bill.

We would note that cases have been filed under the free exercise clause claiming a free-exercise right to access to abortion, and those cases are still being filed. But none of these has ultimately ever proven to be successful, and I don't think this bill will change that one whit.

It is far more probable to imagine a case in which a pro-life advocate will be able to successfully use the protections of this bill. If a State passes a law of general applicability which forces pro-life medical workers to participate in abortion procedures, the *Smith* decision would appear to prevent a successful free exercise defense to such compelled participation in abortion. The likely outcome of a case under the RFRA would be to grant a religious pro-life medical worker protection from compelled participation in abortion.

We think it is irresponsible to oppose the restoration of the free exercise of religion merely because somebody can file a lawsuit which you are philosophically opposed to. We have looked beyond the kind of cases which can be filed and base our support for this bill on what is the likely outcome of such cases. Ultimately, those who raise abortion concerns about this bill would logically have to oppose the first amendment, unless they could get an abortion-neutral rider attached to it.

As a pro-life advocate, I think it is counter-productive to turn every legislative issue into a battle over abortion. The abortion issue is on the extreme margins of this bill. It is my opinion that this bill could never be successfully used to advance a pro-choice position. The legal battle on the right-to-life issue will ultimately be won or lost on privacy grounds.

It is unimaginable to me that the Supreme Court of the United States would take an issue as important as abortion and make a watershed decision based on an invisible loophole in a bill dealing with religious freedom. This is a straightforward bill. It contains no hidden agendas. It contains no outcome-determinative test. We have been losing virtually every legal battle in the courts, State and Federal, since the *Smith* decision has been decided. Free exercise is taking a beating in this country. All people of all faiths are

losing. The protection of our religious freedom needs and deserves your immediate support for this legislation, which is of paramount importance for all Americans of all faiths.

Let me just respond to one thing Mr. Fein said. Jesus answered the question. He said, to render unto Caesar that which is Caesar's, and render unto God that which is God's, and the proper role of government is to not invade that spirit of the soul which properly belongs to God. What we are asking this Senate to do is to allow Americans who believe that their duty to God should not be invaded by the Government—to protect the standard that Jesus Christ himself announced.

[The prepared statement of Mr. Farris follows:]

TESTIMONY OF MICHAEL P. FARRIS, ESQ.
PRESIDENT, HOME SCHOOL LEGAL DEFENSE ASSOCIATION

UNITED STATES SENATE
JUDICIARY COMMITTEE
S. 2969, THE RELIGIOUS FREEDOM RESTORATION ACT

September 18, 1992

Mr. Chairman and members of the Committee, it is an honor to be invited to testify before this committee on behalf of the 26,000 families that are members of the Home School Legal Defense Association.

Although a majority of our members are evangelical Christians, we represent families from virtually every religious group in America—Jewish, Christian, eastern religions and others. The commitment of our organization is to religious freedom for everyone. It is that commitment which has brought us to fully support the Religious Freedom Restoration Act, S. 2969.

The bulk of my sixteen years of legal practice has been as a free exercise litigator for legal foundations, most notably Concerned Women for America's Education and Legal Defense Foundation, and in private practice. This experience led me to actively participate in the coalition, supporting this legislation as the co-chairman of the drafting committee.

It was an unusual, yet gratifying experience to work side-by-side with attorneys from organizations I have often faced as opponents in the courtroom. While we disagree on the outcome of many, many cases, we share an unwavering commitment to the principle that the free exercise of religion should be treated as a fundamental freedom. This is one of those bedrock principles that virtually all Americans share regardless of our political or religious affiliation.

We support this bill because it supports the principle that the free exercise of religion should be treated by courts as a fundamental freedom under the traditional standards of the compelling interest test. This bill has been carefully drafted, employing terms that are well-defined by three decades of case law.

The coalition supporting this legislation could not stay together if this bill determined the outcome of any particular case. You see a wide divergence of support because this bill restores a principle and leaves the outcome of particular cases to the judicial system where such decisions

are properly made.

The only material dissension that has arisen concerning this bill relates to the issue of abortion. But it would be quite erroneous to say that the lines have been drawn between the pro-life and pro-choice communities on this bill.

I am personally pro-life. I am politically pro-life. I have handled litigation on behalf of pro-life causes. I have represented a number of ardently pro-life organizations, again notably Concerned Women for America, headed by Beverly LaHaye.

A substantial number of pro-life organizations support this bill in addition to Home School Legal Defense Association and Concerned Women for America. The pro-life supporters of this legislation include the Christian Life Commission of the Southern Baptist Convention, the National Association of Evangelicals, the Church of Jesus Christ of Latter Day Saints, the Christian Legal Society, the Christian Action Council (whose sole mission is the advancement of pro-life causes), Coalitions for America (headed by Paul Weyerich), the Traditional Values Coalition, Coral Ridge Ministries (headed by Dr. D. James Kennedy), the American Association of Christian Schools and others.

The pro-life members of this coalition recognize that people can and will file lawsuits under this legislation that we will oppose. After careful study by the attorneys for these pro-life organizations, it is our judgment that there is no realistic chance that a pro-choice argument could be successfully made if *Roe* v. *Wade* is ever reversed.

Very, very few women could even get past the first step required to make a claim under this bill. It is not enough to show that a woman's religion permits her to have an abortion, the required showing is that her religion compels such a decision. Even if that step is satisfied, the state would still have the ability to demonstrate that its interest in the protection of life is a compelling state interest. The underlying decision a state makes when it chooses to protect life is that an unborn baby is a person. If the Supreme Court reverses *Roe*, it will do so on the basis that the political branches not the judicial branches should define when life begins and is deserving of protection. Once the state is empowered to define the beginning of human life, there can be no legitimate debate over the ultimate result. The protection of life is a compelling

state interest. If the Supreme Court yields jurisdiction over the issue of when life begins to the political branches, the protection of life as so defined will not be disturbed by this bill.

We would note that cases have been filed under the Free Exercise Clause claiming a free exercise right to access to abortion. None of these claims has been ultimately successful.

It is far more probable to imagine a case in which a pro-life advocate will be able to successfully use the protections of this bill. If a state passes a law of general applicability which forced pro-life medical workers to participate in abortion procedures, the *Smith* decision would appear to prevent a successful free exercise challenge to such compelled participation in abortion. The likely outcome of such a case under the RFRA would be to grant a religiously pro-life medical worker protection from compelled participation.

We think it is irresponsible to oppose the restoration of the free exercise of religion merely because someone can file a lawsuit with which you are philosophically opposed. We have looked beyond the kind of cases which can be filed and base our support on what we believe to be the probable outcome of such cases. Ultimately, those who raise abortion concerns would logically have to oppose the First Amendment unless they could get an abortion-neutral rider attached to it.

As a pro-life advocate, I believe it is counterproductive to turn every legislative issue into a battle over abortion. The abortion issue is on the extreme margins of this bill. It is my opinion that this bill could never be successfully used to advance a pro-choice position. The legal battle on the right-to-life issue will ultimately be won on privacy grounds. It is unimaginable to me that the Supreme Court of the United States would take an issue as important as abortion and make a watershed decision based on an invisible loophole in a bill dealing with religious freedom.

This is a straightforward bill. It contains no hidden agendas. It contains no outcome-determinative tests. We have been losing virtually every legal battle on the free exercise of religion in this country since *Smith* was decided. All people of all faiths are losing. The protection of our religious freedom needs and deserves your immediate support for this legislation which is of paramount importance for all Americans of all faiths.

Coalitions for America

Paul M. Weyrich
National Chairman

Eric Licht
President

Library Court
Social Issues

Stanton
Defense & Foreign Policy

Kingston
Budget & Economic Policy

721 Group
Judicial & Legal Policy

Siena Group
Catholic Coalition

The Omega Alliance
Young Activist Coalition

Resistance Support Alliance
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RESTORING RELIGIOUS LIBERTY IN AMERICA:
An Analysis of the Religious Freedom Restoration Act

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RESTORING RELIGIOUS LIBERTY IN AMERICA: An Analysis of the Religious Freedom Restoration Act

The free exercise clause of the First Amendment to the U.S. Constitution states that "Congress shall make no law...prohibiting the free exercise [of religion]."[1] The Supreme Court has applied this clause to the states as well as to Congress by incorporating it into the due process clause of the Fourteenth Amendment.[2]

The free exercise clause "absolutely prohibits the proscription of any religious **belief** by the government."[3] It does, however, permit some government regulation of religiously motivated conduct. The traditional test applied by the Supreme Court in such cases was very strict in order to preserve this fundamental right. It helped effectuate what the Supreme Court itself once found to be a central theme of this nation's founding documents: "There is a universal language pervading them all, having one meaning: they affirm and reaffirm that this is a religious nation."[4] The Court, therefore, has applied strict judicial scrutiny to government actions burdening religiously motivated conduct, requiring that they be "the least restrictive means of achieving some compelling State interest."[5] This formulation links a strict test as to both means and ends to maintain a high burden on the government.

I. THE SUPREME COURT'S THREAT TO RELIGIOUS LIBERTY

In 1990, the Supreme Court radically altered its free exercise jurisprudence, abandoned this traditional "compelling state interest" test, and virtually eliminated the opportunity for religious persons to claim that any government action violates their right to freely exercise their religion.

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[1] U.S. Const., Amend. I, cl. 1.

[2] See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[3] J. Nowak, R. Rotunda & J. Young, *Constitutional Law* (St. Paul: West Publishing Co., 3rd ed. 1986), at 1067 (emphasis added).

[4] *Church of the Holy Trinity v. United States*, 143 U.S. 457,470 (1892).

[5] *Thomas v. Review Board*, 450 U.S. 707,718 (1981).

In *Employment Division v. Smith*,[6] two members of the Native American Church were fired from their jobs and denied unemployment benefits after they had used peyote, a hallucinogenic drug, as part of a religious ceremony. The state of Oregon makes unlawful all uses of peyote and denies unemployment benefits to persons fired for engaging in unlawful activity. They brought suit, claiming a violation of their right to religious exercise.

While it could have done so without changing the underlying constitutional rules affecting all future free exercise clases, the Court ruled for the state, "rejected the compelling interest standard and announced a fundamentally different standard, without notice to the parties that it was reconsidering the standard."[7] Indeed, the issue of the underlying standard of review was not raised, briefed, or argued by the parties, no doubt because they agreed that the compelling state interest standard prevailed.

The Court held that statutes of general application, that is, those that do not explicitly target religion or religiously motivated conduct but may have an incidental effect of burdening religion, need only be rationally related to a legitimate state interest to survive a constitutional challenge under the free exercise clause. By changing the test as to means from "least restrictive" to "rationally related" and the test as to ends from "compelling" to "legitimate," the Court lowered the burden on the government to almost nothing.

No legislature would pass a statute explicitly targeting religion. Justice Sandra Day O'Connor, who concurred in the result but harshly criticized the majority's opinion, wrote that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."[8] Thus, the Court's new test turns free exercise jurisprudence on its head and essentially eliminates the possibility of challenging government action under the free exercise clause. Under the old test, a generally applicable law that also burdened religiously motivated conduct was therefore open to such a challenge; under the new test, such a law is therefore presumptively constitutional.

The *Los Angeles Times* editorialized a few days after *Smith* that the decision is "an affront both to our society's hard-won pluralism and to the belief in limited government that distinguishes principled conservatism from mere reaction."[9] Another commentator correctly said that *Smith* "has the unsavory effect of relegating the first liberty protected in the Bill of Rights to a decidedly second-class status."[10]

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[6] 110 S.Ct. 1595 (1990).

[7] Laycock, "The Remnants of Free Exercise," 1990 *Supreme Court Review* 1,8.

[8] *Smith*, 110 S.Ct. at 1608 (O'Connor, J., concurring).

[9] Editorial, "The Necessity of Religion," *Los Angeles Times*, April 19, 1990, at B6.

[10] Torres, "Recent Developments," 14 *Harvard Journal of Law & Public Policy* 282,282 (1991).

II. THE IMPACT OF THE COURT'S NEW DOCTRINE

This is not simply a discussion about abstract constitutional principles. The Supreme Court's decision in *Smith* continues to have a real and devastating effect. Nearly every federal and state court applying it has ruled against the free exercise of religion. Professor Douglas Laycock writes that "*Smith* announces a general rule of devastating sweep."[11] The Congressional Research Service surveyed federal and state court decisions since *Smith* and concluded that in only one case did a court find that government action burdening religion violated the free exercise clause.[12]

Those who initially believed that the Supreme Court would limit *Smith* to the unusual facts in that case (religious drug use by Native Americans) were proved wrong six days later when the Court vacated a decision by the Minnesota Supreme Court granting free exercise protection to the Amish in a criminal prosecution for refusing to make their buggies conform to modern traffic safety laws.[13] Those who still believed the Court would at least limit *Smith* to the criminal context lost when the Court vacated a decision by the Washington Supreme Court granting free exercise protection for a church seeking to avoid application of a landmark ordinance to its building.[14]

Other examples include:

* The U.S. Court of Appeals held that applying immigration laws to prevent Roman Catholic orders from employing certain persons, thereby violating their religious beliefs, did not even raise a serious constitutional question.[15]

* The U.S. Court of Appeals rejected a challenge by the Salvation Army to a detailed regulatory scheme, holding that, under *Smith*, "the primary right of free exercise [of religion] does not entitle...an organization to challenge state actions...that are not directly addressed to religious association."[16]

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[11] Laycock, *supra* note 7, at 41.

[12] Ackerman, *The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* (Washington, D.C.: COngressional Research Service, April 17, 1992), at 13-18.

[13] *Minnesota v. Hershberger*, 109 L.Ed. 282 (1990).

[14] *City of Seattle v. First Covenant Church of Seattle, Washington*, 113 L.Ed.2d 208 (1991).

[15] *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42 (2nd Cir. 1990).

[16] *Salvation Army v. New Jersey Dept. of Community Affairs*, 919 F.2d 183,199 (3rd Cir. 1990).

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* In another case involving peyote use, the U.S. Court of Appeals, prior to *Smith*, first required proof of a compelling state interest under the traditional rule and, after *Smith*, summarily dismissed the free exercise claim.[17]

* The U.S. Court of Appeals held that, after *Smith*, "a free exercise challenge is presumably precluded" in cases involving application of state public school testing and academic standing rules to children schooled at home.[18]

* In a prisoners' rights case, the U.S. Court of Appeals held that "*Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate...minority religious preferences" and suggested that the free exercise rights of citizens may actually be lower than those of prisoners.[19]

* In another prisoners' rights case, the U.S. Court of Appeals held that "*Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."[20]

* The U.S. Court of Appeals held that applying the National Labor Relations Act to a Catholic school would raise no constitutional problems.[21]

* The Occupational Safety and Health Administration had exempted the Old Order Amish and Sikh Dharma Brotherhood from its requirement that construction workers wear hardhats. The agency, citing *Smith*, cancelled the exemption.[22]

* A U.S. District Court overruled the Boy Scouts' decision to deny admission to a boy refusing to take the "Duty to God" oath employed by the Scouts for more than 75 years.[23]

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[17] *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).

[18] *Vandiver v. Hardin County Board of Education*, 925 F.2d 927 (6th Cir. 1991).

[19] *Hunafa v. Murphy*, 907 F.2d 46 (7th Cir. 1990).

[20] *Salaam v. Lockhart*, 905 F.2d 1168 (8th Cir. 1990).

[21] *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991).

[22] See *Wall Street Journal*, July 23, 1991, at A1. OSHA's decision to cancel the exemption has been stayed pending review.

[23] *Welsh v. Boy Scouts of America*, 742 F.Supp. 1413 (N.D.Ill. 1990).

* A U.S. District Court rejected a free exercise claim that an autopsy performed on a teenager without his mother's knowledge or consent violated her religious beliefs.[24]

* A U.S. District Court rejected a free exercise claim against applying the Age Discrimination in Employment Act to a Catholic hospital.[25]

* A U.S. District Court first decided, prior to *Smith*, that an autopsy performed without the consent of the victim's parents violated their free exercise rights.[26] The judge reversed his decision when *Smith* was decided before he resolved the damages issue, stating: "It is with deep regret that I have determined that the [*Smith*] case mandates that I recall my prior opinion."[27]

III. THE EFFORT TO RESTORE RELIGIOUS LIBERTY IN AMERICA

A coalition of unprecedented diversity filed a petition for the Supreme Court to reconsider its decision in *Smith*. The Court refused. The coalition included law professors from liberals Laurence Tribe (Harvard) and Norman Redlich (New York Univ.) to conservatives Charles Rice (Notre Dame) and Michael McConnell (Univ. of Chicago) and organizations from People for the American Way and the National Council of Churches to the Christian Legal Society and the National Association of Evangelicals.

Out of this coalition arose the Coalition for the Free Exercise of Religion, which now includes nearly 50 organizations from the American Civil Liberties Union and Americans United for Separation of Church and State on the left to Coalitions for America, Home School Legal Defense Association, Traditional Values Coalition, Concerned Women for America, and the Christian Life Commission of the Southern Baptist Convention on the right. The coalition helped draft and is backing the "Religious Freedom Restoration Act" (RFRA) to enforce the fundamental right to religious exercise by restoring the traditional "compelling state interest" test.

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[24] *Montgomery v. County of Clinton, Michigan*, 743 F.Supp. 1253 (W.D.Mich. 1990).

[25] *Lukaszewski v. Nazareth Hospital*, 764 F.Supp. 57 (E.D.Pa. 1991).

[26] *You Vang Yang v. Sturner*, 728 F.Supp. 845 (D.R.I. 1990).

[27] *You Vang Yang v. Sturner*, 750 F.Supp. 750,750 (D.R.I. 1990).

Representative Stephen Solarz (D-NY) introduced RFRA, designated H.R.2797, on June 26, 1991. It states, in relevant part:

> Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
>
> > (1) is essential to further a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

The bill states that nothing in it "shall be construed to affect" the First Amendment's establishment clause.

RFRA would specifically and cleanly overturn the *Smith* decision and restore the traditional strict standard for evaluating free exercise claims against government actions that burden religion. Section five of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation," the amendment's guarantees of due process and equal protection of the laws. This extends to other provisions of the Bill of Rights, such as the free exercise clause, which the Supreme Court has incorporated into the Fourteenth Amendment. RFRA does not create any constitutional right; it enforces the fundamental right to religious exercise already in the text of the Constitution by restoring the standard of review that prevailed prior to *Smith*.

IV. A POTENTIAL OBSTACLE TO RESTORING RELIGIOUS LIBERTY

A. The Pro-Life Objection

The coalition backing RFRA is unprecedented in its political diversity. The members decided early on that unity could be preserved only by keeping RFRA focused on the legal standard for deciding free exercise cases; they rejected any attempts to make RFRA outcome-determinative in particular cases.[28] This approach has required opposing individual amendments relating to specific subjects or religious practices. RFRA simply seeks to enforce the fundamental right to religious exercise by restoring a legal standard critical for preserving that liberty.

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[28] The Congressional Research Service's analysis shows that this effort was successful. It concludes that the "heightened standard of review" restored by RFRA neither "presume[s] to be outcome-determinative" nor "guarantee[s] that any particular religious exercise should be exempted from governmental regulation." Ackerman, *supra* note 12, at 22.

Two organizations, the National Right to Life Committee (NRLC) and the United States Catholic Conference (USCC), have objected to RFRA, threatening to unravel the coalition and derail any chances for success. They claim that the bill will provide a new alternative to protect the right to abortion should the Supreme Court overrule *Roe v. Wade*.[29]

These groups note that abortion advocates have claimed, and will continue to claim, that laws prohibiting abortion violate the free exercise clause. As a result of *Smith*, courts will evaluate these religion-based abortion claims under the "rational relationship" test by determining whether such a law bears a rational relationship to a legitimate government interest. This test is much easier to meet than the compelling state interest test that applied to religious freedom claims prior to *Smith*.[30] They conclude that "the Religious Freedom Restoration Act would restore to viability a free exercise claim against abortion legislation which is currently effectively precluded by the *Smith* decision."[31]

In *Harris v. McRae*,[32] the Supreme Court refused to consider the claim that the "Hyde Amendment," which restricted government funding of abortion, violated the free exercise clause because the plaintiffs lacked the legal standing necessary to assert the claim. They could not claim that they sought an abortion under compulsion of religious belief. NRLC asserts that this critical requirement of standing "**will be met** in future litigation by abortion rights advocates."[33]

These groups oppose RFRA without the following amendment: "Nothing in this Act shall be construed to grant, secure, or guarantee any right to abortion, access to abortion services, or funding of abortion."

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[29] 410 U.S. 113 (1973).

[30] Some may attempt to revise jurisprudential history and suggest that the compelling interest standard actually did not prevail prior to *Smith*. The Congressional Research Service surveyed the case law and concluded that "[p]rior to *Smith*, it seems fair to say that strict scrutiny was the general rule for free exercise cases." Ackerman, *supra* note 12, at 8. The only exceptions were cases arising in contexts, such as prisons or the military, where traditional rules pertaining to constitutional rights do not apply anyway.

[31] Bopp, "Memorandum re The Religious Freedom Restoration Act of 1990, H.R.5377," January 18, 1991, at 4 (hereinafter *Bopp Memo*).

[32] 448 U.S. 297 (1980).

[33] *Bopp Memo* at 2.

B. Analysis of the Pro-Life Objection

Creativity and imagination hath no bounds, especially when exercised by lawyers defending abortion. It is, of course, a fact that abortion advocates have long been trying, both before and after *Roe*, to advance a theory for abortion rights based on the free exercise clause.[34] Now that *Roe*'s future is seriously in doubt, they continue to press this and other theories in an effort to establish an alternative constitutional basis for the so-called "right to abortion." They have done so indirectly through a brief filed in *Webster v. Reproductive Health Services*[35] and directly in challenging Guam's strict anti-abortion law.

RFRA's pro-life opponents apparently accept the fact that abortion advocates make this claim as itself proving that "the danger of a free-exercise abortion claim is real."[36] NRLC and USCC believe this argument's assertion alone apparently means it is legitimate, will ultimately be accepted by the Supreme Court, and therefore must now be legislatively thwarted. Interestingly, while they insist that RFRA -- which only restores the same strict standard used by the Court in free exercise cases for decades prior to *Smith* -- can be used to advance abortion rights, they have never called for a constitutional amendment to correct this apparent flaw in the free exercise clause itself.

