

PROTECTING RELIGIOUS FREEDOM AFTER BOERNE
V. FLORES (PART III)

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTH CONGRESS
SECOND SESSION

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PROTECTING RELIGIOUS FREEDOM AFTER BOERNE V. FLORES (PART III)

THURSDAY, MARCH 26, 1998

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

The subcommittee met, pursuant to notice, at 9:43 a.m., in Room 2141, Rayburn House Office Building, Hon. Charles T. Canady [Chairman of the subcommittee] presiding.

Present: Representatives Charles T. Canady, Bob Inglis, William L. Jenkins, Bob Barr, Asa Hutchinson, Robert C. Scott, and Jerrold Nadler.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. [presiding] The subcommittee will be in order. This morning the subcommittee on the Constitution convenes to hear testimony from legal and religious experts concerning cases where neutral laws or regulations have substantially burdened the ability of people to freely exercise their religion.

As we have discussed in earlier hearings, America was founded upon the notion that the Government should not interfere with the religious practices of its citizens. Constitutional protection for the free exercise of religion is at the core of the American experiment in democracy.

In 1993, Congress passed the Religious Freedom Restoration Act, or RFRA. RFRA was designed to protect the free exercise of religion by requiring government to have a compelling reason for laws that substantially burden that religious exercise. Congress based its authority for RFRA on section 5 of the 14th Amendment. Unfortunately, the Supreme Court struck down RFRA last June in the *Boerne v. Flores* case, deciding Congress had exceeded its authority under section 5 of the 14th Amendment.

The result of the *Boerne* decision is that men and women of faith are now without adequate protection against laws that interfere with their religious practice.

I look forward to hearing from our legal experts and religious leaders today about the religious activities and practices that have been left vulnerable after *Boerne v. Flores*. The freedom to practice one's religion is a fundamental right. We in Congress should work to ensure that this basic right is not relegated to second class status.

I look forward to working successfully in this Congress to preserve full protection for our first freedom, the freedom to practice one's religion without governmental interference.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and I appreciate you holding this series of hearings on the real life experiences of those who have had their religious expressions disrupted as a result of substantial burdens placed by government.

Under RFRA's balancing test, government may substantially burden a person's exercise of religion only if it demonstrates that that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that governmental interest. Although the *Boerne* decision overturned parts of RFRA, we've learned from our hearings at there is a compelling need to prevent the government from substantially burdening religious expression and there is ample opportunity to fix the constitutional deficiencies noted by the Court.

This hearing is a necessary part of establishing a record showing that the religious practices can be substantially burdened and deserving of our protection. These hearings are for the purpose of gathering facts. All of what we hear will not necessarily be intended for protection in whatever RFRA type legislation we eventually enact. Any legislation considered will undergo rigorous and deliberate review to ensure that it is neither over-inclusive nor under-inclusive. In addition, RFRA language will have to steer clear of any disruption of any Civil Rights laws and, of course, the legislation will have to comply with the recent Supreme Court decisions.

I thank the witnesses for appearing today and look forward to their testimony.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Scott.

I want to thank all of you for being here, and I apologize for the delay in beginning the hearing.

First witness on our panel this morning will be Mr. Mark Stern. Mr. Stern is director of the legal department of the American Jewish Congress. Next will be Mr. Mark Chopko. Mr. Chopko is general counsel to the U.S. Catholic Conference. Then we will hear from Dr. Dean Ahmad. Dr. Ahmad is here this morning representing the American Muslim Council. Mr. Steve McFarland will be next to testify. Mr. McFarland is director of the Center for Law and Religious Freedom of the Christian Legal Society. Next will be Isaac Jaroslawicz. Mr. Jaroslawicz serves as executive director and director of legal affairs for the Aleph Institute. Then Mr. Barry Fisher will testify. Mr. Fisher, an attorney specializing in religious liberty, is a former chairman of the American Bar Association Subcommittee on Religious Freedom. And finally this morning, the subcommittee will hear from Mr. Von Keetch. Mr. Keetch is here on behalf of the Church of Jesus Christ of Latter-day Saints, for which he serves as counsel.

We appreciate your participation this morning. I ask that each of you summarize your testimony in 10 minutes or less, and without objection, your full written statements will be made part of the permanent record of this hearing.

With that, Mr. Stern.

**STATEMENT OF MARC D. STERN, LEGAL DIRECTOR,
AMERICAN JEWISH CONGRESS**

Mr. STERN. Mr. Chairman, one of my colleagues looked at my testimony and saw the statement required by House rules that I disclose whether the American Jewish Congress has received any grants in the last 2 years. We haven't and he directed me to ask the committee to help rectify that deficiency. [Laughter.]

Mr. CANADY. That's probably beyond the power of this committee.

Mr. STERN. I want to thank you for holding these hearings, you and Mr. Scott. I have been doing religious liberty law for about 20 years now. If I've litigated 4 or 5 times, it's a lot. Nevertheless, I've always used free exercise protection when it existed, and RFRA when it exists, and still exists to some extent to force the government to take a second look at what it is doing, to consider whether amongst a plenitude of things that government does a particular action infringing on religious practices, is really all that important, whether it's giving due weight to another recognized value that is treasured by our society, and whether there might be other ways of achieving the same governmental end without impinging on religious freedom.

The absence of free exercise protection under *Sherbert* or *Yoder*, or under RFRA to the states, has substantially altered the balance. I'd like to tell you a couple of stories, really, of how the fact that I've had a club to force a government official to stop and think, to take a second look, has made a difference, all without litigation. I would urge if you listen to those in the legal academy, they tend to focus on three or four Supreme Court cases and say, well the Court never really took this very seriously, never really enforced it, you can't find a whole lot Supreme Court cases where people won. But the cases I'm involved in never make it to an official report of decision. If I'm real lucky, they don't even make it to the newspapers. And so nobody knows the cases exist. But that doesn't really affect the legal landscape as it exists in my practice.

Just a couple of days ago, I got called, by a friend affiliated with the ACLU. A Muslim child was damaged, apparently in delivery or some point in early childhood, and was left physically and perhaps mentally handicapped. The child won a substantial judgment. The lawyer for the child went to invest it in an interest-bearing account. The parents who are Muslims objected that doing so would violate their religious beliefs. They offered to take the money without interest. The guardian of course is in a dilemma. He's got the interests of the child which, of course, will be aided by having an interest-bearing account. And, on the other, the parents are insisting that the child's interests are not helped by being forced to sin.

In the old days, what you would have done is said to the judge: Look, they can't take interest but there are a bunch of other things they can do. You can invest it in a safe mutual fund. There are Muslim banks that have worked out arrangements that allow what some economists would call interest to be denominated profits, and that would be fine. We would have worked out a settlement be-

cause we had a club to make them look at what the law required and what could be done. We don't have that club anymore.

Some years ago there was a case involving a school rule designed to deal with gangs. It banned the wearing of hats. It was applied to stop a Jewish child from wearing a yarmulka. We were able to get them to stop and think and say: Well, gee, there isn't a gang around that uses the yarmulka as a gang symbol. Is this really necessary? Is there some other way of doing it?

There was a case a couple of years ago in Illinois where the State athletic association, which is a recipient of Federal funds, wouldn't allow a Yeshiva high school boy's basketball team to play in the league because the yarmulkes posed clear and present danger to opponents; They're falling off the heads and then people trip on them. In fact, the associate even hired an engineer to research the various friction coefficients of different materials used in yarmulkes to find out the likelihood of somebody slipping and breaking a leg on it. The Yeshiva came back and said, okay, fair enough, but what about if we pin the yarmulkes to the head. And the league said, our rule is our rule and you do it our way or you don't do it at all. The Seventh Circuit under the impetus of *Sherbert* and *Yoder* said, no, you've got to take a second look and see if there is some least-restrictive means of achieving that end. And, of course, one is readily available.

Before *Yoder* and RFRA sort of died on the vine, when I dealt with a coroner with religious objections to autopsies, I came in and I could force a second look—and some of the stories are in my written testimony—because I could threaten a RFRA lawsuit. I now have to beg. In fact I recently wrote an article for a pastoral journal in which I warned rabbis who think that because there's constitutional protection for free exercise they have the upper hand with coroners, I said, in fact, that the exact opposite is true now. The coroner has the upper hand, they have all the cards, and you've got to essentially beg for something to be done, even when there are perfectly reasonable alternatives available, there is nothing to force a coroner to give those alternatives any consideration.

One can go down the line. In zoning, which has been a particularly sore area, I know, for local governments. Frequently if you have the ability to say to the government, okay, you've got a zoning law but I have a problem, I can't build my church under your zoning law, but here's another way of protecting your core interests without infringing on my religious liberty. You can work out a compromise.

But now there's nothing to force that second look and what zoning officials increasingly are doing are saying: Look, this is our zoning law, you don't like it, tough.

One of the better examples around is very a typical requirement of zoning laws that you have x number of parking spaces per number of seats in your sanctuary, usually 1 space to 4 seats. Except it doesn't make a whole lot of sense in the case of a Orthodox Jewish synagogue where nobody rides to synagogue on the days when the sanctuary is full. And so what may make sense for one of Mr. Chopko's churches makes very little sense in regard to one of our synagogues because we just don't drive to the synagogue on the Sabbath.

Under the old regime, you could force the zoning authorities to say, well, maybe the ratio should be one to six or one to eight. Now, you have no such club to force a second examination.

Probably the best story of all involves the Amish. Ohio or Wisconsin required slow—Minnesota, one of those States west of the Hudson— [Laughter.]

(I'm reminded I'm from west of the Hudson now.)

—had a requirement that farm vehicles be marked with orange reflective tape. The Amish have a religious belief against bold colors. They said, we'll use white reflective tape. They brought in experts who proved that white reflective tape was actually more visible than orange reflective tape. Under current law, that evidence doesn't even get admitted; It's irrelevant. The law's neutral and it's reasonable, and the Amish are out of court. Under the old system, the court said: Well, this doesn't make any sense, why should we impose on these people's religious beliefs when we can provide the same safety for everybody else with white tape at no loss to the government's interest.

It's that sort of second look that we're missing now.

I'd like to spend just a couple of minutes on some of the more controversial areas that have been mentioned. Zoning, I've already talked about. There are legitimate interests that communities have in zoning but there are also legitimate interests that churches have, or religious institutions have. And only if you don't regard religious liberty as a value that's worthy of respect, is that an easy case.

The second look, in my experience, works very well when you force people to negotiate about how we're going to put this building here and not harm the community. If there's a will, there's usually a way to work that out. Not that you can put a mega-church on a cul-de-sac even under a second look program, but there are lots of other things that you can do that work out well. But now there's nothing to force that examination.

The very hardest cases are the cases that—and this really requires more time—but that Congressman Scott mentioned, which are the civil rights cases. Those are very difficult cases where values of the highest order are at stake on both sides. But, again, the second look makes some of these cases easier. In some cases you just have to choose between one value and the other. But not in all. There are cases cited in my testimony, for example, a pro-choice group is denied the right to rent a hall that the Catholic church generally rents to everybody else, and there's a claim of religious discrimination filed under the public accommodation law—it's unclear that the civil rights laws ought to apply in that case.

Second look means, is it really that important, is there some other place for this group go, some other way of dealing with this problem. Not all civil rights laws are that easy, but even there, the general approach works.

Thank you. I'm sorry I've gone over my time.

[The statement of Mr. Stern follows:]

PREPARED STATEMENT OF MARC D. STERN, LEGAL DIRECTOR, AMERICAN JEWISH CONGRESS

On behalf of the American Jewish Congress, I want to thank you for this opportunity to describe the ways in which the demise of the compelling interest test of

Sherbert v. Verner and *Wisconsin v. Yoder*, and the Supreme Court's invalidation of the Religious Freedom Restoration Act as it applied to the states and local governments, have impacted on my practice as a specialist in religious liberty.

At the outset, I would note that most of the people who consult with me are without question sincere in their assertion of a conflict between religious belief and governmental action. To be sure, there are some few persons who used *Sherbert-Yoder* or RFRA either in pursuit of a non-religious objection or merely to harass government officials. (The latter category is limited only to a small percentage of prison suits.) These individuals abusing the law are decidedly the minority. People simply do not undertake the burden of dissent from neutral laws without good reason.

It is easy to postulate that citizens will take advantage of RFRA, and undermine the rule of law in pursuit of secular or even selfish ends. The problem exists theoretically; it does not exist in the real world. Religious groups counsel believers in ways to abide by law and religious obligations. They warn against distorting doctrine in pursuit of apparent conflicts with religious teaching, and worry about the public image of the faith if marginal cases are pursued. Lawyers like me will not take cases where the insincerity of the plaintiff is evident. People can of course file *pro se*—and I will concede there are some less than scrupulous lawyers—but the larger point remains true.

Second, I would tell you that in now over twenty years of practice in this area I have found it necessary to litigate only in a handful of cases. This, even though I have been involved in literally hundreds of clashes between faith and law over the years. Most who find themselves caught between government regulation and religious belief are not interested in litigation or a public vindication of their principles or publicity. They are not interested in a defeat for the secular values embodied in the challenged government action, or in defeating the forces of secularism or evil. They simply want to be allowed to put their faith into practice with a minimum of fuss or burden to themselves or others. They are prepared to do what they can to accommodate the government so long as their religious concerns are taken seriously and accommodated if possible.

Not every claim made in the name of religious liberty can or should be granted. Some claims are simply beyond the power of a civilized society to grant. Others would do too much harm to the social fabric. But in my experience, a majority of cases lend themselves to creative solutions, to compromises, to different ways of achieving the same governmental end, but in a manner that is compatible with religious practice. And some forms of government activity are just not important enough to justify imposing on religious faith. What is needed is a mechanism to force negotiations, to compel public officials to move beyond a mentality of "this is the way we do things—we don't make exceptions," and to force a recognition in these days of omnipresent government that not everything government regulates or undertakes is equally weighty or that there is only one way to do things. When a mechanism is available to force a second look (and, unfortunately, that mechanism sometimes must be the big, thick and clumsy club of litigation) it is often possible to work out compromises acceptable to both sides, compromises that value and preserve as far as possible the legitimate interests of all concerned.

Under the current state of the law, however that mechanism or club is largely missing. There is nothing with which the religious believer can force the government to try something different, or reconsider its demand for total compliance even where that something different comes at little or no cost to the government, or even where it may be better than what government demands. Certainly nothing in federal law can be used to that purpose. It is that lacunae which I hope this committee will find a creative way of addressing within the confines of federal power as determined by the Supreme Court.

I do not wish to be misunderstood as suggesting that given, the overruling of *Sherbert*, and *Yoder* religious persecution is now common in the United States. It is not. Nor can I contend that since *Boerne* there are numerous horror stories with which to illustrate the urgent necessity of a response.

Changes in the law rarely have such an immediate impact. There are changes which I have already felt. There will be many more as government officials from legislators on down realize that they no longer need to accommodate religion. Rules that have allowed for religion to be accommodated—from statutory exemptions to the priest-penitent privilege to the ban on official resolution of intra-church disputes—will be reexamined, and in many cases, discarded. Religious persecution and inquisitions will not take their place, but we will have relegated religious freedom to a value less weighty than any other value enshrined in law

As I was writing this testimony, I received a telephone call from a friend in another state. He had been asked to look into a case in which a Moslem child won a judgement for injuries which left him physically, and, to some uncertain degree, mentally, handicapped. The child's lawyer sought to invest the judgement in an interest bearing account as required by state law, and indeed, as would appear to be in the child's best interest. The parents objected that their religious beliefs forbid the taking of interest. The lawyer properly called the matter to the attention of the court. The judge has ordered the parties to show cause why the lawyer should not be appointed guardian with the obligation, over the parents' objections, to invest the monies in an interest bearing account.

At first glance, this is a difficult case. The parents' claim is evidently sincere. On the other hand, the child is too young and incapable of expressing a view on how "his" money should be invested. Perhaps at some later date the child will renounce his parents' religious beliefs against the taking of interest, but will remain saddled with the parents' choice and the resulting economic losses. The loss of interest might even someday result in the child becoming a ward of the state.

In fact, the conflict between the interests of the state and religious practice is not as absolute as appears. Islamic law as I understand it permits the taking of profits from an investment. Islamic banks have worked out arrangements under which "deposits" are treated as "investments" and "interest" as "profits," analogous in economic value to interest paid. It might also be possible to settle on relatively safe mutual funds or stocks which would achieve largely the same result for the child (perhaps with a slightly greater risk of default, but perhaps not). The difficulty with the case, as it was explained to me, is that state law does not permit alternative investments of this sort.

Under *Sherbert* or *Yoder*, or under RFRA, this would be an easy case. Assuming roughly identical rates of return and risk of loss, insisting on the traditional form of investments would advance no compelling state interest, nor would it be the least restrictive means of advancing the state's interest in protecting the interests of the child. The judge would be able to rely on *Sherbert-Yoder* or RFRA to justify a departure from the statutory command for investment in an interest-bearing account. And the family would have leverage to insist on such a departure. Today, however, there is no such escape valve. And while before *Smith* the matter probably could have been resolved short of full litigation, today there is no alternative but to bring a *Sherbert*-like claim and litigate it under the state constitution.

Another example. Several weeks ago I received a call from the director of an ACLU office in the western United States. The director of an Immigration and Naturalization Service detention facility refused to provide detainees—some of whom were probably seeking asylum from religious persecution—pork-free diets. His attitude was: this is the diet, if you do not want to eat it, starve. Because the President has ordered federal officials to comply with RFRA, when threatened with a law suit, the manager agreed to provide a pork-free diet. It was the availability of a club which brought this matter to a speedy conclusion. But if these detainees were held in a state or local facility under contract with the INS—as is the case in my home state of New Jersey—the detainees would have now no recourse under federal law. It is surely not plain why federal dollars should not carry with them the same obligation of religious accommodation on a local government contractor that the federal government imposes on itself. Whether an INS detainee is able to observe his faith in detention should not depend on whether he or she is incarcerated in a federal or local facility. As the law stands now, it does.

The impact of the absence of a lever with which to force thought of workable alternatives cannot be underestimated. Just weeks before the decision in *Employment Division v. Smith*, I received a call from a Jewish community in South Carolina. It seems that a school district had a rule barring the wearing of hats in school. The rule was applied to a Jewish boy who wished to wear a yarmulke in school as Orthodox Jewish practice requires. I told the community to inform the school board that if they did not waive the rule, I would sue it within 24 hours. Not surprisingly, the school board rethought application of its rule, and accommodated its student. I could not do that today. Indeed, it is doubtful that if I were to litigate that case, whether I would get beyond a motion to dismiss for failure to state a claim.

Rules against headgear are generally defended as an anti-gang measure. I am unaware of any gang that has adopted the yarmulke as its signature. What the adoption of rules like that of this South Carolina district tells us is that the scope of religious liberty is today determined by the least law abiding elements of society, that the most naive and otherworldly believer may have his or her liberty restricted because some lawbreaker might do something similar. The test of RFRA was well

adapted to ferret out those cases where the state's interest was truly important and where it was ephemeral, and more importantly, where the state's interest could be accomplished in some other way. Today, there is no such check.

Some three years ago, a friend of mine was killed on a commuter train when another train coming in the opposite direction ran a red signal. My friend was sitting at the point of impact. No one in the whole state doubted the cause of death. The coroner insisted upon an autopsy as the condition for certifying the cause of death. The family of the deceased objected on religious grounds to the performance of an autopsy. The coroner was adamant. I asked the coroner if either a CAT scan or an MRI would be acceptable. I was told that the coroner would not accept either alternative. RFRA was in force and a lawsuit was threatened. The State Attorney General advised the coroner that the lawsuit could not be won. A CAT scan showed the cause of death was a severed spinal cord. Here again, the ability to force a second look, to force a consideration of alternatives, led to a result which was acceptable to both sides, which resulted in the preservation of the reliability of death certificates and yet respected the religious beliefs of a grieving family. But nothing in federal law now forces that second look.

Just recently, I was involved in another case involving the same coroner. But because I had no federal right to force the use of—indeed, even the consideration of—alternatives, I was forced to rely on a state law which provides relatively little flexibility and does not explicitly require the consideration of alternatives. Ultimately, the coroner and I worked out an acceptable arrangement, only because this coroner (for whom I have much respect) is respectful of the feelings of believers. But this is personal to her and her office. Not every medical examiner takes matters of faith into account.

So when I recently wrote on the subject of autopsies and the law for a pastoral journal for Orthodox rabbis, I was obligated to tell them that in dealing with coroners they must recognize, as I am certain that many do not, that they cannot assume that because autopsies raise religious difficulties for Orthodox Jews, that the freedom of religion that they take for granted has any legal force in any concrete dispute over an autopsy, no matter how gratuitous. (Some state statutes give medical examiners virtually unfettered authority to require an autopsy.) Thus, I wrote, they should begin by assuming that the decision whether to conduct an autopsy lies totally within the discretion of medical examiners. Their approach, I suggested, should be one of the supplicant seeking a favor, not a citizen demanding respect for a fundamental right.

I want to repeat that I do not contend that every religious claim must be accepted. Of course, only sincerely religious claims need be considered. As I noted at the outset, in some cases the costs of accommodations are simply too high to tolerate. Sometimes truly crucial interests are at stake. In others it will be impossible to devise a workable alternative. It does not follow that religious practice must yield to any governmental interest no matter how slight. And we need to view with some skepticism the persistent and universal response of "it is too expensive, too dangerous, too disruptive" to accommodate religious practice. Two cases, one of which I helped litigate many years ago, further illustrate the point.

Ohio requires slow moving vehicles to be marked with orange reflective tape. The Amish objected to the color of the tape but not to reflective tape of a more modest color, such as white. The state insisted on orange. The trial testimony demonstrated that the Amish's proposed alternative was more visible than the state-mandated orange. That is, it was safer. Because of RFRA, the Amish prevailed. They would not even be allowed to introduce that evidence today, let alone prevail on it.

The Illinois Athletic Association required ball players to play bare-headed. Now this is a classic facially neutral rule, and it was generally applicable. It is also the case that it would never be adopted in a league composed of Orthodox boys (or perhaps Moslem women), so that the claim of neutrality is less than it seems. In any event, the league defended its rule on grounds of safety concerns. It argued that if players wore hats, the hats might fall off and other players could trip over them. It's possible, but surely not common among young Orthodox boys (which I used to be) that a yarmulke would fall off, and someone else would trip and break a bone or otherwise be injured. When an Orthodox school sought to play in the league and have its students wear yarmulkes it was told no. Safety was invoked. (The league actually commissioned a study on whether yarmulkes made of different materials—cotton, wool, velvet, etc.—would lessen the likelihood of injury. That document is one of the proudest possessions of my organization). But, said the schools, our boys can attach their yarmulkes to their hair with clips so they will not fall off. Under *Sherbert-Yoder*, the Seventh Circuit held, that alternative had to be explored. And indeed it was on those terms that the case ultimately settled, and that settlement remains in effect, as far as I can tell, without any problem.

Under current law, the case does not begin—the rule was facially neutral, and it was reasonable. End of case. But why should that be in a society which values religious diversity and relies on individual initiative? And if we require governmental bodies which receive federal funds to accommodate the handicapped in their athletic departments, and if we require them to see to it that boys and girls have an equal opportunity to participate in sports, why should we not require recipients of federal funds to give serious and weighty consideration to religious practices?

These are cases in which the costs of accommodation were small or nil. Indeed, in the Amish case it may well be that the process of exploring accommodations pointed to a better result for all.

III

Religious liberty does not have to be cost free to be worthy of protection. If religious liberty means only that practitioners may practice what others may do it is not a value of any importance in our society. Presumably, every law, every ordinance, every governmental action furthers some public purpose. Presumably, too, the public as a whole is better off for the enforcement of these rules than their non-enforcement. But it is hardly a secret that sometimes larger values, sometimes abstract in the form of what we call rights take precedence over more narrowly focused and more immediately beneficial policies. This is assuredly true, when the question is not the general enforceability of the rule, but whether total compliance is necessary to further the government's interests.

Perhaps the most obvious example is the law of libel after *New York Times v. Sullivan*. I do not share the view that "words can never hurt me." False statements, even about people occupying places of prominence, can and do damage reputations. I surely do not need to tell veterans of the rough and tumble political process that the truth sometimes does not catch up to the slander and libels that accompany political life. Defamation lawsuits serve an important purpose in providing redress.

But the vindication of reputation comes at a price to self governance, in self censorship to avoid the costs of a defamation suit. That is a cost we have generally deemed too high a cost for the benefit conferred in the case of public figures, at least in the absence of malice. Individuals are denied redress not because what was said about him was true, or yet because her reputation suffered no damage, but because larger social interests demand that the individual bear some of the costs of living in a democratic society that depends on an informed electorate. One could multiply examples from other fields of constitutional law; indeed from public policy generally.

The same notion applies to religious liberty. Obviously, there are limits, as there are in other fields. An important limit in the area of accommodation is the constitutionally mandated ban on forcing others to participate in another's religious practice. An inmate has the right to practice her faith—subject to the institution's interest in security and good order, and subject to legitimate logistical concerns—but she does not have the right to practice her faith in a way that compels others to participate against their will. I cannot conceive off-hand of a right to inflict physical harm on an unwilling adult.

It does not follow that no costs are appropriate to impose on society generally, or even on individuals. A liberty is a legal claim that trumps other claims. Almost by definition it comes at a cost. Those who would insist that it is inappropriate to bear any costs for religious accommodation are guilty of what Justice Goldberg warned against in another regard—an overarching secularism, which is hostile to religion, not merely neutral.

IV

The cases I have discussed until now have been relatively non-controversial. Let me turn to some harder cases. I will address areas where there has been particular controversy, either at the national level or in state legislatures as they consider state RFRA's. Some of these issues are hard, some I have personal experience with, some I know only from afar. Some I believe should be decided one way or the other, and some I am happy I do not have to decide. Overall, the approach of the second look works quite well in structuring the discussion of these hard cases.

Zoning

As the Church of Latter Day Saints has demonstrated in their comprehensive review of church zoning cases, in its *amicus* brief in *Boerne*, there is a sharp inverse correlation between a church's likelihood of being involved in zoning litigation and the number of adherents its in the community. This suggests that factors other than land use play a large role in zoning decisions. Actually, in my experience bias is often open and notorious. It is true that if one can prove a deliberate effort to ex-

clude a group because existing residents do not want different people in their community, or dislike a particular church, the church is entitled to a remedy.

However, the lower courts have generally proved quite resistant to proof of illicit motive. In one recent case involving freedom of speech, the First Circuit held that the fact that some members of a council made illicit remarks in support of an illicit policy did not justify a conclusion that the decision of the council as a whole to take the same action was premised on illicit concerns. The Tenth Circuit recently held that illicit motive must be alleged in a complaint, and refused to allow discovery to find evidence of bad motive. On the defendants' motion to dismiss, it went on to speculate about hypothetical permissible motives for the defendants' decision at issue there. In short, under such a regime, proof of bad intent is all but impossible to adduce.

Now consider the following cases: A small congregation sought permission to convert a private home into a small synagogue. At the city council session called to consider its application, one councilman warned that if the application were granted, this nearly all white suburb would begin to resemble an adjoining city which was largely minority and full of storefront churches. I protested that bias was not a permissible basis for a decision. Would I have been able to convince a court that a decision denying the application was tainted? Not likely.

In a case still pending in Ohio, a consortium of Orthodox Jewish congregations and educational institutions seek to develop a common campus. The planning director of the city worked with the consortium to work out an acceptable plan. Community opposition developed because of fears that the campus would attract residents who would send their children to religious schools. Although the planning commissioner testified at a hearing that the plan, from a planning point of view, was perfect and should not be changed, it was defeated at a public referendum during which opponents of the plan did not conceal their biases. The defeat of the plan had nothing to do with traditional zoning concerns. But to challenge it now would require proof that bias was the motivating factor in the referendum—and it is not clear that a court would permit such an inquiry as to a public referendum. Under a RFRA-like statute, this would be far easier case. The question would be whether the denial of the permit was necessary to further a traditional zoning interest, and as to that, the testimony of the planning commissioner would have been dispositive.

That these cases are more easily treated under RFRA is relatively easy to demonstrate. But the same is true where religious institutions are excluded under traditional zoning criteria. Here the crucial point is the one I made earlier—that religious liberty is a value which is weighty and which is entitled to significant consideration in deciding how land will be used.

Where the second look doctrine is in place, religious institutions and municipalities are forced to negotiate the results are often enough results acceptable to both sides. But even if not, and the harm is not great, the larger and more permanent value ought to be dispositive.

Again some examples: The rule in New York (and New Jersey) is that a religious institution is presumed to be a good neighbor and to contribute to the welfare of the community. Wholesale exclusions of such institutions from a community or from residential neighborhoods are impermissible. However, the institution is generally required to engage in a planning process—to seek a special use permit—which allows the municipality to address the impact of the institution on a neighborhood. During that process, concerns such as noise, traffic, environment, lighting, parking, bulk, and the like, can be addressed. If it is possible to address those concerns with modifications of the plan, or by restrictions on the use of the property, this must be done. If it cannot be done, and if *the harms to the community are real and substantial*, the special permit may be denied. Courts, religious institutions and zoning boards have used these powers creatively to accommodate the interests of church and state, but the process also weeds out improper use of zoning laws, or applications which serve trivial interests.

