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NATIONAL JOURNAL'S
CongressDaily/A.M.

MONDAY, FEBRUARY 9, 1998

House Republicans Off To Williamsburg To Plot Strategy

Competing budget interests are likely to dominate the battle for the hearts and minds of House Republicans this week, as the House GOP Conference heads to a retreat in Williamsburg, Va., to plot a legislative strategy for the remainder of the 105th Congress.

OUTLOOK

Tight-fisted budget hawks, tax cut proponents, transportation advocates and members representing a myriad of spending views are likely to be vying for dominance amidst Williamsburg's colonial facades. In recent weeks when Republicans have been asked about the divergent budget interests under the GOP tent, they have constantly said, "That's on the agenda for Williamsburg."

Republicans are expected to discuss such issues as whether to try to balance the federal budget this year by passing a rescissions package or simply wait until FY99. In addition, advocates for strictly enforcing spending caps — including **House Budget Chairman Kasich** and **GOP Conference Chairman John Boehner** of Ohio — are expected to appeal to colleagues to resist attempts by **House Transportation and Infrastructure Chairman Shuster** to drastically boost highway spending. Members are leaving today for Williamsburg from the Rayburn House Office Building at 1:30 p.m. House Democrats also are on retreat this week, gathering in Wintergreen, Va., today and Tuesday.

With members out of town for a chunk of the week, the House has a limited floor schedule, while the Senate today dives into potentially emotional debates over human cloning and David Satcher's nomination to become surgeon general and HHS assistant secretary for health. On the cloning issue, the House Commerce Health and Environment Subcommittee has a Thursday hearing planned. The panel will receive basic information on the subject rather than focus on legislative pro-

Continued on Page 3

SCHEDULE

SENATE

Convenes at 11 a.m. to consider the nomination of David Satcher as surgeon general, and legislation to ban human cloning.

HOUSE

Not in session.

SENATE COMMITTEES

None.

HOUSE COMMITTEES

None.

TUESDAY

SENATE

Not available.

Continued on Page 8

Focus Of Labor Probe Questioned

House Education and the Workforce Oversight and Investigations Subcommittee Chairman Peter Hoekstra, R-Mich., took to the House floor last week to defend his million-dollar American Worker Project, which is examining the merits of current labor law in the changing economy. As part of that project, Hoekstra has toured a variety of businesses around the country and held a series of roundtable discussions with private citizens. But in interviews last week with *CongressDaily*, participants in these sessions said the meetings rarely produce anything of substance and often seem to lack focus. And while they are conducted at taxpayer expense, the discussions are off the record and are not open to the public.

LABOR

Few worker representatives have participated in the meetings, which ostensibly concern their own workplaces. And some events in Texas were organized by Citizens for a Sound Economy, a conservative think tank funded by corporations lobbying for less-restrictive labor laws. Despite the concerns of some House Republicans that the worker project lacks focus and goals, the House Oversight Committee last week gave Hoekstra three-quarters of a million dollars in additional funds to investigate the recently overturned Teamsters election and that union's campaign contribution connections to the Democratic Party. While the Teamsters investigation and the American Worker Project are supposedly separate, GOP aides say the two are closely intertwined, including their funding sources. Hoekstra's subcommittee was given $1.4 million in FY98 for the American Worker Project, from

Continued on Page 5

Religious Liberties Act

THE WHITE HOUSE

WASHINGTON

From the Office of:

The Domestic Policy Council

Elena Kagan
Deputy Assistant to the President
for Domestic Policy

TO: Tom

FAX: 67431

PHONE:

PAGES: 2

MESSAGE:

Please call (202) 456-5584 if there are any problems with the transmission.

consular offices because of the presumption that they will remain in the U.S. illegally when their visas expire. The DPC will follow up with the State Department to determine whether or not any department policy directives exist regarding this matter.

- **The First Lady Delivered Keynote Address to the National Council of La Raza (NCLR):** NCLR was honored and delighted to have the First Lady deliver the keynote address to their conference participants this week. She was very well received by the conference participants.

RELIGIOUS OUTREACH

Tom – What is this? Elena

- **Religious Liberties Protection Act:** Bill Marshall in Counsel's office has worked successfully with the Justice Department to craft compromise language that is also satisfactory to the coalition working on this bill. The language has been sent to Rep. Charles Canady, who is expected to include it in his bill. While local governments may question the zoning exemptions, we do not anticipate any other issues at this time.

WOMEN'S OFFICE OUTREACH

- **At the Table:** The Women's Office hosted an At the Table event with Kellogg Foundation Fellows on June 24. The event, which featured Lynn Cutler and Stacie Spector, was a great success, and we anticipate that this program will move ahead fully after Labor Day.