Attorneys urging the courts to enact their particular political agenda will necessarily make as many arguments as possible, hoping some court somewhere will take the bait. If every one of these arguments were simply accepted at face value as legitimate, without a candid assessment of its relative merit, any meaningful legislation promoting an alternative agenda would need to be amended *ad infinitum* to address every possible political contingency. This approach is clearly untenable and only highlights the need to evaluate an argument's merit before insisting on an immediate legislative response.

1. standing

This pro-life objection rests on a particular formulation of the argument. RFRA's pro-life opponents claim that "the argument of the pro-abortion partisans...does not require that a woman's religion *compel her* to have an abortion. Rather, her religion need only

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[34] *See* Bopp & Coleson, "Why the Religious Freedom Restoration Act Needs an Abortion-Neutral Amendment," March 27, 1991, at 8 (hereinafter *Bopp & Coleson Analysis*).

[35] 109 S.Ct. 3040 (1989).

[36] *Bopp & Coleson Analysis*, at 12.

compel her to make a conscientious decision."[37] They insist that establishing legal standing to make a free exercise claim under RFRA will require showing that the desire to seek an abortion is "motivated" by religious belief, while establishing standing to make the same claim under the Constitution requires showing that the desire is "compelled."[38]

The plain language of H.R.2797 completely negates this argument. NRLC's position is based on the "Findings" section in an earlier draft which stated that "'governments should not burden conduct *motivated by* religious belief without compelling justification.'"[39] First, this is not a substantive, operative section of the statute. In *Webster*, the Supreme Court refused to address the constitutionality of the preamble to the challenged statute because it was similarly non-operative. Second, the cited language, even if adequate to form the basis of their argument, no longer exists in the statute. The relevant language now reads that "governments should not burden religious exercise without compelling justification." As such, it is simply not true that "RFRA imposes an easier showing for would-be plaintiffs to obtain standing."[40] RFRA has been carefully crafted to track as closely as possible the free exercise clause itself and the Supreme Court's traditional interpretation of that clause.

The Congressional Research Service examined this question and concluded that

> the free exercise clause operates to protect a person who performs an act *required* by his religion to be performed or who declines to perform an act because his religion *forbids* the doing of that act. Now, all are aware of religious precepts that deny to adherents any right to have an abortion or to perform or participate in the performance of an abortion. There are religions in which one's decision to have an abortion is consistent with doctrine or not forbidden by it, but that is quite a different matter than being compelled to do or not to do something. So far as we are aware, only within the Jewish faith is there a religious tenet, under which it would be an obligation compelled by her faith for a pregnant woman whose life would be endangered if she carries her baby to term to have an abortion in order to save her life.[41]

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[37] *Id.* at 9.

[38] *Id.* at 13.

[39] *Id.* at 14, quoting March 18, 1991 draft of RFRA at section 2(a)(3) (emphasis not in original).

[40] *Id.*

[41] Killian, *Impact of Proposed Free Exercise of Religion Bill on Access to Abortion* (Washington, D.C.: Congressional Research Service, July 2, 1991), at 2.

Other scholars have addressed this issue and come to a similar conclusion. Professor Michael McConnell (Univ. of Chicago), Professor Douglas Laycock (Univ. of Texas), and Dean Edward Gaffney (Valparaiso) top the list of nationally recognized and respected constitutional scholars in the church-state area. They have concluded that

> the free exercise of religion does not encompass the right to engage in any conduct that one's religion deems **permissible**. It protects only conduct that is motivated by religious belief. The only instance of which we are aware where a sizable religious group teaches that abortion is religiously compelled confines that teaching to circumstances so extreme (such as endangerment of the life of the mother) that any anti-abortion statute likely to be passed by a state would already exempt it."[42]

Put another way, the most a potential litigant could really claim is that her religious beliefs do not prohibit abortion but rather allow her to choose for herself. This is a different claim than if she said that her desire to obtain an abortion were affirmatively motivated by her religious beliefs. The free exercise clause, and therefore RFRA, applies in the latter situation but not in the former. Any anti-abortion proposal with a hope for legislative enactment will not fail to provide exceptions for the very kind of extreme situations in which a woman could claim anything beyond permissibility or compatibility with her religious beliefs.

RFRA's pro-life opponents, in arguing that the bill needs an abortion-neutral amendment, actually make the case why such an amendment is not necessary. Bopp and Coleson state that "it is highly unlikely that any protective abortion statute would be enacted without an exception to preserve the life of the mother, so that religions requiring life saving abortions would have their concerns met even with an abortion-neutral RFRA."[43] No jurisdiction will pass a law prohibiting abortions necessary to save the mother's life. Therefore, no anti-abortion statute will apply to a woman in this situation who chooses an abortion out of religious compulsion. This woman will not be in court challenging a statute that does not apply to her on free exercise grounds, or any other for that matter. Thus, a challenge to such a statute would never take place under RFRA, whether amended or not.

A woman whose pregnancy threatens her life could potentially challenge a statute banning all abortions on grounds unrelated to religious exercise. The Congressional Research Service concluded that "[s]uch a conflict would implicate as well a woman's right

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[42] Letter from M. McConnell, E. Gaffney, and D. Laycock to Reps. Stephen Solarz and Paul Henry, dated February 21, 1991, at 2 (emphasis in original) (hereinafter *Professors Memo*).

[43] *Bopp & Coleson Analysis* at 31.

under the due process clause of the Fourteenth Amendment to her life and liberty, and that right would provide a compelling argument for relief from the statute."[44] A woman in such a situation could make such an argument now, while the lower standard established by *Smith* prevails, as well. Dissenting in *Roe v. Wade*, then-Justice William Rehnquist wrote that if a "statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective."[45]

2. validity of the claim itself

Even assuming that some women could establish legal standing to make a free exercise claim against a statute prohibiting abortion, we must evaluate whether it has any real merit or chance of success.

Professors McConnell, Gaffney, and Laycock, writing before Justice Clarence Thomas replaced Justice Thurgood Marshall, posit that at least a plurality on the Supreme Court recognizes a compelling state interest in preborn life from conception.[46] NRLC goes even further and acknowledges that "a majority of the Supreme Court has already recognized, even though the Court itself has not specifically **held**, that there **is** a compelling interest in unborn life throughout pregnancy."[47] The professors conclude that "[i]f *Roe* is overruled on this ground -- that the states have a compelling interest in protecting fetal life throughout pregnancy -- then the question under the Religious Freedom Restoration Act (does the government have a 'compelling' interest?) will already have been answered."[48]

While we do not, of course, know precisely how the Court will overrule *Roe*, this will likely be an essential part of the Court's decision. It is the only way to jettison *Roe* without implicating the Court's other privacy decisions. This issue dominated the oral argument before the Court in *Webster*, when that case was viewed as the likely vehicle for overruling *Roe*. This conclusion is further based on an observation already in *Roe*, that the abortion situation is "inherently different" from other privacy contexts in that "[t]he pregnant woman...carries...the developing young in the human uterus."[49] Professor William Van

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[44] Ackerman, *supra* note 12, at 29.

[45] *Roe v. Wade*, 410 U.S. 113,173 (1973) (Rehnquist, J., dissenting).

[46] *Professors Memo* at 3.

[47] *Bopp Memo* at 3 (emphasis in original).

[48] *Professors Memo* at 3.

[49] *Roe v. Wade*, 410 U.S. 113,159 (1973).

Alstyne develops this same point in a recent article offering an outline of a Supreme Court decision overruling *Roe* but leaving the Court's privacy jurisprudence intact.[50] This is crucial because, should a woman claim that a law prohibiting abortion infringes her right to freely exercise her religion, the state can then assert its countervailing compelling interest in protecting preborn human life.

RFRA's opponents assert that, even given *Roe*'s reversal, a free exercise claim provides "the potential for a 'safe harbor' for abortion...and, thus, provide[s] an opportunity for a future Supreme Court to protect the abortion right."[51] This is very curious since the author of this position himself has written elsewhere that "the free exercise clause provides no protection for abortion" after the reversal of *Roe*.[52]

In their later analysis, Bopp and Coleson address this claim of apparent contradiction by saying it "misses a point which repeatedly gets lost in this discussion, e.g., that Mr. Bopp's article concerns arguments made under the Free Exercise Clause of the Constitution while the present discussion must focus on claims under the RFRA."[53] Bopp's conclusion that the free exercise clause provides no basis for abortion rights was made **before** *Smith*, when the traditional compelling interest standard still prevailed. RFRA restores precisely that same standard; therefore, Bopp's conclusion applies with equal force to RFRA. RFRA tracks the language of the free exercise clause and the Supreme Court's traditional interpretations of that provision. Moreover, RFRA states explicitly its purpose "to restore the compelling interest test as set forth in" those precedents.

Essentially, RFRA's pro-life opponents take the unusual position that the Supreme Court will ultimately be willing to implement through a statute such as RFRA what it chose to eliminate from constitutional law by overruling *Roe v. Wade*.

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[50] Van Alstyne, "Closing the Circle of Constitutional Review from *Griswold v. Connecticut* to *Roe v. Wade*: An Outline of a Decision Merely Overruling *Roe*," 1989 *Duke Law Journal* 1677.

[51] *Bopp Memo* at 4.

[52] Bopp, "Will There Be a Constitutional Right to Abortion After the Reconsideration of *Roe v. Wade*?," 15 *Journal of Contemporary Law* 131,156 (1989).

[53] *Bop & Coleson Analysis* at 9 n.6.

The Congressional Research Service similarly concluded that while "[free exercise] claims could be made....it seems doubtful that most such claims would have any likelihood of success."[54]

Ironically, opposing RFRA means opposing an essential pro-life weapon. As Tom Glessner, president of the Christian Action Council, points out:

> the *Smith* decision has created the very real possibility that health care providers could be required to refer or participate in abortion procedures, religious convictions to the contrary. Recent pro-abortion legislation in Maryland raises this concern in a very substantial way. Religiously motivated medical workers and institutions must have the freedom to refrain from participation in abortion-related procedures. The *Smith* decision endangers this freedom while the RFRA would restore needed protection for this type of religious conviction which is so crucial to our cause.[55]

3. Effect of a successful free exercise challenge

For those of us who believe that human beings have a fundamental right to life that exists from conception, any abortion is the taking of a human life. Thus the chance that any legislative enactment could open up new avenues for permitting abortions must be taken very seriously. It is impossible to say that no judge anywhere will contemplate, or even partially accept, the arguments made by abortion advocates in the free exercise context. We must also remember, however, that a successful free exercise challenge to a generally applicable statute results in the **individual** being exempt from that statute. It would remain in force, fully applicable to everyone else in the particular jurisdiction.

4. Other opinions on the pro-life objection

The opinion of Professors McConnell, Gaffney, and Laycock and of two separate analyses by the Congressional Research Service have already been noted. The Christian Action Council and Christian Legal Society now strongly support RFRA. On November 22,

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[54] Ackerman, *supra* note 7, at 28.

[55] Letter from Thomas A. Glessner to Pro-Life Leaders, dated March 1, 1991.

1991, the following pro-life organizations issued a letter stating that "[b]ased upon our own independent analysis, we do not believe that this legislation could be used to secure a broad, new right to abortion."

Agudath Israel of America
Christian Life Commission, Southern Baptist Convention
Coalitions for America
Concerned Women for America
General Conference of Seventh-Day Adventists
Home School Legal Defense Association
National Association of Evangelicals
Rabbinical Council of America
Traditional Values Coalition
Union of Orthodox Jewish Congregations of America

Noted constitutional attorney William Ball, after studying NRLC's position, came to conclusions similar to those in this analysis. He stated in his own 17-page analysis that "pro-abortion plaintiffs' standing to sue is not created or improved by the RFRA,"[56] that RFRA "would pose no danger to pro-life laws,"[57] and that NRLC's proposed amendment "would be improper."[58] He agreed, again writing prior to Justice Thomas' appointment, that "a majority of the present Supreme Court holds that there is a compelling state interest in the protection of the unborn throughout pregnancy."[59] He concluded that objections by RFRA's pro-life opponents "are not well founded, or are at best extremely speculative. That being so, the political effect of publicizing them would be disastrous to the effort to pass legislation freeing religion from the threat of *Smith*."[60]

A month later, Mr. Ball changed his position, primarily because the coalition backing the legislation contains liberal organizations which support abortion rights.[61] He offered no substantive arguments refuting his earlier lengthy and detailed analysis.

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[56] Ball, Memo to Interested Parties, February 27, 1991, at 14.

[57] *Id.* at 6.

[58] *Id.* at 10.

[59] *Id.* at 8.

[60] *Id.* at 16.

[61] Letter from William Bentley Ball to Marc Stern, dated March 26, 1991.

C. **Representative Smith's Bill**

On November 26, 1991, Representative Chris Smith introduced H.R.4040, the "Religious Freedom Act," which he argues is intended to reverse *Smith* but "makes it clear that the legislation cannot be used to secure a right to abortion or abortion funding."[62]

The Smith bill is an early draft of RFRA with three exceptions added. Its findings section contains the "government should not burden conduct **motivated** by religious belief" language that NRLC once opposed when contained in RFRA. The bill further states:

> (2) Nothing in this Act shall be construed to authorize a cause of action by any person to challenge--
>
> (A) the tax status of any other person;
>
> (B) the use or disposition of government funds or property derived from or obtained with tax revenues; or
>
> (C) any limitation or restriction on abortion, on access to abortion services or on abortion funding.

The Smith bill is unacceptable for at least three basic reasons. First, RFRA is already abortion-neutral for the reasons articulated above. As such, the third of H.R.4040's exceptions is unnecessary and will thwart passage of legislation critically necessary for restoring religious liberty.

Second, the other two exceptions could actually do further damage to religious liberty. In particular, the second provision would prohibit any cause of action which involves "the use or disposition of government funds." This language may be intended to prevent challenges to a religious person or institution's participation in government programs; however, such claims are handled under the establishment clause, not the free exercise clause.[63]

This second exception could be construed to endanger the right of religious persons and institutions to equal participation in government programs. In *Witters v. Washington Dept. of Services for the Blind*,[64] for example, a blind student sought to use his government

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[62] Letter to Colleagues from Rep. Chris Smith, dated November 26, 1991, at 1 (underline in original).

[63] See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988).

[64] 474 U.S. 481 (1986).

vocational rehabilitation money to study for the ministry. In *Sherbert v. Verner*[65] and *Thomas v. Review Board*,[66] the plaintiffs were denied unemployment compensation because of religiously motivated conduct. A court could reasonably interpret H.R.4040 to foreclose similar claims in the future since they involve "the use or distribution of government funds." This would create the bizarre situation of a bill claiming to establish the test set forth by the Supreme Court in *Sherbert* being used to deny the claim that gave rise to that very case. These and other results further threatening religious liberty are more likely than the scenario painted by RFRA's pro-life opponents.

The Congressional Research Service concluded of the Smith bill's exceptions: "In sum, the first two limitations...appear to guard against claims that are generally not pursued on free exercise of religion grounds. The third limitation appears to preclude claims that likely could not be pursued successfully under the RFRA or the RFA anyway, or...could still be successfully pursued apart from the RFRA or RFA."[67]

Third, H.R.4040 represents a very dangerous approach to religious liberty issues. It invites Congress to pick and choose religious practices for protection. Congress could just as easily target "politically incorrect" practices such as employment decisions by churches or ministries based on religion, gender, or sexual preference; parental decisions to educate children at home; parental objections to curriculum content in public schools; or objections by health care workers to participating in abortions. The Coalition for the Free Exercise of Religion rightly rejected that view and insists that any bill to overturn the *Smith* decision should enforce the fundamental right to religious exercise by restoring a standard of review and should not serve as a code of approved or disfavored religious practices.

V. CONCLUSION

The Supreme Court's decision in *Employment Division v. Smith* dealt a devastating blow to religious liberty in America. The Religious Freedom Restoration Act enforces the fundamental right to religious exercise by restoring the high burden on the government to justify its actions that burden religion. RFRA is a religious freedom bill, not an abortion bill. Injecting a spurious abortion-rights argument into the debate unnecessarily splits the pro-life movement and suggests that the right to life and the right to freely exercise religion are mutually exclusive. They are not. The Smith bill is not only unnecessary, since RFRA is already abortion-neutral, it could actually further erode the fragile state of religious liberty in America.

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[65] 374 U.S. 398 (1963).

[66] 450 U.S. 717 (1981).

[67] Ackerman, *supra* note 12, at 29-30.

Senator KENNEDY. Thank you.
Ms. Strossen.

STATEMENT OF NADINE STROSSEN

Ms. STROSSEN. Mr. Chairman, Senator Hatch, it is a pleasure to be here, and I want to especially thank Senator Hatch for his kind words about the ACLU.

Senator HATCH. I was more than pleased to say them, I will tell you.

Ms. STROSSEN. Thank you. My colleague, Mr. Thomas, I think used very dramatic, but not overly dramatic language when he described the Supreme Court's decision in *Smith* as the Dred Scott of first amendment law. I would like to play out that analogy and say, by the same reasoning, that would make this act, the Religious Freedom Restoration Act, the civil rights act of first amendment law. It is that important, and I am very, very honored to have a chance to support it.

Now, I do think the name here is very important—Religious Freedom Restoration Act. This is not a radical step. We are simply going back to where we were for a generation before the Supreme Court took the radical step of eviscerating free exercise law, in essence, reading it out of the Constitution. So when you hear from people such as Mr. Fein about the parade of horribles that would occur if this act went into effect, I think past history is proof that we did not, in fact, see those horribles.

You have heard a lot about the extent to which the *Smith* decision has been criticized by a wide spectrum of opinions, starting with Justice Sandra Day O'Connor, hardly a radical member of the Court herself. I think that one of the most striking things to me is looking at the decisions that have been written by the lower courts that have been forced to enforce this new version of the law. You had one example in Mr. Yang's case where Judge Pettine was forced very reluctantly, against his heart, against his soul, against his intellect and his understanding of the free exercise clause, to deny that family's claims.

I have chosen just one of the many passages that have come from lower court judges expressing their agony and their disagreement in being forced to comply with this revision of the law. It comes from a decision by the Eighth Circuit called *Salaam* v. *Lockhart.* Ironically, this was a prisoner's religious freedom claim, and as the Senators probably know, even before *Smith* prisoners had virtually no religious liberty; indeed, virtually no constitutional rights. Therefore, the Eighth Circuit noted that the *Smith* didn't make prisoners any more soft than they already were in terms of free exercise rights. It then went on to make the following very poignant observation. "*Smith* does not alter the free exercise rights of prisoners. It simply brings the free exercise rights of other citizens closer to those of prisoners." What a sad commentary for our Nation, with its proud heritage of religious liberty.

Now, an especially troubling aspect of this decision has been touched on already by Mr. Montgomery, so I will just reinforce that it is particularly troubling that the Supreme Court showed such a callous view toward the religious rights, and, by analogy,

other constitutional rights of the disempowered, the unpopular, the minority religious and racial groups, turning on its head our understanding that the primary purpose of the free exercise clause and other provisions of the Bill of Rights was precisely to protect those disempowered minorities.

Unfortunately, the Court has—I agree with Mr. Montgomery—turned away from its role to be the guarantor of those rights. It has thrown them back into the political process. It is unfortunate, with all due respect, that we do find ourselves here, in effect, hat in hand, begging you for what should be constitutional rights—in Mr. Farris' view, God-given rights. We shouldn't have to be here begging you for them.

On the other hand, the genius of our constitutional system is that it does have a system of divided and checked governmental powers, so that when, as in this case, the Supreme Court has abandoned its role as the guarantor of religious liberty, fortunately, thanks to our Constitution, we can turn to you as an alternative source of protection.

Now, Mr. Fein says that you, in passing this law and restoring religious freedom, would be invading that sacred territory of States rights, and he raises that old bugaboo of federalism. I thought that was an argument that had been lost many years ago, certainly as long ago as 1964 with the Civil Rights Act. But I think this Congress is acting in its highest tradition, and its members are doing their best to uphold the Constitution, as, of course, you all take the oath to do, when you restore rights even that the Supreme Court has chosen not to protect for us.

I would like to briefly say something about the abortion issue. Again, I think this is a red herring that has been thrown into this debate. I think there are four basic reasons why this concern that RFRA will increase abortion rights is fundamentally flawed. I will just list them and then I would like to elaborate on one that nobody has yet addressed.

First, RFRA does not grant any additional abortion rights beyond those that are guaranteed by the Constitution. I am going to come back and elaborate on that, but let me also note that, secondly, under either the Constitution or RFRA, any religiously-based abortion claim is very unlikely to win. The ACLU having been on the losing side of many of those in the past, I am very well qualified to make that observation.

Third, if RFRA has any impact on the abortion issue, it will be to bolster the rights of those who are conscientiously opposed to abortion, not to bolster the rights of those who are abortion advocates. And, finally, and this point was made by Mr. Farris, if you consider all of the issues that this law affects, the so-called pro-life and pro-family movement will clearly be better off with RFRA.

Let me just touch briefly on that first point I made, Senators, because I don't think anybody else has articulated this. RFRA grants no additional abortion rights beyond those guaranteed by the Constitution. We have two basic constitutional scenarios. One is that *Roe* and *Casey* are still good law, in which case there is a constitutional right granted on a theory of privacy. RFRA doesn't add anything to that.

The other scenario is that *Roe* and *Casey* are overturned and there no longer is a privacy rationale under the Constitution for abortion rights. However, under *Smith*, diluted as its religious freedom standard is, *Smith* still would allow a religiously based abortion claim to trigger strict scrutiny of any restriction on abortion, for this reason. As you recognized, Senator Hatch, even those dissenters in *Casey* who wanted to overturn *Roe* v. *Wade* recognized that the right to choose an abortion is a liberty interest which is protected under the 14th amendment.

Now, the majority opinion in *Smith* said if you have a hybrid claim, a free exercise claim that is coupled with another constitutional right—and one of the examples they gave was a liberty interest. They mentioned the old cases involving parents' right to educate their children in religious schools. The majority opinion said if you add those two together, you have a hybrid claim which will trigger strict scrutiny. So, that would remain the case even without RFRA. RFRA does not add anything by way of rights to argue a religiously based abortion claim that does not already exist under the Constitution.

Now, Senator Hatch, you are looking troubled, so I want to remind you that my second point is, both under the free exercise clause and under RFRA, that claim, in my view, would be very unlikely to succeed, and I won't go on any longer. If you want to question me about that later on, I would be happy to elaborate.

In conclusion, I would just like to reiterate the extraordinary importance of this act and urge you to undo the Dred Scott of first amendment law and pass the civil rights act of first amendment law.

Thank you.