Not all states have such enlightened procedures. In some, for example, religious institutions are treated as any other applicant for a variance. Not only neighborhoods, but whole towns are off limits to religious institutions. In one state, order to even apply for a variance, which is wholly discretionary, churches must first purchase a piece of property, and then seek zoning approval. And if it is denied a church is stuck with a piece of property which is useless to it. In the most developed sections of our nation, the lot size requirements for religious institutions cannot be met on available vacant land. The result in many of these cases is that the religious status quo is frozen in place.

Sometimes the result of straight forward application of zoning rules—all that is required under *Smith*—are wholly absurd. A good example, encountered frequently by anyone representing Orthodox synagogues, is the requirement for a number of

parking spaces per set number of seats in the sanctuary—even though on the days when the sanctuary will be filled worshippers do not drive. Courts applying a second look can deal with this absurdity by requiring a more reasonable number of parking spaces. But there is now no federal requirement that they do so. Many state courts which do apply the second look principle originally adopted the rule under the assumption that the First Amendment required it. That is not the case any longer. I am confident that some states will now abandon a second look in favor of enforcement of zoning ordinances as written.

Another case illustrates how neutral laws can be hostile to religion. Several years ago I represented a small congregation which sought to establish itself in a beachside town in Long Island. The town said that the small number of people coming on Friday nights would ruin the residential character of the town. The local trial judge agreed. Unfortunately for the town, the appeals court judge who heard the case happened to own a summer home in town. He wanted the answer to one question: why was the small minion more disruptive than the large secular parties held by many residents on Friday evenings? The town had no answer and lost its case. Under RFRA that was the right result. It is not clear under present federal law that the question need be answered.

My home town of Clifton, New Jersey is currently in a dispute with a church which wants to buy an abandoned theater. The town wants an art group in the theater and has denied a permit for the church. But is this religious liberty when a town expresses an official preference for secular First Amendment activity over religious activity?

Concededly, state zoning law can be invoked to defeat some of these applications of the zoning law. But review is by deferential standards, and often by judges who are required to run for election in the very towns on whose zoning decisions they are passing. More to the point, it is simply the case that where rules are embodied in case law, zoning boards are likely to do what is politically expedient and let the courts take the heat, and the religious institution bears the expense of litigation, perhaps in the hope that it will seek a site elsewhere. They are more willing to follow statutory directions. I know the system is not supposed to work this way, but it does, not only in my experience, but in the experience of zoning officials with whom I have discussed the issue in private.

Prisons

When Congress originally enacted the Religious Freedom Restoration Act, it took note of the special needs of prison officials. In legislative history which was repeatedly cited by the courts, that history made clear that special deference was due prison officials, that concerns for security, discipline and efficient operations of prisons could, if proven, be compelling. Moreover, the history noted that prison officials could point to budgetary constraints as a justification for limiting inmate rights. There was not to be unlimited deference to prison officials, however. RFRA litigation was not reduced to the *ipse dixit* of prison officials. It remained the province of the courts to insure that alleged compelling interests were not exaggerated, speculative, or *post hoc* rationalizations for policies or decisions which were not at all well considered. The federal system continues to operate under RFRA, without apparent difficulty.

In most litigated cases, courts found for prison officials. But not in all, and these tend not to be reported. Thus, in one unreported case in which I was involved, the State of Pennsylvania took the position that it need not provide kosher food for inmates. It took a federal judge just minutes to decide to the contrary, a not surprising conclusion since the federal system and New York State all manage to provide such food without any great difficulty. Indeed, while one still encounters claims by prison officials that they cannot possibly run a secure prison system and provide religiously acceptable diets, it is strange that a variety of other prison systems manage just that.¹ While I recognize that prison systems differ in terms of facilities, security requirements and budgetary limitations, anyone who engages in in prison related work cannot help but be struck by the fact that what prison officials insist in one facility would bring chaos and a total breakdown of security, works perfectly well in apparently comparable facilities. RFRA works well to test which predictions

¹ A state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food. It claimed Kosher food was available and Hallal food was not. Surely a reasonable justification. But, in fact, one firm produces TV dinners religiously acceptable to both Jews and Moslems. Had there been a way to force consideration of this product, the result in the case should have been different.

of chaos are legitimate and which are nothing more than the usual bureaucratic reluctance to accept outside oversight.

Several years ago, I was involved in an effort to improve the provision of Kosher food to Jewish inmates in New York State. After much work with the Commissioner's office, the office of the nutritionist, and the state-wide office of security, we reached an acceptable arrangement. When it did not go into effect promptly we requested a meeting with the Commissioner, who told us bluntly that the corrections department was only in theory a department directed from the top down. In reality, the Commissioner had to negotiate with the administration of local facilities for their cooperation. But should such bureaucratic recalcitrance (sometimes masking bigotry), which is a reality, be a reason to interfere with religious practice?

The second look of which I have spoken earlier works in the prison context as well, if there is a reason for prison officials to sit down and talk. Although others do more of this than I do, and can give more examples, one case in which I was involved should illustrate the point. Several years ago, Jewish inmates in Michigan sought permission to light Chanuka candles. The response was that to allow them to light candles in the cell or dormitory area would be both a fire and security hazard. Fair enough. But the inmates proposed lighting one set of candles (as opposed to individual lighting, which is the ordinary, but not required, practice) in the chaplains office under, if need be, the eye of a guard. In addition, I suggested that instead of using paraffin candles which in theory could be picked up and transported to other places in the prison, oil candles be used. Such candles further minimized any minimal security risk that existed. Prison officials continued to resist even this reasonable proposal, until threatened with a RFRA lawsuit. They then yielded, all without any harm to legitimate prison interests.

When RFRA was in effect, New York State modified its rules to follow what I understand is the federal practice—to allow beards worn for religious reasons. As long as RFRA was in effect, such beards were allowed, and without any demonstrated problems. As soon as *Boerne* was decided, and with no other factual basis, the State reverted to its earlier ban. Now I do not doubt its right to do so, but the question which must be asked is what penological purpose was served by that change other than an assertion of raw power?

Public Schools

Some two years ago, I chaired a group of civil liberties and religious organizations—organizations which spanned the ideological and theological spectrum—in drafting guidelines for religion in the public schools. The President and the Secretary of Education used those guidelines as a basis for their own guidelines. Now, we have collectively decided to reexamine those guidelines to determine if they need modification. Those that dealt with the Establishment Clause ban on school sponsorship of religion needed no change. But we had to propose revisions to those sections dealing with free exercise rights, because, more or less, these no longer exist. Let me illustrate: The student who seeks to wear a yarmulke or who seeks to display a rosary, no longer enjoys any clear federal right to do so. The student who, out of a religiously based sense of modesty, seeks excusal from a gym clothes requirement, or from a co-ed gym class, now has no basis to approach school officials seeking an accommodation. To be sure, there are some fancy and uncertain legal theories which might prevail in some of these cases. But I am at a loss to understand why school officials should not be bound to make accommodations in these areas, unless they can prove real harm—and in these cases they cannot.

More difficult are a series of cases in which students seek to be excused from instructional units which conflict with their religious beliefs. Several courts have held that mere exposure to ideas with which one disagrees is no burden on religious liberty. Of course, if there was no burden, there was no claim under either *Sherbert* or *Yoder* or RFRA, and there is nothing more to discuss. But the correctness of that result is debatable. I myself think the result wrong, and that the correct question in those cases is whether excusing a student would create an undue burden on the school.² There are other difficult questions raised by these claims concerning the rights of children vis-a-vis their parents, and the interests of society in an educated child. But these are not always implicated in important ways in these cases.

²I should stress that I speak only of the excusal of individual students, not the suppression of an area of study because some object to its being taught on religious grounds. The latter would establish religion under *Epperson v. Arkansas*. The former, in my judgment, would not, at least in the general run of cases, and provided that, in order to avoid a mass demand for exemptions, a school did not engage in self-censorship.

The theoretical issues are interesting. But on the ground, the picture is quite different. Most, but not all, school systems routinely honor requests for exemption, at least if the request is limited to a segment of a course.

I used to make such requests all the time and without any objection—about Christmas holiday observances. Whatever their legality under the Establishment Clause, these observances can be very painful for non-Christian children. Every discussion I have with school officials about such observances begins with my request for an excusal of children who do not wish to participate—an excusal that presumes no penalty for non-participants. This is inevitably granted. It no longer need be. Why not?

In fact, for all the legal controversy over excusal it is—or it has been—widely practiced until now. Schools which insist on resisting the principle of excusal, offer excusals any way. And the litigated cases about objection to textbooks in all but the smallest number of cases proceed on the basis that the student was offered an alternative.

To be sure, there are powerful, but not conclusive arguments for mandating sex education. But all, or almost all, states mandate exemption from such courses, which are invoked, if I remember the statistic correctly, less than 1 percent of the time. Is it really the case that reading this novel rather than that one is that important? And does not religious liberty carry some weight here? It could be that a child who does not have sex education will be exposed to life threatening illnesses as a result (of course, religious teaching on abstinence provides the same result) but is that true of a novel or a short story? Perhaps it is, but the second look process is well designed to take all the relevant concerns into account, and give them the weight they are due.

Civil Rights Law

No issue has raised greater controversy than the application of the accommodation principle to the civil rights law. Those seeking exemption protest that these laws force them to violate fundamental principles of their faith, or to directly facilitate or condone sin. I take those claims seriously. On the other hand, opponents of exemption argue powerfully that as a society we are committed to the equal treatment of all our citizens, and that religion should not be allowed to depart from this fundamental concern, particularly given the newness of the nation's commitment to those principles.

It should be noted that most civil rights laws already exempt religious institutions to one degree or another. Some of these exemptions are limited to religious discrimination by religious organizations. Some are somewhat broader, permitting religious organizations to engage in discrimination if necessary to further their religious purpose. Courts have applied those exemptions judiciously, and, I think, overall with a minimum of controversy.

Second, again as a practical matter, no church of any consequence in the United States today teaches a doctrine of racial segregation. The so-called Identity churches do, but these are small, and, it would appear, not much concerned with what the laws says one way or another. In addition to the relative handful of people who might make such a choice, passage of RFRA would not affect our commitment to ending racial discrimination, since even if one could surmount the sincere belief hurdle, there is likely a compelling interest in eradicating racial bias which cannot otherwise be satisfied.

The harder question arises in the context of sex, and, most commonly today, sexual orientation, and not so much by religious institutions, but by private persons. These are exquisitely hard cases for me, because they put into conflict two principles I value highly—those of equal rights and religious liberty.

I would not, however, foreclose the argument one way or the other. I can imagine cases where the harm to civil rights enforcement is minimal, in exempting a few believers, but the damage to religion great. Conversely, I can imagine cases where the harm to egalitarian principles is too great to tolerate. For example—and without expressing a view for AJCongress—I think that a refusal to rent to a cohabitating unmarried couple by a homeowner renting a basement apartment would stand on a different footing than discrimination by a large-scale commercial landlord. A law banning discrimination in housing might well be applied to prevent a pro-life landlord from renting to a tenant who has had an abortion, but should a public accommodation be applied (as actually happened in Vermont) to require a pro-life printer to print pro-choice pamphlets? Or to a pizza store which refused to supply pizza to pro-choice gatherings? Or (as happened in Minnesota, until reversed by an appellate court) to require a Catholic church to let space for a meeting by a group which was at odds with the church?

I do not believe that all of these cases are identical, nor that they all need be decided one way or the other. On the contrary, they together urge the wisdom of case-by-case adjudication, and application of the second look principle.

CONCLUSION

The second look approach of RFRA leads to balanced and sensible results. Its demise tips the balance too strongly towards a mindless statism, which ill serves the cause of liberty. The Committee should do what it can to restore the balance.

Note: Neither I nor the American Jewish Congress has received any federal grants in the last two years.

Mr. CANADY. Mr. Chopko.

STATEMENT OF MARK E. CHOPKO, GENERAL COUNSEL, UNITED STATES CATHOLIC CONFERENCE

Mr. CHOPKO. Thank you, and good morning. I want to thank the subcommittee for its continued concern about the cause of religious liberty, and its very visible leadership in undertaking this search for an appropriate and constitutional legal protection for religious freedom. I speak as legal counsel for the Conference of Bishops, although I need to be understood not to be speaking for any one or another of the bishops; We're a rather diverse community.

I will address three general issues that arise out of my written testimony. One is the context out of which we speak as a community. Second, our general experience in looking at the cases post-*Boerne* and post-*Smith*. And some specific issues that I want to bring to the committee's attention.

First, why we speak. We're the largest community in the United States, we Catholics, but yet in the United States there is no majority religion. We are all minorities somewhere. Therefore, as a community we strive to work for the common good in collaboration with our religious partners, our partners in faith, for the good and the improvement of the entire country. Therefore, we, like they, remain concerned about the inadequacy of protection for religion.

We also feel a special responsibility because the case that went to the Supreme Court in the *City of Boerne* case involved one of our churches. Although that church has since resolved its difficulties with the city, it is still illustrative of the kinds of cases which persist around the country.

To prepare this testimony, I asked a random sample of our 190 dioceses and more than 24 State Catholic Conferences around the country for assistance. From their returns, I have drawn specific examples, but the committee should understand that they are anecdotal and illustrative only. I have not attempted to quantify the results nor have I attempted to prioritize them by order of relative importance. But like other communities, I suspect, we have little actual litigation to draw on.

What I emphasize here is that as charitable and tax-exempt organizations that are service and mission driven, there will be numerous instances where our needs and the needs of our communities butt up against the demands of government. There have been and there will be conflicts with government. What I see as a duty to accommodate, others see as an expectation that there will be administrative conformity. What this subcommittee is assessing here and in other places is going to be, by what standard should these religious claims be evaluated.

Second, what is our experience? The pattern of instances relayed to me show that religious persons and organizations are being treated much like everything else is in the United States. Generally—generally, although there are exceptions—we are not being treated worse than our secular cousins, but certainly we are not being treated any better than our secular cousins. However, I would point out, that the negative effect of such identical treatment is sometimes exacerbated by the nature of our institutions.

In one instance, a county applied hours of operations for commercial facilities to churches. So if a barber shop or hardware store is going to be opened and closed, it would open at 8:00 a.m. and close at 9:00 p.m. We're a few weeks away from Easter and I don't know how a church under those circumstances would lawfully be able to conduct the sunrise service, unless we have figured out how to manipulate the times. Or how it would be able to conduct an Easter vigil mass, which occurs in darkness. In those instances, the church would not lawfully be able to conduct religious services in that setting.

That's what I mean by there being particular examples when being treated the same exacerbates the negative effect on our institutions because of the nature of the institutions. Most of the laws that apply do not have the means to evaluate what the religious claim is and assign it any weight.

In the specific areas that I highlight in my written testimony, the issue is not, therefore, whether some other body of law can be used to fill the gaps left by the invalidation of the Religious Freedom Restoration Act, but whether that law has the means by which to evaluate the unique nature of religious rights and provide a duty to accommodate. A broad, generally applicable, neutral law does not provide that kind of basis.

Third, in my written testimony I illustrate concerns in four areas. The first is the area of confidentiality of religious processes. The Oregon confession case, which is cited in my testimony, is the extreme case but there are more routine cases. There are more cases involving both oral testimony and compulsion for written testimony that then implicates a patchwork of clergy confidentiality statutes around the country. Those statutes, in many instances, are not adequate to take into account the rights of religious leaders and religious communities. In many places, they only protect the rights of the communicant, but they do not adequately protect the rights of the religious community.

So in a case like Oregon—where the prisoner tried to waive rights—the religious community is not left with any basis at all on which to defend the sanctity of the sacrament and the integrity of its disciplinary process.

The second issue that I illustrate is in the area of property. Churches are present in their municipalities, in the community of believers, but also in the physical presence of real property. These properties change and grow along with the religious community. There are numerous instances that are highlighted in my testimony involving government imposed limits on enrollment of religious schools, size of congregations, hours of operations, and even, in one instance, a limitation on the numbers of users for retreat facilities. This limitation caused a denial of access for religious per-

sons to places for spiritual retreat, as well as a denial of rights to the religious entity to offer those services and fulfill its religious mission to serve the religious community. Those are impacts which are not capable of being assessed under broad, generally applicable government property laws.

A third area is in the area of regulation. There are instances where Catholic entities are being demanded to provide access to a full range of health services including abortion which we oppose. This debate is not about abortion, this debate is about conscience, and many States do not have adequate conscience clause protections that would guarantee the protection of our entities.

A similar example would come up in the area of organ transplants. There are many States that have organ harvesting statutes that allow for the harvesting of corneas and other body parts of people unless the coroner knows that there is an objection. But, for many in the religious community, not just the Catholic community but in the Jewish community, we would oppose those harvests as, again, immoral in certain circumstances. But the laws are broad, and generally applicable and admitted no exceptions.

A fourth area would be in the area of torts. I am not arguing for charitable immunity, and I'm not arguing about specific claims. In the area of punitive damages, punitive damage laws apply generally across the board, and they admit of no exceptions. Where religious organizations are subjected to the potential to be punished on account of internal governance rules or the inadequacy of policies, I submit, we need some means to evaluate the legitimacy of the State's interest against the specter of the religion being punished on account of the way it governs itself. Liability fears are having an impact on the common good. The "Wall Street Journal" last month illustrated a number of instances in which religious people and religious communities are withdrawing from counseling and other services on account of liability concerns.

The absence of strong protection for religious freedom means that we must withdraw or at least rethink how we do our business. But, because we're dealing with people who feel obliged to provide services to the community, conflicts will continue to occur.

I thank the subcommittee again for its attention and its continued leadership in the cause of religious freedom.

[The statement of Mr. Chopko follows:]

PREPARED STATEMENT OF MARK E. CHOPKO, GENERAL COUNSEL, UNITED STATES
CATHOLIC CONFERENCE

Thank you, Mr. Chairman, for the opportunity to present the views of the United States Catholic Conference on a matter of priority for the Conference and for the Committee, the search for appropriate and constitutional legislative protection for religious freedom in the United States. The United States Catholic Conference, to which I am the principal legal advisor, consists of the active Roman Catholic Bishops in the United States and is the agency through which the Bishops address matters of national public policy, especially when that policy concerns the rights and liberties of individual Catholics and Catholic organizations and dioceses around the country. The question of religious liberty is fundamental to the Church, its Bishops, and to the Catholic people. Indeed, it is a fundamental human right enjoyed by all and protected, in the United States, by the Religion Clauses of the First Amendment. My testimony today is devoted to illustrating the experience of the Catholic community dealing with the government and exploring ways in which appropriate legislation can materially assist the Catholic community in resisting the overreaching of government.

My testimony is anecdotal and not quantitative or statistical in any sense. I have requested representatives of dioceses and State Catholic Conferences around the country to suggest examples of the kinds of cases in which an appropriate legislative protection for religious freedom would have been helpful or useful. I do not claim that these examples are exhaustive of the potential range of cases, nor do I claim that any one of these cases is more important than anything else that the Subcommittee might face. I also would like to note for the record that my testimony today should be understood in the context of the testimony that I offered to this Subcommittee on July 14, 1997, in the aftermath of the *City of Boerne v. Flores* and my testimony in 1992 in the aftermath of *Employment Division v. Smith*. The Catholic Bishops of the United States remain committed to the search for an appropriate legislative solution to the difficulties created by these cases. Indeed, we feel a special responsibility because the case that led to the invalidation of the Religious Freedom Restoration Act (RFRA) was raised in the context of a dispute between one of our parishes and a city government in Texas concerning the right of that Catholic parish to worship as a community in space devoted and consecrated for that purpose. Although the parties in that litigation have apparently resolved their differences, that case is not unlike others that persist.

Finally, by way of introduction, I would note our continuing concern with the direction in which our common life in the United States is experienced. There is a trend in the interpretation of the Religion Clauses to treat religion like everything else. This is indeed a fundamental underpinning of *Employment Division v. Smith*. This is not unlike the situation replicated numerous times everyday across the country. We are dealing with large and pervasive bureaucracies. These bureaucracies expect that conformity, not accommodation, will be the rule. Those who have been entrusted with the administration of these bureaucracies believe that once an exception is made for one person for one reason they must make exceptions for all. This expectation discards the longstanding tradition in our country of making accommodations for each other's religious beliefs and practices as a matter of right, not as a matter of convenience. Indeed, we have many times in our history seen evidence of our ability to be inconvenienced on account of not forcing one or another person to choose between adherence to God and adherence to Caesar. It was unfortunate that the Supreme Court should strengthen the contrary trend through *Employment Division v. Smith*. It is equally unfortunate that when Congress passed RFRA to add new protection for religious rights, the Court has disrupted that protection, allowing *Smith* to remain. Although much has been said about the litigation potential of RFRA, the real power of the Religious Freedom Restoration Act, I believe, lay in its use in negotiation and persuasion in numerous local and administrative disputes across the country. The ability to have some legal basis on which religious persons and organizations could depend as a starting point in negotiations was an enormous benefit in continuing to give life to our tradition that, although our practices are diverse and plural, our devotion to the protection of religious liberty remains singular and supreme. RFRA gave religious people and their organizations the right to insist that accommodation, not conformity, be the norm.

We have joined the renewed search for legislative protection for religious freedom—a statutory right to appropriate accommodations absent a narrowly drawn compelling reason to do otherwise. As I said in earlier testimony, of the available alternative approaches, a federal statute is preferred.

It is against this background that I would like to review examples of the kinds of situations in which the religious freedom of individual Catholics or Catholic organizations has been compromised by the actions of government. In each of these situations, the presence or absence of a statutory guarantee of religious freedom would have made or could have made a difference in the way in which the case was presented. It would not guarantee a favorable result in every instance but it could have changed the way in which the case could have been pursued. I will in turn deal with cases illustrating four different areas: confidentiality of communications, property, regulation, and torts.

CONFIDENTIALITY OF COMMUNICATIONS

In the Catholic tradition, confidentiality of communications is not just about protecting privacy of the individuals and what they say to each other. Rather, confidentiality of communications is an important ingredient to the sanctity of the Church process itself. It is well established in the United States, and has long been the tradition in the Church since its beginning, that Catholic priests may not reveal the contents of confessions, even when given the ability to do so by those who seek the sacrament. Although we Catholics call reconciliation or "confession" a sacrament, the process by which individual believers recognize their sin and turn to God for

forgiveness is an integral aspect of the religious experience common in Christian and non-Christian religions. Thus, it is not surprising that a significant instance in which a religious freedom statute would have positively and did positively affect the outcome of a case involved the deliberate interception of a confession of a prisoner to a Catholic priest. The case that resulted from this situation, *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), protects strongly the right of the prisoner to seek reconciliation and the right of the Church to protect the confidences obtained therein and the confidentiality of the process.

The Ninth Circuit found that the interception was not just an impairment of the prisoner's rights but also the rights of the priest who heard the confession and a violation of the rights of the community represented by the Archbishop. It bears repeating that the confessional communication was deliberately selected for interception by prison personnel specifically because they knew from their own experience and training that the sacrament of confession should contain a full and complete acknowledgment of wrongdoing and an expression of repentance. It is plain that those who are incarcerated face a diminution of their rights as an incident of lawful incarceration. A prison regulation dictating that all conversations between prisoners and outsiders will be intercepted is the kind of rule which would generally apply and bind religious and nonreligious communications. In a sense, absent a religious freedom law, it is debatable whether we would have had adequate protection for the rights of the confessor and the Church to resist and seek restitution for this breach of confidentiality. Clearly, the finding by the Ninth Circuit that the Religious Freedom Restoration Act had been violated, in addition to the Fourth Amendment, was instrumental in the resolution of the case. Absent the Religious Freedom Restoration Act, it is not clear how the Court would have ruled on the Free Exercise claim as the Court did not decide the case on that basis.

This Subcommittee is aware that the disclosure of confessional communications is already a subject of debate in other instances in the Pacific Northwest. A minister of an Evangelical Reformed Church has refused to disclose the nature of counseling communications between him and a member of his Church. He testified here last month. It is clear both that the demands of law enforcement are pervasive and that there are limitations to other statutory remedies. Many of the clergy privilege statutes around the country do not expressly grant to the religious body, or the religious official hearing the penitential communication, the right to protect the sanctity of that communication as an element of the discipline of a church. In those states, the clergy confidentiality statute would be inadequate to protect the rights of religious persons and/or organizations. In those states, religious leaders and organizations, confronted by cases where there is a demand by the state for disclosure and a waiver by the penitent, lack the ability to resist, absent a constitutional argument or other statutory basis. Without strong protection for religious freedom, the ability of religious organizations to reconcile persons in private according to their beliefs may be substantially diminished. For us, the sanctity and discipline of the sacraments is violated, and, indeed, confidence in the Church is undermined. As the Ninth Circuit said in *Mockaitis*, interception of and disclosure of these communications would be a cheap way for a government to obtain any evidence that it needs.

It is not just situations where the state seeks to compel disclosure of personal communications that must be protected. This concern also extends to the protection of church written records, prepared in private as part of an internal church process. If *Employment Division v. Smith* is the applicable law, trial courts around the country may override religious rules securing the secrecy and confidentiality of these communications in favor of generally applicable discovery principles. I do not believe that churches are immune from tort liability or contractual liability when they engage in wrongdoing, nor am I advocating a broad and sweeping rule of secrecy in litigation. Rather, I am acknowledging that forced disclosure of private communications that are an integral part of the discipline of a church will undermine and impair, for example, a church's administration of its penal law or a church's internal governance. Widespread disclosure of these communications will deter those persons who might communicate with the church, with the expectation that these matters will be private and intended only for the internal administration of church governance. As noted above, the absence of clarity and strong protection for church bodies under clergy communication statutes and under other constitutional provisions strengthens our plea for vigorous federal protection for religious rights.

PROPERTY CASES

A religious community has a presence in a community that it serves through its physical real property. As the religious community changes, so must the physical presence change or the community will decline and die or move on, causing disrupt-

tion in the place it originally served. In some instances, the needs of a growing religious community conflict with the desire of the state to restrict growth. This was the dispute in *City of Boerne v. Flores* and it is replicated numerous times around the country. For example, landmarking of church properties, occasionally even including the interiors of churches, continues to occur. Church buildings are designated as historical landmarks over the objections of church leaders, which, in turn, restricts the ability of church communities to expand or contract to suit the needs and demands of worshipers. How that specifically impacted on the St. Peter Church in Boerne and why it was an affront to Catholics is described in my testimony on July 14. Moreover, our dioceses report that where a church is located in a historic district, the church is not allowed to use related or appurtenant properties for religious purposes. In one diocese, a church was precluded from demolishing an already dilapidated house it owned adjacent to the church in a historic district. It was told to rehabilitate the property at a cost several times its value. That case is still in litigation.

At times, the experience of a religious community works in the opposite direction. The demands of either government or private developers for land which is occupied by a church sometimes conflicts with the needs of the church community. The absence of effective statutory protection for religion forces religious organizations to defend themselves against seemingly arbitrary government action relying on state property laws. If those laws are generally applicable and facially neutral, churches may not defend themselves under the constitutional right designed for their protection, the Free Exercise Clause. In this second tier of cases, some of our dioceses report conflicts over the loss of land by eminent domain for such things as creation of bicycle paths or parking lots. In addition, two weeks ago, St. Michael's Abbey in Orange County, California, sued the civil authorities to set aside a plan approving large-scale private development on land adjacent to the Abbey, land which had been, until now, dedicated to private and quiet religious services. It is plain that, in all of the above cases, there are possible political and administrative solutions short of litigation. However, I return to my initial observations that the power of a statutory right for protection of religion is not in the actual litigation but as a strong legal basis on which churches may negotiate and persuade that their rights are important, too.

The potential for infringement of these rights is evident in a series of cases in the State of Colorado. Officials in Arapahoe County have placed numerical limits on the number of students that may be enrolled in religious schools and, indeed, on the size of congregations of various churches as a way of limiting their growth. Since churches aspire to evangelize and measure their success, in part, by that growth, numerical limits on the size of church congregations operate in a particularly detrimental way to the historic and traditional evangelical efforts of churches. Catholic communities are not alone in feeling the effects of such actions. In Douglas County, Colorado, administrative officials initially proposed limiting the operational hours of a church the same way that they do any type of "commercial" facility. Limiting its operational hours means that a Catholic church may not lawfully engage in certain acts of service and devotion traditionally associated with our community—perpetual adoration of the Blessed Sacrament or overnight spiritual retreats. In the Grand Teton area, local officials have proposed limiting the number of persons who may seek spiritual consolation and retreat at the Camp St. Malo owned by the Archdiocese of Denver. The Camp was used by Pope John Paul II during his visit to the United States in 1993 for a day of quiet reflection. Because numerical limits were placed on the number of retreatants, the Camp has found that it cannot conduct some retreats, and that it must turn away potential individual users who seek the consolation and prayerfulness of that setting. Because it potentially operates now at a loss, it may have to close, thereby depriving everyone of the opportunity to find spiritual solitude and guidance in that setting.

In earlier ages, religious rights were entitled to preferential treatment. They are now treated as simply another inconvenience that the government must confront. The actual impact of these rules has a direct detrimental affect on the daily lives of people. The religious rights of individual believers and their communities are being adversely impaired.