(202)225-6760 phone (202)226-0938 fax   www.house.gov/democrats

Floor Update

Democratic Policy Committee

Richard A. Gephardt
U.S. House Democratic Leader

July 14, 1999

H.R. 1691, "Religious Liberty Protection Act"

Today, the House will consider H.R. 1691, "the Religious Liberty Protection Act," a bill to protect religious activities and practices by prohibiting government from placing "substantial burdens" on a person's religious exercise under the First Amendment. H.R. 1691 was introduced in response to a 1997 Supreme Court ruling, *City of Boerne v. Flores*, that partially overturned the Religious Freedom Restoration Act (RFRA) which was enacted in 1993 to strengthen protections under the Free Exercise Clause of the First Amendment. Although H.R. 1691 passed the Judiciary Committee by voice vote with a majority of Judiciary Committee Democrats opposing, the legislation has 39 Democratic cosponsors.

Proponents of H.R. 1691 argue that the legislation is necessary because, in the wake of Supreme Court decisions, religious groups in general and religious minorities in particular are no longer guaranteed the religious liberty protections of the Constitution and are more vulnerable to the danger of governmental restrictions on religious freedom. They cite as an example of such a restriction a recent court decision in Los Angeles that declined to protect the rights of fifty elderly Jews to meet for prayer in the Hancock Park area because the Park had no place to worship and the City did not want to create a precedent for one.

Opponents of the legislation argue that H.R. 1691 is well-intentioned but would cause far more harm than good by invalidating many state and local civil rights laws that protect the disabled, gays and lesbians, single parents, minorities and women. They argue that this could occur because H.R. 1619 would allow select defendants to raise a "religious liberty defense" whenever a party brings suit claiming discrimination. In effect, the defendant would be able to claim that any state anti-discrimination law is inconsistent with their religious beliefs.

Rep. Nadler will offer a substitute to H.R. 1691 that would amend the legislation to allow only individuals, small landlords, religious institutions and small businesses to raise the religious liberty defense under the act. The Nadler substitute seeks to address the civil rights concerns raised by offering compromise language that is similar to longstanding accommodations in existing civil rights laws such as Title VII of the Civil Rights Act and the Fair Housing Act. The Nadler substitute mirrors the Texas Religious Freedom Restoration Act (Texas RFRA) recently signed into law by Gov. George W. Bush which provides similar protections to the federal RFRA but does not weaken existing Texas civil rights laws.

Democrats are urged to vote YES on the Nadler substitute.

Donnelly, Carolyn

From: Heimov, Brett
Sent: Tuesday, July 13, 1999 8:47 PM
To: Dear Colleague
Subject: H.R. 1691 Dear Colleague -- re:Nadler Substitute on RLPA

SUPPORT THE CIVIL RIGHTS SUBSTITUTE TO THE RELIGIOUS LIBERTIES PROTECTION ACT

July 14, 1999

Dear Colleague:

When the Religious Liberties Protection Act (RLPA) is considered by the House this week, an amendment in the nature of a substitute will be offered to ensure that this important legislation, while providing a shield for the free exercise of religious rights of all Americans, cannot be used as a sword against civil rights protected by state and local laws.

As reported by the Judiciary Committee, RLPA would allow even the very largest corporations and retail chains to claim a religious exemption from civil rights laws at the state and local level. But, of course, corporations do not have religious convictions, and do not need protection of their religious liberty. To allow corporations to seek exemptions from civil rights laws in the name of religious liberty would be to sacrifice unnecessarily the rights of some Americans as we work to restore the rights of others.

The substitute would permit an individual, small landlord, small business or religious institution to raise a religious liberty defense to any law, including a civil rights statute. This is similar to the exemptions in many local civil rights laws and the federal Fair Housing Act and the Civil Rights Act of 1964. The substitute would not allow large corporations to seek broad carve-outs from civil rights laws using RLPA.

We believe this substitute, <u>which contains all the religious protections of RLPA, but does not threaten hard-won civil rights protections</u>, is fair and balanced. We urge you to support it.

In the event this substitute is not adopted, we have reluctantly concluded that we must urge you to vote against final passage of the bill, so that we can join together to work for a perfected RLPA.

If you have any questions please contact Brett Heimov in Mr. Nadler's office at x5-5635

Sincerely,

Jerrold Nadler Member of Congress	Ellen Tauscher Member of Congress	Barney Frank Member of Congress
Christopher Shays Member of Congress	Howard Berman Member of Congress	Patrick Kennedy Member of Congress
William Delahunt Member of Congress	Sheila Jackson-Lee Member of Congress	

Donnelly, Carolyn

From: Burton, Dawn
Sent: Tuesday, July 13, 1999 6:16 PM
To: Dear Colleague
Subject: dear colleague; Judiciary, H.R. 1691 "Religious Liberty Protection Act"

U.S. House of Representatives
Committee on the Judiciary

July 13, 1999

VOTE NO ON H.R. 1691

DON'T LET "RELIGIOUS LIBERTY" BE USED AS A SWORD TO UNDERMINE OUR CIVIL RIGHTS

Dear Colleague:

When H.R. 1691, the so-called "Religious Liberty Protection Act" (RLPA), comes to the floor on Wednesday, I urge you to vote against final passage.