[The prepared statement of Ms. Strossen follows:]

STATEMENT OF

NADINE STROSSEN
PRESIDENT

AND

ROBERT S. PECK
LEGISLATIVE COUNSEL

AMERICAN CIVIL LIBERTIES UNION

ON

S. 2969

"THE RELIGIOUS FREEDOM RESTORATION ACT"

REGARDING

PROTECTION OF RELIGIOUS LIBERTY

BEFORE THE

U.S. SENATE JUDICIARY COMMITTEE

SEPTEMBER 18, 1992

Summary of Testimony

The American Civil Liberties Union strongly supports enactment of S. 2969, the Religious Freedom Restoration Act. The proposed legislation should be acted upon quickly and affirmatively to restore our nation's strong constitutional commitment to religious freedom. A devastating blow to religious liberty was struck by the U.S. Supreme Court in their 1990 decision in Employment Division v. Smith, in which the court abandoned the lessons of constitutional history, judicial precedent, and the Court's own rules by deciding questions not properly before it. The result was to give government much greater authority over religious beliefs and practices than any reasonable person could have previously imagined.

In Smith, the Court abandoned the compelling-interest justification that it has required whenever government encroaches on constitutionally protected fundamental rights. Previously, the Court applied that standard in religious freedom cases and continues to apply it in other rights cases. Instead, the Court substituted a much weaker standard, upholding any government burden on religious practices so long as it is neutral and generally applicable. In a series of cases applying Smith, the courts have already begun to indicate how profoundly religious freedom is endangered. Without action to end the damage of the Smith precedent, the dangers to religious freedom will grow more severe and will be much harder to redress.

The Religious Freedom Restoration Act simply and elegantly addresses the problems caused by the Smith decision by providing a statutory right that goes beyond the constitutional right as now interpreted by the Supreme Court. It once again mandates that no government may burden a person's free exercise of religion unless justified by a compelling interest and tailored to do so by the least restrictive means to those religious interests. By adopting this standard, the Act merely reflects what had been the constitutional standard under the First Amendment prior to Smith. It does not decide any issue, but merely returns the issue to its previous standard of analysis. Congress has the power to restore this standard by virtue of the Fourteenth Amendment and because, though it could never take away constitutional rights, it always has the power to enhance those rights.

The ACLU respectfully asks that H.R. 2797, the Religious Freedom Restoration Act, be approved by Congress this session.

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to present testimony on behalf of the American Civil Liberties Union concerning H.R. 2797, the Religious Freedom Restoration Act. The American Civil Liberties Union is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and, most particularly, in the Bill of Rights. Throughout its 70-year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment.

The ACLU strongly supports H.R. 2797 because it restores religious liberty to its rightful place as a preferred value and a fundamental right within the American constitutional system. The First Amendment's guarantee of the "free exercise of religion" has proven to be the boldest and most successful experiment in religious freedom the world has known. That is, until recently.

In a sweeping decision two years ago that struck at the heart of religious liberty and evinced disdain for the very purposes of the Bill of Rights, the Supreme Court reduced constitutional protections for religious practices to what is otherwise already available under the Free Speech and Equal Protection Clauses. In essence, the Court wrote the First Amendment's guarantee of the "free exercise of religion" out of

the Constitution. The Court reached this conclusion by ignoring constitutional history, precedent, and the Court's normal practices and procedures. Congress should correct this severe constitutional misjudgment with its devastating consequences, and do so quickly. H.R. 2797 does precisely that.

I. The Supreme Court's Decision Abandoned Established Constitutional Principles.

The case that placed all religions in jeopardy because of the Court's decision began as a relatively simple unemployment compensation case. Alfred Smith and Galen Black are Native Americans and members of the Native American Church. They were employed at a private drug and alcohol rehabilitation facility, but were fired after they admitted ingesting peyote as a sacrament in a religious ceremony while off-duty. Eating peyote is considered an act of worship and communion for members of the Native American Church that dates back at least 1400 years. Moreover, the church regards the non-ritual use of peyote as a sacrilege. Peyote is also a controlled substance. Because of its fundamental importance to the Native American religion and despite its hallucinogenic qualities, the federal government and at least 24 states exempt Native Americans who use peyote in religious ceremonies from drug laws. Oregon did not at the time; it now does.

After being fired, Smith and Black sought unemployment benefits and were approved for compensation by the state hearing

officer. The state statute disallowed benefits when the applicant was discharged for "misconduct," but the officer decided that following one's religious beliefs could not be regarded as misconduct. In doing so, the hearing officer followed the precedent set in the relevant landmark Supreme Court decision, Sherbert v. Verner,[1] which held that the State could not "force [an applicant for unemployment benefits] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the benefits of her religion in order to accept work, on the other hand."[2] Adele Sherbert, a Seventh-Day Adventist, had refused to work on Saturdays, the Sabbath of her faith, and had been fired from her job. The Supreme Court ruled that the state could not condition her eligibility for unemployment benefits on giving up a tenet of her religious faith unless the government could demonstrate "any incidental burden on the free exercise of [her] religion may be justified by a compelling state interest."[3]

In Smith's and Black's cases, the administrative appeals board reversed the hearing officer's decision in favor of the Native Americans. They too applied the Sherbert precedent but determined that peyote use did constitute misconduct. The board

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[1]374 U.S. 398 (1963).

[2]Id. at 404.

[3]Id. at 403.

said that the state had a compelling interest in proscribing the use of illegal drugs, sufficient to overcome religious objections. Smith and Black successfully appealed to the courts. The Oregon Supreme Court found that whatever compelling interest may exist for the State to enforce its criminal laws does not apply with respect to unemployment benefits. On remand from the U.S. Supreme Court, the Oregon Supreme Court reached the same result, finding that the First Amendment guarantee of religious freedom required an exemption for religious use even if the Oregon criminal law did not explicitly provide one.

The case reached the U.S. Supreme Court for its ultimate decision with Oregon officials asserting that the state had a compelling interest in preventing the illegal use of drugs in every possible way, including the denial of unemployment benefits.[4] Smith and Black meanwhile countered that the State's interest in preventing people from benefiting from public funds for their misconduct was not a sufficiently compelling interest to overcome the burden it placed on their religious beliefs. Neither party suggested that the Supreme Court abandon the compelling-interest test; that issue was neither argued nor briefed.

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[4]Subsequent to the Supreme Court's decision, Oregon enacted an exemption to its controlled substances act covering the religious use of peyote.

The Court's decision in Employment Division v. Smith,[5] stunned all who hold religious liberty dear. In a concurring opinion, Justice Sandra Day O'Connor accurately stated that "today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[6] Three other justices dissented from the Court's ruling. The Court's central holding found that an individual's religious beliefs do not relieve that person from compliance with an otherwise valid and neutral law of general applicability.[7] In so ruling, the Court consciously echoed the 1940 decision in Minersville School District v. Gobitis,[8] where the Court had held that school boards had the authority to require students to participate in flag-salute ceremonies even if the students had sincere religious objections. In Gobitis, the Court wrote: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a

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[5]494 U.S. 872 (1990).

[6]Id. at 891 (O'Connor, J., concurring).

[7]Id. at 879.

[8]310 U.S. 586 (1940), overruled, West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

general law not aimed at the promotion or restriction of religious beliefs."[9] The Smith Court quoted that statement from Gobitis approvingly. Yet, the Court disingenuously failed to note that Gobitis was the subject of unprecedented scholarly and editorial criticism when it was issued and was expressly overruled in three short years in West Virginia State Board of Education v. Barnette,[10] perhaps the most celebrated and quoteworthy Bill of Rights decision in judicial history.

The Smith Court, nonetheless, appears to have revived Gobitis. In Gobitis, Justice Frankfurter's majority opinion asserted that courts were ill-equipped to weigh the religious claims against the school board's decisions.[11] In Smith, Justice Scalia's majority opinion asserts that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[12] In Gobitis, Frankfurter advises those aggrieved by general laws that burden their religious beliefs to rely upon the "remedial channels of the democratic process."[13] In Smith,

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[9]310 U.S. at 594.

[10]319 U.S. 624 (1943).

[11]310 U.S. at 597-598.

[12]494 U.S. at 889-90 n. 5.

[13]310 U.S. at 599.

Scalia similarly advises that those seeking vindication of values enshrined in the Bill of Rights "are not thereby banished from the political process."[14]

Scalia went on in Smith to recognize the difficult position the decision placed those whose religious beliefs were outside their particular community's mainstream:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[15]

He went on to describe strict scrutiny of religious freedom claims as a "luxury" that this pluralistic nation could no longer afford.[16]

Interestingly, Barnette, the case that overruled Gobitis, provides a complete answer to both Justice Frankfurter, at whom it was aimed in 1943, and Justice Scalia today. In Barnette, Justice Jackson eloquently wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and

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[14] 494 U.S. at 890.

[15] Id.

[16] Id. at 888.

> property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[17]

The Bill of Rights, added at the people's insistence as the price of ratification of the Constitution, is a limitation on the power of government. Since the First Amendment affirmatively bars the government from "prohibiting the free exercise of religion," it speaks to a political and constitutional philosophy that is centered on individual liberty and familiar with the political process's inability to protect that liberty at all times. Without warning and without having the issue properly placed before it, the Court abandoned that guiding philosophy.

As a result of Smith, no longer would the Court balance the interests between religious rights and an asserted governmental regulatory authority. In its place, the Court presumes that government has whatever power it claims even if it burdens religious practices. The only restrictions on that public power are that religious speech cannot be treated with less respect than other speech protected by the First Amendment's free-speech guarantee and that religious practices cannot be treated with discriminatory intent. As members of this committee know from its experience in the field of civil rights, it is much more difficult for someone to prove discriminatory intent than to prove discriminatory effect. The Court's decision leaves one to

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[17] 319 U.S. at 638.

wonder why the Framers of the Bill of Rights bothered to have a Free Exercise Clause if that is all that it was intended to accomplish.

The Court's decision not only turned its back on longstanding precedent, but also on a recent promise it had made. In 1987, the Court had said with respect to religious freedom that it would not approve a judicial standard that "relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."[18] In Smith, the Court reneged on that pledge and served notice that it will no longer stand as a bulwark of religious liberty.

II. The Smith Decision Is at Odds with Constitutional History.

The rights enshrined in the First Amendment have traditionally been considered preferred rights. They are fundamental to a constitutional system of limited government and individual liberty. These rights provide many of the reasons why this land was originally settled and why it has prospered as it has. It cannot be disputed that much of what was to become the United States was settled by those who sought to escape the religious intolerance, persecution, and conflicts of Europe. Many of the American colonies were founded as a refuge for religious dissenters -- Maryland by Catholics, Rhode Island for

[18]Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987), quoting Bowen v. Roy, 476 U.S. 693, 727 (1986)(O'Connor, J., concurring in part, dissenting in part).

Protestants and other dissenters, and Pennsylvania and Delaware by Quakers, to name a few.

William Penn, founder of Pennsylvania, was deeply dedicated to the concept of religious liberty, especially after he was prosecuted in an infamous trial in 1670 for the crime of preaching on Gracechurch Street. His vindication predisposed him to making a guarantee of religious liberty a part of the frame of government he gave Pennsylvania in 1682 as well as the subsequent charter that went into effect in 1701. The latter's very first article proclaimed religious freedom "[b]ecause no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship."[19] The importance Penn attached to this provision is evidenced by its status as the only portion of that charter that could not be amended.[20]

These principles were carried over after the colonies declared their independence. Eleven states included a provision guaranteeing some degree of religious liberty in their foundational documents. Regarded at the time as "the rising sun of Religious liberty,"[21] the Virginia Declaration of Rights

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[19]Penn. Charter of Privileges art. I (1701), reprinted in Sources of Our Liberties 256 (R. Perry ed. 1978).

[20]Id. art. VIII, at 259.

[21]R. Rutland, The Birth of the Bill of Rights, 1776-1791, at 84 (1983).

viewed religion as a matter of "reason and conviction" that should be exercised freely "according to the dictates of conscience."[22] To the extent these early state constitutions empowered governments to regulate religious practices, the government's power was limited to those practices "repugnant to the peace and safety of the State,"[23] a very high standard.

It is important to remember that the federal Constitution could not have been ratified without the promise of a bill of rights that would specify further limitations on government power that proponents of the Constitution claimed were implied anyway. When the Bill of Rights was drafted, there was never any doubt that religious freedom would be one of those enumerated rights. In an earlier debate in Virginia over Thomas Jefferson's Bill for Establishing Religious Freedom, James Madison, father of both the Constitution and Bill of Rights, wrote that to grant the legislature a power to abridges religious freedom is to agree that legislators "may sweep away all our fundamental rights,"[24] claim all possible powers, and render a constitution meaningless.

Madison certainly would have been appalled at the Court's

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[22]Va. Dec. of Rts. art. 16 (1776).

[23]Ga. Const. art. LVI (1777). Similar provisions were contained in the constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, and South Carolina.

[24]Memorial and Remonstrance (1785), reprinted in, The Mind of the Founder 13 (M. Meyer ed. 1981).

Smith decision. To think that the courts have no special responsibility to act on the First Amendment's guarantee of religious freedom is to render the Constitution meaningless. It also undoes Madison's prediction during the debate over the Bill of Rights in the First Congress that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[25] The Religious Freedom Restoration Act would again make the courts a bulwark of religious liberty.

III. Government Should not Encroach on Fundamental Rights, such as Religious Liberty, without a Compelling Interest.

Before Smith, it was a fundamental premise of constitutional law that fundamental rights could not be infringed without the justification of a compelling state interest and, even so, the regulation had to be narrowly tailored to serve that interest without unnecessarily burdening those rights. Just one year before the Smith decision, the Supreme Court unanimously ruled that the compelling interest standard applied to the speech and

[25] 1 Annals of Cong. 457 (J. Gales ed. 1834)(June 8, 1789).

associational rights of political parties.[26] In that case, the Court correctly invalidated, inter alia, regulations that affected the organization, composition, and internal rules of political parties. Because of Smith, state and local governments have the power to regulate the kinds of internal rules of religious bodies that they would be constitutionally powerless to regulate for political parties. Obviously, something is amiss when religious practices do not receive at least the same level of constitutional protection as political parties.

Sherbert, as previously noted, clearly relied on the compelling interest standard. In the same year, in NAACP v. Button,[27] the Court declared that "[t]he decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms." Ever since, the Court has consistently applied the standard to issues of free speech,[28] symbolic speech,[29] campaign

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[26]Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989).

[27]371 U.S. 415, 438 (1963)(applying the compelling interest standard to free expression and the right to judicial redress).

[28]Sable Communications v. FCC, 492 U.S. 115, 126 (1989) and Boos v. Barry, 485 U.S. 312 (1988).

[29]United States v. O'Brien, 391 U.S. 367 (1968).

expenditures,[30] freedom of the press,[31] the right of association,[32] right to picket,[33] right of access to criminal trials,[34] the right to vote,[35] the right of ballot access,[36] the right of interstate travel,[37] the right to marry,[38] and the right to privacy.[39]

Until Smith, religious freedom enjoyed similar protection. The Smith Court itself acknowledged the relevance of the compelling interest test to unemployment compensation cases, but

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[30]Buckley v. Valeo, 424 U.S. 1 (1976).

[31]Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

[32]NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[33]Carey v. Brown, 447 U.S. 455 (1980).

[34]Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[35]Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[36]Williams v. Rhodes, 393 U.S. 23 (1968).

[37]Shapiro v. Thompson, 394 U.S. 618 (1969).

[38]Zablocki v. Redhail, 434 U.S. 374 (1978).

[39]Carey v. Population Services International, 431 U.S. 678 (1978); Roe v. Wade, 410 U.S. 113 (1973); and Griswold v. Connecticut, 381 U.S. 479 (1965).

65-604 O - 93 - 7

treated the matter before it as a criminal case. Yet, this distinction had never been used before and makes no sense. Certainly, a state seeking to enforce a criminal law ought to have a compelling interest when that law abridges religious freedom. As Chief Justice Burger wrote for the Court in Wisconsin v. Yoder,[40] "[w]here fundamental claims of religious freedom are at stake, . . . [the Supreme Court] must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that flow from recognizing the claimed . . . exemption." The decision went on to find that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[41] Thus, the Court applied a compelling interest test to find that a Wisconsin penal statute that enforced the state's compulsory school attendance law could not be applied to the Amish after the eighth grade over their religiously based objections. To emphasize, Yoder did involve a criminal law.

In Larsen v. Valente,[42] the Court also applied the compelling interest test to the right of religious organizations to solicit contributions from non-members.

Instead of acting consistently with these precedents and

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[40]406 U.S. 205, 221 (1972)(citations omitted).

[41]Id. at 215.

[42]456 U.S. 228 (1982).

dismissing the non-employment compensation cases as immaterial precedents involving hybrid rights, instead of following the constitutional language, American history, and judicial precedent, the Supreme Court reserved enforceable constitutional protection solely to religious speech (as opposed to practices) and to equal treatment among religions.

Religious speech, it said, was fully protected, but not those practices that are prohibited to all religions equally. The absurdity of these distinctions was made apparent centuries ago by Oliver Cromwell's equally cramped view of religious liberty for Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted."[43] If it was previously thought that no such view of government could ever prevail where the First Amendment exists, the Smith decision wiped out that presumption.

Equal treatment is also unsatisfactory as a standard. The substantive guarantees of the Bill of Rights are always stronger than the protections available through the Equal Protection Clause because otherwise neutral laws affect different people in different ways. It would seem neutral, for example, to prohibit headwear in federal buildings. The same rule applies to

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[43] Quoted in McDaniel v. Paty, 435 U.S. 618, 631 n. 2 (1978)(Brennan, J., concurring), quoting S. Hook, Paradoxes of Freedom 23 (1962).

everyone, no matter what their religious beliefs. Yet, Orthodox Jews and Sikhs who cover their heads as part of their religious faith would find themselves faced with a choice of avoiding federal buildings or violating their religious beliefs. The Smith precedent would uphold such a law; the compelling interest test would require some overriding justification, one that we cannot imagine, before it could be upheld.

IV. Without H.R. 2797, Religious Liberty is Gravely Threatened.

In the aftermath of the Smith decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional, religious preferences in church hiring, establishing places of worship in areas zoned for other use, permitting religiously sponsored hospitals to decline to provide abortion or contraception services, sex segregation during worship services, exemptions from mandatory retirements laws, a church's refusal to ordain women or homosexuals, exemptions from landmark and zoning regulations, and the inapplicability of highly intrusive educational rules to parochial schools. These were decisions in areas that society had previously assumed that religious groups had the right to make for themselves and could not be compelled to change just because society thought otherwise. As long as Smith remains the last word on the law, no

longer will the courts prevent government from encroaching on those decisions.

Courts are now reaching decisions that were unthinkable before Smith. Today, you heard about one such case involving a state's insistence on an autopsy over the religious objections of a Hmong family.[44] A similar issue was resolved against a Jewish family in Michigan.[45] In several other cases, churches have been denied the right to make alterations on their properties because of landmark laws.[46] This trend will only continue as state and local officials become used to the permissiveness of the new standard. Before those precedents pile up too high, Congress should restore the pre-Smith standard and stand up for religious liberty.

V. H.R. 2797 is Scrupulously and Properly Neutral on the Issue of Abortion.

It is unfortunate that H.R. 2797 has been held back from passage because a few groups mistakenly claim that it is a stalking horse for establishing a religiously based right to abortion if Roe v. Wade is overruled. The diversity of the

[44]Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

[45]Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990).

[46]See, e.g., St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S.Ct. 1103 (1991).

coalition behind H.R. 2797, including groups who actively oppose each other on the abortion issue, should be substantial testimony by itself that H.R. 2797 gives no advocate an advantage or disadvantage on that issue. The studies of the Congressional Research Service confirm that RFRA will not be a workable vehicle for abortion rights.

Nowhere in the bill is abortion mentioned. Indeed, it is as neutral on this question as the First Amendment is itself. Instead, the claim is made that Roe would be reestablished as a free exercise right by the same court that overrules that landmark precedent. The exposition of this claim is its own refutation. No Court that takes away women's rights to reproductive freedom will then give it back under the guise of religious freedom, particularly not the same one that reached the Smith decision. If Roe is overruled, it will no doubt be because the Court is willing to recognize compelling state interests in controlling this freedom. The same compelling interests that might overcome privacy rights will also be sufficient to overcome any religious claims that might be imagined.

The Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey,[47] provides further support for the proposition that RFRA is unnecessary to those who seek compelling interest analysis for their religiously based abortion claims. In Casey, the Supreme Court recently reaffirmed Roe's

[47]60 U.S.L.W. 4795 (Jun. 29, 1992).

"essential holding" that a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State."[48] The Casey Court also confirmed the "State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health."[49] As a result of this decision, pending challenges to abortion statutes in Guam, Utah, and Louisiana will also not provide a vehicle to overturn Roe. We also know, as a result of Casey, that Roe will continue to be the law as long as membership on the Supreme Court remains unchanged. Therefore, if RFRA were passed, a woman seeking an abortion and asserting religious grounds for the right would be able to obtain one without resorting to a claim under RFRA.

Four justices of the Casey Court indicated their willingness to overrule Roe immediately. If membership on the Court is changed and the new member joins this four-justice minority, Roe would no longer be a viable precedent. It is the claim of those who oppose RFRA that the legislation would reestablish Roe as a religious right once it has been overturned. The assertion is based on faulty reasoning.

In Smith, the Supreme Court characterized the holding in

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[48] Id. at 4798.

[49] Id.

Wisconsin v. Yoder[50] as using strict scrutiny because it was a "hybrid situation," one involving a Free Exercise claim in conjunction with another constitutional protection.[51] Yoder relied, according to Scalia's Smith opinion, on the combination of the rights of parents to direct the upbringing of their children and the right to exercise one's religion freely.[52] Only this combination of constitutionally cognizable claims merited scrict scrutiny, according to the Smith Court. Hence, when a religiously based claim is combined with another interest having some level of constitutional protection, it receives compelling interest analysis.

In Casey, those who would have overturned Roe would have lowered the protection of access to abortion from a fundamental right to a "liberty interest." Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, wrote that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause."[53] Thus, when this liberty interest in abortion rights is properly combined with a religious claim, the Smith decision mandates that strict scrutiny apply. If the

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[50] 406 U.S. 205, 214 (1972).

[51] Smith, 496 U.S. at 881-82.

[52] Id. at 881, note 1.

[53] Id. at 4832 (Rehnquist, C.J., concurring in part, dissenting in part).

courts were to entertain a claim for a religious right to abortion in the event that Roe was overruled, they would evaluate that claim under a compelling interest test even without the passage of RFRA. Thus, it is not abortion-related claims, but virtually all other religious-based claims, that desperately needs the additional protection afforded by RFRA.