REGULATION

The needs of religious organizations to seek exemption and accommodation from various regulations which are written in broad, generally applicable, and neutral language is apparent. For example, many religious primary and secondary schools must contend with overreaching and potentially harmful workplace regulations. In religious settings, sometimes those laws can be employed against the rights of the

religious community to conduct its educational and evangelical operations in accord with its own principles. What I am suggesting is that, in particular cases, there can be a clash between the demands of religious belief and secular law. For example, courts and administrative agencies can become involved in religious doctrinal disputes when called upon to resolve certain employment related matters. In 1979 in *N.L.R.B. v. Catholic Bishop of Chicago*, the U.S. Supreme Court recognized the potential serious First Amendment issues involved with the exercise of civil authority over certain employment relationships in religious schools. It is reported that dioceses have abandoned RFRA-type claims in the wake of *Boerne v. Flores*. In the absence of adequate statutory protection for religious freedom, there is the quite reasonable fear that religious authorities will be treated like everyone else and subjected to the same kinds of restrictions even when to do so would operate to the detriment of the rights of the religious community.

Other times, the rights of individual believers have been leveled according to the secular community. Already in the record of this Subcommittee's deliberations are examples of individual believers who have not been granted time for religious observances or have been penalized for objecting to particular kinds of assignments on account of religious belief. Even more insidious is the absence of protection for objections based on religious conscience. It is reported that, if church employers are to provide adequate insurance for their employees, they must also provide a full array of medical services, including abortion which our religious community condemns as intrinsically evil. Our inability to obtain adequate conscience clause protection in certain parts of the country makes the rights of religious communities more precarious. The presence of a strong statute protecting religious freedom would offer a useful way in which we could resist this additional demand that our religious communities conform to the secular norm.

TORT CASES

I want to be clearly understood that I do not advocate a broad immunity for churches against the consequences of their wrongdoing. Where churches violate the law, they risk the consequences of that violation. However, it is clear that the legitimate rights and expectations of churches are not being adequately balanced around the country in litigation that is directed against religious authorities. I wish to highlight two concerns that continue to be materially affected without an adequate federal statute.

The first is the issue of punitive damages. On two occasions in legal periodicals, I have advocated for limitations on punitive damages against churches on constitutional grounds. It is plain that when litigants seek to involve the state or federal courts in punishing a religious organization on account of their doctrine, as was the case in *Lundman v. McKown*, such claims need to be precluded and dismissed. The state simply has no business punishing the church on account of its own internal practices and belief system. Where the situation does not involve the deliberate endangerment of the public by the church but rather is related to the adequacy of internal practices (which often times involve pastoral and religious assessments) or governance or administration of a church, then I believe that punitive damages should be barred. However, punitive damage rules are neutral and generally applicable. Absent claims that target religious belief, the Free Exercise Clause (after *Smith*) is, as some commentators have suggested, little help. But claims targeting internal practices and governance of a church may be just as detrimental, seeking to compel a judicial reformation of church administration. In one case, the Conference confronted claims (including punitive damage claims) for "failing to act as a reasonably prudent religious organization." RFRA would have been a significant part of our defense.

This concern is also valid in litigation of certain invasive claims which target the nature of the relationships within the religious body and make them the predicate for liability. I am not speaking of ordinary direct negligence of the religious entity (which as I said is accountable) or even some forms of agency liability. In some instances, courts, under a broad and neutral fiduciary duty claim, dictate the type and quality of religious counseling offered by churches in similar matters. The fear of liability has already been documented in a recent article in the "Wall Street Journal" which noted that religious communities around the country are restricting the amount and type of counseling available. Most ministers believe that they have an obligation to counsel members of the religious community who seek their guidance on spiritual and religious questions. Often these counseling questions do not involve theology or pastoral practice questions isolated from the context and direction of that person's life. In those circumstances, the mixture of religious and nonreligious questions is one which cannot, in my view, reasonably be separated. Allowing for

liability where the person does not believe that the counseling was adequate or feels in some way offended as was the case in *Moses v. Episcopal Diocese of Colorado* or *Winkler v. Rocky Mountain Conference of the United Methodist Church*, both Colorado cases, undermines the ability and willingness of churches to do good and to promote the welfare of the community. It is this kind of claim which, I think, could reasonably be subjected to scrutiny under an effective statute protecting religious practices and beliefs.⁴

We urge the Committee to continue its pursuit of statutory language protecting religious rights to give religious communities the protection they need in contemporary and increasingly secular life. The Conference believes the need is evident as restrictions and the failure of accommodation jeopardize our ability to govern ourselves and minister to those in need, according to our own beliefs and pastoral practices.

Mr. CANADY. Thank you, Mr. Chopko. Dr. Ahmad.

STATEMENT OF IMAD A. (DEAN) AHMAD, PH.D., AMERICAN MUSLIM COUNCIL

Mr. AHMAD. In the name of God, the Gracious, the Merciful.

Good morning, Mr. Chairman, members of the committee. Thank you for this opportunity to speak on behalf of the 6 million Muslims in the United States. Our experiences may be taken as representative of those of the many religious traditions that are misunderstood or even unrecognized.

Before the *Smith* decision, the first amendment rights of all Americans seemed to be protected not only from deliberate, overt and discriminatory intrusion by the Federal Government, but also from unintended, covert, or indiscriminate abridgement by the government at any level. Many of us had believed that the State's police powers, on the one hand, and the people's fundamental right to freedom of religion, on the other, were well balanced by the strict scrutiny test. We expected that any law incidentally placing a substantial burden on the free exercise of religion or any other fundamental human right must meet that test.

RFRA statutorily restored that standard struck down by the narrowest of majorities in *Smith*. Since the Supreme Court has now struck down parts of RFRA, Muslims, among others, have been left naked before the power of State and local authorities as I shall illustrate by some examples.

Two New Jersey fire fighters and a policeman have been disciplined, and two of them were dismissed, for growing beards. In Islam, the growing of beards falls in the category of religiously motivated acts called Sunnah. Although not necessarily mandatory, their desirability is well established by Muslim tradition.

Muslims who have not previously observed such traditions often adopt them after undergoing the profound experience of the pilgrimage to Mecca. The tradition of the beard goes back the Prophet himself—peace be upon Him. The reason offered for the no-beards rule by the fire department is that they may interfere with breathing apparatus used by the firefighters. These concerns are speculative as OSHA does not prohibit beards in this connection and many, many jurisdictions have no such rule—and D.C. firefighters have beards with no problems.

Invoking RFRA, the firefighter, Abdul Shakid Yasin, won in New Jersey State Office Administrative Law. RFRA does not admit of speculative concerns. But the city appealed to the Merit System

Protection Board and after RFRA was struck down, the case was remanded.

The other firefighter, Ibrahim Abdul Haqq, was initially put on an inactive list pending the outcome of the Yasin matter. After Yasin's victory, however, the City of Newark's fire department suspended and subsequently terminated Mr. Abdul Haqq. He must now appeal the case without the benefit of the RFRA provisions that permitted his fellow firefighter, and fellow Vietnam veteran, to prevail initially.

Mikail Muhammad, a police officer in New Jersey, had a beard for most of his 12 years with the department, but he grew it thicker after the pilgrimage to Mecca 5 years ago. He was given a choice of shaving the beard or resigning. Absent RFRA he has filed a complaint under title VII but title VII is not as strong as RFRA. The EEOC has made a determination of probable cause of a violation but the Justice Department declined to pursue the matter.

The faith of these firefighters and police officers plays an important role in providing them with the courage and self-possession that they require in laying their lives on the line to protect us from fires and dangerous criminals. It is shameful to leave them insufficiently protected when a government attempts to deprive them of the freedom to exercise in a manner meaningful to them, the religion from which that faith springs.

Tanya Davis' husband is incarcerated at the State correction institution in Dallas, Pennsylvania. She made frequent visits to the prison to see her husband and had become a volunteer receiving certificates of appreciation in recognition of her work. On one occasion, a male officer asked her to raise her dress during what she took to be a routine search. Because Islamic tradition prohibits a woman from exposing her bare midriff to an unrelated post-pubescent male, she declined.

She left to put on a garment under her dress so that she could comply with the search without exposing her body. On her return the officer refused to complete the search now claiming that the previous search had not been routine, but that he had perceived puffiness at her waistline and suspected contraband. Her visiting privileges were suspended and her volunteer status was terminated.

Certainly, terminating an inmate's spouse or a volunteer because her religious beliefs require modesty before members of the opposite sex does not serve the compelling interests of searching for contraband in the least restrictive manner. Surely a pat-down by a female officer would have been sufficient.

Let us contrast these post-*Boerne* decisions with some cases while RFRA still applied to State and local governments. The Federal courts granted to Muslim practitioners of Sufi rituals a preliminary injunction in their challenge of a prison ban on the display and possession of dhikr beads. The beads, like rosaries, are used to keep count of the recitation made in the remembrance of God. The prison officials maintained a compelling interest in prohibiting gang violence and justified the ban on the beads on the grounds that the beads could be used to identify gangs by their colors.

The court found that the inmates had demonstrated a substantial burden on the religious exercise and that the prison was unlikely to succeed in proving that the ban was the least restrictive method of furthering the compelling interest.

The importance of RFRA in the court decision is made clear in the following passage: "The idea that prison authorities will be unable to distinguish the bona fide practice of dhikr from the showing of colors by gang members is, at this stage of the proceeding at least, the product of speculation by what one suspects are non-Muslims dealing with an unfamiliar ritual. It is precisely because of Congress' fears that lack of contact with unfamiliar religious practices might lead to the suppression of such practices on insufficient grounds that RFRA causes against the use of speculation to justify limitations on the free expression of one's religion."

Although this particular example deals with prison authorities, RFRA's protection extended to regulatory authorities and other government bodies like police and fire departments. Authorities' unfamiliarity with certain religions also leads to lumping together incompatible denominations. One imagines government officials would hesitate to force Quakers and Evangelicals to share a single religious service, yet prison officials forced the followers of the Temple of Islam, a group strongly opposed to Louis Farrakan's Nation of Islam, to share facilities and chaplains with the latter.

RFRA was instrumental in permitting the courts to dismiss the authority's bald allegations of an interest in maintaining order and discipline as sufficient to support a summary judgment motion. Given the failure of many to distinguish even between Orthodox Islam with its utter repudiation of racism, from other groups that brand some people as devils because of the color of their skin, the implications of the weaker standard are frightening to mainstream Muslims like myself.

The many Muslims who cover their hair in public were benefitted by a Federal court's decision to deny summary judgment to prison officials against an inmates claim that a ban on religious headgear violated RFRA and the first amendment. The importance of RFRA is seen in the court's statement that the defendants failed to show a narrowly tailored compelling interest.

Absent RFRA it is a problem for free citizens as well as it is for prisoners as is demonstrated by a law in Philadelphia originally directed against Catholic nuns, now a problem for Muslim women, prohibiting public school teachers from covering their hair.

Before *Boerne*, almost all the cases I saw involved prisoners. Indeed, when firefighter Ibrahim Abdul Haqq initially filed his complaint pro se, he had to use a form designed for prisoners. It is as though the mere existence of RFRA had a salutatory effect on how government agencies dealt with their employees and the public. RFRA's legislative history specifically noted that prison order and discipline are compelling State interests. Now these concerns are being spread to cases involving the general public.

After *Boerne*, not only prisoners, but volunteers, firefighters and even policemen, are suffering from inadequately formed regulations and policies grounded on mere speculation, exaggerated fears and post-hoc rationalizations.

I'd like to close with some general observations from my personal experience as a Muslim chaplain in a maximum security hospital. During the time RFRA was in effect the patients in my Jamá (congregation) had a much easier time getting access to the Qur'an, the Islamic scripture, than before RFRA or after *Boerne*. My experience supports what can be inferred from other cases I've discussed: When government agencies and employees understand that they may not infringe upon a person's religious freedom without a compelling government interest, and when they realize that any such interest must be met in the least restrictive means possible, they act with a pronounced reasonability and restraint that almost vanishes when those safeguards against bureaucratic arrogance are removed.

I thank you for your time and attention, and I pray that you will find some effective and tenable means for restoring the freedom of religion and fundamental rights in general. May God guide you in your search.

[The statement of Mr. Ahmad follows:]

PREPARED STATEMENT OF IMAD A. (DEAN) AHMAD, PH.D., AMERICAN MUSLIM COUNCIL

In the name of God, the Gracious, the Merciful.

On behalf of the estimated six million Muslims in the United States, I thank the Committee for the opportunity to speak today on this most important issue. As a minority neither as well known nor even as well recognized as the various minority Christian denominations, and as practitioners of a religion even more misunderstood than Judaism, our experiences may be taken as representative of those faced by many other Americans belonging to the numerous other minority religious traditions also unrecognized or misunderstood. Further, the fact that Muslims conceive religion to cover all aspects of life means that our experience with free exercise questions relates well to the fundamental issues raised by the *Smith* decision and now brought back into public debate by *Boerne v. Flores*.

Before the *Smith* decision, the First Amendment rights of all Americans seemed to be protected not only from deliberate, overt, and discriminatory intrusion by the federal government, but also from unintended, covert, or indiscriminate abridgement by government at any level. Many of us had believed that the states' police powers on the one hand and the peoples' fundamental right to freedom of religion on the other were well balanced by the strict scrutiny test. We expected that any law incidentally placing a substantial burden on the free exercise of religion (or any other fundamental human right) must meet the twin tests of serving a compelling government interest and meeting that interest in the least restrictive manner possible. The Religious Freedom Restoration Act (RFRA) statutorily restored that standard struck down by the narrowest of majorities in *Smith*. Since the Supreme Court has struck down parts of RFRA, Muslims, among others, have been left naked before the power of state and local authorities, as I shall illustrate in the examples that follow.

Two New Jersey firefighters and a policeman have been disciplined (two of them were dismissed) for growing beards.¹ In Islam, the growing of a beard falls in the category of religiously motivated acts called "*sunnah*." Although such acts are not necessarily mandatory, their desirability is well-established by Muslim tradition. Muslims who may not have previously observed such traditions will often adopt them after undergoing the profound experience of the pilgrimage to Mecca. The tradition of the beard goes back to the Prophet Muhammad himself (peace be upon him).

The reason offered for the no-beards rule by the fire department is that they may interfere with breathing apparatus used by firefighters. These concerns are speculative as OSHA does not prohibit beards in this connection. Such speculative concerns were not allowed under RFRA. Invoking RFRA, firefighter Abdul Shahid Yasin won in the New Jersey state office of administrative law, but the city appealed to the

¹This summary is based on information provided me by Kenneth Hall, attorney for the complainants and by Newark firefighter Ibrahim Abdul Haqq.

merit system board and, after RFRA was struck down, the case was remanded. The other firefighter, Ibrahim Abdul Haqq, was initially put on an inactive list pending the outcome of the Yasin matter. After Mr. Yasin's victory, however, the City of Newark Fire Dept. suspended and subsequently terminated Mr. Abdul Haqq. He must now appeal his case without benefit of the RFRA provisions that permitted his fellow firefighter and Vietnam veteran to prevail initially.

Mikail Muhammad, a police officer in New Jersey, had a beard for most of his twelve years with the department, but he grew it thicker after his pilgrimage to Mecca five years ago. He was given a choice of shaving his beard or resigning. Absent RFRA, he has filed a complaint under Title VII, but Title VII is not as strong as RFRA. The EEOC has made a determination of probable cause of a violation, but the Justice Dept. has declined to pursue the matter. The faith of these firefighters and police officers plays an important role in providing the courage and self-possession they require in laying their lives on the line to protect us from fires and dangerous criminals. It is shameful to leave them insufficiently protected when government attempts to deprive them of the freedom to exercise, in a manner meaningful to them, the religion from which their faith springs.

Tanya Davis' husband is incarcerated at the State Correctional Institution in Dallas, Pennsylvania.² She made frequent visits to the prison to see her husband and had become a volunteer, receiving certificates of appreciation in recognition of her work there. On one occasion a male officer asked her to raise her dress during what she took to be a routine search. Because Islamic tradition prohibits a woman from exposing her bare midriff to an unrelated post-pubescent male, she declined. She left to put on a garment under her dress so that she could comply with the search without exposing her body. On her return the officer refused to complete the search, now claiming that the previous search had not been routine, but that he had perceived puffiness at her waistline and suspected contraband. Her visiting privileges were suspended and her volunteer status terminated.

Certainly, suspending or terminating the privileges of an inmate's spouse or of a volunteer because her religious beliefs require modesty before members of the opposite sex does not serve the compelling interest of searching for contraband in the least restrictive manner. Ms. Davis protests that had the officer really suspected contraband, he should have employed a pat down by a female officer or other female employee as prison policy requires in such cases.³ Perhaps the courts will eventually find for the complainant in this case, but I question if the matter would have gone this far had RFRA not been struck down.

Let us contrast these post-*Boerne* situations with some cases while RFRA still applied to state and local governments. The federal courts granted to Muslim practitioners of Sufi rituals a preliminary injunction in their challenge of a prison ban on the display and possession of *dhikr* beads.⁴ The beads are used to keep count of recitations made in remembrance of God. The prison officials maintained a compelling interest in prohibiting gang violence and justified the ban on the beads on the grounds that beads could be used to identify gangs by their colors. The court found that the inmates had demonstrated a substantial burden on their religious exercise and that the prison was unlikely to succeed in establishing that the ban was the least restrictive method of furthering its compelling interest in preventing gang violence. The importance of RFRA in the court's decision defending the Sufis right to their religious practice is made clear in the following passage: "The idea that prison authorities will be unable to distinguish the bonafide practice of *dhikr* from the showing of colors by gang members is, at this stage of the proceeding at least, the product of speculation by (what one suspects) are non-Muslims dealing with an unfamiliar ritual. It is precisely because of Congress' fears that lack of contact with unfamiliar religious practices might lead to the suppression of such practices on insufficient grounds that RFRA cautions against the use of speculation to justify limitations of the free expression of one's religion."⁵ Although this particular example deals with prison authorities, RFRA's protection extended to regulatory authorities or other government bodies like police and fire departments.

Authorities' unfamiliarity with certain religions also leads to lumping together incompatible denominations. One imagines government officials would hesitate to

²I acquired the information here from documents filed in the matter, confirmed in a telephone interview with Ms. Davis on March 23, 1998.

³Indeed, in 1995, a federal district court ruled that permitting the unveiling of female Muslim visitors to occur only in the presence of a female corrections officer represents the least restrictive means of furthering the compelling interest of prison safety (*Ishmawiyl v. Vaughn*, WL 461949, E.D. Pa. Aug. 1, 1995).

⁴*Alameen v. Coughlin*, 892 F. Supp. 440 E.D.N.Y. July 19, 1995.

⁵*Ibid.*, at 450.

force Quakers and Evangelicals to share a single religious service. Yet, prison officials forced followers of the "Temple of Islam," a group strongly opposed to Louis Farrakhan's "Nation of Islam" to share facilities and chaplains with the latter.⁶ RFRA was instrumental in permitting the court to dismiss the authorities' "bald allegations" of interest in maintaining order and discipline as insufficient to support a summary judgment motion. The court wrote that "the directives are in support of a legitimate interest and are rationally connected to that interest," that is, they met the weaker standards absent RFRA. Given the failure of many to distinguish even between orthodox Islam, with its utter repudiation of racism, from other groups that brand some people "devils" because of the color of their skin, the implications of this weaker standard are frightening to mainstream Muslims like myself.

The many Muslims who cover their hair in public were benefited by a federal court's decision to deny summary judgment to prison officials against an inmate's claim that a ban on religious headgear violated RFRA and the First Amendment.⁷ The importance of RFRA is seen in the court's statement that the defendants failed to show a narrowly tailored compelling interest. From personal experience as Muslim chaplain at a maximum security hospital I know that the issue of head covering is a recurrent issue in maximum security institutions. Absent RFRA it is a problem for free citizens as well as is demonstrated by the law in Philadelphia—originally directed against Catholic nuns, now a problem for Muslim women—prohibiting public school teachers from covering their hair.

In preparing my testimony I was struck with the realization that before *Boerne* almost all the cases I saw involved prisoners. (Indeed, when firefighter Ibrahim Abdul Haqq initially filed his complaint *pro se* he had to use a form designed for prisoners.) It is as though the mere existence of RFRA had a salutary effect on how government agencies dealt with their employees and with the public. RFRA's legislative history specifically noted that prison order and discipline are compelling state interests and prison officials must be afforded the deference needed to protect such interests. After *Boerne*, not only prisoners, but volunteers, firefighters, and even policemen are suffering from "inadequately formulated . . . regulations and policies grounded on mere speculation, exaggerated fears and post-hoc rationalizations."⁸

I would like to close with some general observations from my own experience as Muslim chaplain in a maximum security hospital. During the time that RFRA was in effect, the patients in my *jamâ'* (congregation) had a much easier time getting access to the Qur'an, our holy scripture, than before RFRA or after *Boerne*. My personal experience supports what can be inferred from the other cases I have discussed. When government agencies and employees understand that they may not infringe upon a person's religious freedom without a compelling governmental interest, and when they realize that any such interest must be met in the least restrictive means possible, they act with a pronounced reasonability and restraint that almost vanishes when those safeguards against bureaucratic arrogance are removed.

I thank you for your time and attention, and pray that you shall find some effective and tenable means for restoring the strict scrutiny test for religion freedom and for all fundamental rights. May God guide you in your search.

Mr. CANADY. Thank you, Dr. Ahmad. Mr. McFarland.

STATEMENT OF STEVEN T. MCFARLAND, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY

Mr. MCFARLAND. Thank you, Mr. Chairman, members of the committee.

Congressional action is vitally necessary to protect our first freedom. Houses of worship have to go to court just to get equal access to a suitable facility or land in their own community. Churches and religious charities across the country are having their offering plates confiscated by bankruptcy trustees. Student religious groups at public universities and graduate schools, many of them chapters of the Christian Legal Society, are increasingly confronted with rules that prohibit them from meeting on campus if they have a

⁶ *Allah v. Menei*, 844 F. Supp. 1056 E.D. Pa. Feb. 23, 1994.

⁷ *Hall v. Griego*, 896 F. Supp. 1043 D. Colo. Aug. 10, 1995.

⁸ Senate Report on RFRA, July 27, 1993, at 10.

prerequisite of a religious faith for the leaders of their own private group. And religious believers with conscientious objections to participation in the taking of human life are afforded little or no accommodation in many places; they find no solace in Federal constitutional or statutory protection in light of the *Smith* and *Boerne* decisions.

America's religious communities need a Federal law that would first of all reaffirm the applicability of the Religious Freedom Restoration Act to Federal law, Federal policy, actions of Federal employees. Second, a law that would specifically and uniquely address the problem of church land use. And third, clarify, at least in its legislative history, that strict scrutiny is to be applied whenever the government burden is more than a frivolous one on freedom of religion.

Let me give some actual examples, first of all in the cases involving church land use. The Refuge is a church in St. Petersburg, Florida, whose ministry, in addition to worship and Bible study, has an extensive outreach to the community including a feeding program for the poor and homeless, a crisis hotline, an Alcohol Anonymous group, and an HIV support group. Most of its clients, so to speak—most of its parishioners—are poor.

The Refuge has been leasing a facility since 1994. Its certificate of occupancy designates its use as a church; its parcel of land that it leases is zoned for church use. But just about 6 months ago, the St. Petersburg Development Review Service, a fancy name for the building department, informed the Refuge that they didn't think it was a church, it's now a social service agency because, "the majority of time for which your facility is utilized and the clients who are served by the facility are more analogous with a social service agency." Accordingly, they had to move.

And on appeal to the city's Board of Adjustment, the Refuge, this church, was described in startling terms. The city's brief, which we just received couple of weeks ago, describes this church's ministry to the homeless, as "a stinkweed that is eventually going to have a negative impact on the rose garden"—referring to this depressed section of the downtown—"the rose garden, and be weeded out and moved to the weed patch for the sake of all those living around the garden. Such is this case."

This is how the city is treating this ministry to the homeless. It's no coincidence that this newfound concern for the rose garden of their downtown corridor coincides with the acquisition of a professional sports franchise and the improvement of the Tropicana Field area in anticipation for that.

This is just one example of how local governments across the country are discriminatorily restricting churches' ability to locate suitable facilities for worship and related ministry. And local officials get away with some pretty egregious acts against churches in land use matters.

In two separate cases, for example, in Chicago, churches contracted to buy parcels on which a church was a permitted use. They applied for a special use permit. And in both cases, an alderman delayed the hearing on the permit, then introduced a re-zoning ordinance that would render the use as a church to no longer be a permitted use on each of these parcels, and then voted for and

enacted the ordinance. The churches were left out in the cold by this brazen act of discrimination, and the Seventh Circuit just a few months ago ruled that these alderman enjoy absolute legislative immunity from liability for this political power play.

Churches and, therefore, municipal employees and zoning commissioners, as well as courts, are confused about what standard of review to apply under the Free Exercise Clause of the First Amendment. And now RFRA is no longer an issue, at least at the State level.

For example, an Orthodox Jewish rabbi was threatened with criminal prosecution for leading morning and evening prayers of about 30-minutes length in a converted garage in one of Miami's single-family residential areas. The U.S. Court of Appeals for the Eleventh Circuit held that the city's interest in an exception-free zoning plan outweighed the rabbi's interest because the services, "are not integral to his faith," and because the burden on the rabbi and his friends of having to relocate "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of unemployment compensation."

Despite the Supreme Court's invalidation last June of RFRA as it applies, to the States and local law, this subcommittee can still do something to level the playing field for churches when they confront land use problems. The Christian Legal Society would predict that the vast majority and conflicts would go away if two simple protections were codified.

First, that equal access is assured wherever a community allows a place of public assembly, be it a meeting hall, community centers, theaters, schools, wherever the zoning permits those kinds of uses, it should not be allowed to prohibit churches. It should not be discriminating on the basis of the religious content of the assembly. That seems to be pretty basic fairness.

The second principle that would be essential to any legislation in the church land use area should be that churches are permitted as of right somewhere in the jurisdiction; you can't zone them out so they have to get a special use permit to locate anywhere in the city. Churches need to know where they can buy or where they can lease, and to be able to do so without the cloud of a special use permitting process looming over the transaction. The choice should be up to the local government as to whether a church is a permitted use in either residential or else commercial zones, but the law should forbid ordinances that make churches a non-permitted use anywhere and everywhere in the city, thereby requiring a variance.

In addition, the legislative history of any remedial bill should clarify that a higher standard review is triggered against any governmental law when it imposes more than a negligible or frivolous burden on religious exercise.

But land uses aren't the only problems post-*Boerne* for churches. As the committee is undoubtedly aware, and as Mr. Nadler is thankfully assisting in the sponsorship of, a response to the problem of bankruptcy trustees erroneously informing churches that RFRA is now void as to Federal law. That should be corrected, that misconception needs to be corrected.

One other group of citizens, at a minimum, deserve legal accommodation of their religious conscience. As Marc Stern mentioned,

pro-life obstetricians, nurses, physician assistants, and pharmacologists who work in public clinics or hospitals and who refuse on religious grounds to participate in abortions; healthcare professionals who object to assisting depressed patients in committing suicide; Catholic hospitals that must choose between governmental accreditation and training residents in abortion procedure; prison guards who cannot be an accessory to an execution; taxpayers who cannot in good conscience contribute to the military. In many cases, those folks have lost, the government has won. In some cases, however, they would win under strict scrutiny. At a minimum they should at least get to first base, be able to invoke strict scrutiny as they did prior to *Smith* and prior to *Boerne*.

In conclusion, we urge this committee to continue its leadership in seeking meaningful legal protection for our first freedom so it does not vary from State to State, nor depend upon the enlightenment, good will, or courage of city officials. Thank you very much.

[The statement of Mr. McFarland follows:]

PREPARED STATEMENT OF STEVEN T. MCFARLAND, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY

SUMMARY

1. Congressional action is vitally necessary in this area because: a) since 1990, the First Amendment has been interpreted to afford no protection in the vast majority of cases in which government burdens religious exercise; b) due to another Supreme Court decision last year, federal statutory law (the Religious Freedom Restoration Act of 1993) no longer extends relief, at least against state and local laws that burden religious practice; and c) religious adherents and organizations face serious obstacles from government, e.g.:

i). Houses of worship frequently must litigate just to gain equal access to some land or building in their community, and even then the churches often lose.

ii). Churches and religious charities across the country are having their donation revenue confiscated by bankruptcy courts.

iii). Student religious groups at public universities and graduate schools are increasingly confronted with campus rules banning from campus any organization that has a religious prerequisite for its leaders.

iv). Religious adherents with conscientious objection to participating in the taking of human life presently lack federal constitutional or statutory bases for seeking exemption from such participation.

2. Recommendations: America's religious communities need a federal law that would require, within the constraints of the Supreme Court's 1997 ruling on RFRA, strict judicial scrutiny of federal, state and local laws, policies or practices that substantially burden free religious exercise.

In such legislation, the Congress should:

a). Reaffirm the applicability of RFRA to federal law, including the bankruptcy code;

b). Specifically and uniquely address church land use, requiring that municipalities treat houses of worship the same as similar places of public assembly and making churches a permitted use somewhere in the jurisdiction;

c). Clarify at least in its legislative history that strict scrutiny is to be applied whenever the government burden is more than de minimis, frivolous or merely technical.