Although the bill is well intentioned, it will cause far more harm than good, particularly in the area of civil rights. This is because under the bill, whenever a party brings suit claiming discrimination, select defendants will be able to raise a novel "religious liberty defense." In essence, the defendant will be able to claim that any state anti-discrimination law -- whether it protects minorities, women, persons with disabilities, single parents, or gays and lesbians -- is inconsistent with their religious beliefs.

The bill is so sweeping that this new defense will apply not only to religious institutions, but to large private businesses. The only exceptions to the bill's scope is where the anti-discrimination law is found by a court to be both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest" - the most difficult possible obstacles for a law to pass.

This is a particular problem with regard to laws prohibiting discrimination based on marital status, disability, or sexual orientation, because these laws have not been found by the courts to meet the "compelling interest" test. This means that under RLPA, businesses will be free to discriminate against gay and lesbian employees, and large landlords will be able to legally justify their refusal to rent to single parents or gays and lesbians.

I am also concerned about the bill's impact on the civil rights of African-Americans, Hispanics, and women. Although the courts have generally found anti-discrimination laws protecting these individuals as serving a "compelling governmental interest," the bill would create a myriad of new legal and factual issues concerning the degree of each law's governmental interest which would need to be relitigated by civil rights plaintiffs on a case-by-case basis - a very expensive legal proposition. Plaintiffs will also be forced to show that the anti-discrimination law is drafted in the least restrictive means possible, another highly expensive and difficult proposition. Given the current conservative makeup of so many state courts, I am deeply concerned that adoption of RLPA will represent a dangerous step backwards for civil rights.

I believe it is no answer to respond to these concerns by claiming that the bill merely restores the state of law that existed before 1990 - when the Supreme Court (in *Department of Employment Services v. Smith*) rejected the "compelling interest" test and held that the First Amendment did not infringe on the religious liberties of members of a Native American tribe who were illegally ingesting peyote. This is because even prior to 1990, the Court almost never struck down neutral state laws of general applicability on account of First Amendment concerns.

It is also incorrect to claim that RLPA merely restores the legal protections of the "Religious Freedom Restoration Act" (RFRA) which passed the House by voice vote in 1993, before being struck down by the Supreme Court. In an effort to remedy RFRA's constitutional defect, RLPA is based on Congress' interstate commerce and spending powers. This means that the bill is more likely to benefit larger organized religions conducting interstate business activities than smaller religions. Further, unlike the 1993 law, RLPA is so broadly drafted that it would invalidate laws which apply to so-called "optional religious practices." This means, for example, that RLPA would invalidate a zoning scheme applicable to church activities which are not central to or compelled by their religion, even if the zoning law applied to prohibit the same activities (such as operating a soup kitchen or a drug treatment center) by secular charities.

Of no less critical concern is the fact that since the passage of RFRA, we have learned that certain groups are prepared to use religious liberty laws as a "sword" to thwart anti-discrimination laws. As a matter of fact, at our hearings, the Christian Legal Society acknowledged that they planned a widespread campaign to use RLPA to undermine state laws protecting gay and lesbian individuals. Given the advances that have been made in laws protecting against discrimination on account of sexual orientation since 1993, this factor alone justifies a no vote on RLPA, even if you supported RFRA in 1993.

At Subcommittee and Full Committee markup, Democrats tried to remedy the serious policy and constitutional concerns raised by the bill, but we were repeatedly spurned by the Majority. Although the drafters saw fit to exempt many forms of prison litigation from the bill's protections, they could not see their way clear to exempting civil rights, child welfare laws, environmental laws, or any other category of deserving parties.

I seriously question whether a federal law which is so antagonistic to civil rights holds the key to protecting religious liberty in this country. Our nation has more religion and a greater variety of religious expression than any nation on earth. We have done so by maintaining the delicate balance between the First Amendment's religious liberty clause and its establishment clause, as interpreted by an independent judiciary. It is doubtful the "Religious Liberty Protection Act" can improve on the scheme for protecting religious liberty designed by our founding fathers.

Sincerely,
/s/ John Conyers, Jr.
Ranking Member

THE WHITE HOUSE

WASHINGTON

July 12, 1999

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES ~~F.C. RUFF~~

SUBJECT: RELIGIOUS LIBERTY PROTECTION ACT

We seek your guidance regarding the position that the Administration should take on the Religious Liberty Protection Act (RLPA), which is expected to come to the House floor on Wednesday. In particular, the question is whether we should support an amendment to be offered by Congressman Nadler to exempt certain civil rights claims from the bill.

I. Background

You were a strong supporter of the Religious Freedom Restoration Act (RFRA) when it became law in 1993. RFRA provided that the federal, state and local governments must have a compelling interest when they seek to enforce any law against an individual that substantially burdens his or her religious beliefs. RFRA became necessary in 1990 when the Supreme Court, in Employment Division v. Smith, abandoned the compelling interest test in applying the Free Exercise Clause. There was broad bipartisan support for RFRA, and it was applauded by all members of the religious community. However, the Supreme Court struck down most portions of RFRA in City of Boerne v. Flores on the grounds that Congress was improperly attempting to enact its own interpretation of the Fourteenth Amendment. RLPA is an effort to re-enact RFRA in a constitutional form.