It is worth noting that Jewish law requires an abortion when the mother's life is in danger. If a state were not to permit that kind of abortion, certainly a religious claim would be made. And, with or without H.R. 2797, we would expect the claim to be upheld because even in his Roe dissent now-Chief Justice Rehnquist recognized that preventing an abortion to save a woman's life was beyond the State's power.[54] Will other religiously based claims for abortion be made? Probably so, there is no way that legislation can separate out the meritorious claims from those that are not. All legitimately religious-based claims deserve to be measured in the courts by the same yardstick as any other religious-based claim. As to abortion, we expect that religious-based claims made under RFRA will fare no better than they did under the First Amendment.

Some have suggested that language be added to exempt from RFRA's operation a religious freedom claim involving abortion. Any religious freedom legislation that specifically excluded abortion (and no other possible religious freedom claim) would

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[54] 410 U.S. at 173.

violate the very principles it sets out to establish. RFRA is premised on the assumption that the compelling interest test is "a workable test for striking sensible balances between religious liberty and competing governmental interests" and that the legislation is intended "to codify the compelling interest test." It cannot in a second breath state that the compelling interest standard is not available when the religious claim is about access to abortion, or any other disfavored practice. By specifically targeting religious abortion claims, the legislation would discriminate against the religious rights of those who might make such a claim. It then violates even the lax religious freedom standards established in Smith, intentionally targeting some religious claims for different treatment than others. As Justice Sandra Day O'Connor observed, few legislatures "would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."[55] Yet, a provision treating religious abortion claims differently from other religious claims would be precisely this kind of provision. It could not stand up to constitutional scrutiny, and Congress should not be picking and choosing between potential religious claims in determining which ones may be heard in court. We believe, as do the members of the coalition supporting this bill, that all religious claimants deserve their day in court on an equal footing. That does not mean that all will succeed; simply that all should be

[55] Smith, 494 U.S. at 894 (O'Connor, J., concurring).

evaluated according to the same standard.

VI. H.R. 2797 Sets Up a Standard for Review and Does Not Pre-Judge Any Claims.

H.R. 2797 merely returns judicial decision-making in the religious freedom area to the compelling interest standard that the courts apply to all fundamental rights. It does not decide how those claims will be evaluated when the courts balance those interests against legitimate compelling state interests. The courts have had little difficulty in finding a compelling state interest to exist when the government has sought to protect health, safety, or even national security.

Indeed, in Smith, applying the compelling interest standard of review, Justice O'Connor reached the same result as the majority, finding that the state interest in discouraging drug use is sufficiently compelling to justify the denial of unemployment benefits to Native Americans who use peyote. The ACLU believes that is a wrong conclusion, which is why we are separately urging Congress to enact amendments to the American Indian Religious Freedom Act to provide protection to that Native American religious practice and to the sacred sites of traditional Native American religions. It is only because of the unique constitutional status of Native Americans that such result-oriented legislation can be enacted. S. 2969, despite its origins in the Smith case, does not have anything to do with peyote use.

Thus, it should be clear to this Committee that enactment of S. 2969 will not guarantee that claims of religious liberty will always prevail. We invest government with broad and important powers that sometimes override individual liberty. It should, however, not be easy for government to do so -- or official bodies will use that power with substantial frequency.

VII. Conclusion

Unless Congress acts to protect religious liberty, the Court's ruling in the Smith case will have a devastating effect on the free exercise of religion throughout our nation. We urge quick and favorable action on S. 2969.

SECTION-BY-SECTION ANALYSIS.

Section 1. The bill is properly called a religious freedom restoration act because it restores the standard of review that applies to all fundamental rights, returning religious freedom to its rightful place in the hierarchy of constitutional values.

Section 2. The findings correctly acknowledge the importance of religious liberty, the devastating impact that the Smith decision has had and will continue to have, and the need to return to the compelling interest test that previously served liberty and justice so well.

Section 3. The bill properly reestablishes the compelling interest test as the Supreme Court had enunciated it and applied it prior to Smith. Moreover, standing is limited to those whose own practice of religion is burdened by government action and remedies are limited to relief against the government.

Section 4. The bill allows a successful plaintiff to recover attorneys fees in the same manner that others are currently eligible for vindicating constitutional and civil rights.

Section 5. The bill defines key terms.

Section 6. The applicability section states that the act will apply to all currently-in-force laws and future laws. It also clarifies that the authority it confirms for the government should not be construed to permit religious belief to be burdened.

Section 7. The legislation is aimed only at claims made

under the Free Exercise Clause, not the Establishment Clause.

Senator KENNEDY. Thank you very much.
Mr. Bopp.

STATEMENT OF JAMES BOPP, JR.

Mr. BOPP. Thank you, Senator Kennedy. It is indeed an honor to testify before you and Senator Hatch and this committee. I know that someone on the last panel felt that we were disproportionately represented, having one against three, but I understand, Senator Kennedy, you may not share our concerns, but I think you believe that they should be heard and I thank you for that.

I feel like the guy that comes before the committee with the good news/bad news joke. The bad news is that RFRA will protect abortion rights. The good news is that RFRA will protect abortion rights. I am quite familiar with the records of both you two gentlemen. Senator Kennedy is a prime sponsor of the Freedom of Choice Act and believes strongly in the protection of the right to abortion. So the good news to you is that RFRA protects the right to abortion, even if your FOCA doesn't get passed.

To you, Senator Hatch, I know that you have been one of the leading spokesmen and protectors of the right-to-life movement. The bad news is that you are being asked, and, in fact, it is being demanded of you, in my view, that you accept the protection of abortion rights in exchange for and as the price for the protection of religious liberty. I urge you not to do that.

This is no hypothetical future concern; this is an immediate concern. *Casey* upheld regulations on abortion under less than a strict scrutiny standard. Whenever the ACLU has found itself in the rare but unfortunate situation of losing restrictions on abortion, as they did in the *Hyde Amendment* case, and now as they have in the *Casey* case, they proceed to engage all the other theories that they have argued so vigorously since 1960.

One of the primary arguments is that the free exercise of religion prevents the State from impinging on the abortion decision of a woman. This has occurred once prior to the *Casey* decision, and that is the *Hyde Amendment* case. And as you know, Senators Kennedy and Hatch, the district court agreed with the ACLU's first amendment claim that the first amendment was impinged by the Hyde amendment not funding abortion, and therefore, using compelling interest analysis, struck down the Hyde amendment.

Now, that went on appeal to the U.S. Supreme Court. The U.S. Supreme Court did not deal with the merits of the case. What they dealt with was the standing question, and the Court held that the plaintiffs in that case did not have standing, and I quote from the case because it has been misstated before this committee. The Court said the reason they didn't have standing is, "because none alleged, much less proved, that she sought an abortion under compulsion of religious belief." In other words, the person had to show that they were compelled to have an abortion.

Now, under *Thomas,* looking at it on the flip side, you would have to show that the religion forbade something that the State required. So "compelled" or "forbid." The question then is, does this bill maintain that standard, and you will note in the bill that it does not refer to compulsion or forbidding. It refers to "The Gov-

ernment shall not burden a person's exercise of religion." Now, it doesn't say exercise of religion compelled or forbidden by the religion.

The original formulation was "motivated." People on this panel have argued that this bill protects motivated activity in writing and in testimony before the House. The chief sponsor in the House, Representative Solarz, testified. When asked, would you be willing to limit the bill only to compelled claims, he said, "I would be reluctant to limit it," the bill, "to actions compelled by religion, as distinguished from actions which are motivated by sincere beliefs."

I challenge members of this committee and Senator Hatch to suggest that this be limited to "compelled" and "forbidden," as they claim this bill does. They will resist it, and the effect of that resistance and the change in standard to "motivated" is to overrule *Harris* v. *McRae. Harris* v. *McRae,* on standing, will no longer protect restrictions on abortions from claims motivated, in which a religious belief is a significant constituent element in the reason why a person is pursuing a particular approach, or wants an exemption under a particular law. They are repealing *Harris* v. *McRae* that stands in the way of their claims that would protect their religion.

Now, this is an immediate concern because of *Casey. Casey* demonstrates that when the court uses a standard less than compelling interest—undue burden, by the joint opinion; liberty interest, rational basis, in the dissent—that they will uphold restrictions. If they impose a compelling interest standard, then the result will be striking down those regulations—informed consent, waiting period, parental notification—as they did under *Akron* and under *Thornburgh.*

Now, it seems that the ACLU is trying to distance themselves from not only their testimony in the House, but also in their long line of litigation on this matter where they have consistently made these claims. Ms. Strossen testified in the House as follows, "Will other"—that is, other than life of the mother claims to an exemption for abortion; that is what she meant—"Will other religiously based claims for abortion be made? Yes, and they deserve to be measured by the court by the same yardstick as any other religiously based claims." And what are those yardsticks? If it is a religious motivation, then you have standing, and then you apply a compelling interest and we know we lose.

So this is not a theoretical, abstract, in the future, worry about *Roe* v. *Wade* and *Casey* being overturned. It is here and now, and that is the reason why the organizations that litigate abortion cases, not people that litigate free exercise or people that are involved in other areas of the law—people that litigate abortion cases, the National Right to Life Committee, the U.S. Catholic Conference, the Americans United for Life, the Rutherford Institute, that are in court facing these claims and trying to resist these claims believe that this bill must have a provision in which abortion is excluded.

So, as a result, it is our view that we have a situation where this bill is not being held hostage by us. It is being held hostage by those that insist, as Ms. Strossen testified, that abortion claims be treated under the same standard as other religiously based claims.

That means a compelling interest analysis, and that means that the unborn loses in court.

They are holding this bill hostage. They insist upon this linkage of abortion and other religiously based claims. I think that is a price that this committee and this Congress should not pay for this bill.

Thank you.

[The prepared statement of Mr. Bopp follows:]

65-604 O - 93 - 8

WHY THE RELIGIOUS FREEDOM RESTORATION ACT MUST EXPRESSLY EXCLUDE A RIGHT TO ABORTION

TESTIMONY OF

James Bopp, Jr., J.D.
General Counsel
National Right to Life Committee, Inc.

Before the Committee on the Judiciary
United States Senate

September 18, 1992

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE DANGER TO LEGAL PROTECTION OF THE UNBORN POSED BY THE RFRA IS REAL. 2

A. *The RFRA Poses Real Dangers to the Legal Protection of the Unborn.* 3

B. *Pro-Abortion Advocates Have Forcefully Claimed for Over Two Decades That Free Exercise of Religion Protects Abortion on Demand.* 7

C. *Standing to Sue Is Made Easier by the RFRA, Which Would Allow Claims for Any Abortion Claimed to be "Motivated by Religious Belief."* 11

1. The Class of Those Motivated by Religious Belief Would Be Large. 15

2. The Class Would Include Not Just Women Claiming a Religious Exception to Preserve the Life of the Mother But Also for Many Other Reasons. 19

D. *Once a Few Women Are Able to Procure Otherwise Illegal Abortions Via Successful RFRA-Based Claims, Pro-Life Protective Laws Will Quickly Become Unenforceable.* 20

1. Strong Motivation and the Opportunity Created by the RFRA Would Make Full Exploitation of a Free-Exercise Exception to Protective Abortion Statutes Both Attractive and Possible. 21

2. Difficulty of Regulation Would Make Enforcement Implausible. 22

III. A COURT WOULD NOT LIKELY FIND THAT CONGRESS INTENDED TO ESTABLISH OR ENSHRINE A COMPELLING INTEREST IN UNBORN LIFE BY PASSAGE OF THE RFRA WITHOUT AN ABORTION EXCEPTION. 23

A. *The Key to the Interpretation of the RFRA Will Be Congressional Intent, Not Prior Constitutional Law.* . . . 23

B. Roe v. Wade *Has Been Expressly Reaffirmed in* Casey *and No Compelling Interests Were Recognized, So That a Later Court Could Find That Congress Intended to Include Roe's Failure to Recognize a Pre-Viability Compelling Interest in Unborn Life.* 24

1. The Jurisprudential Philosophy of the New Majority on the Court Makes Them Deferential to Congress on Statutory Matters. 25

C. *Even if a Compelling Interest Were Recognized, Because There Are a Number of Ways in Which a State Can Legislatively Favor Childbirth Over Abortion, the Problem Would Remain of Whether a Statute Barring Abortion Would be the Least Restrictive Means to Achieve the State's Objective.* 26

IV. THE LONG HISTORY OF ABORTION LITIGATION AND THE MERITS OF ITS UNIQUE STATUS MAKE IT AN APPROPRIATE EXCEPTION TO BE SPELLED OUT IN THE RFRA. 27

V. IT IS HIGHLY UNLIKELY THAT ANY PROTECTIVE ABORTION STATUTE WOULD BE ENACTED WITHOUT AN EXCEPTION TO PRESERVE THE LIFE OF THE MOTHER, SO THAT RELIGIONS REQUIRING LIFE SAVING ABORTIONS WOULD HAVE THEIR CONCERNS MET EVEN WITH AN RFRA WHICH EXCLUDES ABORTION. 28

VI. CONCLUSION 29

WHY THE RELIGIOUS FREEDOM RESTORATION ACT MUST EXPRESSLY EXCLUDE A RIGHT TO ABORTION

TESTIMONY OF

James Bopp, Jr.[1]

Before the Committee on the Judiciary
United States Senate

September 18, 1992

I. INTRODUCTION

I am James Bopp, Jr., attorney at law and general counsel for the National Right to Life Committee. Thank you for the opportunity to address this committee on the subject of the Religious Freedom Restoration Act of 1992.

Senator Kennedy (D-MA) and others have introduced legislation known as the "Religious Freedom Restoration Act of 1992" (RFRA) (S. 2969, 102d Cong. 1st Sess. (1992)). This legislation is a response to the April, 1990, United States Supreme Court decision in *Employment Decision v. Smith*, 110 S. Ct. 1595 (1990), in which the Court ruled that Oregon could enforce a law forbidding the use of the drug peyote even by members of the Native American Church, who consider the use of the drug sacramental. Supporters of the RFRA believe that the *Smith* ruling had the effect of greatly diminishing the ability of plaintiffs to escape such government regulations by asserting infringement of their rights under the Free Exercise Clause of the First Amendment. The RFRA was introduced in an attempt to provide a federal *statutory* basis for such free exercise claims.

The RFRA, as it currently exists in S. 2969, states that "Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is essential to further a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." S. 2969, § 3(b).

The National Right to Life Committee is opposed to the RFRA without an amendment excluding a claim to a right to an abortion under the RFRA. As shown below, such claims are a real danger, not a remote one. We propose an amendment such as the following:

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Richard E. Coleson, J.D., assisted in the preparation of this written testimony.

This Act does not grant, secure, or guarantee any right to abortion, access to abortion services or funding; or alter or diminish any such rights which may have existed before the enactment of this Act.

II. THE DANGER TO LEGAL PROTECTION OF THE UNBORN POSED BY THE RFRA IS REAL.

The abortion-on-demand movement is urgently seeking new moorings for a constitutional right to abortion because of the ongoing scholarly and judicial rejection of the *Roe v. Wade* abortion privacy analysis. Pro-abortion partisans have repeatedly and forcefully asserted a free-exercise-of-religion right to abortion.

This viewpoint is most often identified with the American Civil Liberties Union (ACLU) and with the Religious Coalition for Abortion Rights (RCAR), a well-funded "umbrella" organization with a permanent headquarters in the United Methodist Building in Washington (directly across the street from the U.S. Capitol). RCAR represents some of the major Protestant and Jewish religious bodies in the United States. The central tenets of RCAR are that any restriction on abortion violates both the Free Exercise Clause (based on the premise that abortion constitutes the practice of religion) and the Establishment Clause (by ostensibly legislating one "religious viewpoint" and rejecting others).

We emphatically reject the RCAR construction of the first amendment. While we would include a life-of-the-mother exception in all proposed state and federal laws restricting abortion, we reject the concept that the Free Exercise Clause of the first amendment can be construed to encompass a right to abortion in any circumstances.

First amendment free exercise of religion law is currently governed by decision of the United States Supreme Court in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that one could not challenge a neutral law of general applicability on a free exercise of religion basis. Under *Smith*, free exercise of religion claims to an abortion right would be impossible. *See, e.g., Jane L. v. Bangerter*, No. 91-C-345G, slip op. at 9 (D. Utah Apr. 10, 1992) (orders vacating trial, etc.) ("This court holds that the Utah [abortion] statute as a matter of law does not interfere with free exercise of religion." (*citing Smith*)); Brief for the United States as Amicus Curiae Supporting Respondents at 18 n.13, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3rd Cir. 1991), *cert. granted* 112 S. Ct. 931-32 (Jan. 21, 1992) (Nos. 91-744 and 91-902 consolidated) (In this case now before the U.S. Supreme Court, the Solicitor General observed that *Smith* currently bars free exercise claims to an abortion right.). Enactment of the RFRA would change the state of the law with regard to free exercise of religion abortion claims, making such claims once again viable.

Without the RFRA, two federal district courts have found a free-exercise component to "abortion rights." An unamended RFRA would make the recognition of a serious free-exercise-

of-religion abortion right easier by making it easier for women to have standing to bring law suits asserting a free-exercise claim. It would enlarge the class of women who could make such a claim by (1) requiring only that they claim that their exercise of a religious belief is "burdened" by the governmental restriction and (2) opening the class not just to women whose religion allows abortion to preserve the life of the mother but also for many other reasons. Because abuse of the rights gained by this already enlarged class will be inevitable, the potential exists for a very large class of women to obtain abortions under an unamended RFRA.

That free-exercise abortion rights claims under the RFRA would be a reality is evidenced by Proposed Committee Report Language set forth by Marc D. Stern, a member of the coalition of drafters of the RFRA. The memorandum represented the consensus of the drafters in a meeting held the day before. In the memorandum, the Proposed Committee Report Language declared:

> Likewise, RFRA could not be invoked to challenge the bare existence of restrictive or permissive abortion laws, but it could be invoked by persons who for religious reasons wish to obtain, or not participate in, abortions where a law imposed contrary restrictions or obligations.

Memorandum from Marc D. Stern to Michael Farris, Samuel Ericcson, David Saperstein, et al. at 2 (May 9, 1991).

From this, it is evident that free-exercise of religion rights under the RFRA are contemplated by the drafters of the RFRA.

A. *The RFRA Poses Real Dangers to the Legal Protection of the Unborn.*

Abortion rights advocates have long argued that abortion restrictions violate the Free Exercise Clause of the First Amendment (which states that "Congress shall make no law respecting the establishment of religion or *prohibiting the free exercise thereof* . . ."(emphasis added)). *See generally* Bopp, *Will There Be A Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemporary L. 131 (1989). At least one court has embraced such an analysis. *See McRae v. Califano*, 491 F.Supp. 630, 741-42 (E.D.N.Y. 1980). Pro-abortion groups continue to press such claims. *See* Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Permanent Injunction, *Doe v. Ada*, Civil Action No. 90-00013 (D. Guam 1990) (where the ACLU argued that "Jewish and several Protestant faiths, each with a substantial number of adherents on Guam, hold religious beliefs that . . . under certain circumstances — to be determined in the first instance by the pregnant woman herself — a woman is morally permitted or, in some cases, even required to obtain an abortion.").

However, on only one occasion in abortion litigation has the U.S. Supreme Court addressed this claim. In *Harris v. McRae*, 100 S.Ct. 2671 (1980), the claim was made that the Hyde Amendment was unconstitutional under the Free Exercise Clause. The Court did not reach the merits of this claim, because the Court found that the plaintiffs did not have standing to assert the claim.

First, the Court said that the individual indigent pregnant women plaintiffs lacked standing "because none alleged, much less proved, that she sought an abortion under compulsion of religious belief." *Id.* at 2690. The Court acknowledged that two officers of the Women's Division of the United Methodist Church "did provide a detailed description of their religious beliefs," but found that they also did not have standing because "they failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid." *Id.* Thus the two essential elements of standing were lacking, i.e. (1) that an individual woman was seeking an abortion "under compulsion of religious belief" and (2) that the statute in question was applicable to them.

We can expect that these two elements of standing set forth in *Harris v. McRae will be met* in future litigation by abortion rights advocates. If proper standing is shown, the Court, under *Smith*, would determine whether the abortion restriction is rationally related to the governmental interest. This is the test applied when no fundamental constitutional right is impinged and under which virtually any law would be upheld. Even under *Roe v. Wade*, the Court recognized that protection of unborn life was a rational reason for abortion restrictions (although it is not enough to support restricting the fundamental right to abortion). Since a rational basis is all that *Smith* requires to uphold a state law, the free exercise claim would *not* prevail on the merits as of today.

Under the Religious Freedom Restoration Act of 1992, however, in the face of a challenge by women claiming a "burden" on the exercise of their religious belief, a *compelling governmental interest* must be shown. This test is very stringent and, historically, few laws are able to survive such rigorous scrutiny. Under the holding of *Roe v. Wade*, there is no *compelling interest* in unborn life until after viability. If the Religious Freedom Restoration Act is viewed by the Court to incorporate this holding of *Roe*, then a free exercise claim under the Religious Freedom Restoration Act would prevail against a law restricting abortion.

This matter would be further aggravated (and the holding of *Harris v. McRae*, referred to above, would be overruled) if the Religious Freedom Restoration Act were viewed to protect not only conduct "compelled" by religious belief, as *Harris v. McRae* appears to require, but also conduct consistent with religious belief. The RFRA doe not limit claims to only those "compelled" by religious belief, but such claims are allowed if the religious exercise is merely "burdened." Obviously, this vastly increases the pool of potential free exercise plaintiffs against abortion restrictions.

One further point. Beyond being assured that an asserted belief is "sincere" and "religious," the courts are loath to try to determine whether a religious belief is valid or bona

fide. Thus, that there may be a dispute as to whether abortion is compelled by, consistent with, or motivated by a *valid* religious belief is not relevant and would provide no defense to a free exercise claim.

The effect of a successful free exercise claim is to exempt the person from the offending statute. *See Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Thus, this claim does not serve as a basis to invalidate the entire statute, but prevents the application of the statute to those asserting such religious beliefs. While, on the face of it, such a claim would seem to have limited applicability to an abortion restriction, in practice it would provide a tremendous loophole. A woman coming to an abortion clinic, even in a state which prohibits abortions except to save the life of the mother, could simply check a box on the admitting form which says that she is seeking the abortion under compulsion of a sincerely held religious belief (or, if applicable, that the abortion is consistent with or motivated by a sincerely held religious belief). It would be exceedingly difficult to enforce the law in the face of such a claim. It is even harder to imagine that an attempt to enforce the law would be made in such a context. As a result, the ability to enforce the statute would be seriously impaired.