STATEMENT¹

Thank you, Mr. Chairman, for the invitation to comment regarding the need for federal legislation to restore meaningful legal protection to our First Freedom, religious liberty.

The Christian Legal Society (CLS) is a thirty-seven-year-old organization of 4,000 Christian attorneys and law students nationwide. Its Center for Law and Religious Freedom has worked for religious liberty on behalf of all faiths in every level of the judicial, legislative and executive branches of state and federal government.

By virtue of its network of member lawyers, its amicus advocacy, and its litigation in most of these issues, the CLS Center brings particular expertise to the question of how current law fails to protect:

- churches from discriminatory land use restrictions;
- religious organizations from confiscation of their donation income;
- student religious groups from rules at public universities that ban from campus any student group that requires its leaders to share a common faith;
- religious adherents with conscientious objection to participating in the taking of human life.

1. Official Discrimination Against Church Land Use

The Refuge Pinellas, Inc. ("the Refuge") is a church in an economically depressed area of St. Petersburg, Florida. Its ministry includes worship services, Bible studies, biblical counseling, Christian leadership training, and a variety of outreach services, including a feeding program for the poor and homeless, a crisis hotline, an Alcoholics Anonymous group, and an HIV support group. Most of the individuals whom the Refuge serves are poor.

The Refuge has been leasing a facility since 1994, and its Certificate of Occupancy authorizes it to operate as a church. The zoning classification for the area within which the Refuge is located permits churches (a term not defined by the relevant municipal ordinance), but not "social service agencies" (a term that is defined by the ordinance).

In late 1996, a coalition of area churches was feeding the hungry in a downtown parking lot. City officials voiced their opposition to this program on the ground that no rest room facilities were available and that no litter control mechanism were in place. The City informed the coalition that they would have to move their operations indoors, to a facility with rest rooms and a mechanism for controlling litter. The Refuge offered to host the food distribution program at its facility, and the City apparently initially found this to be an acceptable alternative.

On September 15, 1997, the manager of the St. Petersburg Development Review Services (the municipal agency responsible for enforcing land use regulations) informed the Refuge that it was not a "church" because "the majority of time for which your facility is utilized and the clients who are served by the facility are more analogous with a social service agency." Accordingly, the Development Review Services manager indicated that the Refuge would either have to cease operations or obtain a "special exception." See Exhibit 1.

On appeal, three of the five members of the St. Petersburg Board of Adjustment agreed that the Refuge was a "church" rather than a "social service agency." One member stated that if the Board adopted the Development Review Services position, "*many other churches in this City would also have to be [labelled] social service agencies.*" Another member stated, "*I suspect, though, that if [my own, mainline church] were asked to put together a summary of activities such as this organization's been asked to do, I suspect that our summary of activities would almost mirror this. I suspect that would be true for most of the churches.*" Board rules require a supermajority to override a decision by Development Review Services; since the Refuge only received three of five votes, its appeal failed.

The church filed a petition for a writ of certiorari in the Pinellas County Circuit Court (which is the appropriate step for seeking review of an administrative agency's decision).

In resisting the Church's appeal, the City of St. Petersburg described The Refuge as a "stink weed" that

is eventually going to have a negative impact on the rose garden [a generous description of this depressed section of downtown] and be weeded out and

¹DISCLOSURE: Neither the Christian Legal Society nor its Center For Law And Religious Freedom has received any federal grant, contract or subcontract in the current or preceding two fiscal years. CLS represents only itself at this hearing.

moved to the weed patch for the sake of all those living around the garden. Such is this case.²

Through its public interest law firm, the Western Center For Law And Religious Freedom, CLS attorneys have been asked to assist this inner city church in St. Petersburg. This is just one example of how local governments across the country are discriminatorily restricting churches' ability to locate suitable facilities for worship and related ministry.

A small congregation in Evanston, IL was unable to rent any building in the city because churches were not a permitted use, meaning that they can only locate in the city if they go through the laborious and costly process of applying for a special use permit. The congregation ended up having to sue the City of Evanston in federal court just to be treated the same as meeting halls, theatres and schools, all permitted uses in the City.³

Local officials can get away with egregious acts against churches in land use matters. In two separate cases in Chicago, churches contracted to buy parcels on which a church would have been a permitted use, subject to obtaining special use permits. In both cases, an alderman delayed the hearing on each church's permit application, introduced ordinances to rezone the parcels so that the applicant churches would not be permitted uses for the properties, and then voted for and enacted the rezoning ordinances. The churches were left out in the cold by this brazen discrimination against religious land use. Just last November the U.S. Court of Appeals for the Seventh Circuit ruled that these Chicago City aldermen enjoy absolute legislative immunity from lawsuit liability for their manipulative political power play.⁴

Courts (and therefore municipal employees and zoning commissioners as well) are confused about what standard of review to apply under the First Amendment Religion Clause to land use regulations that burden religious exercise. For example, an Orthodox Jewish rabbi was threatened with criminal prosecution for leading morning and evening prayers in a converted garage in one of Miami's single-family residential areas. The rabbi sought protection in federal court, which was denied on appeal. The U.S. Court of Appeals for the Eleventh Circuit held that the city's interest in an exception-free zoning plan outweighed the rabbi's interest, because the services "are not integral to [his] faith" and because the burden on the rabbi and his friends of having to relocate "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit [unemployment compensation]."⁵

This demonstrates the importance of clarifying in the legislative history of any remedial bill from this subcommittee that the term "substantial burden" is not intended to be a difficult threshold for the religious claimant; it should not mean that government-imposed burdens need not be justified unless they rise to the level of criminal prosecution or loss of livelihood.

In another example of judicial confusion, a federal judge in Philadelphia granted judgment for the city against a Seventh-day Adventist church to which the city had issued a building permit and then revoked it after construction had commenced when the city discovered it had erred in calculating the number of parking spaces its code would require. The judge mislabeled one of the Supreme Court's Free Exercise of Religion rulings as setting forth "the constitutional standard under the Establishment Clause of the First Amendment"; the judge also remarkably could not find any showing "that anyone's freedom of religion was affected, let alone 'substantially burden[ed],' by the City's zoning provisions."⁶

There is disagreement in the judiciary as to whether zoning ordinances impinge on free exercise of religion:

Thus, when government agencies seek to encumber the use of buildings for religious worship, they are, in fact, impinging on speech, assembly, and religious exercise through the use of zoning ordinances . . . Indeed, if first amendment free exercise rights are not triggered by the impingement on places of wor-

²*The Refuge Pinellas, Inc. v. City of St. Petersburg*, Pinellas Co. Cir. Ct., No. 97-8543-CI-88B (City's Response To Petition For Writ Of Certiorari, p. 3).

³*Love Church v. City of Evanston*, 671 F. Supp. 515 (N.D. Ill. 1987).

⁴*Ira Iglesia De La Biblia Abierta v. Banks*, and *C.L.U.B. v. Huels*, 129 F.3d 899 (7th Cir. 1997).

⁵*Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984).

⁶*Germantown Seventh-day Adventist Church v. City of Philadelphia*, No. 94-1633, 1994 WL 470191 (E.D. Pa. 1994) (unpublished) (court noted that neither party invoked the Religious Freedom Restoration Act of 1993), *aff'd*, 54 F.3d 768 (3rd Cir. 1995).

ship, the right of free exercise of religion is for practical purposes subject to broad infringement in all of its aspects except perhaps belief.⁷

Recommendations: Despite the Supreme Court's invalidation last June of the Religious Freedom Restoration Act as it applied to state law, this subcommittee still can do something to level the playing field for religious assembly. In any remedial bill, the subcommittee should consider a separate section addressing church land use conflicts. CLS would predict that the vast majority of such conflicts would be prevented if two simple protections were codified.⁸

First, *equal access* should be assured. Wherever a community allows places of assembly, like meeting halls, community centers, theaters, schools, or arenas, it must allow churches as a permitted use. Government must not discriminate on the basis of the nature of the assembly.

The second principle essential to any legislation in the church land use area should be that churches are permitted *as of right* somewhere in the jurisdiction. Churches need to know where they can buy or lease, and to be able to do so without the cloud of the special use permitting process looming over the transaction. The choice of whether it is in residential or in commercial zones should be up to local government. But the law should forbid ordinances that make churches a nonpermitted use requiring variance or a special use permit anywhere and everywhere in the city.

In addition, the legislative history of any remedial bill from this subcommittee should clarify that a higher standard of review is triggered against any government law, policy or practice when it imposes more than a *de minimis*, technical or frivolous burden on religious exercise.

2. Confiscation Of Donation Income From Churches And Religious Charities.

Zoning discrimination is not the only widespread crisis that churches, synagogues, mosques and religious charities face today. For the first time in four centuries of Anglo-Saxon bankruptcy law, federal bankruptcy courts are now ordering churches to turn over tithes and donations they received from members in good faith.⁹ Why? Because the donor went bankrupt one, two, three or as late as six years *after* the donation. State courts have also joined the excavation of this new gold strike for creditors, using state fraudulent transfer laws. See Exhibit 2.

The 1993 RFRA largely stopped this juggernaut in its tracks when the U.S. Court Of Appeals for the Eighth Circuit agreed with CLS that a Protestant church outside Minneapolis would be substantially and unjustifiably burdened in its religious exercise if its offering plate were to be confiscated by a bankruptcy trustee.¹⁰ But that dam was breached last June when the Supreme Court vacated (erased) the appeals court decision and sent it back to the Eighth Circuit for reconsideration in light of its holding several days earlier that RFRA was unconstitutional.¹¹ Now bankruptcy trustees are erroneously informing churches that RFRA is void even as to federal bankruptcy law. See Exhibit 3.

Recommendation: CLS has assisted Sen. Grassley and Rep. Packard in drafting an amendment to the federal bankruptcy code that would turn back this incursion into church financial autonomy and fundamental freedoms.¹² But this subcommittee could help restore protection to bona fide religiously-motivated charitable giving by including in legislation a reaffirmation that the Religious Freedom Restoration Act

⁷ *Messiah Baptist Church v. County of Jefferson, Colo.*, 859 F.2d 820, 829 (10th Cir. 1988) (McKay, J., dissenting), *cert. denied*, 490 U.S. 1005 (1989). *Cp. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F. 2d 303, 307 (6th Cir. 1983) (court concluded that an ordinance permitting churches in 90% of the City did not burden church's religious freedom).

⁸ CLS is indebted for these recommendations to member attorney John W. Mauck, Esq., Mauck, Bellande & Cheely, Chicago, IL [(312) 853-8709], who specializes in defending churches against unreasonable land use restrictions.

⁹ *Morris v. Midway Southern Baptist Church (In re Newman)*, 203 B.R. 468 (D.Kan 1996); *Christians v. Crystal Ev. Free Church (In re Young)*, 152 B.R. 939 (D.Minn. 1993), *reversed* 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded*, ___ U.S. ___ (1997); *Weinman v. Word of Life Christian Center (In re Bloch)*, 207 B.R. 944 (D. Colo. 1997); *Fitzgerald v. Magic Valley Ev. Free Church (In re Hodge)*, 200 B.R. 884 (D. Idaho 1996), appeal pending, No. 96-00458 (U.S.D.C., D. Idaho).

¹⁰ *Christians v. Crystal Ev. Free Church*, ___ F. ___ (8th Cir. 1996), *vacated and remanded* U.S. ___ (1997).

¹¹ *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

¹² In the 104th Congress, see Testimony of Steven T. McFarland Before The (House) Judiciary Subcommittee On Commercial And Administrative Law (In Support of H.R. 2604) (February 12, 1998); and Testimony of Steven T. McFarland Before The (Senate) Judiciary Subcommittee On Administrative Oversight And The Courts (In Support Of S.B. 1244) (September 22, 1997).

of 1993 remains in full force relative to federal law, policy and practice, including the bankruptcy code.

3. *University Prohibitions Against Student Religious Groups Having Religious Standards For Their Leaders.*

Another form of discrimination against religious exercise and assembly has infected public colleges and graduate schools in the last decade: Religious student groups are penalized if they require that their student leaders share a particular religious belief. CLS has student chapters on scores of law school campuses. As our name implies, members must subscribe to a profession of orthodox evangelical Christian faith. Any student of any faith (or none) may attend and participate in CLS chapter meetings. But only members may hold office or vote for their officers. But many campuses deny official charter status to any group like CLS that discriminates in its leadership selection on the basis of religion. This means that our chapter cannot meet on campus, use campus media to announce their activities, or distribute literature to their peers. Our students are penalized—sent not just to the back of the bus but kicked off altogether—because of their religious beliefs.

Only after months of legal advocacy and intervention by our national staff, including litigation, have we procured charter status and equal rights without compromising our convictions. Besides many private colleges, the list of public institutions where we have had to fight this recurring battle—either for a student chapter of CLS or of another Christian ministry—includes University Of Arizona, University of Minnesota, University of Kansas, University of Toledo, Texas Institute Of Technology, Johnson State University (VT), California State University-Monterey Bay, and Georgia Institute Of Technology. The problem has been exacerbated by the demise of RFRA last year.

4. *Need For Exemptions For Religious Conscience.*

Free religious exercise also sometimes requires religious exemptions from other laws prohibiting discrimination, such as fair employment and housing legislation.¹³ This would not give free rein for racist groups to ignore such laws; the government's interest in eradicating certain bases of discrimination (e.g., on the basis of race or national origin) is certainly sufficiently compelling to justify a law's burden on religion-based bigotry. But this cannot be said of the state's interest in eradicating other forms of discrimination.¹⁴

Another group of citizens deserving legal accommodation of their religious conscience are those who are religiously opposed to assisting in the intentional taking of human life. Pro-life obstetricians, nurses, physician assistants and pharmacologists who work in public clinics or hospitals but refuse to participate in abortions. Similarly, health care professionals who conscientiously object to assisting depressed patients in committing suicide. Catholic hospitals that must choose between governmental accreditation and training residents in abortion procedure.¹⁵ Prison guards who cannot be an accessory to an execution on death row. Or the taxpayer who cannot in good conscience contribute her tax dollars to the military portion of the federal budget. In some of these cases, even under the strict scrutiny standard of RFRA, the government would still prevail (and has in the past). In other cases, religious accommodation would prevail. And in all such cases, the law would at least dignify the conviction with a serious hearing. Presently all such people of conscience have been stripped of protection under the First Amendment's Free Exercise Clause and under RFRA by the Supreme Court's decisions in *Employment Division v. Smith* and *City of Boerne v. Flores*.

CONCLUSION

As the First Freedom in the Bill of Rights, religious liberty should not find its legal protection varying from state to state, or dependent upon the enlightenment, goodwill, and courage of city officials. A federal law is needed to restore strict scru-

¹³ *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), cert. denied, 513 U.S. 979 (1994); *Thomas v. Anchorage Equal Rights Comm'n*, Nos. 97-35220, 97-35221 (9th Cir. pending).

¹⁴ Indeed, the best (if not exclusive) indicator of governmental interest is legislation. The Congress has recognized that religious freedom is furthered by affording religious associations a blanket exemption from federal prohibitions against religious discrimination in employment. Sec. 702, 703(e)(2), Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, e-2. See *Corporation Of Presiding Bishop v. Amos* (upholding the constitutionality of Sec. 702 exemption against Establishment Clause challenge).

¹⁵ *St. Agnes Hospital of the City of Baltimore, Inc. v. Riddick*, 748 F.Supp. 319 (Sept. 10, 1990).

tiny to laws and official practices that place more than a negligible burden on free religious exercise. The bill should address as many of these government burdens as the *Flores* holding permits, including discriminatory restrictions on church land use, confiscation by bankruptcy courts of charitable contributions, intolerance at public universities of religious distinctives in student groups, and the absence of any legal argument for religious exemptions in matters of conscience.

CITY OF ST. PETERSBURG,
DEVELOPMENT REVIEW SERVICES,
St. Petersburg, FL, September 15, 1997.

BRUCE WRIGHT,
The Refuge,
St. Petersburg, FL.

DEAR MR. WRIGHT: Thank you for meeting with me on August 27th to discuss the activities occurring at your site. As we discussed, you do not currently meet the parking requirements since your parking agreement with George F. Young was rescinded. This issue needs to be resolved immediately either by reinstating another parking agreement, providing the required parking, or seeking a variance to the parking requirement. This variance would require review and approval by the Environmental Development Commission (EDC).

Secondly, the Certificate of Occupancy (CO) lists the use of the Refuge as a Church. Our department has discussed the information that you furnished in writing and verbally during our meeting of August 27. While many churches offer social service functions as an accessory use to their church function, the majority of time for which your facility is utilized and the clients who are served by the facility are more analogous with social service agency. Social Service agencies are a Special Exception use within the ROR-1 Zoning district which requires approval by the EDC.

Therefore, you will need to apply to the Environmental Development Commission to receive the proper approvals in order to operate your facility. I have enclosed the application form, time schedule and other related information. This letter will serve as notification to the Code Compliance and Assistance Division that you will be required to correct your Occupational License. However, I will ask that Code Enforcement allow you until the October 6th, 1997 application deadline to apply for the November 5th 1997 EDC hearing. If you do not make application by this deadline, then a formal citation will be issued.

I appreciate your cooperation in this matter and look forward to your making application to the EDC. If you have questions or need clarification, please contact me at 893-7877.

Sincerely,

ROBERT W. JEFFREY, *Manager.*

Judge rules church must return tithes

By EMILY ELSEN
The Baytown Sun

Cedar Bayou Baptist Church plans to fight a Houston judge's ruling that the Baytown congregation must return \$23,000 in tithes given by a member who later went bankrupt.

The ruling was handed down by state District Judge Tom Sullivan on Wednesday.

Sullivan ordered the Baytown church to pay \$23,000 to Gregory-Edwards Inc., a Houston air-conditioning firm.

The firm sued Cedar Bayou in 1995, seeking a refund of tithes given by Leland Collins, a long-time church member who had been involved in a failed business venture with Gregory-Edwards in the 1980s.

Cedar Bayou's the Rev. Richard Steel said Wednesday the ruling, if allowed to stand, has ominous implications for churches and other nonprofit entities all across America.

"For us it's not a question of money," said Steel. "It's a question of religious liberty."

Steel said his congregation had turned down offers to settle the case because members felt the principle at stake was too important.

Don J. Knabeschuh, Cedar Bayou's attorney, said Sullivan's ruling was based on a state law that was designed by legislators to make it difficult for debtors to hide assets from creditors.

But Knabeschuh said he doubts that legislators intended for the statute to be used against church-

es and other nonprofit organizations.

"Unfortunately, we've got the statutes that make it possible. It is going to start a precedent."

Paul Nimmmons, a Houston attorney representing Gregory-Edwards, said the case was not about religious freedom or greed — the lawsuit was simply a matter of settling a business debt.

"We're not trying to inhibit anybody's religious freedom," Nimmmons said.

Gregory-Edwards sued the church in 1995 after winning a judgement against Collins in 1991.

After losing the judgement in 1991, Collins filed for bankruptcy, which, under Texas law, protects his house, his car and his retirement funds from creditors.

Gregory-Edwards contended that Collins' tithe contributions to Cedar Bayou from 1988 to 1992, however, were fair game — a contention supported by Judge Sullivan.

Knabeschuh said the ruling is particularly troubling because there was no evidence Collins made the contributions to the church in an effort to avoid offering the money to his creditors.

In fact, according to Knabeschuh and Steel, the tithes were offered by Collins, a 30-year member of the congregation, on a regular basis, in regular amounts.

"What does this mean for other churches, the American Red Cross, the United Way?" Knabeschuh asked.

Steel and Knabeschuh said they will take the case to the Supreme Court if necessary.

Ruling against church could lead to changes

By GEORGE ZARAZIA
The Baytown Sun

A state representative agreed Thursday some revisions might be needed to a Texas law used against Cedar Bayou Baptist Church in a lawsuit over its tithes.

The Baytown church was ordered Wednesday by a Houston judge to return \$23,000 in tithes to Gregory-Edwards Inc., a Houston air-conditioning firm.

Cedar Bayou attorneys plan to appeal the decision, saying it violates the freedom of religion.

The money had been given to the church by one of its longtime members, Leland Collins, who declared bankruptcy in 1991 after the firm successfully sued him for \$90,000.

Both Collins and the firm had been involved in a failed business venture, after which Gregory-Edwards Inc. sued him and two other business partners.

Attorneys for Gregory-Edwards Inc. used a section of the Texas Business and Commerce Code dealing with bankruptcy to convince state District Judge Tom Sullivan to rule in their favor.

The section states: If a transfer is made without receiving reasonable equivalent value in exchange for the transfer, then the creditor is entitled to receive the money that was given.

Paul Nimmons, a Houston attorney representing Gregory-Edwards, said the state law is clear.

"It doesn't distinguish between the donor and the recipient," Nimmons said.

However, Cedar Bayou's attorney Don J. Knabeschuh argues the use of the law in the case violates the First Amend-

ment's free exercise of religion clause.

"The statute discriminates against religious organizations as opposed to secular businesses," Knabeschuh said.

He said if Collins had spent the money in other ways, such as gambling in Las Vegas, then it wouldn't have been refundable.

Cedar Bayou's the Rev. Richard Steel takes offense to the claim that Collins didn't receive "equivalent value" for his tithes.

"To say that one does not receive equivalent value for his gifts to his church, synagogue, temple or other religion is to deny the basic freedom for which the Pilgrims came to America," Steel said in a press release.

Knabeschuh said he doubts legislators intended for the Texas Business and Commerce Code to be used against churches.

"I think it's unfortunate for them to interpret it that way," he said.

Rep. Henry R. Cuellar (D-Laredo), who co-authored the 1987 revisions to the Texas Business and Commerce Code, said the law was designed to stop the fraudulent transfer of money with no exceptions.

"We didn't look at who they gave it to," Cuellar said.

He said many laws are passed without knowing all the different situations that might challenge it.

Cuellar said he doesn't remember if legislators talked about excluding churches or other non-profit groups in the law. "That's something we might want to look at in the next legislative session," he said.

US BANKRUPTCY COURT,
DISTRICT OF OREGON,
Klamath Falls, OR, August 14, 1997.

FIRST BAPTIST CHURCH,
Klamath Falls, OR,
Bankruptcy of: Robert R & Doris J Davis
#697-63012-aer7

GENTLEMEN: This is to inform you that your church members have filed bankruptcy and have provided evidence that during the last twelve months they have paid \$4,849.62 in the form of donations or tithes. The US Supreme Court struck down the Religious Freedom Restoration Act in the case of "City of Boerne V. Flores". This case eliminated the protection of tithes from avoidance as constructively fraudulent transfers under section 548(a)(2) of the Bankruptcy Code.

Demand is made upon you to return the \$4,849.62. You are to make the check payable to: "BANKRUPTCY ESTATE OF Robert & Doris Davis" and send it to me at the above address. If you have not paid this by September 2, 1997, further legal action will be commenced against you in the US Bankruptcy Court.

Sincerely,

BOYD C. YADEN, *Trustee.*

Mr. CANADY. Thank you, Mr. McFarland. Mr. Jaroslawicz.

STATEMENT OF ISAAC M. JAROSLAWICZ, DIRECTOR OF LEGAL AFFAIRS FOR THE ALEPH INSTITUTE

Mr. JAROSLAWICZ. By the grace of God, Mr. Chairman, thank you for allowing me the opportunity to appear before this honorable committee in support of the need for Federal protection of religious freedom after the Supreme Court decision in *Boerne v. Flores*.

There is certainly one environment where such Federal legislation is needed and will do the most good, the hundreds of State and local prisons around the country

I can and will provide personal testimony as to how many State prison administrators have now returned to the pre-RFRA mindsets, and once again routinely trample upon legitimate minority religious practices with seeming impunity.

My name is Isaac Jaroslawicz, and I am the director of legal affairs for the Aleph Institute, a national not-for-profit agency that was founded over 16 years ago by Rabbi Sholom Lipskar at the behest of Rabbi Menachem Schneerson, the Lubavitcher Rebbe, of blessed memory. Rabbi Schneerson, as you may know, was the first religious leader in our Nation to be awarded the Congressional Gold Medal of Honor.

Among other things, Aleph helps State and Federal departments of correction meet the legitimate religious needs of Jewish inmates. We receive on average over 1,000 letters and phone calls per month from inmates and family members, many of which concern unreasonable restrictions on religious practices in the prison environment.

There are an estimated 6,000 to 8,000 incarcerated Jewish men and women out of a total national prison population of over 1.5 million. And, unlike many other religions where salvation may be obtained primarily through a believe, Judaism imposes a duty on its adherents to ensure that all actions, including eating, drinking, talking, walking, dressing, praying, and studying, are all performed in a certain way and in a manner worthy of serving our Creator. These rituals, therefore, require items such as a yarmulke, prayer shawls, prayer books, Torah volumes, phylacteries, and sometimes special foods.

Before RFRA, the religious concerns of the average Jewish prisoner were generally ignored. Requests were either misunderstood or viewed as a burden on the system. Administrators are not afraid of Jewish riots. As a result, many religious requests were ignored, purposely delayed or dismissed out of hand. If nothing else, as Mr. Stern has said, RFRA forced prison officials to stop and think before simply denying requests for religious accommodation.

My own experience demonstrated that the potential of litigation and the real risk that a prison system might lose fostered a much more cooperative effort to find solutions that worked for everyone. For example, in 1996, the State of Michigan suddenly decided to prohibit the lighting of Chanukah candles at all State prisons. The asserted basis for the decision was fire safety notwithstanding that smoking and cooking and votive candles were all still to be allowed. There is little doubt in my mind that the department of correction's last minute decision to allow group candle lightings came about because someone in their legal department told them that they had a real risk of losing a litigation that we threatened under RFRA, and losing big.

In the aftermath of the *Boerne* decision, the Federal Bureau of Prisons, under the able leadership of Director Kathleen Hawk, and through the guidance of Assistant Director Wallace Cheney and Chief Chaplain Susan Van Baalen, has done a remarkable job of working to accommodate the religious needs of its population. In a system that now houses over 100,000 inmates in over 100 facilities around the country, it is understandable that there are still problems to overcome but the basic commitment is certainly there.

The same cannot be said now with respect to State and local prison systems. The State of Ohio joins many States, including, unfortunately, our own home State of Florida, in routinely refusing to accommodate Jewish religious prayer services, and denying Jewish inmates the opportunity to obtain kosher food. Many State prisons routinely bar religious text and ritual materials.

The State of Michigan does not allow inmates to observe the Sabbath, and often bars religious materials and text, too. Moreover, if you now want kosher food in Michigan, they ship you to facilities up in Siberia, near the Canadian border, 800 to 1,000 miles away from family, rabbis or anyone else. Moreover, they also refuse to allow Jewish religious services at those facilities, so a Jewish inmate has to now pick between family, prayer and food.

I would like to supplement our written submission with one additional exhibit I obtained only yesterday. It is a religious preference form from the Michigan Department of Corrections, Carson City regional facility. Eight different religious preferences are listed, but as the inmate who sent this to us scrawled across the page, "where is Judaism?" An inmate is not even offered the option of choosing to be Jewish at Carson City.

Pennsylvania now insists—and we're in the Third Circuit now, appealing this decision—that if you want a kosher diet in prison, all you will get at every meal is a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal. That is a kosher diet according to the Pennsylvania Department of Correction.

We have received hundreds of letters from Jewish inmates around the country telling us that they get punished for missing meals during the Jewish fast day, and that wardens refuse to provide them with a sack lunch so that they can appropriately break their fast after nightfall.

While senior officials often recognize the importance of allowing inmates to develop their spiritual side, many rank-and-file staff and chaplains still seem to believe that salvation can only come by following their own religious beliefs.

For example, Rabbi Ted Sanders, the official Jewish chaplain for the Texas Department of Criminal Justice, has stated that many of the other line chaplains in the Texas prison system fight everything Jewish. Inmates are hounded if they wear a yarmulke, even while praying in their cells. Efforts to convert are rampant.

The extremes of insensitivity of the institutional mind-set can best be seen, but certainly still not comprehended, by reading Rabbi Sanders relate how prison authorities in Texas actually attempted to deny Max Soffar, a Jewish death-row inmate, the opportunity to have a rabbi present at his execution, and insisted in only allowing a Christian minister to officiate.

Of course, not all State prison systems have shown such callous disregard for basic human rights. Illinois has just announced a unique partnership with Aleph's affiliated rabbi there, Rabbi Binyomin Sheiman, that will ensure the Jewish inmates at more than 20 prisons in that State will receive sufficient kosher-for-Passover foods for the upcoming holiday. Hundreds of chaplains from other States also contacted Aleph for donations of tens of thousands of pounds of matzo, grape juice, and other Passover supplies that we ship around the country.

Michigan, true to form, refuses to allow us ship matzo to any of their high-security facilities. They assert that outside foods are prohibited, yet they also adamantly refuse to spend the less than \$250 that would be needed to purchase matzo on their own to give to their Jewish inmates, therefore, forcing their Jewish inmates to violate a mandated religious practice on Passover.