II. The Civil Rights Controversy

There was little controversy surrounding the passage of RFRA. Since its passage, however, there have been a number of cases involving conflicts between religious freedom and the civil rights laws. These cases have arisen under state constitutions or RFRA itself before it was struck down. For example, a number of courts have held that a landlord can assert a religious claim as a defense to a fair housing law that prohibits discrimination against unmarried couples.

While we cannot be certain how courts would rule if RLPA is enacted in its current form, a fair prediction is the following: 1) religious claims would not be a defense to state and local civil rights laws barring discrimination based on race or gender; the courts have recognized that these laws further a compelling interest; 2)courts would sometimes recognize religious claims as a defense to fair housing and fair employment laws that bar discrimination based on marital status, sexual orientation, and pregnancy; the courts are divided on whether these laws further a compelling interest; and 3) courts are less likely to recognize any defense if the employer or landlord is a large business; courts generally do not view restrictions on the actions of large businesses as a burden on religious freedom.

Gay and lesbian groups are particularly concerned about the possibility that RLPA could negate their limited success to date in persuading states and cities to ban discrimination based on sexual orientation in employment and housing. Their fear is reinforced by the express statements of some groups on the religious right who are seeking this very result. In fact, we can assume that some of these groups would use a newly enacted RLPA in a public campaign to limit the effectiveness of gay rights laws and ordinances.

The religious coalition argues that there should be no exception for any category of laws or individuals. At least some in the coalition feel deeply that small landlords and employers should be able to discriminate against gays, lesbians and unmarried persons. On the other hand, people in the civil rights community as well as some members of the religious community take the position that a person who has decided to engage in a business activity must be willing to accept some limitations on their freedom to choose with whom they will deal.

III. A Possible Resolution

This difficult conflict between religious liberty and civil rights claims is not easy to resolve. The religious coalition is somewhat split on the issue. More conservative members, such as the Christian Legal Society, are flatly opposed to an exception. Others, such as the Catholic Conference, are open to one. White House staff have met with groups on both sides to encourage them to find some kind of resolution. So far, the religious coalition has formally maintained a unified position in opposition to an exception.

The Texas legislature recently enacted its own RFRA, signed by Governor Bush, which exempted most civil rights claims. However, Texas has no laws protecting gay rights, and the exemption was less controversial.

Congressman Nadler, whose district includes many constituents on both sides of the issue, tried to reach a compromise in the House by proposing that the protections of the bill would be limited to small employers, in the case of employment claims, and small landlords, in the case of housing claims. His amendment was rejected by voice vote, but it was clear most Democrats supported it and the Republicans, led by Congressman Canady, opposed it. On the other hand, Senator Hatch, who will sponsor the Senate version of RLPA, has publicly encouraged the civil rights coalition and the religious coalition to find a way to resolve their differences. Senator Kennedy, who cosponsored the bill last year, has signaled that he will not support the bill without some resolution.

We remain hopeful that a compromise will be reached at some point. However, it is likely that a compromise, if one occurs at all, will happen in the Senate. Consequently, we may be faced with the question of whether to support Nadler's amendment on the House floor and whether to express support for the bill in the likely event that the Nadler amendment is defeated. As a practical matter, the Nadler amendment will change the result in only a few cases. It exempts large employers and landlords, but courts usually do not find there is a burden on religion in those situations. It could allow a small landlord or employer to discriminate, e.g., on the basis of sexual orientation, but state and local laws usually exempt very small businesses in any event. Nevertheless, the issue is important symbolically, and we can expect that some members of the religious right will portray the amendment as a choice between religious freedom and rights for gays and lesbians.

You and the religious groups opposed exceptions to the RFRA in 1993. For example, one of the few controversial issues at that time was an effort by Senator Reid to exempt prisoners from the bill's coverage. You and the religious coalition opposed Reid's amendment on the grounds that everyone should be entitled to protection of his or her religious liberty. White House staff in the past have also suggested that we would not support any exceptions. Consequently, the religious coalition is likely to view your support for a civil rights exception as abandoning your position. On the other hand, since the enactment of RFRA there have been a number of court cases that show there is a real threat to civil rights laws protecting gays and lesbians. These legal developments provide some justification for a change in your position.

IV. Options and Recommendations

Our options are the following:

1) oppose the Nadler amendment;

2) support the Nadler amendment, if it is made in order by the Rules Committee, but indicate support for the goals of the bill in the likely event that the Nadler amendment is defeated; we would also state that we want to work with all parties to ensure Senate passage;

3) remain silent on the Nadler amendment but express a desire to reach a compromise eventually to ensure passage;

4) support the Nadler amendment and leave open the possibility of a veto if no civil rights exception is eventually included in the bill.