However, some countervailing arguments have been made. Some argue that the compelling interest required by the RFRA for the burdening of a free exercise of religion right would be found by the United States Supreme Court, and religiously-based abortion rights claims would fail. However, in the recent case of *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), the Supreme Court not only reaffirmed the core holding of *Roe v. Wade*, 410 U.S. 113 (1973), but declined to call "compelling" the states' interests in preserving unborn human life and maternal health. In *Casey*, the "undue burden" test became the controlling analysis on the Supreme Court. Under this test, states may now pass informed consent law requiring that women be provided with neutral, medically-correct information about the risks of both abortion and childbirth, about fetal development, and about resources available to help a women in carrying a child to term. Such statutes may also require the physician performing the abortion to actually meet with the woman before her arrival on the procedure table to discuss the possible risks of obtaining an abortion. Finally, after *Casey*, a state may require that a woman wait 24 hours after receiving this (possibly) new information to reflect and possibly to explore the options revealed to her. Such abortion regulation is supported by the vast majority of the American people, yet it would be impossible under the "compelling interest" standard of the RFRA, just as it was impossible under the strict scrutiny analysis imposed by *Roe v. Wade*.[2]

Moreover, under the proposed RFRA statute, abortion rights advocates are likely to argue that it was Congress' intent (or at least understanding) when it adopted the Religious Freedom

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[2]Language in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Casey*, 112 S. Ct. at 2806, also reflects that for these justice, at least, an abortion choice has spiritual overtones. They wrote "about the profound moral and spiritual implications of terminating a pregnancy," *id.*, and that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives . . . ." *Id.* at 2807. Such language could arguably be claimed as evidence of support on the Supreme Court for the notion of a religious liberty right to an abortion.

Restoration Act that, since no compelling interest in unborn life had yet been found (at least before viability) by the Supreme Court there exists no compelling interest *under the statute*.

Unfortunately, even a future *favorable* holding by the Court on the compelling interest question would not resolve the inquiry. In addition to the requirement that a state law be supported by a compelling interest, the bill requires that it be "the least restrictive means of furthering that compelling governmental interest" (which is also the second test in the Court's constitutional jurisprudence). In this regard, abortion rights advocates are likely to argue that a general prohibition on abortion is not the "least restrictive means" available to further the state's compelling interest in unborn life. This would be a fertile field for pro-abortion litigation.[3]

Therefore, the Religious Freedom Restoration Act would restore to viability a free exercise claim against abortion legislation which is currently effectively precluded by the *Smith* decision. While there are arguments against such claims, even under the Religious Freedom Restoration Act, the claims are weighty ones and the outcome would be uncertain. Even with the some future possible explicit reversal of *Roe v. Wade* by the Court, the new species of challenges to pro-life laws made possible by the bill would have to be resolved *before* effective abortion restrictions could be enforced — which could take years.

Furthermore, these claims provide the potential for a "safe harbor" for abortion *even* if *Roe* is explicitly overruled at some later date and, thus, provide an opportunity for a future Supreme Court to protect the abortion right after *Roe's* reversal in a way that would avoid the obvious flip-flopping back and forth that a later restoration of the "privacy right" would involve.

These points are developed more fully in the following sections.

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[3]Interestingly, Justice O'Connor apparently abandoned the "narrowly tailored" requirement in favor of a "rationally related" requirement as the second step in compelling interest analysis of abortion restrictions in *Webster*. *See* Bopp & Coleson, *What Does* Webster *Mean?*, *supra*, at 164-65. The rationally related test is a more favorable one for upholding state laws that are subject to the compelling interest test. The proposed Religious Freedom Restoration Act, however, would reject this development.

B. *Pro-Abortion Advocates Have Forcefully Claimed for Over Two Decades That Free Exercise of Religion Protects Abortion on Demand.*

Even before *Roe v. Wade*, pro-abortion advocates were claiming that protective abortion laws could interfere with a woman's free exercise of religion under the Free Exercise Clause of the First Amendment. Oteri, Benjoia & Souweine, *Abortion and the Religious Liberty Clauses*, 7 Harv. C.R.-C.L. L. Rev. 559, 592-96 (1972). Oteri, Benjoia & Souweine concluded that protective abortion statutes placed an onerous burden "on individuals who wish to act in a manner consistent with their religious beliefs." *Id.* at 594. Examining the legislative purposes underlying protective abortion statutes, these three authors concluded that they served no compelling governmental interest and were, therefore, unconstitutional under the Free Exercise clause. *Id.* at 594-96.

Of course, *Roe* relied on a privacy theory under the fourteenth amendment's liberty clause. However, this did not stop the speculation on alternative theories to protect an abortion right within the Constitution. Indeed, because of the powerful scholarly attacks on *Roe*'s privacy theory, many efforts were made to find ways of propping up the abortion right with alternative constitutional theories.

After *Roe*, Rhonda Copelon, appearing on behalf of the Center for Constitutional Rights in New York City, argued before a Senate subcommittee that:

> The first amendment also protects the right to follow religious and conscientious convictions. It demands that the state respect diverse beliefs and practices that involve worship, ritual, and decisions about everyday life. We recognize as religious, matters of life and death and of ultimate concern. The decision whether to bear a child, like conscientious objection to military service, is one of conscientious dimension. The religions and people of this country are deeply divided over the propriety and, indeed, necessity of abortion. While for some any consideration of abortion is a grave evil, others hold that *a pregnant woman has a religious and moral obligation to make a decision* and to consider abortion where the alternative is to sacrifice her well-being or her family's or that of the incipient life. *The right to abortion is thus rooted in the recognition that women too make conscientious decisions.*

Legal Ramifications of Human Life Amendment: Hearings on S.J. Res. 3 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 98th Cong., 1st Sess. 132 (1983) (statement of Rhonda Copelon) (citations omitted, emphasis added).

It should be especially noted that the argument of the pro-abortion partisans quoted above does not require that a woman's religion *compel her* to have an abortion. Rather, her religion need only compel her to make a conscientious decision, which, according to them, must include the option of choosing abortion in order to be a fully conscientious decision. As a result, they argue that a woman's religion "may specify situations appropriate for an abortion or may leave

the entire decision to the individual to be resolved in a manner consistent with her understanding of her religion." Oteri, Benjoia & Souweine, *supra*, at 593.

In the 1980 case of *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980), abortion rights activists were again pushing a free exercise abortion right. This time they had launched their attack in a federal district court. Plaintiffs included the Women's Division of the Board of Global Ministries of the United Methodist Church and two of its officers. These plaintiffs and their expert witnesses asserted that their religion imposed on them a religious duty of *responsible parenthood*, which required pregnant women not to simply "let nature take its course" in a pregnancy but, rather, to "act responsibly and seriously" and abort a child if "the conditions into which the new life is being born" are not right to fulfill "God's intention" for the unborn child. *Id.* at 701, 742 (emphasis added). Moreover, women are to "make their *own* responsible decisions concerning the personal or moral questions surrounding the issue of abortion." *Id.* at 701 (emphasis added).

In sum, this religious view is that women are compelled to exercise responsible parenthood, meaning that they have a religious duty not to bring a child to term in certain (broadly defined) circumstances, and that women are religiously compelled to make up their own minds about whether they should have an abortion.

Because the abortion statute at issue in *McRae* (dealing with the Hyde Amendment which prohibited federal funding for almost all abortions) did not provide for women to make such a conscientious decision about abortion, the *McRae* court enjoined the statute. Judge Dooling held:

> These teachings, in the mainstream of the country's religious beliefs, and conduct conforming to them, exact the legislative tolerance that the First Amendment assures. . . . The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation. Judgment must be for plaintiffs.

Id. at 742.

On appeal to the United States Supreme Court, that Court held that these women did not really have legal standing to raise such an issue and so it should not have been reached by the lower court. *Harris v. McRae*, 448 U.S. 297 (1980). However, the Supreme Court did not declare that the district court was wrong on the merits if the women had had standing.

Pro-abortion advocates continue to this day to press their claim that there is a broad free-exercise right to abortion. They made such a claim in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), in the Brief Amicus Curiae for American Jewish Congress, Board of Homeland Ministries-United Church of Christ, National Jewish Community Relations Advisory Council, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General

Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, and thirty other religious groups. In this Brief, these groups claimed:

> Together, the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction, and child-rearing. Missouri's law impermissibly secularizes these choices. The state law constrains critical, private choices about child-bearing and thereby burdens the free exercise of religion and its crucial component, protection of individual conscience. . . . . Deciding whether to marry or divorce, and whether to conceive and bear a child are simultaneously matters of individual choice and religious significance. The Constitution has provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience.

Id. at 8 (citations omitted).

This Brief also stated:

> The Free Exercise Clause of the First Amendment should control this case. Missouri cannot claim that the Free Exercise Clause guarantees only people's freedom to hold pro-choice views, but not their freedom to obtain an abortion in any public facility, to discuss the matter with any public employee, or to act contrary to a state law declaring that human life begins at conception. The Free Exercise Clause guards much religiously inspired conduct, not just religious views. *Wisconsin v. Yoder*, 406 U.S. 205 . . . . In the context of religious freedoms, this constitutional protection applies where the government withholds a benefit as much as when it imposes a penalty.

Id. at 19.

Abortion rights advocates again asserted their free-exercise right to abortion claim in the Guam abortion case, recently decided by the Ninth Circuit. Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Permanent Injunction, *Doe v. Ada*, No. 90-00013 (D. Guam 1990) (where the ACLU argued that "Jewish and several Protestant faiths, each with a substantial number of adherents on Guam, hold religious beliefs that . . . under certain circumstances — to be determined in the first instance by the pregnant woman herself — a woman is morally permitted or, in some cases, even required to obtain an abortion."). While the Guam District Court decided the Guam case on different grounds, Judge Munson indicated his sympathy for a "religious freedom" right to choose abortion. Responding to a comment by Senator Arriola (who introduced the bill) in legislative debate that "Guam is a Christian Community," Judge Munson remarked:

> This passage calls to mind the 1856 admonition of Chief Justice Black of the Commonwealth of Pennsylvania, as quoted by Justice Brennan in *School District of Abington Township (Pa.) v. Schempp*:

> The manifest object of the men who framed the institutions of this country was to have a *State without religion*, and a *Church without politics* — that is to say, they meant that one should never be used as an engine for any purpose for the other. . . .

Schempp is a noteworthy primer on ***First Amendment religious freedom***.

Doe v. Ada, No. 90-00013, slip op. at 6 n.1 (D. Guam 1990) (emphasis added).

Also recently, abortion rights advocates have again asserted a free-exercise abortion right in a Michigan abortion case. In that case, attorneys for the ACLU and Planned Parenthood Federation of America sought the right of *inter alia* the Religious Coalition for Abortion Rights to intervene as party-plaintiffs in a case challenging Michigan's parental consent to abortion for minors law. They set forth their claim in these words:

> *COUNT IV: FREEDOM OF RELIGION*
>
> . . . .
>
> 33. The parental consent and judicial bypass provisions of the parental consent law violate the right to freedom of religion of the citizens of Michigan by penalizing them for acting in accordance with their religious beliefs in seeking to exercise their right of privacy to an abortion.

Proposed Intervening Plaintiffs' Complaint for Injunctive and Declaratory Relief at 7, *Planned Parenthood of Mid-Michigan et al. v. Attorney-General of Michigan*, No. D91-0571-AZ (filed Mar. 6, 1991).

It is clear that the danger of a free-exercise abortion claim is real. It has been advanced for the past two decades and is currently being urgently advanced by abortion rights advocates. Their urgency is all the greater as *Roe*'s privacy theory is falling into disrepute. And their devotion to a broad free-exercise abortion right is unstinting. Their view may be summed up in these words from the Fall, 1990, Religious Coalition for Abortion Rights (RCAR) publication *Options*:

> Three hundred and fifty-five years ago this October, a young man named Roger Williams fled the Massachusetts Bay Colony . . . . Williams, a Baptist, was banished from the Colony for the teaching of 'dangerous opinions' that countered the teaching of the state. . . . He eventually formed the colony of Rhode Island . . . as a place to worship according to the dictates of the soul, free from government interference.
>
> In October 1988 . . . a young woman weaved through a wilderness of screaming, angry people to a health clinic, only to find her entrance blocked by scores of people lying in front of the door. She was . . . in the State of Rhode Island, the state founded for the purpose of 'full liberty in religious concernments.' She had made one of the most difficult decisions of her life. She was on a trek to exercise her freedom of conscience with regard to religion. She was trying to obtain an abortion. . . .

Although Williams and the young woman lived in different eras, their desire to practice their religion in freedom is the same. An individual's right to have an abortion is as much a matter of religious liberty as William's choice to preach his religion. Abortion is a religious issue because the issue of when the fetus becomes a person is a matter of religious belief, not 'scientific fact' as anti-choice proponents claim. . . .

Today, Williams' dream of freedom of conscience with regard to religion, and our constitutional right to the free exercise thereof, is in serious jeopardy. Justice Scalia, writing for the majority in the disastrous decision for the *Employment Division v. Smith* case has . . . 'eliminated the free exercise clause' of the Constitution. . . . Scalia's opinion eliminated the test of 'compelling interest' and ruled that free exercise claims are to be determined in state legislatures. This will force religious groups into the legislatures to protect their free exercise rights—rights which we had previously taken for granted. This decision allows more vocal and organized religions to enact laws through the political process, laws that may limit the free exercise of less powerful religions.

THE SUPREME COURT'S ACTIONS have signaled the opponents of abortion that they should work through the state legislatures to tear down the 'wall of separation' between church and state. . . .

The Governor of Guam, Joseph Ada, in a brief to the federal district court in support of a recently passed law that bans almost all abortions, stated that since the majority of the citizens of Guam are Catholic, and that Catholic doctrine forbids abortion, the law is an example of democracy in action. Ada's reasoning parallels Scalia's decision in *Employment Services v. Smith*, that free exercise of religion claims should be put up for a vote. . . .

THE PROPONENTS OF ANTI-ABORTION LAWS fail to consider the diversity of theological opinion on the issue of fetal personhood. They are attempting to establish their religious views as normative for society, and limit the free exercise of people of other faiths. [End of quote.]

C. *Standing to Sue Is Made Easier by the RFRA, Which Would Allow Claims for Any Abortion Claimed to be "Motivated by Religious Belief."*

The RFRA would make it easier for more plaintiffs to bring suits alleging a free-exercise right to abortion because legal standing would be easier under the RFRA than under the Constitution. However, it has been asserted by some that pro-abortion plaintiffs' standing to sue is not created or improved by the RFRA.

This questioning of the position of those opposed to the unamended RFRA is premised on the basic error of equating standing under the Free Exercise Clause of the Constitution with standing under the RFRA. Under the former, the Supreme Court, in *Harris v. McRae*, 448 U.S. 297 (1980), said that it need not reach the Free Exercise Clause claims of plaintiffs (although the district court had enjoined the Hyde amendment, in part, by recognizing plaintiffs' free exercise

claims) because the plaintiffs lacked standing: "none alleged, much less proved, that she sought an abortion under *compulsion* of religious belief." *Id.* at 320 (emphasis added). Thus, plaintiffs under the Constitution in this context had to show that their religion *compelled them* to receive an abortion.

That plaintiffs must be compelled by their religious beliefs in suits brought under the First Amendment, is evidenced by other case law. For example in *Thomas v. Review Board*, 450 U.S. 707 (1981), a Jehovah's Witness sought unemployment compensation after quitting his job because he believed his religion prohibited him from producing parts for military tanks. The Supreme Court held that

> Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was *forbidden by* his religion.

Id. at 716 (emphasis added). In *Wisconsin v. Yoder*, the Amish defendant parents who had not sent their children to school believed, according to the United States Supreme Court:

> [T]hat by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.

406 U.S. 205, 209 (1972).

The recent case of *Frazee v. Illinois Dept. of Employment Security*, 109 S. Ct. 1514 (1989), also demonstrates how one's religious beliefs must compel one to a certain religious practice. In the *Frazee* case, the United States Supreme Court considered a case in which a man had been denied unemployment compensation benefits because he had refused employment which would have cause him to work on Sunday. The case turned on the issue of whether one's sincerely held religious beliefs must be based on tenets of an established religious sect. The Court held that a religious belief is sufficient if it is a sincerely held personal religious belief, whether or not it is based on "some tenets or dogma" of "some church, sect, or denomination." *Id.* at 1516. In its discussion, the Court spoke of persons "*compelled* by their religion," of religious tenets "*forbidding*" certain activity, and of persons being "*required*" to do certain actions. *Id.* at 1517 (emphasis added).

By contrast, the RFRA would have Congress find that government may not "burden" the free exercise of religion without compelling justification which would include conduct motivated by religious belief. The phrase, "motivated by," was present in an earlier draft of the RFRA. While it has now been removed, the primary scholarly champions of the bill insist that the RFRA must be interpreted as applicable to religious motivation, not just religious compulsion. Messrs. McConnell, Gaffney, and Laycock, in their February 21, 1991, letter to Representatives Solarz and Henry, implicitly acknowledge that the statute would govern and that the standing

requirement is changed by RFRA's rejection of a "compelled by" test. In the process of defending the "motivated by religious belief" language of the RFRA, they argue that the "compelled by" test, which *McRae* would require, is *not* the test they prefer:

> It is difficult to capture the idea of the dictates of conscience in statutory language because different theological traditions conceptualize the force of God's moral order in different ways. Some treat it as a binding moral law; others view it as an expression of God's will, which believers will freely conform to out of love and devotion to God. For example, consider the question: must a believer tithe? Some will easily answer "yes." Others will answer: "no, but a believer *will* tithe, because he will want to act in conformity to God's will for him." For this reason, it would be *a mistake to tighten the language* of the Act *by confining it to conduct 'compelled by'* religious belief. By the same token, the Act should not refer to conduct 'consistent with' religious belief, since this would go beyond the dictates of conscience. The language in the operative section of the proposed Act — 'the practice of religion' — seems to avoid the extremes.

Letter from Michael W. McConnell, .Edward McGlynn Gaffney, and Douglas Laycock to Representatives Solarz and Henry at 2 n.* (Feb. 21, 1991) [hereinafter "2/21 McConnell et al. Letter"].

McConnell et al. argue that there is some protection in the language of the RFRA: "[T]he free exercise of religion does not encompass the right to engage in any conduct that one's religion deems *permissible*. It protects only conduct that is motivated by religious belief." *Id.* (emphasis in original). The distinction is more apparent than real; it breaks down when applied to real life situation. For example, how could a court refuse a person whose religion encourages her to exercise her liberty to make personal choices on the matter of abortion, *see supra* p. 8 (position of United Methodists)? In such a situation, the woman could credibly argue that she was motivated by her religion to make this moral choice herself and that she chose abortion. It is readily apparent that this is a far easier test than whether one is compelled as a religious duty to engage in a certain activity. Thus, even if the merely "permissible" is excluded and only the "motivated by" is allowed by the RFRA, this is still more expansive than the "compelled by" test of the Free Exercise clause.

McConnell et al. have been the driving scholarly force behind the RFRA coalition. Their continued support for the "motivated by religion" position indicates that it is still the proper way to interpret the RFRA, rather than the "compelled by religion" position. Given that the RFRA no where defines the phrase "burden a person's exercise of religion" and that it's scholarly proponents call for a "motivated by religion" interpretation, it is doubtless that a court called upon to make the decision of whether the RFRA reaches religious motivation would find that it does. Supporters of the RFRA could, of course, easily resolve this problem by inserting "compelled by" language in the RFRA. They have neither done so nor may they be expected to do so because they believe that the "motivated by" standard is correct.

In hearings on H.R. 2797, the Religious Freedom Act of 1991, before the U.S. House Judiciary Committee's Subcommittee on Civil and Constitutional Rights in May, 1992, Representative Stephen J. Solarz (D-NY), chief sponsor and author of the Religious Freedom Restoration Act conceded that the RFRA does not limit claims under the RFRA to those compelled by religion. In a colloquy with Representative Henry Hyde (R-IL), Mr. Hyde asked Mr. Solarz, "Does H.R. 2797 [the RFRA] protect conduct compelled by religious belief or conduct motivated by religious belief?" Mr. Solarz responded, "I would be reluctant to limit it to actions . . . compelled by religion, as distinguished from actions which are motivated by a sincere belief." Mr. Solarz also conceded in this colloquy that the RFRA should not be restricted to claims where the mother's life is at stake because it is not "the job of the Congress to pick and choose among which religious rights are legitimately a subject of presentation to the courts."[4]

Thus, under the RFRA, a person would not have to show that they were *compelled* by a religious belief but that they were *motivated* by one. In common use, "compel" means "1: to drive or urge forcefully or irresistibly **2:** to cause to do or occur by overwhelming pressure." *Webster's Ninth New Collegiate Dictionary* (1983). By contrast, "motivate" means "to provide with a motive," which means in turn "something (as a need or a desire) which causes a person to act . . . *syn* MOTIVE, IMPULSE, INCENTIVE, INDUCEMENT, SPUR, GOAD." *Id.*

Under the RFRA then, with free exercise so defined, one need only show a religious motivation, i.e., that one's personal religious beliefs would justify, condone, or encourage an action, rather that one is compelled to do this action as religiously imposed duty. Indeed, as noted herein, pro-abortion advocates would argue that it is enough if one's religion declares that one has a duty to make one's own moral choice with regard to abortion and the state's action "burdens"[5] this choice. This argument was accepted by the *McRae* district court.

Clearly, the RFRA imposes an easier showing for would-be plaintiffs to obtain standing than did the *McRae* standard. Thus, persons denied standing under *McRae* would be allowed to pursue their free-exercise-of-religion attack against a protective abortion statute under the RFRA.

It has been suggested by one commentator that the courts would be free to apply the standing test of *McRae* under the RFRA. But this cannot be so, because any free-exercise-of-religion abortion claim would be brought under the RFRA, not the First Amendment, so that whatever the statute requires would supersede what the Constitution would allow.

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[4]In a subsequent letter, Rep. Solarz sought to mitigate the force of this concession. However, in his attempt to do so, he cited approvingly the letter of Messrs. McConnell et al., discussed herein, wherein any restriction of the RFRA to actions "compelled by" religion is rejected. Moreover, Mr. Solarz in his letter refused to say that he would limit RFRA claims to those compelled by religion, thereby vitiating his mitigation attempt. Letter from Stephen J. Solarz to Don Edwards (June 22, 1992).