Now, however, I do not have RFRA as an equalizer to level the playing field in negotiations. Federal legislation especially with respect to inmates, is appropriate and necessary for at least three reasons. First, many States simply will not address these issues with a local RFRA initiative. Second, practically all State penal systems receive Federal funding of one kind or another. Third, a flourishing trade in interstate commerce has developed in living human beings. As a result of overcrowding in some States, and overbuilding in others, States such as Texas, Michigan, Kansas, Oklahoma, Colorado, and others, each transfer or receive inmates from other States. In many cases, Jewish inmates in one State who request accommodation find themselves shipped in the dead of night across the border to a facility in another State, hundreds or sometimes even thousands of miles away from their family and their community. And there is certainly no uniformity in accommodation.

Even if States do pass local religious freedom acts, they contain widely varying standards. Many of the acts enacted—excuse me, I see my time is up.

Mr. Chairman, thank you again, it is important to continue the Federal process, and we certainly thank you, Chairman Canady, for recognizing—

Mr. CANADY. If you want to finish your paragraph there, that's fine. [Laughter.]

We're not going to cut it off. If you want to take another 30 seconds.

Mr. JAROSLAWICZ. Thank you.

Mr. CANADY. Okay.

Mr. JAROSLAWICZ. Just to explain in terms of the problem with local States, the States themselves that are passing these standards contain widely varying standards. Many of the acts enacted or proposed specifically contain prisoner exemptions primarily because local politicians do not have the fortitude to stand up to a local prison industry and a mob mentality which believes that stripping human beings of every vestige of civilization and humanity is an appropriate way to deal with the issue of crime. In the growing number of cases where an inmate is convicted in one State but housed in another, issues of differing standards, jurisdiction, conflicts of law, would simply create a legal quagmire as to how to apply religious freedom issues. Basic human freedom of religious exercise should not be subject to such vagaries. And interestingly, Mr. Chairman, as we note intensively in our amici brief in the *Boerne* case, spiritual development has proven to be one of the most valuable tools for rehabilitation and to prevent recidivism.

I've appended to our written submission pages from our brief in *Boerne* which outlines our history and the recognition in this country of the importance of religion in the prison system. Thank you. [The statement of Mr. Jaroslawicz follows:]

PREPARED STATEMENT OF ISAAC M. JAROSLAWICZ, DIRECTOR OF LEGAL AFFAIRS FOR
THE ALEPH INSTITUTE

By the Grace of G-d. Mr. Chairman, thank you for allowing me the opportunity to appear before this honorable committee today in support of the need for federal protection of religious freedom after the United States Supreme Court decision in *Boerne v. Flores*, where the Court held that Congress' enactment of the Religious Freedom Restoration Act was unconstitutional as applied to the States. I am grateful for the chance to speak to this problem in a public forum, and I am hopeful that you can pass positive, reasonable legislation to meet the pressing demand for such federal action, especially in the environment where it is most needed and will do the most good—the hundreds of state and local prisons around the country.

I can and will provide personal testimony as to the present reality of how, usually in the name of administrative convenience, many state prison administrators have returned to the pre-RFRA period and once again routinely trample upon legitimate minority religious practices with seeming impunity. In many egregious cases, they tolerate shameful racism and anti-Semitism by both inmates and staff.

My name is Isaac M. Jaroslawicz, and I am the Director of Legal Affairs for the Aleph Institute, a national, not-for-profit educational, advocacy and humanitarian organization that was founded over 16 years ago by Rabbi Sholom D. Lipskar at the express direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Rabbi Schneerson, as you know, was the first religious leader in our nation to be awarded the Congressional Gold Medal of Honor. It was he who recognized the need to minister to those of our brothers and sisters who are enduring the lowest depths of our exile. It was he who named our group, noting that,

"In Hebrew, only one letter differentiates the word for 'exile' or 'imprisonment' ('gola') from the word for 'redemption' ('geula'). That letter is Aleph, the first letter of the alphabet. The first step."

We have tried to live up to the Rebbe's ideal. Aleph's mission and mandate is narrowly focused and clear: to serve one of the pressing needs of our society by addressing significant issues relating to our criminal justice system. Among other things,

Aleph helps state and federal departments of correction meet the legitimate religious needs of Jewish inmates.¹ We receive, on average, over 1,000 letters and telephone calls per month from inmates and their families, many of which concern unreasonable restrictions on religious practices in the prison environment, some of which I have appended to our written submission.

There are an estimated 6,000 to 8,000 Jewish men and women incarcerated in federal, state and local jails and prisons. This, out of a total population that now exceeds 1.5 million. And while it may appear to be a blessing that my co-religionists constitute such a minute percentage of that population, those who are imprisoned suffer immeasurably.

Judaism is unlike many religions in which adherents are offered salvation primarily for their beliefs or occasional ritual practice. Rather, Jewish law imposes a duty on its adherents to insure that all *actions*, including eating, drinking, talking, walking, sitting, dressing, transacting business, praying, studying, lying down and rising up, are all performed in a certain way for the sake of, and in a manner worthy of, serving our Creator.² Accordingly, the observant Jew's day is consumed with ritual, requiring such items as certain articles of clothing (e.g., a head covering such as a yarmulke and a prayer shawl), prayer books, Torah volumes and phylacteries.

Pre-RFRA, the religious concerns of the average prisoner were generally ignored. Prison personnel had little, if any, understanding of Jewish requests for religious services, and followed an institutional mind-set that traditionally regarded the unique petitions of Jewish inmates as a "burden to the system." Moreover, prison administrators had no concerns about facing Jewish riots, if only because of the low numbers of such inmates. As a result, many religious requests from Jewish men and women were ignored, purposefully delayed in "channels," or dismissed out of hand by unsympathetic supervisors. In worst-case scenarios, Jewish individuals attempting to meet legitimate religious needs were treated with suspicion, contempt, hostility, and even subjected to wrongful punitive actions.

If nothing else, RFRA forced prison officials to stop and think before simply denying requests for religious accommodation. Suddenly, the fact that such accommodation involved some bureaucratic inconvenience was no longer sufficient to sustain a denial. Indeed, although administrators vociferously complained that RFRA had increased litigation, the State of Texas, which filed an *amici* brief in *Boerne*, acknowledged that its Office of Attorney General handles 26,000 cases at any one time, of which only 2,200 were inmate related, and only 60 of those were RFRA-related. Brief of *Amicus Curiae State of Texas, City of Boerne, Texas v. Flores*, No. 95-2074 (U.S. 1997) at 7. Thus, the Texas brief noted:

RFRA-related cases represent .23 (that is, one-quarter percent) of the entire caseload of the Texas Attorney General's office, and about 2.7 percent of the inmate-related (non-capital punishment) caseload of the State of Texas. Moreover, of the approximately 60 RFRA-related cases, many of these are frivolous to be dispensed summarily.

Id. at 7-8.

My own experience demonstrated that the *potential* of litigation—and the real risk that the prison system might lose—fostered a much more cooperative effort to find solutions that worked for everyone. For example, in 1996 the State of Michigan Department of Corrections suddenly decided to prohibit the lighting of Chanukah candles at all state prisons. The asserted basis for the decision was "fire safety," notwithstanding that smoking, cooking and votive candles were all still allowed. Moreover, officials insisted on enforcing the ban even after some good-hearted institutional fire marshals offered to stand over the communal menorahs with fire extinguishers for the 40 minutes that the candles would burn. There is little doubt in my mind that the DOC's last-minute decision to allow menorahs came about because someone in their legal department told them they had a real risk of losing the litigation we threatened under RFRA—and losing big.

In the aftermath of the *Boerne* decision, President Clinton reaffirmed the federal government's commitment to RFRA, and federal agencies appear to remain faithful to its dictates. The Federal Bureau of Prisons, under the able leadership of Director Kathleen Hawk and through the guidance of Assistant Director Wallace Cheney and

¹ Aleph has also created and implemented a host of programs that have been proven effective to rehabilitate inmates, to counsel and assist their families, and to provide moral and ethical educational programs inculcating universal truths and concepts common to all of humanity. Our written submission includes an extensive overview of Aleph's in-prison services, including religious freedom advocacy, visitations, educational material, holiday programs, and more.

² Observant Jews follow 613 commandments found in the five books of Moses and derivative precepts expounded in the Oral Law (contained in writings such as the Talmud, the Code of Jewish Law ("Shulchan Arukh") and later rabbinic rulings) (collectively, the "Mitzvot" or "Halacha").

Chief Chaplain Susan Van Baalen, has done a remarkable job of working to accommodate the religious needs of its population. Understandably, in a system that now houses over 100,000 inmates of diverse backgrounds at over 100 facilities across the country, there are still problems to overcome. But the basic commitment to accommodate legitimate religious practices is certainly present, consistent with the legitimate needs of institutional security and administration.

Unfortunately, the same cannot be said now for many state and county departments of corrections.

Having filed an amicus brief ourselves supporting RFRA in the *Boerne* case with Prison Fellowship Ministries, I was present at the oral arguments before the Supreme Court. I listened as the Assistant Attorney General for the State of Ohio argued that federal protection of religious freedom was totally unnecessary, and that his state and others would certainly outdo RFRA on a local level if only given the opportunity. That has not proven to be the case. The State of Ohio still suppresses religious freedom, and joins many states, including, unfortunately, our own home state of Florida, in routinely refuse to accommodate Jewish religious prayer services and denies Jewish inmates the opportunity to obtain kosher food.

Immediately after the Supreme Court's decision in *Boerne*, the State of Washington's Department of Corrections issued a memorandum recommitting itself to the standard codified in RFRA. Unfortunately, that was the remote exception rather than the rule.

For example, the State of Michigan has established a departmental rule formalizing its policy of refusing to recognize work proscription days such as the Sabbath and any religious holidays. And while it professes to provide kosher food at certain institutions, those institutions are only located in cold, isolated parts of the state, making it practically impossible for family members or clergy to regularly travel 800 miles or more to provide any visitation. Moreover, no Jewish prayer services are offered at these facilities, essentially forcing Jewish inmates to choose between family, food and prayer. In Michigan and many other states, Jewish religious texts are routinely rejected or confiscated. Religious items such as phylacteries are routinely barred.

Aleph has just filed an amicus brief in the United States Court of Appeals for the Third Circuit, because the Pennsylvania Department of Corrections now insists that Jewish inmates who request kosher food will have to subsist on a raw fruit, a vegetable, a granola bar and a "liquid nutritional supplement"—served for each and every meal. This, notwithstanding that other groups seeking accommodation, such as Muslim inmates, are offered hot, non-pork meals.

Many Jews in state prisons are afraid to even announce their religion, for fear of the anti-Semitic attitude of wardens, guards and other inmates—especially in environments where groups such as the Aryan Brotherhood, the KKK, Black Muslims, the Black Mafia, Spanish Mafia, etc. flourish and sometimes control. Jewish inmates in Arizona have been knifed and beaten, then placed in isolated segregation "for their own benefit" while the perpetrators roam free. One inmate in Texas, Brett Cook, declared himself Jewish and requested accommodation. After refusing to withdraw a religious freedom lawsuit, he suddenly found himself transferred from a minimum to maximum security prison, where, apparently, neo-Nazi skinheads were alerted as to his imminent arrival. Within 15 minutes of his being placed on the compound, he was set upon by members of a gang and killed. The crime was never solved and, shamefully, the Texas Department of Criminal Justice quietly put the case on the shelf. The major who ordered the transfer was subsequently found responsible for retaliatory transfers in other instances.

Certainly, the senior officials in state government and administrators of some states' departments of corrections recognize the importance of allowing inmates to develop their spiritual side. Nevertheless, many rank and file staff and chaplains appear to believe that salvation can only come by following the beliefs and dictates of their own religion and beliefs. For example, almost alone among the states, the State of Texas filed its own amicus brief in the *Boerne* case wholeheartedly supporting the Religious Freedom Restoration Act, and provided an excellent counterpoint to the sixteen states that filed a hysterical amicus brief in opposition.³ Yet, Rabbi Ted Sanders, the official Jewish chaplain for the Texas Department of Criminal Justice, has gone on the record to state that most of the other line chaplains in the Texas prison system fight everything Jewish, from releasing inmates for services,

³ An amicus brief in opposition to RFRA was filed by the States and Territories of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, American Samoa, Guam and the Virgin Islands. The "factual" portion of the brief engages in a diatribe against RFRA and state prison systems, yet provides absolutely no statistics or factual basis to support its hyperbole.

to denying them and confiscating prayer books, Bibles, talaisim (prayer shawls), yarmulkes, etc. In many instances, the chaplain or administration will confiscate needed Passover supplies, such as matzo and horseradish that the Rabbi provides, and say it's "contraband." Missionaries constantly try to convert Jewish inmates with promises of toothpaste and soap. Inmates are hounded if they wear a yarmulke in their cells while praying. Rabbi Sanders states that it seems to him that there is a deliberate attempt to make it impossible for Jewish inmates who want to attend Jewish services from doing so. Non-Jews who inquire about converting to Judaism are subjected to harassment and intimidation, too.⁴ Unfortunately, the story is the same at many other state prisons around the country.

Even minor requests from Jewish inmates are often summarily denied. For example, we have received hundreds of letters from Jewish inmates around the country who advise us that administrators at their facilities regularly refuse to allow them to miss meals during a Jewish fast day and obtain a "sack lunch" to "break" their fast after nightfall. Lest anyone think that such requests unreasonably burden the system or constitute a legitimate threat to security, note that Muslim inmates are regularly granted such accommodations, particularly during the 30-day Ramadan observance.

The extremes of the insensitivity of the institutional mindset can best be seen—but perhaps still not comprehended—by reviewing Rabbi Sanders' statement, where he relates how prison authorities in Texas attempted to deny Max Soffar, a Jewish death-row inmate, the opportunity to have a Rabbi present at his execution, and insisted on only allowing a Christian minister to preside. Fortunately, Rabbi Sanders was able, albeit with some help, to have that offensive policy changed.

Of course, not all state prison systems have shown such callous disregard for such basic human rights. Illinois has just announced a unique partnership with Aleph's affiliated Rabbi in that state, Rabbi Binyomin Scheiman, that will insure that Jewish inmates at more than 20 prisons in that state will receive sufficient kosher-for-Passover foods to observe the upcoming holiday. Chaplain Leon Adams of the Vandalia Correction Center suggested that Prison Industries could deliver all the meals. Mr. Ronald Parish and Paul Swagmeyer at the IDOC headquarters in Springfield gave their enthusiastic approval. Other states, and many hundreds of chaplains of good faith employed in their prison systems, have contacted Aleph for donations of tens of thousands of pounds of matzo, grape juice, and other Passover supplies.

Contrast this, however, to Michigan, which refuses to allow us to ship matzo, the unleavened bread required to be eaten by Jews on Passover, to any of their high-security facilities. They assert that "outside" foods are prohibited, yet also adamantly refuse to purchase matzo on their own, essentially forcing all their Jewish inmates to violate their mandated religious practices. Now, unfortunately, I do not have RFRA as an equalizer to level the playing field. Expensive and wholly-unnecessary litigation may result.

While punishment is clearly necessary in a moral society, confinement itself is a grim failure according to numerous American and world penal experts. Behind the walls, the gates, the barbed-wire fences or the lines, ambitions, dreams and endearments are regularly snuffed out. Monotonous assembly line routines replace opportunities for personal growth. An emotionally scarred and unforgiven individual is the common product—a man or woman who will one day reenter society—but alone, stripped of dignity, societal rights and financial resources. Is it any wonder that we have the problems we do of recidivism?

"Modern" incarceration already imposes stunning hardships on the average prisoner. Aleph not only works with staff and inmates, but provides counseling and support to families of inmates, too. From our experience, the insidious damage incarceration wreaks on marriages is often irreparable. The cavernous rifts it creates between parents and children are tragic. The powerful emotions it fosters can be disabling: guilt, fear, isolation, depression, callousness, and a sense of failure. It is disheartening that America has managed to establish the world's most elaborate inventory and warehousing hubs for human beings—and accomplishes little more.

Spiritual development and study have proven to be some of the most valuable tools for rehabilitation and to prevent recidivism. For the record, I have appended to our written submission those pages from our amici brief in the *Boerne* case that highlight the importance of religious exercise in the prison environment and traces our country's historical recognition of its importance in furthering legitimate penological goals and objectives.

⁴See letter from inmate Dexter Hoover of Navasota, Texas, appended as an exhibit to our written submission.

Mr. Chairman, federal legislation, especially with respect to inmates, is appropriate and justified for at least three reasons: First, many states simply will not address these issues with a local-RFRA initiative, promises to the Supreme Court notwithstanding.

Second, because all state criminal justice systems obtain federal funding of one kind or another.

Third, a flourishing trade in interstate commerce has actually developed in living human beings. As a result of overcrowding in some states and overbuilding in others, states such as Texas, Michigan, Kansas, Oklahoma, Colorado and others each transfer or receive inmates from other states. Often, the receiving state does not offer the same religious tolerance as the shipping state. In many cases, Jewish inmates in one state who request accommodation find themselves shipped in the dead of night to a facility in another state hundreds or thousands of miles away from family and community.⁵ The problem is exacerbated when such inmates are housed in county or private facilities in the receiving state. As Alex Taylor, Chaplain Coordinator for the Texas Department of Criminal Justice (and a person who has extended himself against overwhelming odds on behalf of religious freedom in Texas prisons) has noted, such persons are "out of reach" of the chaplaincy departments of the state prison system.⁶ A federal statute—and a uniform standard that can be interpreted and developed by the courts—should eliminate the wide discrepancies that exist.

Such federal legislation is imperative for at least two reasons. First, because even if states do pass local religious freedom acts, they contain widely-varying standards. Many of the acts enacted or proposed specifically contain prisoner exemptions, primarily because local politicians do not have the fortitude to stand up to a powerful local prison industry and a mob mentality which believes that stripping human beings of every vestige of civilization and humanity is an appropriate way to deal with the issue of crime. Second, prisoners above all need a federal forum in which they can present their grievances. State courts, and the elected judges who often sit therein, are subject to the same pressures as local politicians. Moreover, in the growing number of cases where an inmate is convicted in one state but housed in another, issues of differing standards, jurisdiction and conflicts of law, will create a legal quagmire and subject the victim to the vicissitudes of which particular jurisdiction controls. Basic human freedoms of religious exercise should not be subject to such vagaries. Concerns about a wave of federal litigation were voiced but proven unfounded when RFRA was first enacted.⁷ Today, of course, the Prisoner Litigation Reform Act is in effect, and will certainly serve to provide an additional limit on those frivolous claims that may be asserted by the litigious or insincere.

Mr. Chairman, it is important to continue the federal process of protecting one of our most-cherished rights—the right to practice our religion. While I am sure there are good reasons in the free world to merit such protection, the deplorable conditions of which I am personally aware certainly cry out for your support. I thank you again for allowing us this opportunity to discuss these issues here today, and I thank Congressman Canady for recognizing the problem and moving forward in the House with a proposed solution.

APPENDIX

1. Curriculum Vitae of Isaac M. Jaroslawicz Pursuant to House Rule XI, clause 2(g)(4).

⁵See, e.g., Letters to the Editor, Intermountain Jewish News, March 13, 1998 (appended to our written submission) (many Jewish inmates in the Colorado correctional system were transferred to Texas after filing suits to obtain kosher food). In another, well-known example, Keith Phillips, now completing the federal portion of his sentence on a white collar crime at the low-security complex in Butner, North Carolina, was previously serving time for his offense in the Kentucky state system. He was forcibly removed from his prison cell and transferred to Alabama after requesting religious accommodation, on the asserted ground that his requests (for, among other things, kosher food) amounted to a threat to the "safety and security" of the institution. Thereafter, the warden at Easterling Correctional in Alabama was overheard screaming into the telephone to "get this guy from Kentucky out of my facility. He wants all these religious things and we don't have a budget for it." Ultimately, it appears that Kentucky State Senator Susan Johns intervened, Phillips was returned to Kentucky, and the state circuit judge reduced his sentence and freed him from the state system altogether.

⁶Chaplain Taylor's letter to the Aleph Institute, dated November 25, 1996, regarding inmate Roderick Hardiman, a "transferee" from Colorado, is appended as an exhibit to our written submission.

⁷The Texas amici brief in *Boerne* countered the "floodgate" argument extremely well, noting that "[c]onvikts in prisons . . . will always find other bases for bringing junk lawsuits. The free exercise rights of millions of Texans, in any event, should not be held hostage to a few dozen convicts looking for excuses to bring a lawsuit."

2. Disclosure of Federal Grants or Contracts Pursuant to House Rule XI, clause 2(g)(4).
3. Mission Statement and 1997 Status Report: The Aleph Institute (1997).
4. Reprint: "To Michael Peck [Houston attorney] From Rabbi Ted Sanders."
5. Brief *Amicus Curiae of Prison Fellowship Ministries and The Aleph Institute In Support of Respondents, City of Boerne, Texas v. Flores*, No. 95-2074 (U.S. 1997).
6. Letter dated March 18, 1998 from Michal Sarovitz, inmate in Wyoming
7. Affidavit of and Letter from Bobby Frank Romisch, Jr., Texas inmate, re: death of Bret Cook.
8. Letter dated November 25, 1996, from Alex Taylor, Chaplaincy Coordinator of Texas Department of Criminal Justice.
9. Letter dated October 29, 1995, from Dexter Hoover, Texas inmate, re: intimidation of prospective Jewish converts.
10. Letters to the Editor, Intermountain Jewish News (March 13, 1998), re inmate transfers from Colorado to Texas and other issues.

Mr. CANADY. Thank you, Mr. Jaroslawicz. Mr. Fisher.

STATEMENT OF BARRY A. FISHER, FLEISHMAN, FISHER & MOEST

Mr. FISHER. Good morning Mr. Chairman and subcommittee members. I'm Barry Fisher of the Los Angeles firm Fleishman, Fisher & Moest, and for nearly 30 years, my practice has focused on constitutional law with a particular emphasis on freedom of religion. I began practicing law with Hayden Covington, the Jehovah's Witnesses lawyer their remarkable string of landmark first amendment cases in the 1940's and 1950's, and since then, I've worked with a rich diversity of America's minority religious groups, often where religion is mixed is ethnicity, culture, language and nationality, including black and Arab Muslims, Hispanic Pentecostals, Koran Presbyterians, Cuban Santeros, Serbian Orthodox, Hare Krishnas, Orthodox Jewish groups, Rom—the correct name for what's commonly called Gypsies—Native American religionists, and many others.

I've also had close up views of religion's place in society in many other countries. Besides consulting on church issues from Japan to Argentina to Russia, I work with the ABA Central and East European Law Initiative on draft laws and constitutions impacting religions in many countries.

And recently, I consulted in Moscow with the author of the new and controversial Russian law regulating religion, Victor Zorkaltzev, the powerful chairman of the Duma's public organization's committee. That law, in the name of societal stability, tamps down religious pluralism by making life difficult for most churches other than the Russian Orthodox church.

Now, Chairman Zorkaltzev told me he drew great comfort for the U.S. Supreme Court's *Smith* decision and saw it as support for the Russian legislation, particularly the *Smith* language that any society making exceptions to general laws for those acting under their religious beliefs would be courting anarchy and societal destabilization, and that the danger in direct proportion to society's diversity of religious beliefs.

Now it's certainly disturbing that a U.S. Supreme Court decision interpreting the First Amendment is taken abroad as precedent or even as an excuse for repressive legislation, and the Russian legislature's anti-religion regulation is spreading to emerging democracies in Central and East Europe, all searching for national iden-

tity and, like Russia, trying to define the role now for the church that was dominant before communism.

Of course, *Smith* was body-blow to religious freedom in this country, and the *City of Boerne* has resulted in these hearings, and the subcommittee's continued effort to find a solution on behalf of the Free Exercise Clause. And I'll talk briefly today about some of my litigation experiences which might assist the subcommittee's work.

Since the 1970's, for example, I've at times represented the Hare Krishnas, the International Society for Krishna Consciousness, ISKCON. ISKCON's religion falls within the broad Vaishnava tradition of Bhakti Hinduism, formalized in the Ninth Century in southern India. In forming their core ritual sankirtan, Krishna followers are scripturally mandated to go into public places to proselytize, distribute their scriptures, and seek donations, their religion's lifeblood and mainstay, and the lifeblood and mainstay of any fledgling group.

The cases ISKCON has brought over the years have raised a wide array of issues under both the speech and religion clauses of the First Amendment and the cases illustrate a variety of RFRA-related issues as well. For example, one ISKCON post-*Smith* pre-RFRA case brought up the important question of taxation of scriptures. The case involved imposition of the California use tax on sacred books published by ISKCON and distributed to temples which then distributed the books to the public for donation only. On the express basis of *Smith*, the California court of appeal rejected application of the compelling State interest test, but if that test had been applied, courts would have to look much more carefully at use and other tax burdens on churches.

Other ISKCON cases deal with public place witnessing and material distribution, things critical for many fledgling, often unpopular religious groups. In a post-*Smith*, pre-RFRA case, the court, applying the intermediate Free Speech scrutiny, upheld a Park Service regulation as applied to the distribution of prayer beads and preaching tapes for donation in D.C. Federal parks. Had the compelling State interest test been available, a precedent might have been generated that might have benefitted many religious groups.

Another important issue arises from the government agencies to curtail food distribution in religious facilities as carried out by many groups I've represented including Sabbatarian Pentecostal and Islam. RFRA led to overriding the government restrictions on church food distribution in the D.C. district case, *Western Presbyterian Church*, and without such protections, important aspects of missionary work are jeopardized.

Government also frequently purports to require religious organizations to disclose donor and membership lists, or other potentially sensitive matters, in pursuit of various regulatory programs. Before *Smith*, courts in a number of contexts, applied the compelling interest test to such requirements and struck them down. One case I litigated concerned a law licensing solicitation for church support contributions, providing for the inspection of church books and records. But the court held that the church shouldn't be "compelled to bear itself of its membership lists and explain the sources and use of its funds without a showing of compelling need achievable by no adequate alternative."

Disclosure issues for religious organizations can arise in other contexts as well, for example, civil discovery proceedings. In one case I was involved in, for example, a religion in one of the traditions of northern India was ordered to produce video tapes and transcripts of the church's central religious practice of sharing in which its members seek spiritual guidance from the spiritual master and from congregants. This court proceeding took place after RFRA but before *City of Boerne* and so an objection under RFRA was possible. Today, an order to disclose such sensitive information wouldn't have to clear that hurdle.

Now, living arrangements and child rearing raise further questions. Some Christian missionary groups I've worked with seek to pattern their lifestyle after what they believe to have been the divinely ordained practices of the early Christian church, citing scriptural bases like Acts 2:44, the practice communal living, a lifestyle that's not uncommonly brought under hostile review by government agencies under laws that may, for example, limit the number of unrelated people in the same household.

Such groups I've represented also sometimes refuse on religious grounds, to create formal structures, including incorporation, something that municipalities sometimes demand in licensing fund-raising and other things.

In some cases, it's difficult for local political bodies even to understand that religious values are at stake. This can occur, for example, where religion is inextricably tied to notions of ethnicity, culture, nationality and race. I frequently dealt with such walls of misunderstanding and have come across many, for example in representing the Roma or Gypsies, a people with their origin in India whose traditions and culture are rooted in Indian religious philosophies.

The activity of what is known in the west, sometimes, as fortune telling has been identified by scholars as an ancient form of religious healing. Because of hostility and fear, laws against this have followed the westward migration of the Roma from India across Europe and into the Americas, and these laws have often been used as a means of excluding or marginalizing these people.

The religious values in many instances stand little chance of recognition in the local political arena. In courts however, groups like the Roma would, if free exercise claims were viable, be able to bring to bear a focus and a perspective that would otherwise be lost.

Finally, let me add, that while *Smith* enjoined minority groups to seek accommodation through the political process, and while that may be possible for some groups and some places and on some issues, it's just not possible and realistic for so many others. Some religious groups have even a doctrinal prohibition on even getting involved in politics. Others may be unpopular in their beliefs, practices, or both, and, therefore, unable to obtain action by a local political majority.

Simply, churches should not be subjected to this haphazard process in all of the thousands of political jurisdictions in the country. They should instead have a single reliable mode of analysis that will apply across the board to enable the judiciary to consider seriously the claims of conscience. Thank you.

[The statement of Mr. Fisher follows:]

PREPARED STATEMENT OF BARRY A. FISHER, FLEISHMAN, FISHER & MOEST

Good morning Chairman Canady and Subcommittee members. I'm Barry A. Fisher of the Los Angeles law firm Fleishman, Fisher & Moest and for nearly 30 years, my practice has focused on civil rights and constitutional law, with a particular emphasis in freedom of religion and church-state relations. I began practicing law with Hayden Covington, the Jehovah's Witnesses lawyer in their many landmark First Amendment cases in the United States Supreme Court from 1940 through the 1950's. Since then, I have worked with a rich diversity of minority religious groups, often where religion is inextricably mixed with ethnicity, culture, language, and nationality, including black and Arab Muslims, Hispanic Pentacostalists, Korean Presbyterians, Cuban Santeros, Serbian Orthodox, Hare Krishnas, Unification Church members, Orthodox Jewish groups, Rom (commonly but incorrectly called Gypsies), Native American religionists, and many others, including televangelists, campus ministries, and so-called new age religions.