DPC recommends that the Administration wait until after Rep. Nadler's amendment is made in order by the Rules Committee before making any statement. In the event that the amendment is made in order, DPC suggests that the Statement of Administration policy sent on the day of the vote include language such as the following: "The Administration supports the Religious Liberty Protection Act. In addition, the Administration also supports efforts to clarify civil rights protections and looks forward to working with Congress to resolve this important issue."

OPL's position is as follows: Two important constituencies within OPL are strongly divided on this issue. The religious coalition is as broad based as it is possible to get within that community and is united in opposition to a civil rights carve out. They have made it clear that they will view your support of a carve out as betrayal. Gay rights groups and the ACLU, however, equally strongly support a carve out which Rep. Nadler hopes to offer. Senator Hatch is already working on a compromise in the Senate. It is a battle that will be characterized as "religious rights" versus "gay rights." The best outcome at this point would be for the Nadler amendment or its equivalent to fail in the Rules Committee. Absent that, OPL would recommend supporting the bill, remaining silent on the amendment, and working for a compromise in the Senate.

Legislative Affairs recommends that we support the Nadler amendment if he gets to offer it. Otherwise, we should indicate in the SAP that we have some concerns about unintended consequences but that we expect them to be resolved before the legislation comes to the President.

White House Counsel recommends that we adopt Option 2: support the Nadler amendment if Rules permits it to be offered and work to secure a compromise in the Senate. Support for the amendment would rest on two grounds: 1) recent developments in the courts lead us to conclude that greater certainty about the impact of the bill on the civil rights laws is needed; and 2) resolving this issue will facilitate speedy passage in the Senate. Recognizing the strong feelings of the religious community, Counsel is more concerned that silence on the Nadler amendment will send a message that this Administration does not support the efforts of the gay and lesbian community to secure protection under the civil rights laws and will undermine those efforts in the states.

_____ Option 1: Oppose Nadler Amendment

_____ Option 2: Support Nadler Amendment; work for compromise in Senate

_____ Option 3: Remain silent on Nadler Amendment but express a desire to reach a compromise to assure passage

_____ Option 4: Support the Nadler amendment; leave open the possibility of a veto if there is no civil rights exception

_____ Option 5: Discuss further with staff before decision

House Subcommittee on the Constitution
Hearing on H.R. 1691
The Religious Liberty Protection Act of 1999
May 12, 1999

Testimony of Douglas Laycock
University of Texas Law School

Thank you for the opportunity to testify in support of H.R. 1691, the Religious Liberty Protection Act of 1998. This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

I have taught and written about the law of religious liberty, and also about a wide range of other constitutional issues, for more than twenty years. I have represented both religious organizations and secular civil liberties organizations, including important cases under the Religious Freedom Restoration Act.

Other witnesses have addressed the need for this bill, in this hearing and in earlier hearings. I will not repeat that testimony, except to say that RLPA is not a bill for left or right, or for any particular faith, or any particular tradition or faction within a faith. RLPA will protect people of all races, all ethnicities, and all socio-economic statuses. Religious liberty is a universal human right.

The Supreme Court has taken the cramped view that one has a right to believe a religion, and a right not to be discriminated against because of one's religion, but no right to practice one's religion. You will hear today from witnesses opposed to the bill, witnesses who are intensely committed to the view that there is no right to practice a religion, and that religion should be regulated to the same extent as everything else in our pervasively regulated society. There is no room for religious liberty in that view of the world. Congress rejected that view by overwhelming margins when it passed the Religious Freedom Restoration Act. To the extent that it still has power to do so, Congress should again enact substantive protection for religious liberty.

My own testimony will explain the detailed workings of the bill, the sources of Congress's constitutional authority to enact RLPA, the range of cases to which the bill might be applied, and some of the drafting choices presented by the bill.

This bill would use those powers that are available to Congress to provide as much protection as is possible under existing Supreme Court interpretations. There is ample precedent in other civil rights legislation for using such a combination of federal powers to protect as much as possible of what Congress wanted to protect. The Civil Rights Act of 1964 used the power to enforce the Fifteenth Amendment in Title I, the commerce power and the power to enforce the Fourteenth Amendment in Title II, the power to enforce the Fourteenth Amendment in Title III, the spending power and the power to enforce the Fourteenth Amendment in Title IV, the spending power in Titles VI, VIII, and X, the commerce power in Title VII, and all these powers in Title V. The Federally Protected Activities Act uses the enforcement power, the commerce power, the spending power, and power to prohibit interference with federal programs and activities (thus invoking all the powers which Congress used to create such programs and activities) to protect a broad list of activities. 18 U.S.C. §245 (1994). RLPA is more focused and less miscellaneous, but it is similar in its use of those powers that are available to protect activities in need of protection.