[5]The RFRA is replete with references to "burdens" on religious practice. *See infra* § II-C-1.

It must be observed that the various critics opposing the RFRA have, either consciously or subconsciously, frequently jumped back and forth between the demands of the RFRA and the Constitution. For example, this was the logical error of two pieces of commentary on RFRA by the Congressional Research Service. *See* Ackerman, *The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis* (Congressional Research Service, Apr. 17, 1992); Memorandum from Johnny H. Killian, American Law Division of Congressional Research Service, to Honorable Bill McCollum (Jul. 2, 1991). The researchers in these pieces ignored the obvious fact that any cases brought under the RFRA would be brought under the RFRA and not under prior court decisions under the first amendment to the Constitution.

However, once a statute such as the RFRA is passed, actions brought under the statute must be governed by the demands of the statute, not the Constitution. This is discussed at greater length below, but in the present context it means that whatever the statute requires will control, regardless of the prior practice in constitutional litigation.

Furthermore, under the RFRA, a woman seeking a free-exercise exemption from a protective abortion statute would not be required to *belong* to a religious body, the teachings of which motivate her to seek an abortion, but only that she is personally motivated to seek an abortion by her own sincere religious beliefs. Statements of religious bodies such as those cited below would buttress such claims, but membership in a pro-abortion religious body would by no means be a requirement for a successful claim.

1. The Class of Those Motivated by Religious Belief Would Be Large.

The number of women who could claim a free-exercise right to abortion would be drastically increased under the RFRA in two ways. First, those whose exercise of religion is merely burdened would be entitled to a religious exception. Second, many of these would claim a right to abortion for reasons beyond the life of the mother. In testimony on H.R. 2797, the Religious Freedom Act of 1991, before the U.S. House Judiciary Committee's Subcommittee on Civil and Constitutional Rights on May 13, 1992, Nadine Strossen and Robert S. Peck, President and Legislative Counsel of the American Civil Liberties Union respectively, provided written testimony declaring that RFRA claims would not be limited to those where the life of the mother was at risk: "Will other religiously based claims for abortion be made? Yes, and they deserve to be measured by the Court by the same yardstick as any other religious based claims." In her oral testimony, Ms. Strossen asserted that a religious abortion claim would be appropriate where "there is belief, a specific good faith, sincere belief that would be violated absent an abortion." This language is much broader than the "compelled by" language of *McRae*.

As demonstrated by the quotations above and below, there are numerous religious bodies in the United States, large and small, which assert that their doctrinal systems motivate, or even dictate, that their adherents seek abortion in very expansive circumstances, *and* that the free exercise of religion must encompass the legal right of these women to procure abortions without state "interference."

Of course, if the RFRA is enacted without an abortion amendment, those religious bodies (whether long established or newly formed) that are tolerant of abortion can be expected to reword these "doctrinal" statements to even more closely conform to the language of the RFRA. However, little in the way of adjustment would be necessary for many bodies, even if the RFRA were modified to incorporate the "*compelled by*" test. Note, for example, the language of the 1989 Religious Coalition for Abortion Rights (RCAR) brief to the Supreme Court in *Webster*, which incorporates the view that the use of abortion for "the promotion of responsible parenthood and preservation of the health and well-being of existing, living persons rank among the highest, *religiously commanded obligations*." Brief Amicus [sic] Curiae for American Jewish Congress et al. at 11, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (No. 88-605).(emphasis added).

Further, the RFRA requires only that a woman show that her exercise of religion is "*burdened*" by the government. S. 2969, §§ 2(a)(2); 2(a)(3); 2(a)(4); 2(b)(1); 2(b)(2); 3(a); 3(b); 3(c) (emphasis added). This means that a woman could logically assert that her religion requires her to make a free moral choice between abortion and carrying a pregnancy to term and that a state statute eliminating one of those options burdens her religious practice. This "burdens" language further broadens the class from those motivated by their religion to seek an abortion.

To illustrate the potential size of the class of women compelled by their religion to seek an abortion compared with the size of the class of those women motivated by their religion to make an abortion decision unburdened by state restrictions several quotations follow.

● ***United Synagogue of America Statement.*** "Jewish tradition cherishes the sanctity of life, even the potential of life which a pregnant woman carries with her. Under certain unfortunate circumstances, such as when the *life or health* of the mother are in jeopardy, Judaism sanctions, *even mandates*, abortion." Religious Coalition for Abortion Rights, *We Affirm* 28 (1991) (emphasis added). In a 1979 version of *We Affirm*, the United Synagogue revealed that it religiously mandated abortion for its adherents in cases of psychological health, as well: "In all cases 'the mother's life takes precedence over that of the foetus' up to the minute of its birth. This is to us an unequivocal principle. A threat to her basic health is moreover equated with a threat to of her life. To go a step further, a classical responsum places danger to one's *psychological health*, when well established, *on an equal footing* with a threat to one's physical health." (emphasis added).

● ***Statements of RCAR and a Host of Religious Organizations in* Webster.**

- "Together, the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction, and child-rearing." Brief Amicus [sic] Curiae for American Jewish Congress et al. at 8, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (No. 88-605).

- "Views range from the belief that abortion is a sin forbidden by divine authority *to the view that abortion may be a religious obligation if needed to preserve the* life or

well-being of the pregnant woman. Still another view maintains that promotion of responsible parenthood and preservation of the health and well-being of existing, living persons *rank among the highest, religiously commanded obligations*." *Id.* at 10-11 (emphasis added).

- "Other Protestant Churches have declared their support for a woman's choice regarding abortion because of potential risks to the life or *physical or mental health* of the mother, *because of concerns about the social situation in which the infant might be born*, and because of instances of severe deformity of the fetus. As a matter of religious belief, many Protestant theologians maintain that 'human personhood . . . does not exist in the earlier phases of pregnancy.' The United Methodist Church, for example, resolved in 1976 to affirm the '"principle of responsible parenthood" and the right and *duty* of married persons prayerfully and responsibly to control conception [including abortion] according to their circumstances.'" *Id.* at 14 (citations omitted) (emphasis added).

- "Many consider abortion to be a *religious duty*, a duty resembling obligations to observe religious rituals, when a pregnancy threatens a woman's *life* or *health*. Some would protect a *woman's choice* to abort simply as a matter of her *entitlement to control her own destiny*. *Id.* at 16 (emphasis added).

- "The Free Exercise Clause of the First Amendment should control this case. Missouri cannot claim that the Free Exercise Clause guarantees only people's freedom to hold pro-choice *views*, but not their freedom to *obtain* an abortion in any public facility, to *discuss* the matter with any public employee, or *to act* contrary to a state law declaring that human life begins at conception. *The Free Exercise Clause guards much religiously inspired conduct, not just religious views*. *Id.* at 19 (emphasis added).

- "Through its General Assembly, as its highest governing body, the Presbyterian Church (U.S.A.) has stated that the morality of abortion is a question of stewardship of life and abortion can, therefore, be considered a responsible choice within a Christian ethical framework when, for example, serious genetic problems arise *or when resources are inadequate to care for a child appropriately*." *Id.* at Statement of Interest (emphasis added).

- ***United Methodist Statement.*** "Because human life is distorted when it is unwanted and unloved, *parents seriously violate their responsibility* when they bring into the world children for whom they cannot provide love." Religious Coalition for Abortion Rights pamphlet, 1979 (emphasis added).

- ***Religious Coalition for Abortion Rights Statement.*** "An individual's right to have an abortion is as much a matter of religious liberty as [colonial Baptist preacher Roger] Williams' choice to preach his religion. . . . Today Williams' dream of freedom of conscience with regard

to religion and our constitutional right to the free exercise thereof, is in serious jeopardy. Justice Scalia, writing for the majority in the disastrous decision for the *Employment Division v. Smith* case has . . . 'eliminated the free exercise clause' of the Constitution. . . . The Supreme Court's actions have signaled the opponents of abortion that they should work through the state legislatures to tear down the 'wall of separation' between church and state. . . . They are attempting to establish their religious views as normative for society, and limit the free exercise of other faiths." *Roger Williams[,] Fetal Personhood and Freedom of Conscience*, Options, Fall 1990, at 4, 5.

● ***Religious Coalition for Abortion Rights Executive Director's Statement.*** "[I]t's easy to lose sight of the fact that if a woman isn't free to make a decision about abortion based on her own personal beliefs, then she is not *free* to practice her own religion." Letter from RCAR Executive Director Patricia Tyson to Fund Raising Solicitees, January 1991 (emphasis added).

● ***B'Nai B'Rith Women Statement.*** "We wholeheartedly support the concepts of individual freedom of conscience and choice in the matter of abortion. Any constitutional amendment prohibiting abortion would deny to the population at large their basic rights to follow their own teachings and attitudes on this subject which would threaten First Amendment rights." Religious Coalition for Abortion Rights, *We Affirm* (1979).

● ***Episcopal Women's Caucus Statement.*** "We believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise." *We Affirm* at 13 (1991)

● ***American Ethical Union, National Service Conference, Statement.*** "We believe in the right of each individual to exercise his or her conscience; every woman has a civil and human right to determine whether or not to continue her pregnancy." *Id.* at 6 (1991).

● ***American Jewish Congress Statement.*** "Jewish religious traditions hold that a woman must be left to her own conscience and God to decide for herself what is morally correct." *Id.* at 8.

● ***American Friends Service Committee Statement.*** "[T]he AFSC has taken a consistent position supporting a woman's right to follow her own conscience concerning child-bearing, abortion and sterilization. . . . That choice should be made free or coercion, including the coercion of poverty, racial discrimination and unavailability of services to those who cannot pay." *Id.* at 6-7.

● ***Presbyterian Church (U.S.A.) Statement.*** "It is exactly this pluralism of beliefs which leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference. . . . [W]e have a responsibility to guarantee every woman the freedom of reproductive choice." 195th General Assembly of the Presbyterian Church, *Covenant and Creation: Theological Reflections on Contraception and Abortion* (1983).

● ***United Methodist Church, Women's Division Statement.*** "We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise." *We Affirm* (1979).

● ***Catholics for a Free Choice Statement.*** "We affirm the religious liberty of Catholic women and men and those of other religions to make decisions regarding their own fertility free from church or governmental intervention in accordance with their own individual conscience." *Id.*

2. The Class Would Include Not Just Women Claiming a Religious Exception to Preserve the Life of the Mother But Also for Many Other Reasons.

The size of the class of women seeking abortions through the RFRA would include many more than those whose "religious tenets would require an abortion . . . when the pregnancy jeopardizes the life of the expectant mother." Letter from David Zwiebel, General Counsel for Agudath Israel of America, to Douglas Johnson 1 (Jan. 24, 1991). In fact, the RFRA would allow free-exercise claims by the adherents to many religions which justify abortion if chosen by the pregnant woman.

Messrs. McConnell et al. have claimed that the RFRA is not really a problem because:

> The only instance of which we are aware where a sizable religious group teaches that abortion is religiously *compelled* confines that teaching to circumstances so extreme (such as endangerment of *the life of the mother*) that any anti-abortion statute likely to be passed by a state would exempt it.

2/21 McConnell et al. Letter at 2-3 (emphasis added). This comment is remarkable on its face, given the fact that McConnell et al. rejected limiting the RFRA to situations of religious compulsion — in favor of a religious motivation standard — in this same letter. *Id.* at 2 n.*.

This statement contains two major fallacies, both already refuted above: (1) the erroneous equation of the RFRA's "motivated by" standard with the "compelled by" standard of *McRae*; and (2) the mistaken belief that "sizeable" religious bodies teach that abortion is indicated only in "extreme" circumstances such as life endangerment.

The federal district court in *McRae* cited the evidence presented at trial, which

> makes clear that in the Conservative and Reform Jewish teaching the mother's welfare must always be the primary concern in pregnancy, that the fetus is not a person, and that abortion is mandated to preserve the pregnant woman's health. The American Baptist

> Church position recognizes that abortion should be a matter or responsible personal decision, and it envisages danger to the physical or mental health of the woman, evidence that the conceptus has a physical or mental defect, and conception in rape, incest or other felony as justifying abortion. The United Methodist Church affirms the principle of responsible parenthood and takes account, in the abortion context, of the threat of the pregnancy to the physical, mental and emotional health of the pregnant woman and her family; in that belief continuance of the pregnancy is not a moral necessity if the pregnancy endangers the life or health of the woman or poses other serious problems concerning the life, health, or mental capability of the child to be.

McRae, 491 F. Supp at 742.

The *McRae* court also cited testimony of Dr. James E. Wood, Jr., Executive Director of the Baptist Joint Committee on Public Affairs who asserted that those he represented believed a woman had a religious liberty of conscience to choose for themselves concerning abortion in cases such as contraceptive failure, fetal deformity, risk to a woman's mental, emotional or physical health and where a child is "unwanted for significant familial reasons." *Id.* at 700.

From these and previous quotations from religious organizations, it may be seen that the right to make a free choice between abortion and childbirth is religiously mandated, according to some religious organizations. Similarly, some assert a religious duty to practice responsible parenthood by not bringing children into less than optimum conditions. Both of these make the matter of choice itself a religious obligation. According to this view, if one of these choices, abortion, is taken away by statute, then the religiously-mandated duty to make a moral choice is burdened. It cannot be said to be prohibited, because if one makes a choice for life then that choice is available. However, say these religious groups, the choice would be "burdened" — a ubiquitous term in the RFRA.

What is evident from these positions on abortion is that major religious organizations do have religious positions approving — and giving religious justification for — abortion in much broader circumstances than the life of the mother.

D. *Once a Few Women Are Able to Procure Otherwise Illegal Abortions Via Successful RFRA-Based Claims, Pro-Life Protective Laws Will Quickly Become Unenforceable.*

1. Strong Motivation and the Opportunity Created by the RFRA Would Make Full Exploitation of a Free-Exercise Exception to Protective Abortion Statutes Both Attractive and Possible.

There will be sufficiently strong motivation for both women seeking abortions, and abortion clinics and abortionists, to fully exploit the RFRA to render pro-life laws "dead letters."

One mechanism could take the form of a check-off box on abortion clinic client information forms. By checking a box or signing a pre-printed declaration on the form, women could claim and clinics could "document" that the woman claimed to be motivated by religious beliefs in seeking the abortion.

It has been claimed, moreover, that the tremendous loophole projected by opponents of the RFRA won't exist, because the RFRA provides only *judicial* relief (i.e., only to individual plaintiffs who bring a lawsuit).

Of course, an initial plaintiff would have to win a free-exercise claim to an exemption from a protective abortion statute. This is possible, as outlined elsewhere. After a woman succeeded in such a lawsuit, however, other women claiming that their abortions were motivated by their sincerely held religious beliefs would not need to litigate each case. Legal counsel for abortion clinics would simply have the clinics document in some fashion the fact that the woman claimed a free-exercise right and the clinics would perform abortions on such women without further legal proceeding. An analogy to the *Yoder* case may be helpful; after the Amish won the right to be exempted from compulsory school attendance for their children past the eighth grade, individual Amish children are no longer required to re-litigate the matter on their own behalf, but their parents simply don't send them to school. If public school authorities questioned this, they could claim a free-exercise exception under *Yoder*.

The argument has also been made that a court decision, based on a free-exercise RFRA claim, would only apply to the individual woman bringing the free-exercise law suit; the court would not enjoin the entire statute. Absurd as it may seem to some, that is exactly what the federal district court in *McRae* did. It enjoined the entire statute. While it is true that there were also other bases on which the statute was enjoined, the district court rejected the statute for not providing for such individual religious choices:

> The irreconcilable conflict of deeply and widely held views on this issue of individual conscience *excludes any legislative intervention except that which protects each individuals freedom of conscientious decision* and conscientious nonparticipation.
>
> Judgment must be for plaintiffs.

McRae, 491 F. Supp at 742 (emphasis added).[6]

Finally, it is noteworthy that, in the amicus curiae brief filed in *Webster* by RCAR and other religious bodies, individual exemptions from Missouri's law were not sought. Rather, it was urged that the statute should be enjoined from enforcement as to anyone:

> We do not argue here for religious exemptions to Missouri's law not only because that would be impracticable, *given the large numbers of people whose religious beliefs are burdened by the law*. Even more importantly, any process providing for exemptions would be insufficient protection of religious freedom, given the intrusion any process for considering exemption would itself place on the individuals facing intimate decisions involving procreation and termination of pregnancy. *This Court's ruling on the dangers of government entanglement with religion would apply in any case-by-case evaluation of religious beliefs about abortion.*

Brief Amicus [sic] Curiae for American Jewish Congress et al. at 17 n.7, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (No. 88-605) (emphasis added).

2. Difficulty of Regulation Would Make Enforcement Implausible.

Where women identified themselves as religiously motivated to seek their abortion, any enforcement against them would necessarily be after the fact. A prosecutor would have to be found who would claim that the woman was not motivated by a sincere religious belief in seeking her abortion. The reality is that it is unlikely that prosecutors will question, after the fact, a women's religious beliefs to be certain that she qualified for the free-exercise exemption. Indeed, it is implausible to suppose that states will continue to enforce pro-life laws after the courts have established that religiously motivated abortion-seekers are exempt from those laws.

The logical conclusion is that the RFRA will tremendously expand the class of women able to obtain abortions under a free-exercise claim. Under *Smith* (requiring a rational basis only for statutes of general applicability), no woman could succeed with a free-exercise claim to abortion, and under *McRae* (requiring that religion compel one to have an abortion), few women would even have standing to claim one. Under the RFRA, however, there would be a large class of women who could successfully make the claim.

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[6] It should be noted that the *McRae* district court decision on the merits of the free-exercise claim was not "overruled" by the United States Supreme Court, which merely held that the plaintiffs lacked standing to assert this claim for failing to assert *inter alia* that they were religiously compelled to obtain an abortion.

III. A COURT WOULD NOT LIKELY FIND THAT CONGRESS INTENDED TO ESTABLISH OR ENSHRINE A COMPELLING INTEREST IN UNBORN LIFE BY PASSAGE OF THE RFRA WITHOUT AN ABORTION EXCEPTION.

Under the RFRA, a person seeking a free-exercise exemption from a protective abortion statute, would have to assert initially that the statute burdens her free exercise of her religion, which motivates her to seek this abortion. This would establish her standing to bring such a claim. In court, then, the state would have to demonstrate that (1) it has a compelling interest in protecting unborn human life which justifies the refusal to exempt this woman from the protective abortion statute and (2) that barring her from having this abortion is "the least restrictive means" of asserting this compelling interest.

Because congressional intent would control law suits under the RFRA, it would be necessary for pro-life litigators to show that Congress recognized a compelling interest in restricting abortion. This would not be likely.

A. *The Key to the Interpretation of the RFRA Will Be Congressional Intent, Not Prior Constitutional Law.*

Those who have questioned the position of opponents of the RFRA have, either consciously or unconsciously, slipped back and forth, between what the Constitution would require pre-*Smith* and what the RFRA would require. It is important to observe that any litigation brought under the RFRA will be governed by the demands of the RFRA and not the Constitution. Therefore, the sole criteria for judging what the law requires will be the congressional intent in enacting the RFRA.

Most significantly, it would not be determinative what the Supreme Court has held or not held with regard to the compelling governmental interest in protecting unborn human life throughout pregnancy under the Constitution. At issue would be whether Congress recognized a compelling interest in unborn life under the RFRA.

The deferential jurisprudential philosophy of the current Supreme Court majority would cause them to resolve any doubt on this matter in favor of a finding that Congress had not intended to establish a compelling interest in unborn life under the RFRA, because of a variety of factors. These would include the fact that, at the time of passage of the RFRA, the state interest in protecting unborn human life was not legally compelling and that the ACLU and other pro-abortion organizations came out strongly in favor of the RFRA. *Cf. Franklin v. Gwinett County Public Schools*, 112 S. Ct. 1028, 1036 (1992) ("[A]bsent any contrary indication in the text or history of the statute, we presume Congress enacted this statute with the prevailing traditional rule in mind.").

Furthermore, if the American Civil Liberties Union and the Religious Coalition for Abortion Rights challenge a protective abortion law under the RFRA, it is completely plausible that the prime sponsors of the RFRA and the committee chairmen of jurisdiction would be among the signers of an amicus curiae brief advising the Supreme Court that the RFRA guarantees the right of a woman to procure any abortion motivated by a woman's "conscience" or "beliefs." These persons would argue that they never intended to establish a compelling interest in protecting human life under the RFRA. They would assert that they would never have supported the bill if it had established or enshrined such a compelling interest. The ACLU will assert that its position — that there is a free-exercise right to abortion — is long-standing and well known, and it had no intention, by its support of the RFRA, to establish a compelling interest in protecting unborn human life.

B. Roe v. Wade *Has Been Expressly Reaffirmed in* Casey *and No Compelling Interests Were Recognized, So That a Later Court Could Find That Congress Intended to Include Roe's Failure to Recognize a Pre-Viability Compelling Interest in Unborn Life.*

Roe v. Wade held that (1) there is a fundamental right to abortion and (2) state interests in protecting maternal health and unborn life become compelling only after the second trimester and viability, respectively. Therefore, the *Roe* Court struck down a Texas abortion statute which prohibited abortion except to preserve the life of the mother.

In *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), the Supreme Court reaffirmed the core holding of *Roe*, although it abandoned the trimester scheme. However, the Supreme Court did not in *Casey* recognize any compelling interest in unborn life or maternal health, referring instead to "legitimate" interests. *Id.* at 2804 (joint opinion). Given this fact, it is highly unlikely that a court would conclude that Congress intended to restore or recognize a compelling interest in unborn life when it enacted the RFRA.

Even if *Roe* is reversed at some point, the Court would likely not proclaim a compelling state interest in restricting abortion, but that there is no "fundamental right to abortion." Therefore, it would no longer be necessary to demonstrate a compelling interest in restricting abortion. Protective abortion laws would be upheld under the easily met "rational basis test."

If Congress meanwhile enacts the RFRA, however, laws restricting abortion will again face the formidable "compelling state interest" barrier, this time erected not by the Constitution but by the RFRA itself.

1. The Jurisprudential Philosophy of the New Majority on the Court Makes Them Deferential to Congress on Statutory Matters.

It has been urged that a new majority on the Supreme Court believes that important societal matters, such as abortion, should be handled by state legislatures. 2/21 McConnell et al. Memo at 4. McConnell et al. stated this jurisprudential philosophy thus:

> If the Court overrules *Roe*, it will be because of a fundamental jurisprudential judgment that the abortion issue is not appropriately resolved by judges — that 'the answers to most of the cruel questions posed are political and not juridical.'