I have also had close-up views of the place of religion in society in quite a few other countries. Besides consulting on church issues from Japan to Argentina to Russia, I work with the ABA's Central and East European Law Initiative (CEELI) on draft laws and constitutions impacting religion in many countries, and was sent by the Mexican Human Rights Commission to Chiapas to examine the important, but little known, religion conversion component of the Zapatista rebel movement. I've served as Chairman of the ABA Religious Freedom Subcommittee, a fellow of the International Academy for Freedom of Religion, and Vice President of Human Rights Advocates International, a U.N.-recognized NGO.

Recently I consulted in Moscow with the author of the new, highly controversial, Russian law regulating religions, Victor Zorkaltzev, the powerful chairman of the Public Organizations Committee of the Duma. As the members of this Subcommittee will recall, the purpose of that law is, in the name of societal stability, to tamp down religious pluralism by making life relatively difficult for non-mainstream religions (which in Russia includes such groups as the Roman Catholics).

Chairman Zorkaltzev told me that he drew comfort from the U.S. Supreme Court's *Smith* decision and saw it as support for the Russian legislation. In *Smith*, this Nation's highest court ruled that "[a]ny society" that made exceptions to general laws for those acting under their religious beliefs "would be courting anarchy," and that the "danger increases in direct proportion to the society's diversity of religious beliefs." It concluded that "we cannot afford the luxury" of acceding to religious demands for exemptions and subjecting government restrictions to strict scrutiny and compelling interest tests.

The Duma Committee Chairman understood the American Supreme Court to be proceeding from the premise that the stability of society is threatened by the proliferation of religions, each with its own demands for accommodation of its particular beliefs and practices, and that the general laws of the State are a necessary anchor to assure social equilibrium.

It is indeed disturbing that a U.S. Supreme Court decision interpreting the First Amendment is taken abroad as precedent—or even as an excuse—for repressive legislation. And what the Russian legislature has done is spreading as a popular anti-religion regulation in the emerging new democracies of Central and East Europe.

Smith was a body blow to religious freedom in this country, and *City of Boerne* has resulted in these hearings and this Subcommittee's continued effort to find a solution on behalf of the Free Exercise Clause. I will talk today about some of my own experiences in the trenches of litigation and other dealings on behalf of minority religious groups with state and municipal authorities. I hope that recounting these experiences may assist the Subcommittee's work.

Since the early 1970's, I have, for example, represented the Hare Krishnas—the International Society for Krishna Consciousness or ISKCON. ISKCON's religion falls within the broad Vaishnava tradition of Bhakti Hinduism, formalized in the ninth century in southern India. At the core of the religion is the activity known by the Sanskrit name *sankirtan*. In performing *sankirtan*, Krishna followers are scripturally mandated to go into public places to proselytize, distribute their scriptures and other religious articles, and seek donations—the life-blood and mainstay of their church.

The cases that ISKCON has brought over the years have raised a wide array of issues under both the Speech and Religion Clauses of the First Amendment and its cases illustrate a variety of RFRA-related issues as well.

One set of issues deals with public-place witnessing and materials distribution—critical for many fledgling or unpopular religious groups. In the post-*Smith*, pre-

RFRA case *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), ISKCON challenged National Park Service regulations which banned aspects of sankirtan in the National Capital Area parks, including the dissemination of prayer beads and preaching cassette tapes for donations in the D.C. federal parks.

ISKCON of Potomac was filed before the enactment of RFRA. In applying intermediate free-speech scrutiny, the court upheld the regulation applied to the distribution of beads and tapes for donations. Had the compelling state interest test thus been available, ISKCON might very well have prevailed on the sales issue. In that event, a precedent might have been generated that would benefit many religious groups.

Another ISKCON case brought up the important question of taxation of religious scripture. The post-*Smith*, pre-RFRA case *International Society for Krishna Consciousness v. Board of Equalization*, 2nd Civ. No. B026332 (Cal. Ct. App. July 5, 1990) (unpublished opinion), involved imposition of the California *use tax* on sacred books, published by ISKCON and distributed to temples in California, which then distributed the books to the public for *donation only*. Had RFRA been available, ISKCON would have been in a much stronger position regarding the distribution of literature—a core religious practice that had been severely burdened by the tax. As it was, the California Court of Appeal mechanically applied the post-*Smith Jimmy Swaggart* case¹ upholding the tax. Moreover, the court rejected, on the express basis of *Smith*, ISKCON's claim that it was required to apply the compelling state interest test. If that test had been applied, courts would have to look much more carefully at tax burdens on churches.

Another area of note is that of property taxation. The Los Angeles ISKCON temple, for example, is compelled to pay property taxes on those portions of its facilities that are used to publish religious literature, although the publication is certainly as important to *sankirtan* as the actual distribution.

Property taxes are also an issue with respect to ISKCON farm projects. Central to these communities are temple worship, ashram living arrangements, cow protection (cows being holy to Hindu religions generally), and the production of organic food that is ultimately offered to Krishna. ISKCON maintains that all of these activities are central to the Krishna Consciousness religion and should be exempt. In the various states where such communities are located, however, there is wide disparity. In Florida, for example, temple worship is exempt, but not ashram living facilities. In Pennsylvania, ashram living is exempt, but not cow protection. RFRA would provide churches with an effective means of protecting all of the important aspects of their religious communities, where the imposition of a tax could spell the difference between success or failure.

Another important issue arises from the frequent efforts of governmental agencies to curtail food distribution in religious or church facilities as carried out by many groups I've represented, including Cuban Sabbatarian Pentacostals and ISKCON. ISKCON, for example, uses temple facilities for the distribution of their ritually sanctified foodstuffs, called *prasadam*, scripturally mandated to be distributed. RFRA led to overriding the government restrictions in the D.C. District case *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994). Such protections are essential to religious organizations that seek to use their facilities for religiously mandated activities that the government seeks to prohibit or restrict.

Focused protection for religious groups is also important with regard to attempts to procure overbroad disclosure of information. Government frequently seeks to require religious organizations to disclose donor and membership lists, or other potentially sensitive matters, in pursuit of various regulatory programs. Before *Smith*, courts in a number of contexts applied the compelling-interest test to such requirements as applied to religious organizations and struck them down.

For example, in *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 80 (1st Cir. 1979), the court held unconstitutional orders by the Puerto Rico Department of Consumer Affairs that required the Roman Catholic schools in Puerto Rico to submit an array of financial information. The orders were issued during the Department's investigation of the costs of operating private schools, which in turn was part of the Commonwealth's larger efforts to contain costs throughout the economy in a period of high inflation. Without questioning the "legitimacy" and secular nature of Puerto Rico's objectives, the court applied the *Sherbert-Yoder* test and held that the Religion Clauses required the "exclusion" of the "one segment of the economy" from the governmental program.

A case I litigated the same year, *Fernandes v. Limmer*, 465 F. Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. Unit A Dec. 1981), *cert. dismissed*,

¹ *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990).

458 U.S. 1124 (1982), concerned an ordinance that allowed denial of a permit to solicit religious contributions if a government regulator deemed the cost of the solicitation to be "excessive," and to that end provided for the inspection of the charity's books and records. The court held, however, that "this type of financial inquiry into the use of church funds is not constitutionally permissible," and that a church should not be "compelled to bear itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative."

Disclosure issues for religious organizations can arise in other contexts as well. I have been involved in many of these; I will mention here two matters that arose during civil discovery proceedings.

In one case, pre-*Smith*, a Christian group was asked to produce records relating to donations that had been made to it. It declined to do so. Under its interpretation of the Christian scriptures, see *Matthew* 6:4 ("That thine alms may be in secret; and thy Father which seeth in secret himself shall reward thee openly."), the identities of alms-givers must be held inviolate. Objection was therefore made based on the Free Exercise Clause. After *Smith* and without any form of RFRA, the viability of such an objection would be in serious doubt, and the church, adhering to its principles, might be required to suffer judgment against it, with potentially disastrous consequences, for the sake of such adherence.

In another case, a religion in one of the traditions of Northern India was ordered to produce audio and video tapes and transcripts of private religious ceremonies. These ceremonies consisted of the church's central spiritual practice of "sharing," in which its members assemble and, one by one, seek guidance on their spiritual paths. The ritual took place within a protected spiritual environment and the participants were under a duty of confidentiality. This proceeding took place after the enactment of RFRA, but before *City of Boerne*, and so an objection under RFRA was possible. Today, an order to disclose such sensitive information would not have to clear that hurdle.

Living arrangements and child rearing raise further questions. Some Christian missionary groups I have worked with seek to pattern their lifestyle after what they believe to have been the divinely ordained practices of the early Christian church. Citing scriptural bases like *Acts* 2:44, 45 ("And all that believed were together, and had all things common; and sold their possessions and goods, and parted them to all men, as every man had need."), they practice communal living, a lifestyle that is not uncommonly brought under hostile review by government agencies under laws that may, for example, limit the number of unrelated people in the same household. A strict-scrutiny test in this area would be a positive development indeed.

Such groups I've represented also sometimes refuse on religious grounds to create formal structures, including incorporation, sometimes something municipalities demand to license fundraising, and sometimes these groups believe in home schooling, and find that in some states their strongly held belief about their children's socialization can come into conflict with laws regarding compulsory education. While this is by no means a simple problem, the opportunity for religious beliefs to enter into the judicial calculus would be a significant step forward.

I have also represented Orthodox Jewish groups. One of these that, for a complex of reasons, was not on friendly terms with other Jewish, even other Orthodox, organizations, was refused admittance to a pan-Jewish festival that was being held on public land. But, after *Smith* and *City of Boerne*, even Orthodox groups more in the mainstream may also have to rely on politics rather than law for the accommodation of important practices.

For example, the Torah's command, *Exodus* 16:29, to "let no man go out of his place on the seventh day," has been interpreted by the rabbis to permit the concept of the home to be expanded to a larger physical domain—called the *eruv*—demarcated by natural barriers or wires strung across poles. The existence of an *eruv* allows an observant Jew to carry or push objects into otherwise public places on the Sabbath. In pre-*Smith* situations, some localities permitted the construction of *eruvim*. (See *ACLU v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987); *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup. Ct. 1985).) These developments could be in jeopardy.

Another land-use issue important to Orthodox Jews is the use of a home—usually that of a particular rabbi with a devoted following—for religious services. Municipalities have, citing zoning restrictions, often denied such use. RFRA reinvigorated these religious claims. In one case, the Eleventh Circuit held that a ban on home services previously upheld in a pre-*Smith* free exercise case had to be reconsidered under RFRA—that is, that RFRA might be more protective of religious freedom than the First Amendment was even before *Smith*. See *Grosz v. City of Miami*

Beach, 82 F.3d 1005 (11th Cir. 1996). At the moment, of course, that tantalizing prospect has been dashed.

In some cases it is difficult for local political bodies even to understand that religious values are at stake. This can occur, for example, where religion is inextricably tied to notions of ethnicity, culture, nationality, and race.

I have frequently dealt with such walls of misunderstanding. I have come across many, for example, in representing the Roma people ("Gypsies"). It often goes unrecognized that the Roma are a people with their origin in India whose language is a derivative of Sanskrit, and whose traditions and culture are rooted in the philosophies of India. The activity of what is known in the West as fortunetelling is viewed in most of the country with attitudes ranging from disdain to great hostility. This practice, however, has been identified as a form of religious healing that the Roma call *drabarimos*, believing that it is a gift from God. At the same time, it is an important element of the Roma's social and economic structures, given that their historically enforced nomadism impeded them from engaging in agriculture or other stable means of economic survival.

Because of hostility and fear, anti-fortunetelling laws have followed the westward migration of the Roma, from India across Europe and into the Americas. These laws have often been used as a means of excluding or marginalizing the Roma people.

The religious values involved in many instances stand little chance of recognition in the local political arena. In courts, however, groups like the Roma would, if free exercise claims were viable, be able to bring to bear a focus and a perspective that would otherwise be lost.

Smith enjoined minority religions to seek accommodation through the political process. While that may be possible for some groups in some places on some issues, it is not possible or realistic for many others. Some religious groups have doctrinal prohibitions on even getting involved in politics. Others may be unpopular in their beliefs, practices, or both and therefore are unable to obtain action by a local political majority.

Churches should not be subjected to this haphazard process in all of the thousands of political jurisdictions in the country. They should instead have a single, reliable mode of analysis that will apply across the board to enable the judiciary to consider seriously the claims of conscience.

Thank you very much.

Mr. CANADY. Thank you, Mr. Fisher. Mr. Keetch.

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

Mr. KEETCH. Thank you, Mr. Chairman, and good morning to members of the committee as well. I greatly appreciate the opportunity to share with you some of my views on one of the most important topics facing Congress today: the passage of legislation ensuring religious liberty throughout the United States.

I decided to focus my testimony today on one of the most important issues of religious liberty, the right of individual members to gather together in a place of worship. This is an extremely important right in the LDS faith because in order to gain eternal exaltation under church doctrine—which to LDS believers is the highest form of spiritual glory—Members of the church strongly believe that they must receive specific ordinances through the authority of God in a holy temple that's been consecrated for that purpose.

It's in the land use arena, Mr. Chairman, that the general applicability and neutral standards adopted by the Supreme Court in *Employment Division v. Smith* can be particularly devastating. There's certainly no exact way to measure religious animus or antireligious motivation in this area. However, in an effort to provide some basic guidance and understanding, a group of highly regarded law professors at Brigham Young University joined together with attorneys at the prestigious law firm of Mayer, Brown and Platt, in Chicago, to conduct a study of religious liberty in the land

use area. The full study was completed in 1997 and is attached as appendix A to my testimony. I urge the committee to review it in depth. I provide only the briefest of discussion here.

The study starts from the basic proposition that generally applicable and neutral land use ordinances and policies should impact all religious and all other land use applicants in a consistent way. That is, that a majority religion and other prospective developers should fare no better under land use laws than minority religions do.

The joint study not only failed to find this consistency, it found a huge disparity. Most striking is that while minority religions represent just less than 9 percent of the general population, they've been involved in over 49 percent of court challenges regarding the right to locate a religious building at a particular site, and in over 33 percent of cases seeking approval of accessory uses of the church (for example, sheltering or feeding the homeless).

This disparity becomes even greater if one also takes into account those cases which involve nondenominational or unclassified churches. Then, over 68 percent of the reported location cases, and over 50 percent of the accessory use cases involve minority and unclassified religious organizations.

To be sure, Mr. Chairman, there may be other unrelated factors which have some influence on the study's outcome. But the huge disparity revealed by the study is very difficult to dismiss on the basis of other unrelated factors. Put bluntly, at least in the area of land use, minority religions are apparently carrying a much heavier load as they deal with so-called generally applicable and neutral laws. That is of special concern to all of us, I believe, because throughout this great Nation of religious diversity, there's one geographical area or another where every religious body is a minority.

I believe the difficulties faced in the land use area are clearly exemplified by the recent experience of the Church of Jesus Christ of Latter-day Saints with the City of Forest Hills, Tennessee. In 1991, coincidentally only a short time after the United States Supreme Court's decision in *Smith*, the City of Forest Hills adopted an entirely new development plan. The city's plan set up an educational and religious zone, ER for short, applicable to churches, but then limited that zoning designation only to the four existing churches within the community. No other land was zoned ER, and under the plan there was no other property with appropriate zoning for the construction of a religious building.

In 1994, the Church of Jesus Christ of Latter-day Saints determined the need for a temple within the city of Forest Hills. Accordingly, because there were no available properties zoned ER, it sought a zone change for some of the property that it owned. This application was resoundingly rejected by the city.

Taking the city at its word that it would give open and fair consideration to a zone change of another more appropriate parcel, the church acquired a second piece of property for its temple. This 20-acre parcel sat on the northwest corner of two major arterial roads. Several years before, a church building had actually sat on the site. Three other churches of different denominations are either directly across the street or on neighboring lots. I also hasten to add, Mr.

Chairman, that the temple planned for this parcel was much smaller than the one we all see on the outskirts of Washington. Indeed, the specifications which the church submitted for its new temple in Forest Hill were well in keeping with the specifications of other religious buildings already existing within the city.

For the second time, the church filed its petition with the city for a zone change, and for the second time, the city rejected it. With it now painfully clear to the church that the city would not approve any site within its boundaries for a zone change, the church—with some reluctance—determined that it would file suit against the city. It did so because of the important legal and religious freedom principles that it believed were in play: Specifically that the city did not have the right to zone out all new churches from its boundaries. A suit was filed by the church in 1995, the parties generally stipulated to the facts as I've described them to you, and the judge issued her decision in January of 1998.

She concluded first, exactly as the church feared, that “the city adopted ER zoning districts to better control the development of religious use within the city.” Second, that there was “no property in the city-zoned ER in which the church could construct the temple.” And, third, that the city's refusal to re-zone the particular site was “essentially aesthetic to maintain a suburban estate character of the city.”

With these findings, the church argued strenuously that the judge should apply strict scrutiny analysis. However, the judge simply couldn't get past the generally applicable and neutral test established in *Smith*. The intent of the city, she concluded, “was not directed to restricting the right of an individual to practice his or her religion, the intent was simply to regulate the city's land.”

I want to make one thing very clear, Mr. Chairman. I know of absolutely no definitive evidence showing that city officials in Forest Hills discriminated against the LDS church. That, however, is exactly the problem, because if the church had direct evidence of religious prejudice, *Smith* makes absolutely clear that the strict scrutiny test should be applied. The difficulty is that such direct prejudice is impossible to prove in all but the most unusual cases.

When a city—any city—can close its doors to new religions while allowing other established churches to operate within its boundaries; when a city can give the thinnest of reasons for this, like aesthetics or preserving the suburban estate character of the city; and when a court will only review those reasons under the lowest form of scrutiny to determine whether they're rational or irrational, I submit to you that we leave some of the essential components of religious freedom at the total mercy of local government. For minority religions especially, that is an extremely sobering thought.

I don't want my testimony here to be misunderstood today: local governments and local citizens should have a substantial say in how their community is to be developed. There's a balance to be struck here, but the current status of the law leaves no balance at all. It leaves with the local entity the total power as to where a church may locate or even if it may locate at all.

I find it extremely dismaying and somewhat ironic that under controlling first amendment principles, a city like Forest Hills most probably cannot zone out of its community a sexually oriented

adult bookstore, but can totally zone out a church that desires to erect a temple there for the edification of its members. Something is wrong here and it needs to be fixed.

Land use is not the only problem for us. Mr. McFarland talked about the bankruptcy context; we are facing literally hundreds of cases where trustees are attempting to recover tithing monies from members paid by the church.

We also are facing dozens, as shown in my written testimony, of proselyting difficulties where cities are passing generally applicable and neutral laws trying to prohibit or restrict the door-to-door proselytizing of church missionaries.

To conclude, Mr. Chairman, we strongly believe that religious freedom is one of the first freedoms in our republic. The right to religious liberty should apply to all, from border to border, in every State across this great nation. I urge you and your colleagues to continue your close study of the problem and to craft statutory solutions to protect the religious liberty of all. Thank you.

[The statement of Mr. Keetch follows:]

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

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

For almost a decade, as an attorney in the law firm of Kirton & McConkie in Salt Lake City, I have served as counsel to The Church of Jesus Christ of Latter-day Saints (sometimes referred to as the "LDS Church" or "Mormon Church"). With more than 10 million members worldwide, and with almost 5 million of those members in the United States, the Church has a significant presence in every State of the Union, with active members in almost every city and town.

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

As eloquently expressed in The Williamsburg Charter, "Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and as free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular [religious] communities."¹ Rather than at the whim of the majority, the Charter continues, this right "is premised upon the inviolable dignity of the human person."

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

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

From its very inception, The Church of Jesus Christ of Latter-day Saints has recognized and strongly supported this concept. The Church's Eleventh Article of Faith states: "We claim the privilege of 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."

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

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

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

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

Under the current application of free exercise law, a claimant whose religious practice is burdened by an otherwise "generally applicable" and "neutral" law can obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind a law, and thus, that it is not truly neutral or generally applicable.² The difficulties in doing so are considerable. Assuming that government decision makers intend the reasonably foreseeable consequences of their lawmaking actions, judges can of course make responsible judgments about the purpose of a law based on its language and effect. Once the inquiry ventures past these external indications of purpose to the subjective intentions of members of the lawmaking body, however, reliable conclusions about government motivations are nearly impossible to reach. Although statements of intention by individual decision makers can sometimes be found in legislative histories, such histories are not always compiled, particularly in cases involving state and local legislation or discretionary administrative action, and are in any event subject to manipulation. Even when they exist, statements of individual decision makers, while highly probative of the intentions of those who make them, are only circumstantial evidence of the motivation of the decision making body as a whole. Finally, courts are understandably reluctant to find unconstitutional motivations because of the implicit insult such a finding directs at

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

members of the decision making body.³ This is especially true when, as is almost always the case, direct evidence of unconstitutional motivation is totally lacking.⁴

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

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

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

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

The difficulties faced in the land use area are clearly exemplified by the recent experience of The Church of Jesus Christ of Latter-day Saints with the City of Forest Hills, Tennessee, just outside Nashville. In 1991, coincidentally only a short time after the United States Supreme Court’s decision in *Employment Division v. Smith*⁵, the City of Forest Hills adopted an entirely new Comprehensive Plan covering development within the City. The Plan was based on “the overwhelmingly residential aspect of the City”,⁶ and limited any new development within the City to single family unit dwellings. Specifically as it applied to churches, the City’s Plan set up an “Educational and Religious Zone” for schools and churches, but then limited that zoning designation to schools and churches that already existed within the City. Thus, the four existing churches within the City received the “ER” zoning designation, as did the one school. No other land was zoned “ER”, and under the Plan,

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

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

⁵ 494 U.S. 872 (1990).

⁶ Order, *Findings of Fact* ¶ 5, p. 2. (Citations are to the Order of the Chancery Court for Davidson County, Tennessee, in *The Corporation of the Presiding Bishop of the church of Jesus Christ of Latter-day Saints v. The Board of Commissioners of the city of Forest Hills*, Nos. 95-1135, 96-868, 96-1421, issued on January 27, 1998. For the convenience of the Committee a full copy of this judicial order is attached as Exhibit B to this testimony.)

there was therefore no other property available for the construction of a new religious building.⁷

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

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

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

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

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

With these comparisons, and now with a site that was bordered by other churches, the Church approached the Planning Commission to seek a rezone of its parcel. In a divided decision, the Commission refused. Citing the "suburban estates character of the area", and also expressing some concern that traffic could be increased, the Planning Commission expressly concluded that granting the Church permission to build a temple on the site would not be "in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City."¹² The City's Board of Commissioners accepted this recommendation and denied the rezoning for identical reasons.¹³

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

Suit was filed by the Church in 1995 in the Tennessee State Chancery Court. The parties generally stipulated to the facts, as I have related them above. The judge issued her decision in January of this year. In assessing the City's adoption of its new Comprehensive Plan, the judge determined—exactly as the Church feared—

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

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

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

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

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

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

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

that “[t]he City adopted ER zoning districts to better control the development of religious use within the City.” She also found that there was “no existing undeveloped site zoned ER in the City”—that is, there is “no property in the City . . . zoned ER on which the Church can construct a temple.”¹⁴ Lastly, the judge determined that the City’s refusal to rezone the site was “essentially aesthetic, to maintain a ‘suburban estate character’ of the City.”¹⁵

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

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

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

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

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

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

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

¹⁶ Order, p. 9.

¹⁷ Order, pp. 10–11.

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

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

Of course, not every post-*Smith* intrusion upon religious belief and practice is likely to provoke a collective cry of alarm. Some religious liberties infringed by "neutral" and "generally applicable" laws (such as the right of Old Order Amish to refuse to display a fluorescent orange triangle on a horse-drawn buggy²² or of a Sikh to decline to wear a motorcycle helmet because of a religious obligation to wear a turban)²³ seem rather prosaic in a pervasively secular society. The long-recognized concepts of religious liberty, however, exist precisely because even prosaic violations of conscience are deeply felt. The Constitution exists to protect unpopular ideas, not popular ideas; and many "neutral," "generally applicable" assaults upon religious practice are significant indeed.

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

My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hear-

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

¹⁹ *Id.* at 149.

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

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

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

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

ing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief. *Id.* at 558.²⁴

The Church of Jesus Christ of Latter-day Saints has experienced a wide range of difficulties, similar to those discussed by my colleagues today. Many of these infringements go to the core teachings and beliefs of the Church. Over the past several year, literally hundreds of bankruptcy trustees have attempted to recover tithing monies paid by members to the Church. The sacred belief of the Church and its members that ten percent of one's income belongs to God has bowed to trustees and bankruptcy courts that have found the avoidance laws to be neutral and generally applicable.²⁵ The strict confidentiality of communications between member and clergy has come under strong attack, with litigants attempting to gain information or otherwise discover sacred confessional information for use in pursuance of their civil claims.²⁶ Local governments have attempted to impair or altogether eliminate the proselyting of Church missionaries by passing "generally applicable" and "neutral" ordinances placing severe restrictions on the times and places that missionaries may contact door-to-door.²⁷

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

I thank you, Mr. Chairman.

APPENDIX

Discrimination Against Minority Churches in Zoning Cases

In order to gain some perspective on the treatment of non-mainline groups in zoning cases, a broad sample of zoning decisions challenged on free exercise grounds has been analyzed. A total of 196 cases was ultimately included in the study. This set of cases should include a fairly comprehensive set of reported cases in this field. It includes all cases cited in annotations that have collected cases on this topic (including cases cited in pocket part updates),¹ all cases cited in the section of a leading treatise on zoning that addresses issues of religious land uses,² and all cases identified through a Westlaw search classified under West's Constitutional Law Key Number 84.5(18), which collects religion cases involving zoning and land use. It is conceivable that some cases involving religion-based constitutional challenges to zoning decisions may not have been captured through these sources, but it is unlikely that there are many such cases.

The cases thus collected have been classified by the type of zoning case and by the denomination involved. Essentially, the zoning issues fall into two broad categories: cases that involve zoning on property to permit a church building to be erected on a particular site ("location cases"), and cases that determine whether an accessory use (such as a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases").

In most of the cases, the denomination involved is obvious either from the case name or from discussion of the case in the opinion. There are, however, a substantial number of cases in which either no denominational affiliation appears in the case, or the church involved is non-denominational. These cases are designated as

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

²⁵ See, e.g., *In re Packham*, 126 B.R. 603 (Bankr. D. Ut. 1991).

²⁶ See, e.g., *Hadnot v. Shaw*, 826 P.2d 978, 981 (Okla. 1992); *Scott v. Hammock*, 870 P.2d 947 (Utah 1994).

²⁷ In the past year alone, local officials have attempted to curtail Church proselyting in such cities as Mundelein, Illinois; Dover, New Jersey; Flemington, New Jersey; Chester, Connecticut; Valencia, California; Media, Pennsylvania; Downers Grove, Illinois; Marin County, California; and Seven Hills, Ohio.

¹ Jay M. Zitter, Annotation, *What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance*, 11 A.L.R.4th 1084 (1992); Jeffrey F. Ghent, Annotation, *Definition of Church or Religious Use Within Zoning Ordinances*, 62 A.L.R.3d 197 (1967); Annotation, *Zoning Regulations as Affecting Churches*, 74 A.L.R.2d 377 (1961).

² A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ¶ 20 (4th ed. 1992).

“unclassified” in the tables below. While some of the unclassified religious associations may in fact have a denominational affiliation that simply is not evident from the cases, most of these cases appear to involve local, congregationally organized churches that are functionally similar to the organizations we have classified as minority churches.

Information on the size of various denominations was derived from tables provided in BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD; RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 15–17 (1993). The data is derived from the National Survey of Religious Identification conducted by the Graduate School of the City University of New York, which surveyed a representative sample of 113,000 people across the continental United States. This is the most comprehensive poll ever conducted on the issue of religious affiliation. *Id.* at 1–2. It provides the best available data of religious affiliation as assessed from the perspective of the believer.

The line between mainline denominations and smaller groups is difficult to draw, because one is dealing with a continuum. For purposes of this study, groups with more than 1.5% of the adult population were treated as mainline groups, whereas groups with smaller percentages were included in the minority category. The only exception in the tables that follow is Judaism, but if the statistics on Judaism were divided to reflect the major branches of that tradition, the various branches would come under the 1.5% threshold. Some smaller Protestant groups may be more analogous to mainline groups, so that the categorizations in a few cases could be questioned.

The population percentages in the tables that follow do not add up to 100% because the tables do not include data on non-religious groups and on the portion of the population (only 2.30%) that did not respond to the survey. Many smaller religions were not covered by the study because they have no reported cases, but such religions represent only 2.22% of the population.