I. The Spending Clause Provisions.

Section 2(a) of RLPA tracks the substantive language of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994), providing that government shall not substantially burden a person's religious exercise, and applies that language to cases within the spending power and the commerce power. Section 2(b) also tracks RFRA. It states the compelling interest exception to the general rule that government may not substantially burden religious exercise.

Section 2(a)(1) specifies the spending power applications of RLPA. The bill applies to programs or activities operated by a government and receiving federal financial assistance. "Government" is defined in §8(6) to include persons acting under color of state law. In general, a private-sector grantee acts under color of law only when the government retains sufficient control that "the alleged infringement of federal rights [is] `fairly attributable to the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

Section 2(a)(1) would therefore protect against substantial burdens on religious exercise in programs or activities receiving federal financial assistance and operating under color of state law. It would protect a wide range of students and faculty in public schools and universities, job trainees, workfare participants, welfare recipients, tenants in public housing, and participants in many other federally assisted but state-administered programs. An individual could not be excluded from a federally assisted program because of her religious dress, or because of her observance of the Sabbath or of religious holidays, or because she said prayers over meals or at certain times during the day -- unless these burdens served a compelling interest by the least restrictive means.

The federal interest is simply that the intended beneficiaries of federal programs not be excluded because of their religious practice, and that federal funds not be used to impose unnecessary burdens on religious exercise. The provision should be interpreted to protect both the person who avoids violation of his religious beliefs by refusing to participate in a federally-assisted program for which he is eligible, and the person who participates in the program at the cost of violation his religious beliefs. The burden on religious exercise is the same in each case: each has been subjected to the choice of abandoning the practice of his religion or of forfeiting governmental benefits. The Supreme Court has long recognized that government burdens religious liberty when it imposes such a choice. *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court has not questioned that part of *Sherbert*, although it has largely eliminated the governments duty to justify such burdens.

The Spending Clause provision is modeled directly on similar provisions in other civil rights laws, including Title VI of the Civil Rights Act of 1964, which forbids race discrimination in federally assisted programs, 42 U.S.C. §2000d (1994), and Title IX of the Education Amendments of 1972, which forbids sex discrimination in federally assisted educational programs, 20 U.S.C. §1681 (1994).

Congressional power to attach conditions to federal spending has been consistently upheld since *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). Conditions on federal grants must be "[]related to the federal interest in particular national projects or programs." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Federal aid to one program does not empower Congress to demand compliance with RLPA in other programs; the bill's protections are properly confined to each federally assisted "program or activity." *Dole* upheld a requirement that states change their drinking age as a condition of receiving federal highway funds, finding the condition directly related to safe interstate travel. *Id.* at 208. The connection between the federal assistance and the condition imposed on that assistance by RLPA -- ensuring that the intended beneficiaries actually benefit -- is even tighter than the connection in *Dole*. Section 2(a)(1) is clearly constitutional under existing law.

"Program or activity" is defined in §8(4) by incorporating a subset of the definition of the same phrase in Title VI of the Civil Rights Act of 1964. The facial constitutionality of that definition has not been seriously questioned. If it turns out, in the case of some particularly sprawling state agency, that federal assistance to one part of the agency is wholly unrelated to a substantial burden on religious exercise imposed by some other and distant part of the agency, the worst case should be an as-applied challenge and a holding that the statute cannot be applied on those facts. Given the variety of ways in which agencies are structured in the fifty states, I believe that it would be difficult to draft statutory language for such unusual cases. We may be able to agree on such language, or we may leave such cases to case-by-case adjudication.[1]

Section 2(c) provides that the bill does not authorize the withholding of federal funds as a remedy for violations. This provision is modeled on the Equal Access Act, another Spending Clause statute that precludes the withholding of federal funds. 20 U.S.C. §4071(e) (1994). Withholding funds is too harmful, both

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[1] *Cf.* Salinas v. United States, 118 S.Ct. 469, 475 (1997). *Salinas* interpreted 18 U.S.C. §666(a)(1)(B) (1994), part of the federal bribery statute, to apply to any bribe accepted in a covered federally assisted program, whether or not the federal funds were in any way affected. The Court also concluded that under that interpretation, "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case." Preferential treatment accorded to one federal prisoner (the briber) "was a threat to the integrity and proper operation of the federal program," even if it cost nothing and diverted no federal funds. The Court did not find it necessary to consider whether there might someday be an application in which the statute would be unconstitutional as applied.

to the states and to the intended beneficiaries of federal assistance. Because the remedy is so harmful, it is rarely used. A far more effective remedy is provided in §4, which authorizes individuals to sue for appropriate relief, and authorizes the United States to sue to enforce compliance. States may accept or reject federal financial assistance, but if a state accepts federal assistance subject to the conditions imposed by this bill, it is obligated to fulfill the conditions and the courts may enforce that obligation. Private rights of action have been the primary and effective means of enforcement under other important Spending Clause statutes, including Title IX (*see Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1978)), and of course the Equal Access Act (see *Board of Education v. Mergens*, 496 U.S. 226 (1990).