Id. (quoting *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring)).

That there is currently a majority willing to overturn *Roe* has been disproved in the recent *Casey* decision. Moreover, it is precisely the jurisprudential philosophy cited — a deferential attitude toward the judgments of legislatures — which *also* makes this Court majority deferential to the actions of Congress and concerned to abide by the Congressional intent in enacting a statute such as the RFRA. This majority will likely ask whether Congress intended, by passage of the RFRA, to subject protective abortion laws to the stringent compelling state interest test. As already discussed, the answer would likely be "yes" (with the understanding that Congress could act to change matters if it did not agree with the Court's interpretation). This leaves the matter sufficiently uncertain to warrant excluding an abortion right under the RFRA.

The recent decision of the United States Supreme Court in the case of *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America et al. v. Johnson Controls*, 111 S. Ct. 1196 (1991), underscores this point. In *Johnson Controls*, the Court considered whether a corporate policy of barring fertile women from jobs where they could be exposed to lead violated Title VII of the Civil Rights Act because it constituted sex discrimination. In striking down the policy, the Court declared:

> Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the Pregnancy Discrimination Act.

Id. at 1207. Justice White authored an opinion, concurring in part and concurring in the judgment, joined by Chief Justice Rehnquist and Justice Kennedy, and Justice Scalia wrote separately, concurring in the judgment. A quote from Justice Scalia's opinion illustrates the judicial philosophy of these conservative Justices:

> I think it irrelevant that there was 'evidence in the record about the debilitating effect of lead exposure on the male reproductive system.' Even without such evidence, treating women differently 'on the basis of pregnancy' constitutes discrimination 'on the basis of sex,' *because Congress has unequivocally said so*.

Id. 1216 (Scalia, J., concurring) (emphasis added) (citations omitted).

This sort of analysis applied to a future attack by the ACLU and/or RCAR on a protective abortion statute could readily result in a holding that if a state law burdens conduct motivated by religion, in this case abortion, it cannot be enforced, because Congress said so. If Congress did not intend to include abortion as a form of protected conduct within the RFRA, the court opinion would read, Congress could have said so.

C. *Even if a Compelling Interest Were Recognized, Because There Are a Number of Ways in Which a State Can Legislatively Favor Childbirth Over Abortion, the Problem Would Remain of Whether a Statute Barring Abortion Would be the Least Restrictive Means to Achieve the State's Objective.*

Critics of the opponents of the RFRA have argued that an abortion-exception amendment to the RFRA is not needed because (1) the Supreme Court will establish at some point that there is a compelling interest in unborn life (an assertion demonstrated to be debatable, *supra*) and (2) that a protective abortion statute barring abortion in most circumstances would be "the least restrictive means" to effect the state's recognized compelling interest. This second point may not be so easily assumed.

First, it should be noted that this least-restrictive-means test, employed in First Amendment analysis, is a more rigorous test than the narrowly tailored test employed in Fourteenth Amendment analysis. There may be a number of ways in which a state could assert a compelling interest which would be no wider than the interest itself. These would all be narrowly tailored. However, not all of these would be equally restrictive. Among those narrowly tailored possibilities, a state would have to assert its interest in protecting unborn human life in the least restrictive way possible.

There are a variety of ways in which a state could seek to assert an interest in protecting unborn life, most of them less restrictive than barring abortion. For example, a state could promote its interest in protecting unborn human life by passing laws promoting adoption by simplifying legal procedures, providing financial assistance and incentives, and so on. Likewise, the state could provide various incentives to carry a child to term and disincentives for abortion falling short of a ban. The state could establish a network of homes for unwed mothers. It could launch state-wide education programs in schools and advertising programs to promote childbirth and adoption over abortion. Under the RFRA, pro-abortion groups will argue that these (and other state actions which may be imagined) are among the many less restrictive ways in which a state could assert its interest in protecting unborn human life. It is entirely conceivable that some court could find that barring abortion would weigh too heavily on women seeking abortion and that the state must employ less restrictive means to promote its interest.

IV. THE LONG HISTORY OF ABORTION LITIGATION AND THE MERITS OF ITS UNIQUE STATUS MAKE IT AN APPROPRIATE EXCEPTION TO BE SPELLED OUT IN THE RFRA.

William Bentley Ball, one of America's foremost litigators for religious freedom, has made two important points in arguing that the RFRA needs "an express reservation, in the text of the act, which would exclude from the scope of the act any cause of action challenging an abortion-restrictive statute" Letter from William B. Ball to Marc Stern at 3 (Mar. 26, 1991). These are: (1) that we must take into account the political context of the current support for the RFRA and (2) that abortion is specially qualified to be an exception to the RFRA. Concerning the first point, he writes:

> The problem . . . [is] with the RFRA as it appears likely to be used. I feel that it is unrealistic to ignore the context in which the bill is appearing. The chief promoter of RFRA is the Coalition For the Free Exercise of Religion. Also favoring the measure is the Religious Coalition for Abortion Rights. You have seen the latter group's passionate plea on behalf of RFRA. . . . Let us suppose that an otherwise adequate piece of legislation is being expressly backed by [the Ku Klux Klan and several other white supremacist organizations]. I wonder if we would not both feel that we could not ignore the factor of those promoters when we would come to consider the bare texts of the proposed legislation. *It is unrealistic to view legislation apart from its political context.*

Id. at 1-2 (emphasis added).

As to the unique status of abortion, making it appropriate for special treatment in the RFRA, Mr. Ball writes:

> I am not bothered by the making of this extremely important exception. I know that you had said that, if one exception is made, all may be made. . . . I believe that the abortion exception is one not remotely like any other which can be conceived. You well recall the statement in the Mormon cases that human sacrifice does not lie within the scope of religious liberty. If a cult were flourishing, on a widespread basis in our country, which practices human sacrifice, I am sure that you would not refuse an exception being made to the RFRA to exclude their "rights." Let me tell you that abortion on demand in the United States today dwarfs, in the opinion of millions of Americans, the horrors of human sacrifice.

Id. at 3-4.

V. IT IS HIGHLY UNLIKELY THAT ANY PROTECTIVE ABORTION STATUTE WOULD BE ENACTED WITHOUT AN EXCEPTION TO PRESERVE THE LIFE OF THE MOTHER, SO THAT RELIGIONS REQUIRING LIFE SAVING ABORTIONS WOULD HAVE THEIR CONCERNS MET EVEN WITH AN RFRA WHICH EXCLUDES ABORTION.

Some members of the RFRA coalition, such as Agudath Israel of America, have argued that their religion compels them to seek an abortion in a case where the life of the mother is at risk. Therefore, Agudath Israel urges that an abortion-exemption amendment not be added to the RFRA because the RFRA would then not allow a free-exercise claim to be excepted from a protective abortion statute. Letter from David Zwiebel, Director for Government Affairs and General Counsel to Agudath Israel, to Douglas Johnson at 1 (Jan. 24, 1991). Forest Montgomery has opposed an abortion-exemption amendment because he believes that such claims ought to be allowed under the RFRA. Letter from Forest Montgomery to Representatives Solarz and Henry at 1 (Mar. 1, 1991).

It should be noted that these positions concede that the RFRA would allow free-exercise-of-religion abortion claims. Indeed, Montgomery and Agudath Israel have taken the position that such claims are proper and opportunity to raise them should be preserved.

NRLC has long maintained the public policy position that an exception to protective abortion statutes to preserve the life of the mother is permissible. This has been the uniform [illegible]he American states in their abortion statutes for most of American statutory history [illegible]ommon law before that. We would include such an exception in both federal and state proposals to restrict abortion. Therefore, we do not take issue with Agudath Israel's desire for a life-of-the-mother exception to protective abortion statutes. We do differ as to how this ought to be achieved. Allowing free-exercise claims to an abortion right under the RFRA would result in much broader claims than just for the life of the mother. What principled line could be drawn to say that one religious claim (for the life of the mother) is more legitimate than another religious claim (for the right to make a free choice without any "burden" on the choice)? None is possible. Therefore, by defending the right of persons to have a recognized free-exercise claim to life-saving abortion under the RFRA, one holds open the door to a host of other claims.

The way to achieve a life-of-the-mother exception is through the legislative process, and not through the RFRA with the accompanying flood of other religious claims that could be made if one is recognized. The state legislatures have a long history of recognizing, at a minimum, an exception for the life of the mother. Therefore, the concerns of religious organizations which would impose a religious duty to obtain an abortion to preserve the life of the mother are already provided for.

VI. CONCLUSION

In sum, the RFRA without an amendment excepting abortion poses grave dangers to protective abortion laws. Efforts to protect religious liberty must not come at the expense of the lives of innocent unborn children. The Religious Freedom Restoration Act of 1992 needs an abortion exception amendment.

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Senator KENNEDY. Well, thank you very much, Mr. Bopp. I gather from what Mr. Bopp has mentioned, those members who are sponsors or supporters who happen to be pro-life are being taken in. Maybe Mr. Montgomery and Mr. Farris are being taken in, too. I will give you each a chance to respond.

Mr. FARRIS. Well, as the cochairman of the drafting committee, I don't think I was taken in when I helped write this bill. And to specifically focus on his—to talk about "motivated," a prior draft of the bill did talk about "motivated." To get around this problem, we substituted the word that he said, and that is the word "exercise." That is the word the first amendment uses, and so we are using the time-honored standard.

Basically, for individuals, individuals have to show that they are compelled or forbidden from obeying their religious beliefs. Now, I don't think that that standard should be the standard for religious institutions. If my church wants to put its altar 10 feet away, it should be no business of the Government to tell me I can't move that; that I have to show that the Bible requires me to have my altar in a specific location.

Churches and church institutions and religious institutions shouldn't have to get to the standard of "forbidden" and "compelled," but religious individuals who are confronting the Government have always been required to do that. That is a nuance that is very difficult to put in statutory language, and that is why we chose the term of art from the first amendment itself, and that is "exercise."

We are making sure that those standards have been there since 1963, at least, will be retained, and so the standards that were victorious in *Harris* v. *McRae* are in this bill. Maybe they weren't in the prior draft of this bill, but they are in the current version of this bill. So, that problem has been answered.

I would say, also, that that shows that we have tried—the coalition has tried to work with any legitimate arguments that come from people who have raised questions. But legitimate responses haven't been enough, and I had a conversation with Mr. Bopp that I think will shed some light on this when we talk about being taken in.

When this first was raised nearly 2 years ago, I had a conversation with him where I said there is not better than a 2-percent chance that this bill could ever be used to successfully advance an abortion argument. He said he disagreed with my 2-percent analysis, but he said that is the difference between your organization and my organization; we are a single-issue organization and we take no position on any issue outside of abortion, not even religious freedom.

I think that somebody who is so single-minded that doesn't understand that religious freedom is the heart of the pro-life movement, and is willing to abandon religious freedom where there is a 100-percent liability to our religious freedom, out of this minuscule, speculative possibility that something drastic will happen that has never happened in our history, I think is doing a disservice to the constituency he is supposed to represent.

The pro-life community is by-and-large a religious community, not exclusively, but by-and-large. Our freedoms are at jeopardy,

and Mr. Bopp's single-mindedness and willingness to throw religious freedom down the tube, I think, is a disservice to his constituency.

Mr. BOPP. Mr. Chairman, could I respond to that ad hominem attack?

Senator KENNEDY. Yes, please.

Mr. BOPP. You know, Mr. Farris—I don't know what his problem is, but I think that these matters need to be addressed on the issues. I wouldn't question his motivation, and I think it is wrong for him to question my motivation and quote out of context from a long discussion and mislead this committee on my views.

Let me just answer on the merits. On the merits, he simultaneously said two things. He first said that the standard under the act is "compelled" or "forbidden," and then he argued that because you couldn't show that an altar needed to be only 10 feet, as opposed to some other distance, away, that that is no business of the Government. What he was saying is, yes, that is what he believes. It is no business of the Government to require that religious practice be shown to be compelled or forbidden by religious belief.

He has written, as the others have, as Representative Solarz has testified, that the standard is "motivated." That standard is a different one than *Harris* v. *McRae*. *Harris* v. *McRae* said "under compulsion of religious belief." Test this by moving an amendment in this committee, if this bill is marked up, to say "compelled" and "forbidden." Talk to Mr. Farris and the other people who are supporting this bill in your chambers about whether or not they would support such an amendment. They will vigorously oppose it, and what have they done? They have proposed a bill whose test is "motivated" and they have overruled *Harris* v. *McRae* that says "compulsion," and they have done exactly what they claim that they are not doing.

Ms. STROSSEN. Senators, if I may move us beyond this, to me, abstruse debate about the difference between "motivated" and "compelled," I think the bill is very clear in the section in which it talks about the purpose being to restore the compelling interest test as set forth in *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder*. In both of those cases, the Court makes clear that the free exercise clause is only triggered. In other words, the threshold requirement is that the person show that a religiously compelled belief or practice is prohibited, or the other way around, that one is compelled to do something that violates one's religious belief. That is a threshold showing without which you don't even get your first foot in the door.

So if we talk about abortion restrictions such as the ones involved in the *Casey* case, that would mean that a woman would have to say, I have a specific religious belief that I may not wait 24 hours, or that I may not confer with the doctor about the other options to having an abortion. It seems to me she wouldn't even get that far, but even assuming for the sake of argument she got that far, it would still remain open to the Government to show a compelling interest.

Some people are happy about it, some are less happy about it. I count five votes on this Court for reaching the conclusion that the State's interest in protecting unborn life is a compelling interest. If

it is a compelling interest sufficient to overcome the privacy right, it is sufficiently compelling to overcome a religious freedom right.

Senator KENNEDY. Is your position that there are no religions that, as a matter of religious belief, require abortion?

Ms. STROSSEN. Senator Kennedy, I am an expert in constitutional law, not religion. However, I have read all of the statements and articles that have been written about this issue and, to the best of my knowledge, I have come across only one example of a religious belief of when abortion is required, and that is certain orthodox Jewish women who believe that it is required in order to save the life of the mother.

Senator KENNEDY. What about you, Mr. Bopp?

Mr. BOPP. Well, as far as I know, in terms of compelling an abortion, I would agree with Ms. Strossen that the orthodox Jewish position, as I understand it, is that when the life of the mother is at stake, an abortion is compelled. However, there are numerous denominations—the Religious Coalition on Abortion Rights is made up of many large denominations, Protestant and otherwise, that feel that the question of abortion is a matter of religious conscience of the individual woman to decide. That makes the question of abortion not compelled, I would agree, in many of those cases, but motivated; that is, a matter of religious conscience.

This claim has been made in Utah, Senator Hatch, against your own statute, and the protection that was afforded your statute from that claim was the *Smith* decision that it would be held only on a rational basis, and certainly the rational basis for your statute. So, you know, these are real questions if it is a "motivated" test, and the people who drafted this, the people who sponsor it and who testify about it, that is their intent.

Mr. FARRIS. If I could speak to that just for a second, the actual text of the bill says, "A person whose religious exercise has been burdened in violation of this section may assert that the violation," and so on. The key phrase there is "exercise which has been burdened." That is the classical first amendment test that has always been used.

As I said, and Mr. Bopp twisted my words, for religious individuals, there has been one standard of "compelled" or "forbidden." For religious institutions within the context of their own religious practice, that standard has not been quite so rigorous. I said it is difficult to do all that, and the reason I would oppose substituting "burden"—if "motivated" was in here, I think we should change it, but it is not in here. It is "burden" and it is "free exercise," and that is the language we have used. It is the classical test.

Harris is the same language that was decided under the first amendment as we have incorporated in this bill. It does not change it, and his twisting of what I said about religious institutions is just inaccurate.

Ms. STROSSEN. Senators, I would also like to point out that in 1989, before the *Smith* decision—in other words, when the constitutional test was the same as what it would be under RFRA—Mr. Bopp himself wrote an article in which he concluded, "The free exercise clause provides no protection for abortion," after the reversal of *Roe*. It is an article entitled "Will There Be a Constitutional Right to Abortion After the Reconsideration of *Roe* v. *Wade*?" It

appears in volume 15 of the Journal of Contemporary Law, and that citation appears at page 156.

Mr. MONTGOMERY. Mr. Chairman, may I jump in here just a minute?

Senator KENNEDY. Yes.

Mr. MONTGOMERY. I have been allowing my boiling blood to cool down a little bit. I noticed Mr. Bopp—I commend him for not wanting to engage in any personal attacks, but I noticed, Senator Hatch, when he referred to you, if my recollection is correct at my age, he ascribed the motive that abortion is the price we must pay for religious freedom.

Mr. BOPP. I certainly did not.

Senator HATCH. No, I don't think he did. I didn't interpret it that way.

Mr. MONTGOMERY. Well, what I heard him say was this opening up the floodgates to abortion is the price of religious liberty. Now, maybe my perception is different, but let me just say, in the statement we submitted for the record that includes a statement of the Christian Action Council, which is a one-issue group. They are pro-life. They operate 445 crisis pregnancy centers across the country. They support RFRA because, while their one issue is pro-life, they are also Americans and they appreciate how basic religious freedom is to all family values. It is the bedrock of our belief system.

I would also like to say that among these organizations, pro-life, that support this legislation, of course, are the National Association of Evangelicals, 15 million in our constituency; the Southern Baptist Convention's Christian Life Commission, they represent 15.2 million Baptists; the Coalitions for America; the Traditional Values Coalition; Concerned Women for America, the largest women's organization in the United States; the Christian Legal Society; Mike Farris' Home School Legal Defense Association; and, of course, the Mormon Church and Agudath Israel. Those are just some of the groups. In this statement, I say these groups, in good conscience, could not support RFRA if they thought for a minute that it would advance abortion interests.

Senator KENNEDY. Senator Hatch.

Senator HATCH. Well, thank you, Senator Kennedy. I just want to thank each and every one of you for testifying. I think each of you has elucidated your position very well. Mr. Bopp, I have always had a great deal of respect for you, and still do, in spite of your testimony here today. I am only kidding you, but frankly I can see where I think you can make an extreme case that any change in first amendment rights and privileges, or augmentation of them, might be interpreted one way or the other. I just can't see how the Court is going to interpret it the way you feel that it will.

Ms. Strossen, I really enjoyed your testimony. This is the first time I think I have met you and I am very pleased to have you before the committee. Mr. Farris and Mr. Montgomery, we appreciate the case that you have made for this bill.

I personally believe that if we don't pass legislation like this, this country is going to have a lot more difficulties in the future. I agree with you, Ms. Strossen; this is a civil rights bill for religious belief. I have no doubt in my mind that we need to bring everybody together on it, and I am not sure you can do it by having a bunch

of exemptions that open the door to all kinds of misinterpretation of it.

I think we have got to realize that the purpose of this statute is not necessarily to further anything but religious freedom, and I believe it sends a message to the Court that we won't tolerate anything that will not do that. If we thought we could solve every problem, we wouldn't need the Congress. As a matter of fact, maybe we could solve more problems if we had a little less Congress.

But I am very appreciative of all the witnesses today. It has been very interesting to me, and I think each and every witness has contributed very, very well to this. So thank you for being here, and we will submit any questions we have, Mr. Chairman.

I want to personally thank you for holding these hearings and sitting through them as you have, and for leading out on this issue. I think it is a wonderful thing to have all of these broad cross-sections brought together on something as important as this, and I hope, Mr. Bopp, that somehow we can satisfy you and those who feel sincerely the way you do that this is a better way to go than not having the legislation. But in any event, I have a great deal of respect for you. I just want you to know that.

Senator KENNEDY. I do want to join Senator Hatch. When you get to these religious views, people have strong views and strong emotions, and rightfully so. These are the bedrock factors—defining issues in our society, and people have strong and differing views about these matters, and I think we see it.

I think both Senator Hatch and I would like to see, obviously, and it is always most important if we can possibly find ways where you get general consensus and support for a position. I think that is obviously still a hope, but if not, we have to at least meet our responsibilities in trying to protect and ensure what we believe, and what the courts have stated, are constitutional rights. So we have to address those, and will.

We are very, very grateful to all of you. We found it enormously interesting, and we will be calling on you again and again. I think everyone here has thought about this a great deal and it is enormously important. This is an extremely important piece of legislation. Senator Hatch believes so, I believe so, and the other members do, and we certainly know all of you do, and the others who have spoken, and I am sure people all over the country care very deeply about it.

So we are going to give it attention, we are going to give it focus. We are going to speak to our colleagues about it and others who are here. We are voting right at this moment, but we have been debating the defense authorization. They had the debate on the B-2 bomber, enormously important, and on nuclear testing over there, where many of our colleagues have been required to attend. So it isn't a lack of interest that they are not here, but we will certainly share with them what we have heard this morning.

We are grateful to all of you, and the committee stands in recess.

[Whereupon, at 12:32 p.m., the committee was adjourned.]

APPENDIX

TESTIMONY ON S. 2969 AND THE NEED FOR ADDITIONAL NATIVE AMERICAN RELIGIOUS FREEDOM LEGISLATION

SUBMITTED TO
THE SENATE JUDICIARY COMMITTEE
IN CONJUNCTION WITH HEARINGS HELD IN WASHINGTON, D.C.
ON SEPTEMBER 18, 1992

SUBMITTED BY:
Americans for Indian Opportunity
Association on American Indian Affairs
Church of the Brethren
Consolidated Salish and Kootenai Tribes
Cultural Conservancy
Ecumenical Ministries of Oregon
Environmental Defense Fund
Friends Committee on National Legislation
Friends of the Earth
General Conference of Seventh-day Adventists
Hollywood Women's Political Committee
Hui Malama I Na Kupuna O Hawaii Nei
Kauffman and Associates
Keepers of the Treasures: Cultural Council of American Indians, Alaska Natives and Native Hawaiians
National Congress of American Indians
National Council of Churches
National Indian Education Association
Native American Church of North America
Native American Rights Fund
Native American Religious Freedom Project
Native American Task Force of the Church Council of Greater Seattle
Navajo Nation Corrections Project
Religious Action Center of the Union of American Hebrew Congregations
Seventh Generation Fund
Society for Applied Anthropology
Washington Association of Churches
Ysleta Del Sur Pueblo

"RELIGIOUS FREEDOM RESTORATION ACT" (S. 2969): THE NEED FOR ADDITIONAL NATIVE AMERICAN RELIGIOUS FREEDOM LEGISLATION

This testimony is being submitted by a broad coalition of Indian tribes and organizations and religious, civil rights and environmental organizations to the Senate Judiciary Committee. Many members of the coalition have submitted separate testimony specifically supporting S. 2969 (the "Religious Freedom Restoration Act"). However, they have joined in this testimony because they believe it is critical that members of Congress understand that S. 2969 will not address all critical free exercise problems currently confronted in the United States. For one group of Americans, the First Americans, additional legislation is necessary to ensure their right to continue to exercise their unique religious traditions.