In analyzing the data, a basic starting assumption is that any zoning dispute that progresses far enough into litigation to yield a reported decision reflects a situation in which religious groups *perceive* that their religious rights are being violated. For a variety of practical reasons, ranging from the need to have a good working relationship with local government officials to the sheer cost of litigation to the availability of alternative sites, churches probably bring fewer actions in this area than they think they may be entitled to bring. Table 1 summarizes the number of cases in the location and accessory use categories by denomination:

TABLE 1

Zoning Cases by Denomination					
Denomination	Self-Described % of Adult Population	# of Location Cases	%	# of Accessory Use Cases	%
Larger Denominations					
Catholics	26.20%	16	12.80%	13	20.00%
Major Protestants (>1.5% of Adult U.S. Population)					
Baptists	19.40%	7	5.60%	7	10.77%
Episcopal	1.70%	4	3.20%	2	3.08%
Lutheran	5.20%	6	4.80%	3	4.62%
Methodist	8.00%	3	2.40%	2	3.08%
Pentecostal	1.80%	1	0.80%	0	0.00%
Presbyterian	2.80%	2	1.60%	3	4.62%
Subtotal:	38.90%	23	18.40%	17	26.15%
Minority Denominations (<1.5% of U.S. Population)					
Assemblies of God	0.37%	0	0.00%	4	3.20%
Buddhist	0.40%	0	0.00%	1	1.54%
Christian Science	0.12%	1	0.80%	1	1.54%
Churches of Christ	1.00%	0	0.00%	1	1.54%
Church of God	0.30%	3	2.40%	1	1.54%
Church of Jesus Christ of LDS	1.40%	3	2.40%	1	1.54%
Eastern Orthodox	0.28%	1	0.80%	1	1.54%
Evangelical	0.14%	2	1.60%	0	0.00%
Hare Krishna	0.30%	1	0.80%	0	0.00%
Islam	0.50%	2	1.60%	0	0.00%
Jehovah's Witness	0.80%	19	15.20%	1	1.54%
Judaism	2.20%	25	20.00%	11	16.92%
Quakers	0.04%	1	0.80%	0	0.00%
Seventh Day Adventists	0.38%	1	0.80%	0	0.00%
Unification Church	0.30%	2	1.60%	1	1.54%
Unitarian	0.30%	1	0.80%	1	1.54%
Minority Cases	8.83%	62	49.60%	24	33.97%
Unclassified	14.78%	24	19.20%	11	16.92%
Minority + Unclassified	23.61%	86	68.80%	11	16.92%
Total Cases		125	100.00%	65	100.00%

The figures indicated in Table 1 already suggest that a substantial amount of the litigation in this area involves minority religious groups. This burden is more pronounced when compared to the percentage of groups from these denominations in the general population. Table 2 provides these comparisons.

TABLE 2

Percentages of Zoning Cases by Denominational Group and Percentage of United States Population			
Denomination	Self-Described % of Adult Population	Location Cases (%)	Accessory Use Cases (%)
Larger Denominations			
Catholics	26.20%	12.80%	20.00%
Major Protestants (>1.5% of Adult U.S. Population)			
Baptists	19.40%	5.60%	10.77%
Episcopal	1.70%	3.20%	3.08%
Lutheran	5.20%	4.80%	4.62%
Methodist	8.00%	2.40%	3.08%
Pentecostal	1.80%	0.80%	0.00%
Presbyterian	2.80%	1.60%	4.62%
Subtotal:	38.90%	18.40%	26.15%
Minority Denominations (<1.5% of U.S. Population)			
Assemblies of God	0.37%	0.00%	3.20%
Buddhist	0.40%	0.00%	1.54%
Christian Science	0.12%	0.80%	1.54%
Churches of Christ	1.00%	0.00%	1.54%
Church of God	0.30%	2.40%	1.54%
Church of Jesus Christ of LDS	1.40%	2.40%	1.54%
Eastern Orthodox	0.28%	0.80%	1.54%
Evangelical	0.14%	1.60%	0.00%
Hare Krishna	0.30%	0.80%	0.00%
Islam	0.50%	1.60%	0.00%
Jehovah's Witness	0.80%	15.20%	1.54%
Judaism	2.20%	20.00%	16.92%
Quakers	0.04%	0.80%	0.00%
Seventh Day Adventists	0.38%	0.80%	0.00%
Unification Church	0.30%	1.60%	1.54%
Unitarian	0.30%	0.80%	1.54%
Minority Cases	8.83%	49.60%	33.97%
Unclassified	14.78%	19.20%	16.92%
Minority + Unclassified	23.61%	68.80%	50.89%
Total Cases		100.00%	100.00%

The data in Table 2 are not wholly satisfactory, because the relative populations of various religious groups vary over the rather lengthy period from which the cases are drawn, whereas the population figures, to the extent they are available, are quite recent. Nonetheless, the figures suffice to give a rough sense for how the percentage of cases in which a given religious society is involved corresponds with that

society's percentage representation in the population as a whole. These figures strongly suggest that a high percentage of cases are being contested by religious groups comprising a very small percentage of the total population.

TABLE 3

Zoning Cases by Denomination						
Denomination	Claims Granted	% of Total Claims	% of Denom's Claims	Claims De-nied	% of Total Claims	% of Denom's Claims
Larger Denominations						
Catholics	19	10.00%	65.52%	10	5.26%	34.48%
Major Protestants (>1.5% of Adult U.S. Population)						
Baptists	4	2.11%	28.57%	10	5.26%	71.43%
Episcopal	6	3.16%	100.00%	0	0.00%	0.00%
Lutheran	6	3.16%	66.67%	3	1.58%	33.33%
Methodist	4	2.11%	80.00%	1	0.53%	20.00%
Pentecostal	1	0.53%	100.00%	0	0.00%	0.00%
Presbyterian	5	2.63%	100.00%	0	0.00%	0.00%
Subtotal:	26	13.68%	65.00%	14	7.37%	35.00%
Minority Denominations (<1.5% of U.S. Population)						
Assemblies of God	0	0.00%	0.00%	4	2.11%	100.00%
Buddhist	1	0.53%	100.00%	0	0.00%	0.00%
Christian Science	1	0.53%	50.00%	1	0.53%	50.00%
Churches of Christ	1	0.53%	100.00%	0	0.00%	0.00%
Church of God	2	1.05%	50.00%	2	1.05%	50.00%
Church of Jesus Christ of LDS	2	1.05%	50.00%	2	1.05%	50.00%
Eastern Orthodox	0	0.00%	0.00%	2	1.05%	100.00%
Evangelical	1	0.53%	50.00%	1	0.53%	50.00%
Hare Krishna	0	0.00%	0.00%	1	0.53%	100.00%
Islam	2	1.05%	100.00%	0	0.00%	0.00%
Jehovah's Witness	11	5.79%	55.00%	9	4.74%	45.00%
Judaism	30	15.79%	83.33%	6	3.16%	16.67%
Quakers	1	0.53%	100.00%	0	0.00%	0.00%
Seventh Day Adventists	1	0.53%	100.00%	0	0.00%	0.00%
Unification Church	2	1.05%	66.67%	1	0.53%	33.33%
Unitarian	2	1.05%	100.00%	0	0.00%	0.00%
Minority Cases	57	30.00%	66.28%	29	33.72%	33.72%
Unclassified	17	8.95%	4.00%	18	9.47%	51.43%
Minority + Unclassified	74	38.95%	61.16%	47	24.74%	38.84%
Total Cases	119	62.63%	62.63%	71	37.37%	37.37%

According to Table 3, 63% of religious claims were granted, and 37% were denied. At the judicial level, minority groups appear to fare slightly better than mainline groups: they won 57 cases, or 66% of the cases in which they were involved; majority religions prevailed in 26 cases, or 65% of the cases in which they were involved. Among other things, these figures suggest that judicial review does help remedy the problems minority groups face, and tends to be impartial across groups. Since the data do not indicate that the higher percentage of cases in which minority religions are involved reflect higher levels of ungrounded claims, Table 2's data showing that minority groups face a substantially greater level of problems in the zoning area than mainline churches seems sound.

The percentage of cases in which various denominations' religious challenges to zoning decisions have been won and lost is summarized in Table 4. The figures show the number of claims won and lost both as percentages of the total number of cases and as percentages of the total number of claims in which each denomination (or group of denominations) is involved.

TABLE 4

Percentages of Zoning Cases Won and Lost by Denominational Groups and Percentages of United States Population			
Denomination	Self-Described % of Adult Population	Cases won as % of Total Cases	Cases Lost as % of Total Cases
Larger Denominations			
Catholics	26.20%	10.00%	5.26%
Major Protestants (>1.5% of Adult U.S. Population)			
Baptists	19.40%	2.11%	5.26%
Episcopal	1.70%	3.16%	0.00%
Lutheran	5.20%	3.16%	1.58%
Methodist	8.00%	2.11%	0.53%
Pentecostal	1.80%	0.53%	0.00%
Presbyterian	2.80%	2.63%	0.00%
Subtotal:	38.90%	13.68%	7.37%
Minority Denominations (<1.5% of U.S. Population)			
Assemblies of God	0.37%	0.00%	2.11%
Buddhist	0.40%	0.53%	0.00%
Christian Science	0.12%	0.53%	0.53%
Churches of Christ	1.00%	0.53%	0.00%
Church of God	0.30%	1.05%	1.05%
Church of LDS	1.40%	1.05%	1.05%
Eastern Orthodox	0.28%	0.00%	1.05%
Evangelical	0.14%	0.53%	0.53%
Hare Krishna	0.30%	0.00%	0.53%
Islam	0.50%	1.05%	0.00%
Jehovah's Witness	0.80%	5.79%	4.74%
Judaism	2.20%	15.79%	3.16%
Quakers	0.04%	0.53%	0.00%
Seventh Day Adventists	0.38%	0.53%	0.00%
Unification Church	0.30%	1.05%	0.53%
Unitarian	0.30%	1.05%	0.00%
Minority Cases	8.83%	30.00%	15.26%
Unclassified	14.78%	8.95%	9.47%
Minority + Unclassified		38.95%	24.74%
Total Cases		62.63%	37.37%

The foregoing data suggest that a variety of factors are operating in the zoning area in the United States that lead to de facto discrimination against smaller religious groups. This confirms that behind the surface of ostensibly neutral zoning laws, a variety of discriminatory and prejudicial factors may be operational that have the effect of violating the religious rights of minority groups.

To facilitate access to the date provided in this appendix, the cases reviewed are listed below, classified as they have been categorized in the study. Within each denominational category, the citations appear alphabetically by jurisdiction (with federal cases preceding state cases) in reverse chronological order. The parenthetical following the citations includes how the case was classified for purposes of the study. The letters in the parentheticals have the following meanings:

- G = The religious organization prevailed on the religious claim asserted.
- D = The religious claim asserted was denied.
- L = The case was a "location" case.
- A = The case was an "accessory use" case.

CATHOLIC:

- Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (D) (A)
- Ellsworth v. Gercke*, 156 P.2d 242 (Ariz. 1945) (G) (L)
- Ramona Convent of Holy Names v. City of Alhambra*, 26 Cal. Rptr. 2d 140 (Ct. App. 1993) (D) (A)
- Tustin Heights Ass'n v. Board of Supervisors of County of Orange*, 339 P.2d 914 (Cal. Dist. Ct. App. 1959) (D) (L)
- St. John's Roman Catholic Church Corp. v. Town of Darien*, 184 A.2d 42 (Conn. 1959) (D) (L)
- Daughters of St. Paul v. Zoning Board*, 549 A.2d 1076 (Conn. App. Ct. 1988) (G) (A)
- Hull v. Miami Shores Village*, 435 So.2d 868 (Fla. Dist. Ct. App. 1983) (D) (A)
- Diakonian Soc'y v. City of Chicago*, 380 N.E.2d 843 (Ill. App. Ct. 1978) (G) (L)
- Board of Zoning Appeals v. Wheaton*, 76 N.E.2d 597 (Ind. Ct. App. 1948) (G) (A)
- Society of Jesus of New England v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (G) (L)
- Sisters of Holy Cross of Mass. v. Town of Brookline*, 198 N.E.2d 624 (Mass. 1964) (G) (L)
- Mooney v. Village of Orchard Lake*, 53 N.W.2d 308 (Mich. 1952) (G) (L)
- City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880 (Minn. 1983) (G) (L)
- Association for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976) (G) (A)
- Black v. Town of Montclair*, 167 A.2d 388 (N.J. 1961) (G) (A)
- Andrews v. Board of Adjustment*, 143 A.2d 262 (N.J. Super. Ct. Law Div. 1958) (G) (A)
- Diocese of Rochester v. Planning Board*, 136 N.E.2d 827 (N.Y. 1956) (G) (L)
- Diocese of Buffalo v. Buckowski*, 446 N.Y.S.2d 1015 (Sup. Ct. 1982) (D) (L)
- Province of Meribah Soc'y of Mary, Inc. v. Village of Muttontown*, 538 N.Y.S.2d 850 (App. Div. 1989) (D) (A)
- American Friends of Soc'y of St. Pius, Inv. v. Schwab*, 417 N.Y.S.2d 991 (App. Div. 1979) (G) (L)
- People v. Kalayjiami*, 352 N.Y.S. 2d 115 (App. Div. 1973) (D) (L)
- Franciscan Missionaries of Mary v. Herdman*, 184 N.Y.S.2d 104 (App. Div. 1959) (G) (A)
- Hayes v. Fowler*, 473 S.E.2d 442 (N.C. Ct. App. 1996) (G) (A)
- Allen v. City of Burlington Board of Adjustment*, 397 S.E.2d 657 (N.C. Ct. App. 1990) (G) (L)
- Archdiocese v. Washington County*, 458 P.2d 682 (Or. 1969) (D) (L)
- O'Hara v. Board of Adjustment*, 131 A.2d 587 (Pa. 1957) (D) (L)
- Stark's Appeal*, 72 Pa D. & C. 1681 (Pa. 1950) (G) (A)
- In re Appeal of Hoffman*, 444 A.2d 764 (Pa. Commw. Ct. 1982) (G) (A)
- State ex rel. Roman Catholic Bishop v. Hill*, 90 P.2d 217 (Nev. 1939) (G) (L)

MAJOR PROTESTANT:

BAPTIST:

- Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988) (D) (L)
- Messiah Baptist Church v. County of Jefferson*, 697 F.Supp. 396 (D. Colo. 1987) (D) (L)
- Ex Parte Fairhope Bd. of Adjustments*, 567 So.2d 1353 (Ala. 1990) (D) (A)
- Corinth Baptist Church v. State Dep't of Transp.*, 656 So.2d 868 (Ala. Civ. Ct. App. 1995) (D) (A)

- Cochise County v. Broken Arrow Baptist Church*, 778 P.2d 1302 (Ariz. Ct. App. 1989) (D) (L)
Abram v. City of Fayetteville, 661 S.W.2d 371 (ARK. 1983) (D) (A)
City of Chico v. First Ave. Baptist Church, 238 P.2d 587 (Cal. Dist. Ct. App. 1951) (D) (L)
East Side Baptist Church of Denver v. Klein, 487 P.2d 549 (Colo. 1971) (D) (A)
Parkview Baptist Church v. City of Pueblo, 336 P.2d 310 (Colo. 1959) (D) (A)
North Syracuse First Baptist Church v. Village of N. Syracuse, 524 N.Y.S.2d 894 (App. Div. 1988) (G) (A)
Yocum v. Power, 157 A.2d 368 (Pa. 1960) (G) (L)
Antrim Faith Baptist Church v. Commonwealth, 460 A.2d 1228 (PA. COMMW. CT. 1983) (D) (L)
City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982) (G) (A)
State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trustees, 108 N.W.2d 288 (Wis.) (G) (L)

EPISCOPAL:

- Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (G) (A)
O'Brien v. Chicago, 105 N.E.2d 917 (Ill. App. Ct. 1952) (G) (L)
State v. Cameron, 498 A.2d 1217 (N.J. 1985) (G) (L)
Greentree at Murray Hill Condominiums v. Good Shepherd Episcopalian Church, 550 N.Y.S.2d 981 (Sup. Ct. 1989) (G) (A)
Diocese of Central New York v. Schwarzer, 199 N.Y.S.2d 939 (Sup. Ct. 1960) (G) (L)
Heard v. City of Dallas, 456 S.W.2d 440 (Tex. Civ. app. Ct. 1970) (G) (L)

LUTHERAN:

- Miami Beach Lutheran Church of Epiphany v. City of Miami Beach*, 82 So.2d 880 (Fla. 1955) (D) (L)
Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722 (Ga. Ct. App. 1949) (G) (L)
Bethel Evangelical Lutheran Church v. Village of Morton, 559 N.E.2d 533 (Ill. App. Ct. 1990) (D) (A)
Our Savior's Evangelical Lutheran Church of Naperville v. City of Naperville, 542 N.E.2d 1158 (Ill. App. Ct. 1989) (G) (A)
Schueller v. Board of Adjustment, 95 N.W.2d 731 (Iowa 1959) (G) (L)
Zion Evangelical Lutheran Church v. City of Detroit Lakes, 21 N.W.2d 203 (Minn. 1945) (D) (L)
St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983) (G) (L)
Lutheran in America v. City of New York, 316 N.E.2d 305 (N.Y. 1974) (G) (A)
Synod of Ohio of United Lutheran Church v. Joseph, 39 N.E.2d 515 (Ohio 1942) (G) (L)

METHODIST:

- West Hartford Methodist Church v. Zoning Board of Appeals*, 121 A.2d 640 (Conn. 1956) (D) (A)
Keeling v. Board of Zoning Appeals, 69 N.E.2d 613 (Ind. Ct. App. 1946) (G) (L)
Linden Methodist Episcopal Church v. Linden, 173 A. 593 (N.J. 1934) (G) (L)
Cash v. Brookshire Methodist Church, 573 N.E.2d 692 (Ohio Ct. App. 1988) (G) (A)
First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996) (G) (L)

PENTECOSTAL:

- Pentecostal Holiness Church v. Dunn*, 27 So.2d 561 (Ala. 1946) (G) (L)

PRESBYTERIAN:

- Western Presbyterian Church. v. Board of Zoning Adjustment*, 862 F.Supp 538 (D.D.C. 1994) (G) (A)
Synod of Chesapeake, Inc. v. City of Newark, 254 A.2d 611 (Del. Ch. 1969) (G) (A)
City of Richmond Heights v. Richmond Heights Presbyterian Church 764 S.W.2d 647 (Mo. 1989) (G) (A)
First Westminister Presbyterian Church v. City Council, 393 N.Y.S.2d 180 (App. Div. 1977) (G) (L)
Westminister Presbyterian Church v. Edgecomb, 189 N.W. 671 (1922) (G) (L)

MINORITY DENOMINATIONS:

ASSEMBLIES OF GOD:

First Assembly of God v. Collier County, 20 F.3d 419 (11th Cir. 1994) (D) (A)
First Assembly of God v. City of Alexandria, 739 F.2d 942 (4th Cir. 1984) (D) (A)
First Assembly of God v. Collier County, 775 F.Supp. 383 (M.D. Fla. 1991) (D) (A)
Lakeshore Assembly of God Church v. Village Board of Village of Westfield, 508 N.Y.S.2d 819 (App. Div. 1986) (D) (A)

BUDDHIST:

Moore v. Trippe, 743 F.Supp 201 (S.D.N.Y. 1990) (G) (A)
 Christian Science:
Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 469 N.Y.S.2d 851 (Sup. Ct. 1983) (D) (L)
Mahart v. First Church of Christ Scientist, 142 N.E.2d 678 (Ohio Ct. App. 1955) (G) (A)

CHURCH OF CHRIST:

Church of Christ v. Metropolitan Bd. of Zoning Appeals, 371 N.E.2d 1331 (Ind. Ct. App. 1978) (G) (A)

CHURCH OF GOD:

Church of God v. City of Monroe, 404 F. Supp. 175 (M.D. La. 1975) (G) (A)
Jernigan v. Smith, 126 S.E.2d 678 (Ga. 1962) (D) (L)
City of Sherman v. Simms, 183 S.W.2d 415 (Tex. 1944) (D) (L)
State ex rel. Howell v. Meador, 154 S.E. 876 (W. Va. 1930) (G) (L)

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS:

The Church of Jesus Christ of Latter-day Saints v. Jefferson County, 741 F. Supp 1522 (N.D. Ala 1990) (G) (L)
Corporation of the Presiding Bishop v. City of Porterville, 203 P.2d 823 (Cal. Dist. Ct. App. 1949) (D) (L)
Corporation of the Presiding Bishop v. Ashton, 448 P.2d 185 (Idaho 1968) (G) (A)
City of Las Cruces v. Huerta, 692 P.2d 1331 (N.M. Ct. App. 1984) (D) (L)

EASTERN ORTHODOX:

Macedonian Orthodox Church v. Planning Bd., 636 A.2d 96 (N.J. Super. Ct. App. Div. 1994) (D) (L)
Appeal of Russian Orthodox Church of Holy Ghost, 152 A.2d 489 (Pa. 1959) (D) (A)

EVANGELICAL:

State ex rel. Covenant Harbor Bible Camp v. Steinke, 96 N.W.2d 356 (Wis. 1959) (G) (L)
Cornerstone Bible Church v. City of Hastings, 740 F. Supp 654 (D. Minn. 1990) (D) (L)

HARE KRISHNA:

Marsland v. International Soc'y for Krishna Consciousness, 657 P.2d 1035 (Haw. 1983) (D) (L)

ISLAM:

Islamic Center v. City of Starkville, 840 F.2d 293 (5th Cir. 1988) (G) (L)
Islamic Soc'y v. Foley, 464 N.Y.S.2d 844 (App. Div. 1983) (G) (L)

JEHOVAH'S WITNESSES:

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (D) (L)
Galfas v. City of Atlanta, 193 F.2d 931 (5th Cir. 1952) (D) (L)
Jehovah's Witnesses Assembly Halls v. Jersey City, 597 F. Supp 972 (D.N.J. 1984) (G) (L)
Matthews v. Board of Supervisors, 21 Cal Rptr. 914 (Dist. Ct. App. 1962) (D) (L)

- Garden Grove Congregation of Jehovah's Witnesses v. Garden Grove*, 1 Cal. Rptr. 65 (Dist. Ct. App. 1959) (D) (L)
- Redwood City Co. of Jehovah's Witnesses v. City of Menlo Park*, 335 P.2d 195 (Cal. Dist. Ct. App. 1959) (G) (L)
- Minney v. City of Azusa*, 330 P.2d 255 (Cal. Dist. Ct. App. 1958) (D) (L)
- State ex rel. Tampa Co. of Jehovah's Witnesses v. City of Tampa*, 48 So. 2d 78 (Fla. 1950) (G) (L)
- Rogers v. Mayor of Atlanta*, 137 S.E.2d 668, 672 (Ga. Ct. App. 1964) (G) (L)
- Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals*, 182 N.E.2d 722 (Ill. 1962) (G) (L)
- Board of Zoning Appeals v. Decatur Co. Jehovah's Witnesses*, 117 N.E.2d 115 (Ind. 1954) (D) (A)
- Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, 226 N.W.2d 306 (Minn. 1975) (G) (L)
- Allendale Congregation of Jehovah's Witnesses v. Grosman*, 152 A.2d 569 (N.J. 1959) (D) (L)
- Jehovah's Witnesses Assembly Hall of S. New Jersey v. Woolwich Township*, 532 A.2d 276 (N.J. Super. Ct. Law Div. 1987) (G) (L)
- State ex rel. Wiegel v. Randall*, 116 N.E.2d 300 (Ohio 1953) (G) (L)
- Libis v. Board of Zoning Appeals*, 292 N.E.2d 642 (Ohio Ct. App. 1972) (G) (L)
- Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 330 P.2d 5 (Or. 1958) (D) (L)
- Appeal of Trustees of the Congregation of Jehovah's Witnesses*, 130 A.2d 240 (Pa. Super. Ct. 1957) (D) (L)
- Congregation Comm. N. Fort Worth Congregation, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. Ct. 1956) (G) (L)
- State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 312 P.2d 195 (Wash. 1957) (G) (L)

JUDAISM:

- Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (D) (L)
- Village of Univ. Heights v. Cleveland Jewish Orphan's Home*, 20 F.2d 743 (6th Cir. 1927) (G) (L)
- Lucas Valley Homeowners Ass'n v. County of Marin*, 284 Cal. Rptr. 427 (Ct. App. 1991) (G) (L)
- Stoddard v. Edelman*, 84 Cal. Rptr. 443 (Ct. App. 1970) (G) (L)
- Beit Havurah v. Zoning Board of Appeals*, 418 A.2d 82 (Conn. 1979) (G) (A)
- Garbaty v. Norwalk Jewish Ctr., Inc.*, 171 A.2d 197 (Conn. 1961) (G) (L)
- Lubavitch Chabad House v. City of Evanston*, 445 N.E.2d 343 (Ill. App. Ct. 1982) (G) (L)
- Wolbach v. Zoning Bd. of Appeals*, 226 N.E.2d 679 (Ill. App. Ct. 1967) (G) (L)
- Schwartz v. Congregation Powolei Zeduck*, 131 N.E.2d 785 (Ill. App. Ct. 1956) (G) (L)
- Congregation David Ben Nuchim v. City of Oak Park*, 199 N.W.2d 557 (Mich. Ct. App. 1972) (G) (L)
- Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959) (G) (L)
- Kali Bari Temple v. Board of Adjustment*, 638 A.2d 839 (N.J. Super. Ct. App. Div. 1994) (G) (L)
- Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (G) (L)
- Farhi v. Commissioners of Borough of Deal*, 499 A.2d 559 (N.J. Super. Ct. Law Div. 1985) (G) (L)
- Sexton v. Bates*, 85 A.2d 833 (N.J. Super. Ct. Law Div. 1951), *aff'd sub nom.*, *Sexton v. Essex County Ritualarium*, 91 A.2d 162 (N.J. Super. Ct. App. Div. 1952) (D) (L)
- Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*, 342 N.E.2d 534 (N.Y. 1975) (G) (L)
- Westchester Reform Temple v. Brown*, 239 N.E.2d 891 (N.Y. 1968) (G) (A)
- Community Synagogue v. Bates*, 136 N.E.2d 488 (N.Y. 1956) (G) (L)
- Slevin v. Long Island Jewish Medical Ctr.*, 314 N.Y.S.2d 937 (Sup. Ct. 1971) (G) (A)
- Westbury Hebrew Congregation, Inc. v. Downer*, 59 Misc. 2d 387 (N.Y. Sup. Ct. 1969) (G) (A)
- Westchester Reform Temple v. Griffin*, 276 N.Y.W.2d 737 (Sup. Ct. 1966) (D) (A)
- Application of Garden City Jewish Center*, 155 N.Y.S.2d 523 (Sup. Ct. 1956) (G) (L)
- Harrison Orothodox Minyan, Inc. v. Town Board*, 552 N.Y.S.2d 434 (App. Div 1990) (G) (L)

Yeshiva and Mesivta Toras Chaim v. Rose, 523 N.Y.S.2d 907 (App. Div. 1989) (D) (L)
Siegert v. Luney, 491 N.Y.S.2d 15 (App. Div. 1985) (G) (A)
North Shore Hebrew Academy v. Wegman, 481 N.Y.S.2d 142 (App. Div. 1984) (G) (A)
Congregation Gates of Prayer v. Board of Appeals, 368 N.Y.S.2d 232 (App. Div. 1975) (D) (L)
Seaford Jewish Ctr., Inc. v. Board of Zoning Appeals, 368 N.Y.S.2d 40 (App. Div. 1975) (G) (L)
Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477 (App. Div. 1974) (D) (A)
Shaffer v. Temple Beth Emeth, 190 N.Y.S. 841 (App. Div. 1921) (G) (A)
Young Israel Org. v. Dworkin, 133 N.E.2d 174 (Ohio Ct. App. 1956) (G) (L)
Overbrook Farms Club v. Zoning Board, 40 A.2d 423 (Pa. 1945) (G) (A)
Appeal of Floersheim, 34 A.2d 62 (Pa. 1943) (G) (A)
Minyan v. Cheltenham Township, 552 A.2d 772 (Pa. Commw. Ct. 1989) (G) (L)
Berlant v. Zoning Hearing Board, 279 A.2d 400 (Pa. Commw. Ct. 1971) (G) (L)
State ex rel. B'Nai B'rith Foundation v. Walworth Co. Bd. of Adjustment, 208 N.W.2d 113 (Wis. 1973) (G) (L)

QUAKERS:

Milharic v. Metropolitan Bd. of Zoning Appeals, 489 N.E.2d 634 (Ind. Ct. App. 1986) (G) (L)

SEVENTH DAY ADVENTISTS:

Application of Faith for Today, Inc., 104 N.Y.S.2d 751 (App. Div. 1960) (G) (L)

UNIFICATION CHURCH:

New Educ. Dev. Sys. Inc. v. Boitano, 573 F. Supp. 594 (N.D. Cal. 1983) (G) (L)
Holy Spirit Ass'n v. Town of New Castle, 480 F. Supp. 1212 (S.D.N.Y. 1979) (D) (L)
Holy Spirit Ass'n for Unification of World Christianity v. Brush, 469 N.Y.S.2d (App. Div. 1983) (G) (A)

UNITARIAN:

North Shore Unitarian Soc'y v. Village of Plandome, 109 N.Y.S.2d 803 (Sup. Ct. 1951) (G) (L)
Unitarian Universalist Church v. Shorten, 314 N.Y.S.2d 66 (Sup. Ct. 1970) (G) (A)

UNCLASSIFIED:

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (G) (L)
Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221 (9th cir. 1990) (D) (L)
Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (D) (A)
Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991 (D. Colo. 1994) (Alpine Christian Fellowship) (G) (A)
Nichols v. Planning & Zoning Comm'n, 667 F. Supp. 72 (D. Conn. 1987) (G) (L)
Love Church v. City of Evanston, 671 F. Supp. 508 (N.D. Ill. 1987) (D) (L)
Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982) (D) (A)
City of Colorado Springs v. Blanche, 761 P.2d 212 (Colo. 1988) (D) (L)
Grace Community Church v. Town of Bethel, 622 A.2d 591 (Conn. App. Ct. 1993) (G) (L)
Grace Community Church v. Planning Comm'n, 615 A.2d 1092 (Conn. Super. Ct. 1992) (G) (L)
Town v. Reno, 377 So. 2d 648 (Fla. 1979) (Ethiopian Zion Coptic Church) (D) (L)
Pylant v. Orange County, 328 So. 2d 199 (Fla. 1976) (First Apostolic) (D) (L)
State v. Maxwell, 617 P.2d 816 (Haw. 1980) (Hula Hau) (D) (A)
Hope Deliverance Ctr., Inc. v. Zoning Bd. of Appeals, 452 N.E.2d 630 (Ill. App. Ct. 1983) (Non-denominational) (G) (L)
South Side Move of God Church v. Zoning Bd. of Appeals, 365 N.E.2d 118 (Ill. App. Ct. 1977) (D) (A)
Twin-City Bible Church v. Zoning Board of Appeals, 365 N.E.2d 1381 (Ill. App. Ct. 1977) (G) (A)
Coston Chapel A.M.E. Church v. Chaddick, 292 N.E.2d 215 (Ill. App. Ct. 1972) (D) (L)

- Family Christian Fellowship v. County of Winnebago*, 503 N.E.2d 367 (Ill. App. Ct. 1986) (G) (L)
- Board of Zoning Appeals v. New Testament Bible Church*, 411 N.E.2d 681 (Ind. Ct. App. 1980) (G) (A)
- Portage Township v. Full Salvation Union*, 29 N.W.2d 297 (Mich. 1947) (D) (A)
- Yanow v. Seven Oaks Park*, A. 2d 482 (N.J. 1963) (Eastern Christian Institute) (D) (L)
- Covenant Community Church, Inc. v. Gates Zoning Bd. of Appeals*, 444 N.Y.S.2d 415 (Sup. Ct 1981) (G) (L)
- Duallo Realty Corp. v. Silver*, 224 N.Y.S. 2d 55 (Sup. Ct. 1965) (Temple Emanuel) (G) (A)
- Holy Sepulchre Cemetary v. City of Greece*, 191 Misc. 241 (N.Y. Sup. Ct. 1947) (D) (L)
- Neddermeyer v. Town of Ontario Planning Bd.*, 548 N.Y.S. 2d 951 (App. Div. 1989) (The Healing Church) (G) (L)
- Unification of World Christianity v. Rosenfeld*, 458 N.Y.S. 2d 920 (App. Div. 1983) (Holy Spirit Ass'n) (D) (L)
- Independent Church Realization of Word of God, Inc. v. Board of Zoning Appeals*, 437 N.Y.S. 2d 443 (App. Div. 1981) (D) (L)
- State ex rel. Anshe Chesed Congregation v. Bruggemeir*, 115 N.E. 2d 65 (Ohio Ct. App. 1953) (Anshe Chesed Congregation) (G) (L)
- Damascus Community Church v. Clackamus County*, 610 P. 2d 273 (Or. Ct. App. 1980) (D) (A)
- Christian Retreat Ctr. v. Board of County Comm'rs*, 560 P. 2d 1100 (Or. Ct. App. 1977) (D) (A)
- Church of Savior v. Zoning Hearing Bd.*, 568 A.2d 1336 (Pa. Commw. Ct. 1989) (G) (L)
- Conversion Center, Inc. v. Zoning Board of Adjustment*, 278 A.2d 369 (Pa. Commw. Ct. 1971) (G) (L)
- City of Rapid City v. Kahler*, 334 N.W.2d 510 (S.D. 1983) (Conerston Rescue Mission) (G) (L)
- Fountain Gate Ministries, Inc. v. City of Plano*, 654 S.W.2d 841 (Tex. Ct. App. 1983) (D) (A)
- First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (G) (L)

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

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

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ORDER

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

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

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

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

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

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

Findings of Fact

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

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

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

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

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

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

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

Comprehensive Plan.