The rule of construction in §5(c) provides that RLPA neither creates nor precludes a right to receive funding for any religious organization or religious activity. The bill is therefore neutral on legal and political controversies over vouchers and other forms of aid to religious schools, charitable choice legislation, and other proposals for funding to religious organizations. The Coalition for the Free Exercise of Religion includes groups that disagree fundamentally on these issues, but all sides agreed that this language is neutral and that no side's position will be undermined by this bill.

As already noted, private-sector grantees not acting under color of law are excluded from the bill. This exclusion is important, because some private-sector grantees are religious organizations, and applying the bill to them would sometimes create conflicting rights under the same statute. The result in such cases might be to restrict religious liberty rather than protect it. Congress has provided similar statutory protections where needed in the private sector, most notably in the employment discrimination laws, the public accommodations laws, and the church arson act. The free exercise of religion has historically been protected primarily against government action, with statutory protection extended to particular contexts where Congress or state legislatures found it necessary. This bill need not change the existing scope of protection in the private sector.

II. The Commerce Clause Provisions.

Section 2(a)(2) protects religious exercise in any case in which a substantial burden on religious exercise, or the removal of that burden would affect interstate or foreign commerce. This language embodies the historic constitutional standard, and it is similar to language in many other statutes that require an effect on commerce as a condition of applicability.[2] The bill protects all

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[2] See the Clayton Act, 15 U.S.C. §18 (1994) ("person engaged in commerce or in any activity affecting commerce"); the Federal Trade Commission Act, 15 U.S.C. §45 (1994) ("unfair or deceptive acts or practices in or affecting commerce"); the Federal Fire Prevention and Control Act, 15 U.S.C. §2224 (1994) ("places of public accommodation affecting commerce"); the Petroleum Marketing Practices Act, 15 U.S.C. §2801 (1994) (trade, etc., "which affects any trade, transportation, exchange, or other commerce" between any state and any place outside of such state); the Semiconductor Chip Protection Act, 17 U.S.C. §910 (1994) ("conduct in or affecting commerce"); the criminal provisions of the Health Insurance Portability and Accountability Act, 18 U.S.C. §24 (Supp. II 1996) ("any public or private plan or contract, affecting commerce"); the Federally Protected Activities Act, 18 U.S.C. §245 (1994) ("engaged in a business in commerce or affecting commerce"); the National Labor Relations Act, 29 U.S.C. §152 (1994) ("affecting commerce"); the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §402 (1994) ("industry affecting commerce"); the Age Discrimination in Employment Act, 29 U.S.C. §630 (1994) ("industry affecting commerce"); the Occupational Safety and Health Act (OSHA), 29 U.S.C. §652 (1994) ("engaged in a business affecting commerce"); the Employment and Retirement Income Security Act (ERISA), 29 U.S.C. §1003 (1994) ("in commerce or in any industry or activity affecting commerce"); the Employee Polygraph Protection Act, 29 U.S.C. §2002 (1994) ("any employer engaged in or affecting commerce");

that religious exercise, and only that religious exercise, that Congress is empowered to protect. This part of the bill is constitutional by definition; any religious exercise beyond the reach of the Commerce Clause is simply outside the bill.

Hearings held in the previous Congress documented parts of the enormous volume of commerce that is based on religious exercise. See especially the testimony of Marc Stern before this Subcommittee on June 16, 1998. These data make clear that the activity of religious organizations substantially affects commerce; the religious exercise of these organizations is protected by the bill, subject to the compelling interest test. The construction of churches, the employment of people to do the work of the church, and the purchase of supplies and materials all are conducted in interstate commerce. Courts have upheld federal arson prosecutions for the burning of churches, on the grounds that the property destroyed was used in an activity that affected commerce. *United States v. Rea*, 169 F.3d 1111 (8th Cir. 1999). The religious exercise of individuals will sometimes be protected by the bill, as when religious exercise requires the use of property of a kind that is bought and sold in commerce and used in substantial quantities for religious purposes, or when an individual is denied an

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the Family and Medical Leave Act, 29 U.S.C. §2611 (1994) ("industry or activity affecting commerce"); Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a (1994) ("if its operations affect commerce"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("engaged in an industry affecting commerce"); the Privacy Protection Act, 42 U.S.C. §2000aa (Supp. II 1996) ("public communication, in or affecting interstate or foreign commerce"); the Energy Policy and Conservation Act, 42 U.S.C. §6291 (1994) (trade, etc., "which affects any trade, transportation, exchange, or other commerce" between any state and any place outside of such state); the Americans with Disabilities Act, 42 U.S.C. §12111 (1994) ("engaged in an industry affecting commerce"); the Commercial Motor Vehicle Safety Act, 42 U.S.C. §31101 (1994) ("engaged in a business affecting commerce").

occupational license or a driver's license because of a religious practice.