Native Americans, in general, support S. 2969, as it is vitally important to restore to all Americans the basic First Amendment freedoms which have been stripped from them by recent Supreme Court decisions. The acceptability of religious practice should never be decided by majority rule in a country that encompasses diverse populations. Indeed, Native American religions, in particular, are not well understood by the majority society.

However, for the reasons expressed below, S. 2969 is not enough to protect the religious freedom rights of Native Americans. Additional legislation is necessary if Native Americans are to receive the same degree of protection of their religious practices as that accorded to other religious traditions. Thus, proposals are being developed to amend the American Indian Religious Freedom Act to ensure the ability of traditional Native Americans to fully and freely practice their own religions. The same moral imperative which makes it urgent for Congress to move rapidly forward on S. 2969 is equally applicable to legislation which would amend the

American Indian Religious Freedom Act to protect Native American religious free exercise rights. The following testimony explains the reasons why this additional legislation is needed.

Executive Summary

In General: Many Native Americans support S. 2969, introduced by Senator Kennedy, as a partial remedy to their Free Exercise problems, but S. 2969 does not address unique Native American Free Exercise problems. Thus, there is a need for separate legislation to protect Native American religious freedom (now being developed by the Senate Select Committee on Indian Affairs).

Background: In two recent decisions, the United States Supreme Court held that the First Amendment provides no protection to (1) Native American sacred sites which are integral to the practice of traditional religions (Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1988)), and (2) the ceremonial use of peyote in Native American Church ceremonies (Employment Div. of Oregon v. Smith, 494 U.S. 872 (1990). For Indians -- who have already suffered a long and troubling history of religious intolerance, including total bans on tribal religious practices by the United States Government as part of its federal Indian policy -- these decisions were devastating. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, which made it Federal policy to protect and preserve traditional religions of Native Americans. However, that Act was held in Lyng to be judicially unenforceable -- "it has no teeth".

Rationale for Separate Indian Legislation:

It is appropriate and critical that additional legislation be enacted to directly address the religious freedom concerns of traditional Indian religious practitioners for a number of reasons:

1. Since the creation of the United States, the treaty relationship between Indian tribes and the United States government has engendered a long-standing political relationship under the Constitution, which includes a federal trust relationship for Indian tribes and voluminous federal legislation dealing with all aspects of Indian life. One can look to areas of health, education, religion, economic development, children, employment, language and culture, and a host of other areas, and consistently find separate legislation because of the sui generis legal status of American Indians. Recently, this long-standing rationale served, in part, as a basis for upholding the constitutionality of the Drug Enforcement Administration's rule exempting Native American religious use of peyote from federal drug laws (Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

2. S. 2969 is a reactive bill which relies primarily upon litigation as a check upon government power. But in Federal Indian affairs, where numerous governmental policies so completely pervade Indian religious life, there is a need for proactive legislation to affirmatively change problematic federal and state procedures to accommodate and protect Native religions. When AIRFA was enacted in 1978, Congress mandated a one-year study of federal practices which adversely impacted upon Native religious freedom to identify needed changes and recommendations for administrative and statutory changes. The report identified 522 specific examples of government infringement upon traditional American Indian religious practices involving Indians from 70 Indian tribes in 28 states. It made 11 recommendations to Congress

for proposed uniform administrative procedures to correct these problems and 5 legislative proposals. None of these recommendations was ever carried out with the exception of one recommendation pertaining to the theft and interstate transport of sacred objects which was partially addressed in the Native American Graves Protection and Repatriation Act. Thus, there is a detailed and unfinished agenda in the area of Native American religious freedom with specific government actions (or inaction) identified as constituting obstacles to Native religious practice. These obstacles can best be addressed by specific carefully-crafted legislation which affirmatively addresses the needs of Native religions.

3. Traditional Indian religions are of a highly unique nature. Unlike Western religions which are written and based upon theological doctrine, Indian religions are unwritten and dependent upon the ongoing practice of ceremonies and rituals for their continuing existence. For this reason, they are little understood by courts, land administrators and other governmental officials. For example, the history of litigation over sacred sites reveals courts struggling with the application of the traditional First Amendment balancing test in that context, with the Lyng case holding that governmental land management decisions which would destroy a Native religion did not unconstitutionally infringe upon free exercise and other cases "inventing" novel standards such as requiring a showing of "centrality" before applying the test (Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980)). Thus, it is appropriate that Congress utilize its special expertise in Indian affairs to craft legal standards which will work in the context of Native American religions.

4. Although such efforts have been piecemeal and left enormous holes in the protective fabric, Congress has in the past included in many laws, provisions which address the

unique religious needs of Native Americans. Special provisions are present in such laws as the Native American Graves Protection and Repatriation Act, Eagle Protection Act, Archaeological Resources Protect Act and Indian Civil Rights Act. Moreover, on a number of occasions sacred lands have been transferred directly to Indian tribes, e.g., Blue Lake to the Taos Pueblo, Mount Adams to the Yakima Tribe.

The following is an analysis which elaborates on the above issues.

I. *INTRODUCTION: THE RELIGIOUS FREEDOM CRISIS*

In general, Native Americans support S. 2969 as it restores basic religious freedoms to all Americans. However, S. 2969 does not address unique Native American Free Exercise problems; and there is a need for additional legislation to protect Native religious freedom. This testimony presents the rationale for additional American Indian religious freedom legislation to meet the First Amendment crisis caused by recent Supreme Court decisions in two American Indian religion cases: Smith (1990) and Lyng (1988).

Though these Indian cases have seriously weakened religious liberty of all Americans, it is important not to forget that they specifically targeted and impacted upon Native Americans. Thus, as Congress addresses the Nation's religious freedom crisis caused by these American Indian religion cases, it must address the specific needs of American Indians and take appropriate steps to safeguard their First Amendment rights.

To date, much congressional attention has been given to S. 2969, but very little to American Indians. While S. 2969 seeks to redress the Free Exercise problems created by the Indian religion Smith case, Congress and supporters of the bill must also focus upon the serious Free Exercise problems of the very Native people suffering direct harm by that case.

Thus, while Native Americans may support S. 2969 as a partial remedy to their Free Exercise problems, it is critical that the paramount need for additional Indian legislation (now being developed by the Senate Select Committee on Indian Affairs) must be clearly understood and supported by sponsors and supporters of S. 2969. The pronounced need for Indian legislation was created, discussed, and made self-apparent in Smith and Lyng -- making it morally impossible for policymakers to fail to deal with American Indians in a legislative process to overturn the disturbing trend of those decisions.

There are four reasons why special Indian legislation is necessary to address the Smith and Lyng crisis, even though S. 2969 would restore the balancing test discarded in Smith:

1. Congress normally addresses important Indian issues through federal Indian legislation because of the treaty, political and legal status of American Indians under the U.S. Constitution.
2. There is an existing Congressional policy on American Indian Religious Freedom, which establishes the foundation for further legislation to correct adverse impacts of Smith and Lyng.
3. S. 2969 does not implement the AIRFA policy established in 1978; and the bill will not solve all of the unique problems previously identified by the Administration and reported to Congress in 1979.
4. Congress has legislated **extensively** in the Indian religion field over the years; and has already established -- though it was never fully implemented -- a comprehensive religious freedom policy for Native Americans with the 1978

enactment of the American Indian Religious Freedom Act, 92 Stat. 469, 42 USCA 1996.

A. Background of the Crisis

In 1990, American religious freedom was seriously undercut by the Supreme Court in a case involving American Indian religious freedom; Employment Div. of Oregon v. Smith, 494 U.S. 872, 108 L.Ed.2d 876 (1990). For Indians -- who have already suffered a long and troubling history of religious intolerance, including total bans on tribal religious practices by the United States Government as part of its federal Indian policy -- the Court's decision was devastating, particularly in light of an earlier 1988 decision in another Indian religion case, Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1988), denying First Amendment protection for tribal holy places located on federal lands from being destroyed by federal agencies. Lyng and Smith create a frightening loophole in the First Amendment for First Americans and a serious human rights crisis on Indian reservations that must be addressed by Congress.

For non-Indians, Smith also caused an outcry, because in excluding Indians from the First Amendment, the court seriously weakened religious liberty for all Americans. Time reported (Dec. 9, 1991, at 68):

> For all the rifts among religious and civil-libertarian groups, this decision brought a choir of outrage singing full-voice. A whole clause of the Bill of Rights had been abolished, critics charged, and the whole concept of religious freedom was now imperiled. "On the really small and odd religious groups," said University of Texas' Laycock, "it's just open season."

B. Two Legislative Efforts Address The Crisis

There are two distinct, but compatible, efforts in Congress to restore basic American religious liberty: 1) One effort is S. 2969 to restore the "compelling state interest" test, which is supported by the American church and civil libertarian communities. 2) The other effort is the Native American initiative before the Senate Select Committee on Indian Affairs to amend and put teeth into Congress' existing Indian religious freedom policy of the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996 ("AIRFA").

S. 2969 (introduced by Senator Kennedy and other sponsors) was referred to the Senate Judiciary Committee. It would restore the "compelling state interest test" discarded by Smith. The bill is supported by the **COALITION FOR THE FREE EXERCISE OF RELIGION**, a broad array of religious groups and civil libertarians. The bill is supported by many Indian people and may help solve some Indian Free Exercise problems; but **it does not redress long-standing unique, Indian Free Exercise and religious discrimination problems, nor implement the federal Indian policy initiated by AIRFA, and there remains a need for additional legislation to protect Free Exercise rights of Native Americans.**

Many members of the **COALITION FOR THE FREE EXERCISE OF RELIGION** have acknowledged the need for separate Indian legislation, and have pledged their support for that initiative.

II. RATIONALE FOR SEPARATE INDIAN LEGISLATION

The following is a rationale for separate Indian legislation in the form of amendments to the American Indian Religious Freedom Act, supra (AIRFA):

A. Congress Normally Addresses Indian Issues In Federal Indian Legislation

Since the creation of the United States, the treaty relationship between Indian tribes and the United States government has engendered a long-standing political relationship under the Constitution, which includes a federal trust responsibility for Indian tribes and voluminous federal legislation dealing with all aspects of Indian life. One can look to areas of health, education, religion, economic development, children, employment, language and culture, as well as a host of other areas, and consistently find separate federal legislation. An entire title of the United States Code (25 USC) is devoted exclusively to special Indian legislation.

Because Indians and Indian tribes occupy a sui generis legal status in federal law under the U.S. Constitution and enjoy a special political relationship with the United States government, separate Indian legislation has consistently been upheld by the U.S. Supreme Court, as explained in Morton v. Mancari, 417 U.S. 535, 551-55 (1974):

> Resolution of the instant issue (validity of a federal Indian employment statute) turns upon the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, Sec. 8, Cl.3, provides Congress with the power to "regulate commerce. . . with the Indian tribes," and thus, to this extent, singles out Indians as a proper subject for separate legislation. Article II, Sec.2, Cl.2, gives the

> President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes.
>
> * * * *
>
> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. [citations omitted] As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgment will not be disturbed.

This long-standing rationale for separate Indian treatment by the federal government was recently applied in the religion area by the Fifth Circuit, at the urging of the Justice Department, in Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir., 1991). Upholding the constitutionality of the Drug Enforcement Administration's rule (in effect since 1966) exempting Native American religious use of peyote from federal drug laws, the Court stated at 1216-17:

> We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans.
>
> * * * *
>
> The unique guardian-ward relationship between the federal government and Native American Indian tribes precludes the degree of separation of

> church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that relationship.

Indeed, the Supreme Court itself in Smith (108 L.Ed.2d at 893, 901) and Lyng (487 U.S. at 452) referred the Indians in those cases to Congress for legislation to protect their tribal religious freedom -- which is an area where Congress has passed many laws, as discussed next.

B. There is an Existing Congressional Policy on American Indian Religious Freedom, Which Establishes the Foundation For Further Legislation to Correct Adverse Impacts of Smith and Lyng

In 1978, Congress initiated a comprehensive policy in the Indian religion area with the passage of the American Indian Religious Freedom Act, 92 Stat. 469, 42 USCA 1996 (AIRFA). In the finding clauses of AIRFA, Congress found that "the lack of a clear, comprehensive, and consistent federal policy has often resulted in the abridgement of religious freedom for traditional American Indians." AIRFA established a federal policy:

> To protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

To implement the policy, Section 2 required a one-year study of federal practices which adversely impacted upon Native religious freedom to identify needed changes and recommendations for administrative and statutory change:

> The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

In the President's Report to Congress, widespread problems were identified, including 522 specific examples of government infringement upon traditional American Indian religious practices involving Indians from 70 Indian tribes in 28 states. The President made 11 recommendations to Congress for proposed uniform administrative procedures to correct these problems (Report at 62-63, 71, 75, 81) -- **none was ever carried out**. The President also made 5 legislative proposals to:

1. Suggest a new type of federal landholding for Native sacred sites or shrines located on federal land (Id. at 63);
2. Amend specific laws which prevent Native religious practices on federal lands (Id.);
3. Protect information concerning sensitive religious matters and sites (Id.);
4. Amend tariff schedules, export laws and the Jay Treaty (Id. at 75);

5. Legislation to protect Indians against theft, export, interstate transportation of sacred objects (Id. at 81);

Of the five recommended legislative proposals, only No. 5 has been acted upon (in part) by Congress to date. See, Archaeological Resources Protection Act of 1979, supra; Native American Graves Protection and Repatriation Act, supra. Though none of the other recommended administrative or legislative changes was made, the AIRFA policy and its Section 2 legislative recommendations provide a foundation for separate Indian religious freedom legislation to carry out the 1978 Indian religion policy by putting teeth into it, because, in the intervening 13 years, the Executive Branch has not acted to implement needed administrative changes and the Judicial Branch has tossed the ball back to Congress in Smith and Lyng.

C. S. 2969 Does Not Carry Out Congress' AIRFA Policy Nor Address Unique Native American Religious Freedom Problems

A more tailored approach to addressing the Indian religious freedom crisis caused by Lyng and Smith is needed than that provided by S. 2969. S. 2969 does not specifically address any of the complex issues identified by the AIRFA policy, report and recommendations for necessary changes in federal law and policies. Because much government infringement on tribal religion has been identified as the result of insensitive and uninformed enforcement of federal statutes, regulations and policies that were enacted without considering the impact upon little understood and unwritten Native religions, the "compelling state interest" test of S. 2969 will not unravel those deeply ingrained problems as well as uniform legislation that: 1) Changes specifically identified federal laws, policies, practices and procedures to accommodate Indian

religious freedom values; and 2) provides clearer, more refined standards and criteria for protecting indigenous religions.

S. 2969 is a reactive bill which relies primarily upon litigation as a check on government power. But in federal Indian affairs, where numerous government policies so completely pervade Indian religious life, there is a need for **proactive** legislation to affirmatively change problematic federal procedures to accommodate and protect Native religions.

Moreover, because traditional religions of the 500 federally recognized Indian tribes have a highly unique nature, are unwritten, and are little understood religions -- which are vastly different from the Judeo-Christian tradition -- there is a need to ensure that the "compelling state interest" test is refined and made to more adequately "fit" these sui generis religions. Undoubtedly, courts have been perplexed in applying the test to sacred sites cases -- which ultimately led to a weakening of religious freedom for everyone in cases such as Lyng and Smith. For example, Lyng held that no "burden" was placed upon religious freedom within the meaning of the test by the complete physical destruction of the tribes' central holy place by the federal government. Other Indian sacred sites cases show the contorted approaches courts have taken to try to apply constitutional concepts developed with the Judeo-Christian tradition in mind to vastly different tribal religious practices, such as the novel "centrality" standard of Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980).

Yet, if our legal system is to serve all segments of our society, it should ensure that unique needs of indigenous peoples are addressed and incorporated. Thus, more specific criteria should be spelled out so federal judges and officials can understand and fairly apply the

"compelling state interest" test in the context of America's unwritten and little understood indigenous religions.

Given the long history of government suppression of tribal religion and the federal trust relationship, Indians are entitled to specific standards and assurances that federal laws and programs do not infringe unnecessarily upon their right of worship -- especially after the AIRFA report to Congress clearly identified widespread problems and made specific recommendations to correct them. Because the Federal Government is so intimately involved with all aspects of Native American life, through the trust doctrine and voluminous federal laws and programs which impact the religious and cultural life of the Tribes, it is important that government take special care that its laws and programs accommodate tribal religious freedom. This objective can be accomplished through appropriate amendments to the AIRFA as part of Congress' federal Indian policy.

D. Congress Has Legislated Extensively in the Indian Religion Field Over the Years

Based upon the above rationale and legal authority, Congress has passed many laws to address unique needs of Native Americans in the religion area. See, e.g.:

--American Indian Religious Freedom Act, 42 USCA 1996 [federal policy to protect and preserve traditional religions of American Indians, Alaska Natives, Aleuts and Native Hawaiians];

--Indian Civil Rights Act, 25 USCA 1302 [Imposes most Bill of Rights limitations upon tribal governments, but makes an exception for establishment clause protections because government and religion are interwoven in many tribes];

Eagle Protection Act, 16 USCA 668a [permits for Indian religious use allowed]

--Native American Graves Protection and Repatriation Act, 25 USCA 3001 (1990 Supp.) [protects Indian graves, allows for return Indian dead to Tribes, and repatriation of sacred objects to be done in consultation with tribal religious leaders]; cf, **National Museum of the American Indian Act, 20 USCA 80q-9(a)** [Repatriation in consultation with Native religious leaders];

--Archaeological Resources Protection Act, 16 USCA 470cc [requires notification to Tribes of possible harm to religious sites located on federal or Indian lands];

--Rights of Indian School Children, 25 USCA 2017 [requires Secretary of the Interior to promulgate rules to inter alia protect religious freedom rights of Indian students attending BIA boarding schools];

--Access to Sacred Sites Located on various federal lands: Federal Cave Resources Protection Act, 16 USCA 4305 [notice to Tribes of possible harm to sacred sites]; National Forest Scenic-Research Areas, 16 USCA 543f [access by Indians to federal lands for religious purposes insured]; Chaco Canyon National Historical Park, 16 USCA 410ii-4 [Traditional Native religious uses allowed]; El Malpais National Monument and Conservation Act, 16 USCA 564uu-47 [Indian access to monument for religious purpose protected, including temporary closure to protect privacy for worship allowed]; Pipestone National Monument, 16 USCA 445c [Monument established for Indian religious use]; Zuni-Cibola National Historical Park, 16 USCA 410pp-6 [Park may be closed off for tribal religious worship]; Havasupai Indian Reservation, 16 USCA 228i(c) [access to Indian sacred sites may not be prohibited];

--**Conveyance of lands containing sacred sites to Indian tribes:** Blue Lake Transfer, Pub.L. 91-550 [sacred lake transferred to the Pueblo of Taos]; Pueblo of Zia, 92 Stat. 1679 [certain lands placed in trust protecting 6 tribal religious sites and shrines]; Pueblo of Santa Ana, Pub.L. 95-498, 92 Stat. 1672 [lands placed in trust and protecting 14 tribal religious sites]; Zuni Tribe, 98 Stat. 1533 [conveyance of lands for religious purposes]; Yakima Tribe, Exec. Order No. 11,670, 37 F.R. 10,431 (May 23, 1972) [sacred site transferred to Tribe by federal government].

A large body of federal administrative regulations carries out the above federal Indian religious policies, including DEA exemptions for the religious use of peyote under 21 CFR 1307.31; access to certain Native Hawaiian religious sites, 32 CFR 763.5; religious use of Eagle feathers, 50 CFR 12.36, 22.11; and consideration of environmental impacts on sacred sites under NEPA, 47 CFR 1.1307.

The above laws and regulations are piecemeal efforts to remove barriers to the free exercise of traditional religions, leaving enormous holes in needed protective fabric, that were done before the Smith and Lyng decisions. However, this patchwork reveals Congress' long history of legislating in the area of American Indian religious freedom; and this legislative record is appropriate in light of the treaty, political and trust relationship, as well as the unique nature of America's indigenous tribal religions.

CONCLUSION

In response to Smith and Lyng, the Senate Select Committee on Indian Affairs is developing proposed amendments to the American Indian Religious Freedom Act. This legislative effort is supported by Indian country as a major legislative priority for 1992, with

support from concerned human rights, church and environmental organizations who have joined Natives in an unprecedented alliance to secure passage of adequate religious freedom legislation for Native Americans.

Proposed amendments were mailed to tribal leaders in August of 1991; and a field hearing in Portland, Oregon was conducted on March 7 by the Senate Select Committee on Indian Affairs. Testimony from Native witnesses on barriers to the Free Exercise of traditional religions was received. Further hearings will be scheduled later this year. In addition, Native American and environmental groups have also recently requested that the House Interior and Insular Affairs Committee hold oversight hearings on AIRFA to begin the process in the House of considering appropriate measures to protect religious freedom of America's native peoples in the wake of Smith and Lyng.

We urge the supporters and sponsors of S. 2969 to understand and support the need for such additional legislation, so that both compatible legislative efforts -- S. 2969 and AIRFA amendments -- can go forward as expeditiously as possible.

II

102D CONGRESS
2D SESSION

S. 2969

To protect the free exercise of religion.

IN THE SENATE OF THE UNITED STATES

JULY 2 (legislative day, JUNE 16), 1992

Mr. KENNEDY (for himself, Mr. HATCH, Mr. METZENBAUM, Mr. GARN, Mr. ADAMS, Mr. HATFIELD, Mr. BURDICK, Mrs. KASSEBAUM, Mr. GRAHAM, Mr. PACKWOOD, Mr. HARKIN, Mr. SPECTER, Mr. INOUYE, Mr. LAUTENBERG, Mr. LEVIN, Mr. LIEBERMAN, Mr. PELL, Mr. RIEGLE, Mr. WELLSTONE, and Mr. WIRTH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To protect the free exercise of religion.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1992".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, se-

cured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is essential to further a compelling governmental interest; and

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

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1992," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1992;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

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

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States; and

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

SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal law adopted after the date of the enactment of this Act is subject to

this Act unless such law explicitly excludes such application by reference to this Act.

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

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion.

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