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

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

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

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

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

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

objective and subjective standards.

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

Conclusions of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

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

It is so ORDERED.



CHANCELLOR

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

Mr. CANADY. Thank you, Mr. Keetch.

Mr. Scott, you're recognized.

Mr. SCOTT. Thank you, Mr. Chairman. I'd like to ask Mr. McFarland, on the bankruptcy question, would your proposal differentiate regular, consistent contributions to the church differently than they would view a one-time large, recent contribution?

Mr. MCFARLAND. Well, a different subcommittee of the Judiciary Committee, obviously, is addressing with very specific legislation, but to answer your question with respect to the restoration of a strict scrutiny test, yes, in the sense that as prior to *Smith*, and after RFRA, a claimant must always prove that this is a sincerely held belief and practice and it would be rather difficult for someone to prove that the night before he filed bankruptcy he suddenly got religion and dumped \$30-grand on a church in which he had never darkened door until then. [Laughter.]

So, in the sense of, yes, the consistency of practice is the best evidence of sincerity of belief, and sincerity is a prerequisite for even getting to first base in a RFRA case.

Mr. SCOTT. And another question, on college religions practicing at public colleges, how do you differentiate, how do protect other civil rights, that is, people attending a public college have the right to join organizations, would you allow those organizations to discriminate based on race or religion?

Mr. MCFARLAND. On race, absolutely not. It's very clear from Supreme Court precedent and elsewhere, not to mention Congressional legislation, that the government, Federal and State, have a compelling interest in eradicating racial discrimination both publicly and privately. But when it comes to religion, Congress' best evidence of what is the Government's interest is stated in Title VII in this area, as well as other civil rights laws, and that is that religious groups have a compelling interest in being able to continue, at least with respect to their leadership in having religious prerequisites for their leaders. It's—

Mr. SCOTT. Well, let me ask you about a Christian chess club that doesn't allow Jews to join.

Mr. MCFARLAND. Well, I'm certainly not aware of any such instance, but for the sake of the hypothetical, I would imagine that if a, in this case, Christian group could show that it is a sincerely held religious belief that they can't have anybody but Christians playing chess, it borders on absurd, but I'm trying to be consistent with principle, that I don't believe that government has a compelling interest in steam rolling the associational choices of private religious groups. When it comes to religion—

Mr. SCOTT. So you would allow such an organization to be on campus?

Mr. MCFARLAND. I think they should, as distasteful as that would be. To do otherwise would be to teach the wrong civics lesson in the public forum.

Mr. SCOTT. And receive funding?

Mr. MCFARLAND. Not funding unless all other student groups— unless this is a fund, for example, student body funds to which they contribute and to which other groups have access. Equal access is what we're talking about.

Mr. SCOTT. Let me ask, maybe Mr. Keetch. You mentioned the ability of the localities to essentially zone churches out of the city. Can dispersal requirements for churches accomplish this goal of zoning churches out of the city?

Mr. KEETCH. Dispersal requirements specifically?

Mr. SCOTT. Requiring churches be separated by reasonable dispersal—

Mr. KEETCH. Yes I see, dispersing them out throughout the community. Well, I suppose that depends on the particular community and, make no mistake, cities should have the power along with churches to make a determination about areas of the city where it may not be in the best keeping of the city to have a church in that particular part—

Mr. SCOTT. You mention the adult bookstores. How are they taken care of? How are they gotten rid of?

Mr. KEETCH. In the city?

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 4 additional minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. KEETCH. There's not been an adult bookstore within the city of Forest Hills, but they have commercial development within that city. They have limited commercial development to one specific area of the city, and I suppose that's where the adult bookstore would go.

If the question is, could they do something similar to churches, I think that perhaps not by design, but practically they have. Indeed, all the churches in the city are located in the same area, and that is where the parcel was where the LDS church attempted to build their temple.

I'm not sure if I've answered the Congressman's questions or not. Have I?

Mr. SCOTT. In one area they had a dispersal requirement that was so broad that essentially they just got rid of all the adult bookstores. They could do the same thing to churches.

Mr. KEETCH. I suppose that a city could attempt to do that under the generally applicable rules of *Smith* and could thereby create the same problem that we faced. The city didn't even attempt to do that here, it just said, in a much more stark response, we're simply not going to allow you anywhere within the city.

Mr. SCOTT. Mr. Jaroslawicz, you had mentioned a lot of situations in prison. One of the complaints we hear is that prisoners dream up religions in order to get special treatment. How would you differentiate? What standards would you use to differentiate legitimate religions—if you can ever suggest that one religion is legitimate and one isn't—and reasonable, legitimate religious practices?

Mr. JAROSLAWICZ. Certainly courts have grappled with this now for many years. The *Africa* decision and some other decisions have come up with tests of religious beliefs and motivations and, I have to admit that in some ways it's a problem. A lot of administrators have dealt with it, and courts have also dealt with it: Does this religion exist outside of the prison system? And are there also burdens, as well as benefits, to this religion? What are the belief structures of the religion?

One of the functions that Aleph provides with respect to the Jewish religion is that many States recognize and call us not only to learn and understand what is required, but also to differentiate what is not required. An inmate comes in claiming to be an observant Jew, an Orthodox Jew, and sometimes—there are manipulators in all groups—says, now it's Chanukah, I need steak for four nights. And we will tell them that under the doctrines and understandings of what we know of observant Orthodox Judaism, that is not a religious requirement.

But certainly that is a concern, but it's a concern that the courts have grappled with and, together with the tests of sincerely held beliefs as well as whether or not this is a substantial burden on the proposed religion, courts have managed to deal with it very well under RFRA. That was really not a big problem under RFRA.

The State of Texas, if I may, very quickly, said, in terms of this litigation question, that their attorney general had 26,000 cases of litigation, generally, that it was handling of which only 60 cases were RFRA related. So the concerns that a lot of State attorneys general come up with: Oh, we're being flooded with litigation. It's specious.

Mr. SCOTT. If I can get in one more question. Mr. Fisher, did I understand you to suggest that State RFRA's would be constitutional?

Mr. FISHER. I didn't actually address that.

Mr. SCOTT. Do you want to address it? [Laughter.]

Mr. FISHER. Would State RFRA's be constitutional?

Mr. CANADY. Without objection, the gentleman will have 1 additional minute.

Mr. FISHER. Well my answer is short: Yes. [Laughter.]

If any can be passed.

Mr. CANADY. The gentleman from New York, Mr. Nadler, is recognized for 5 minutes, and probably a little more. [Laughter.]

Mr. NADLER. Thank you, Mr. Chairman. You know me well.

First of all, Mr. Chairman, I ask unanimous consent to insert an opening statement in the record which I wasn't here for.

Mr. CANADY. Without objection.

Mr. NADLER. And I also want to extend a special welcome to Marc Stern who I've know for many years, and who comes from my home borough, or at least works in my home borough of Manhattan.

Let me ask Mr. Stern, Marc, I recently received a letter, a "dear colleague" letter from the gentleman from South Carolina describing a zoning case in California—we've heard about that case today, in fact—in which Rabbi Chaim Rubin of Congregation Hahiam, encountered problems with local zoning because his congregation met in a private home. His letter included a story about another case of a minister in Greenville, South Carolina, who had encountered similar difficulties. And we've heard of other zoning problems this morning.

The gentleman from South Carolina, in citing these cases, urged our colleagues that these cases showed the need for a constitutional amendment proposed H.J.Res. 78, introduced by Representative Istook, and commonly called the Religious Freedom Amendment. As one of the authors of RFRA, do you believe, or in what way do

you believe, this proposed constitutional amendment would affect the rights of religious minorities like Rabbi Rubin, would affect the zoning cases, would it provide a remedy to these problems as the gentleman urges?

Mr. STERN. I don't think so. The most that can be said about the proposed constitutional amendment is that it would require that those meetings be treated equally with everything else. And the problem is precisely, in many of these cases, that zoning officials are in fact acting neutrally in enforcing zoning laws equally as to all sorts of organized activity. The difficulty, of course, is that some forms of congregant activity, many forms of congregant activity, enjoy special protection, either under the Constitution or because our society deems them valuable.

The equality notion that's the core of that part of the proposed amendment—the part that doesn't deal with school prayer—doesn't solve the problem. In fact, what you've heard this morning is that equal treatment is indeed precisely the problem with all neutral laws of general applicability. That part of the so-called Istook amendment that talks about equality makes equality the centerpiece of our religious liberty doctrine doesn't help and indeed, in many ways, it compounds the problem that we face.

I must tell you that—

Mr. NADLER. Well, why do you think it compounds the problem?

Mr. STERN. It compounds the problem because to the extent that equality becomes the centerpiece in the way that society and courts and government think about religion, it enhances the arguments of those who would apply neutral zoning ordinances to churches, equally with everybody else. So that the case in Forest Hills, Tennessee, is a sort of notion of equality. The notion that if a church is engaged in a feeding program and the State decides that's not a ministry but that's a social service, and we're going to treat all social service programs equally, well, then that's fine.

If you have as is true in many suburban communities in my part of the country, where there's no free land, so you're always talking about building in residential areas if you're beginning with a new church. If the community, as many communities do, permit only residential development, not congregant or commercial development; that's equal treatment, but churches are out.

Until recently it was my experience that when you come to legislative bodies, there was a notion that somehow religion was special. We tiptoe around with dealing with churches when regulating religion.

That's gone. *Smith* changed that environment. I think that if you make, as the proposed constitutional amendment does, if you make equality the centerpiece, you reinforce the notion that you don't have to treat religion specially anymore. On the contrary, it's bad to treat religion specially; treat religion as everything else. That's going to make the problem, again, not only at the level of decided cases, but on the ground where I negotiate for religious institutions, it's going to make it much worse.

Mr. NADLER. Thank you. Let me ask, is there anybody on the panel who would have a contrary view on the question I asked? Who thinks that the Istook amendment would help the situation of

churches and synagogues in zoning questions? Everybody agrees with what he just said?

Mr. MCFARLAND. We can never add to Mr. Stern's— [Laughter.]

Mr. NADLER. Thank you very much.

Mr. JAROSLAWICZ. Certainly not disagree.

Mr. NADLER. What?

Mr. JAROSLAWICZ. And certainly not disagree.

Mr. NADLER. Okay. Thank you. Let me ask Mr. Jaroslawicz—

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 4 additional minutes.

Mr. NADLER. Thank you. My office has found in working with the Bureau of Prisons, that in some instances the Bureau will tell my staff that an inmate is receiving kosher food while the inmate's family complains that such food is not available. Often it appears that the dispute results from a difference of opinion between the Bureau and the inmate as to what constitutes kosher and some warden has decided that he is going to make Jewish religious decisions as to whether it's kosher or not.

How much of a problem have you encountered with Bureau of Prisons' personnel who think that their religious authorities in Jewish law or in Muslim law in Hallel, and who, in fact, can't distinguish between a prison guard and a mashgiach?

Mr. JAROSLAWICZ. I would have to say, we just had a meeting with the Federal Bureau this week addressing precisely that issue. The policy statements of the Federal Bureau of Prisons provide that all foods on the common fare line, which is the alternative food line for any religious diets, Jews, Hallel, Muslims, even vegetarians, do maintain the certification of those most commonly accepted within the Jewish community. There are problems at individual institutions.

Again, the issue is not so much what the Bureau policy is, or food service policy is, but as to how it is being translated through the system.

The answer we got from them this week was, well, you let us know the individual and the individual institution that has the problem and we will certainly work hard to resolve it. My answer is fine. This week we are planning to send out a survey to all 1,500 Jewish inmates that we know in the Federal system, saying, please give us information about the food service program at your individual institution. And we will then present to the Bureau each individual item and institution and exactly what the problems are. Whether there are foods on the line that should not be there, whether the serving utensils are not plastic, and deal with it there.

But they, at least in policy, in the few cases we've presented to them, they have worked to resolve them.

Mr. NADLER. Thank you. Mr. McFarland, you testified eloquently to some of the problems and you suggested that we should enact legislation that would ensure equal access with respect to any public assembly, if any public assembly is allowed, that you've got to allow a church on equal terms.

You suggested that we enact legislation that churches must be permitted somewhere as a right within a jurisdiction, and certainly that would go a long way, all though it wouldn't satisfy problems

when people have to walk to the church and the synagogue, and so forth.

And thirdly, you suggested that we should enact legislation mandating that there be a higher standard of review triggered when the religion's burden is more than negligible.

And I think most of us here would agree with all of these things. And, of course, that was the point of RFRA. My question to you is, after the *Boerne* decision—and then I think that's one of the points of this series of hearings—after the *Boerne* decision, what authority does Congress have to enact any of this legislation? And how would we base it?

Mr. MCFARLAND. Well, that's an extensive question and I trust it'll be the subject of another hearing. And I do not purport to be an expert on the Commerce Clause.

But it would be, to answer your question directly, I think Congress does have authority to regulate interstate commerce, it has authority to regulate its spending, and, after *Boerne*, under the 14th amendment, section 5, it would be able to specifically address problems that after extensive fact-finding, such as we have here, address issues like land use, in a specific way.

Mr. NADLER. Thank you. I have no further questions.

Mr. CANADY. Thank you. Mr. Keetch, I want to go back—I recognize myself for 5 minutes, probably a little longer— [Laughter.]

I want to go back to Mr. Keetch, and the point you made about restrictions on proselytizing that you've encountered. Would you elaborate on that a little bit and explain the nature of the restrictions and the extent to which those are being encountered, do you see that as a growing problem?

Mr. KEETCH. It is a growing problem for us, most definitely, Mr. Chairman. In my written testimony I think I list no fewer than a dozen communities which we've dealt with since the start of the year that have passed new, generally applicable and neutral standards having to do with proselytizing in a community.

To pull just a couple of provisions out of those, some of which I view to be the more outrageous ones, there's a particular community in Illinois, cited in my written testimony, that will only allow one group in to door-to-door contact per week. And they actually schedule the weeks out during the year, and so the Fuller Brush man gets the first week of February and the LDS missionaries can sign up for the second week of February. With a generally applicable ordinance, applicable to both commercial and religious sides, a free exercise challenge is very difficult.

We also have seen a number of time proselytizing restrictions that are generally applicable, which provide that no one may go door-to-door except between the hours of 10:00 a.m. to 3:00 p.m., totally leaving evening—

Mr. CANADY. When nobody is at home.

Mr. KEETCH. That's right. And excluding Saturdays, Sundays, and holidays.

All of those laws under *Smith* are very difficult to challenge because they apply across the board to everyone who wants to do door-to-door contacting.

Mr. CANADY. Don't we get into First Amendment issues with those—

Mr. KEETCH. There is some question, and naturally if we were to litigate those—and it looks like we are going to have to litigate some—we will be able to use Justice Scalia's hybrid language to claim that there is not only a right to free exercise, there is a right to free speech as well. It remains to be seen, I think, what the Court will do with its hybrid exception that it articulates in *Smith* and exactly how far it's willing to go in providing protections in those areas.

Mr. CANADY. Is there any pending litigation, with respect to any of these restrictions, that you're aware of?

Mr. KEETCH. There is not from our side, but if you were to ask me that question in another month, there may well be.

Mr. CANADY. Okay. Is anybody else aware of any pending litigation on similar restrictions? Okay.

That's very troubling information you provided, and I think that's something that we need to focus on.

Let me turn to Mr. Stern. Mr. Stern, it seems that the more a religious practice involves some deviation from common secular activity, such as in the case of religious dietary or garment laws, the more that practice is vulnerable to violation or infringement under generally applicable laws. Would you agree with that statement and could you elaborate on your experience in support of that?

Mr. STERN. Sure, neutrality is often in the eyes of the beholder. It's one of the great difficulties with Justice Scalia's opinion. Take the case I talked about with the rule of the league, that nobody could wear a yarmulke and play ball. Or prisons, I just got a letter yesterday from California about head coverings. You know, we set our rules without regard to anybody's religious beliefs and by coincidence that neutral rule happens to be a rule that doesn't permit the wearing of head coverings in prison.

Now, if I were warden of a prison, I would not regard that as a neutral rule. I'd have a different neutral rule. If Dean were running a woman's prison in a Muslim country, the neutral rule would not be that women inmates go with their heads uncovered. So that neutrality itself assumes some starting point which may not be neutral.

It is clearly the case, the case with the public schools. What's acceptable dress is acceptable for most people. When the antireligious garb ordinances or statutes were passed in Pennsylvania, they weren't neutral at all. They were aimed by the nativist groups against Catholic nuns—

Mr. CANADY. Without objection, I'll have 4 more minutes. Please proceed.

Mr. STERN. So that there's no question that neutrality assumes a baseline that excludes those who simply have a different point of view, who have the point of view not because they're opposed to your neutral standard but because they just have a different starting point.

So, I think the answer to your question is very clearly, yes. Some of the times, the neutrality is simply the result of ignorance, sometimes, in the case of the dress codes and some of the things that happen in prisons, it's facial neutrality but not real neutrality. I can tell you from my own experience, and I think someone else said

it on the panel earlier, proving a malevolent purpose to an a-facie neutral law, is an incredibly burdensome task.

The Supreme Court, right after *Smith*, in fact, found a law not neutral after a very able district judge and three very able circuit judges found it neutral. I tell you that because I advised Doug Laycock not to take that case to the Supreme Court, and that there was no way that he would be able to persuade the Court that it was not neutral. Now of course, I predicted a unanimous Court about which I was right. Of course I was wrong about which way it would be unanimous. [Laughter.]

But the fact is, I mean, I don't think I'm that bad a lawyer, if I have trouble believing that a case that I'm behind the sympathetic to, you're not going to persuade about the bias law, I think that's fairly illustrative of the difficulties that my colleagues all would face when we try to bring those facts out in court.

Mr. CANADY. Dr. Ahmad, would you like to comment?

Mr. AHMAD. Yes, I wanted to emphasize and illustrate this point that Mr. Stern made, that neutrality can often be not neutrality. There are many jurisdictions today that still have Sunday closing laws. If you were to apply the Sunday closing laws neutrally to churches as well as to other enterprises, that would certainly be neutral. But it would also be not neutral. And though this is a ridiculous example, in the case of churches, I can assure your that religions that are not as well known or understood suffer this kind of problem all the time.

Mr. CANADY. That's a very interesting example. I want to thank all of you—Mr. Scott.

Mr. SCOTT. I'd like to follow up on one question I asked—

Mr. CANADY. Mr. Scott is recognized.

Mr. SCOTT. This is a fact finding, and I mentioned a Christian chess club, and the answer suggested that you could have such a thing and funded as a student organization, and I just wanted to know if any of the other witnesses had differing views on whether or not a chess club could discriminate on the basis of religion and whether or not we would want to tolerate that.

Mr. STERN. Could I try my hand at that? The obvious reason why Mr. McFarland's friends would want such a club is they couldn't stand the competition. [Laughter.]

But let me and try and say how, if I were stuck with the unfortunate problem of being the judge in a case like that, how the second look approach that I outlined would work. In fact, the chess club case has not come up, but the student club that wanted to choose its own officers and insist that they be Christians has come up. So have, not necessarily in public universities, so has the question whether Steve can recruit attorneys at Yale Law School, which RFRA wouldn't apply, but you can easily apply it to a public university and his group was denied access to recruiting because they insist on hiring Christian attorneys.

Now, I'm not much interested in working for Steve, and I'm not offended by the Christian Legal Society saying they only want hire Christian attorneys. I'm frankly not anxious to run for president of the local Christian club that meets in the school, nor do I think that the Christian club ought to be forced to have me as an officer when I'm pretty clearly not faithful to their principles.

Now the chess club presents a different question, and I think under second look test, you might end up with a different result if the school made the proper showing between a religious club and a chess club. If the main purpose of the organization is to strengthen people's religious commitments, which is the case of most of the equal access religious clubs, I don't think the State has a compelling interest in telling a Christian club they've got to have a Jewish officer. It's hard to see what the compelling interest is there.

On the other hand, if the question is larger extracurricular activities and the fragmentation of the student body along sectarian or racial or sexual lines in ways that school officials can plausibly demonstrate would create real difficulties for them, then I think under the compelling interest and least restrictive means test, they might well win.

But what I would not do is to say that anything that falls under a civil rights law is not subject to the RFRA second look analysis because I can actually point to real cases where those laws have been invoked in ways that I think most of us would think ridiculous.

I think it was a Catholic printer in Vermont, for example, was sued under a public accommodation law, a civil rights law, because he refused to print pro-choice literature. Now, my organization is on the pro-choice side of the ledger, but we don't think that there's any great need to force a pro-life printer to be printing pro-choice pamphlets even though there's a plausible civil rights claim.

The advantage of the second look approach that RFRA endorses is that it allows the court to sort out those cases. Race might well be different than sexual orientation or sex or national origin or religion. And it might make a difference if a landlord was renting his or her basement apartment and whether they were renting 4 apartments, 40 or 40,000 apartments.

I can't predict how those cases will come out. Steve and I would probably end up on different sides of a lot of these cases on the merits of whether there's a compelling interest and least restrictive means, but the analysis works very well. And it did when *Sherbert* and *Yoder* were the law, there was no grand loophole in the civil rights laws, when the test was the same as it was under RFRA.

I think the test works well. We will disagree sometimes about results, but the test, as a whole, works well. And if you exclude the civil rights laws all together from the scope of RFRA, you end up with ridiculous cases, as the printer who is forced to print things which are religiously anathema to him when there are 400 other printers down the block.

Mr. MCFARLAND. Congressman, I just want to make sure the record is clear that the hypothetical that I understood you to ask me the first time was a Christian chess club. I thoroughly agree with everything that Mr. Stern has just said. If it's just a chess club that has a problem with letting someone else of a different faith or, let alone race, that's a whole different kettle of fish—

Mr. CANADY. Or if it were designated a Christian chess club as a pretext for excluding other folks.

Mr. MCFARLAND. Sincerity is always a threshold.

Mr. STERN. In fact, that ought to be in the language of any bill you pass: a sincerely held religious belief. From a funding issue,

which I think you mentioned one time, is a very different issue. And I don't think either Mr. McFarland or I was addressing that. That's a very different problem.

Mr. CANADY. Mr. Jaroslawicz?

Mr. JAROSLAWICZ. If I may—

Mr. CANADY. Without objection, we'll have some additional time here.

Mr. JAROSLAWICZ. Just on the same hypothetical, as I understood the hypothetical, it was not just a Christian chess club but that the playing of chess was a religious function of that group, and that it was not just a conglomeration of people who happened to be of one faith playing chess. And maybe I'm missing something there, but I thought that was really the hypothetical in the sense of chess playing somehow was a "religious" practice in this hypothetical, because I would think that this is central to any issue here of religious freedom is to further the individual practice of a religion. There has to be a religious practice here, and not just a group of people from a particular religion engaging in some other activity.

Mr. SCOTT. I think the pretext example that the chairman mentioned, if it's just a bunch that gets together and just decide that they don't like a particular religion, and declare themselves to be a Christian club so that they would have to accept those of a Jewish faith, then you get into the sincerity test.

Mr. JAROSLAWICZ. Right, but I'm saying that even in that case, they may all happen to be Christian and therefore it's not pre-textual, but if playing chess is not a religious "practice" performed by that group, then I think the hypothetical doesn't apply in a RFRA situation.

Mr. AHMAD. The important—

Mr. CANADY. Dr. Ahmad.

Mr. AHMAD. The important issue is whether there is a substantial burden on the religious practice. I don't think the Christian would claim that the playing chess with non-Christians would constitute a burden on his freedom of religion, but if you want to create a hypothetical where someone has some burden on their religious practice—for example, I think in the Muslim area, if a Muslim female athletes were forced to allow male athletes in certain level of dishabille, participating appropriate to certain athletics, they would not be in favor of inter-gender sports. Conversely, possibly, someone may say if one is involved in a prayer service, to have someone outside their religious group participating in the prayer service would take away from the religious qualities, then one might be able to make an argument that it's a burden on religion. I don't see how one can say the playing the of chess has a religious burden involved with it.

Mr. STERN. It's because he's not a chess fanatic. [Laughter.]

Mr. CANADY. Mr. Nadler is recognized.

Mr. NADLER. Thank you. I just had a very quick question for Mr. Von Keetch. Mr. Von Keetch, in that community in Illinois that was scheduling door-to-door solicitation and proselytization, one group for this week, one group for that week, serious First Amendment question: Who got the week before the election, the Democrats or the Republicans? [Laughter.]

Mr. CANADY. I think that depended on who controlled the local government, I'm sure. [Laughter.]

Thank you for that question.

And, again, I want to thank all of you for participating in the hearing today. I want to thank Mr. Scott and Mr. Nadler for their contribution, as well. We will look forward to continuing to work with you and other interested parties in dealing with the issues that have been highlighted today. I think that there is a compelling need for Congress to address these issues and move forward with legislation as soon as possible.

Thank you very much. The subcommittee stands adjourned.

[Whereupon, at 11:30 p.m., the subcommittee adjourned subject to the call of the Chair.]