Substantial burdens on religious exercise prevent or deter or raise the price of religious exercise. On standard economic models, such burdens reduce the quantity of religious exercise and therefore the quantity of commerce growing out of religious exercise. Religious exercise and associated commerce that is not prevented may be diverted or distorted, which are other ways of interfering with the free flow of commerce. Congress has plenary power to protect the commerce generated by religious exercise or inhibited by substantial burdens on religious exercise, and Congress's motive for acting is irrelevant. *United States v. Darby*, 312 U.S. 100 (1941).

Models for the Commerce Clause provisions include the Privacy Protection Act of 1980, 42 U.S.C. §2000aa (Supp. II 1996), protecting papers and documents used in preparation of a publication in or affecting commerce, which has not been challenged, the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. §2000a (1994), forbidding racial and religious discrimination in places of public accommodation affecting commerce, which the Supreme Court has upheld, the commerce clause provisions of the Federally Protected Activities Act, 18 U.S.C. 245 (1994), which the Tenth Circuit has upheld, *United States v. Lane*, 883 F.2d 1484, 1489-93 (10th Cir. 1989), the church arson act, 18 U.S.C. §247 (1994 and Supp. II), which has not been challenged, and many other provisions of Title 18.

The public accommodations law is particularly instructive. Congress's first public accommodations law was the Civil Rights Act of 1875, enacted to enforce the Thirteenth and Fourteenth Amendments. The Supreme Court struck that law down as beyond the enforcement power. *Civil Rights Cases*, 109 U.S. 3 (1883). Congress's second public accommodations law was the

Civil Rights Act of 1964, enacted with substantially the same scope in practical effect but pursuant to the commerce power. The Court upheld this Act in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

I have given considerable thought to *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court struck down the Gun Free Schools Act as beyond the reach of the Commerce Clause. 18 U.S.C. §922 (1994). The offense defined in that Act was essentially a possession offense; neither purchase nor sale of the gun nor any other commercial transaction was relevant. The Court emphasized that the offense "has nothing to do with `commerce' or any sort of economic enterprise, however broadly one might define those terms," 514 U.S. at 561, and that the offense "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

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

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

These and similar lower court cases read *Lopez* to reaffirm the long-standing rule that Congress may regulate even "trivial" or "de minimis" intrastate transactions if those transactions, "taken together with many others similarly situated," substantially affect interstate commerce. *Id.* at 556, 558. I will refer to this rule as the aggregation rule: in considering whether an activity substantially affects commerce, Congress may aggregate large numbers of similar transactions.

The aggregation rule is important to the scope of the bill, and especially to the protection of small churches and individuals. A small church with a RLPA claim need not show that the burden on that church substantially affects commerce all by itself; it is enough to show that the burden affects commerce to some extent. An individual need not show that the burden on his religious practice substantially affects commerce all by itself; it is enough to show that the burden affects commerce to some extent. If the statute's jurisdictional element is satisfied case by case, Congress can rely on the aggregate effect of all similar burdens that satisfy the jurisdictional element.

There will likely be cases in which the effect on commerce cannot be proved, and which therefore fall outside the protections of the bill. That is the nearly unavoidable consequence of being forced to rely on the Commerce Clause. But there will be many cases in which the burdened religious exercise affects commerce when aggregated with "many others similarly situated," *Lopez*, 514 U.S. at 558, and in those situations, restricting or eliminating the religious exercise by burdensome regulation would also affect commerce. I am certain that the Commerce Clause provisions are constitutional, and I am confident that they will have a wide range of applications.

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

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

III. The Enforcement Clause Provisions.

Section 3 would be enacted as a means of enforcing the Fourteenth Amendment. Section 3 attempts to simplify litigation of free exercise violations as defined by the Supreme Court, facilitating proof of violations in cases where proof is difficult.

A. Shifting the Burden of Persuasion.

Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it. *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), of course reaffirms broad Congressional power to enforce constitutional rights as interpreted by the Supreme Court.

This provision applies to any means of proving a free exercise violation recognized under judicial interpretations. *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990). Thus, if the claimant shows a burden on religious exercise and prima facie evidence of an anti-religious motivation, government would bear the burden of persuasion on the question of motivation, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religious exercise and prima facie evidence that the burdensome law is not generally applicable, government would bear the burden of persuasion on the question of general applicability, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religion and prima facie evidence of a hybrid right, government would bear the burden of persuasion on the claim of hybrid right, including all issues except burden on religion. In general, where there is a burden on religious exercise and prima facie evidence of a constitutional violation, the risk of nonpersuasion is to be allocated in favor of protecting the constitutional right.

The protective parts of the *Smith* and *Lukumi* rules create many difficult issues of proof and comparison. Motive is notoriously difficult to litigate, and the court is often left uncertain. The general applicability requirement means that when government exempts or fails to regulate secular activities, it must have a compelling reason for regulating religious activities that are substantially the same or that cause the same harm. *See, e.g.*, *Lukumi*, 508 U.S. at 543 ("The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree"); *id.* at 538-39 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (rule against beards, with medical exception, must have religious exception; exception for undercover officers is distinguishable and would not require religious exception). As these examples suggest, there can be endless arguments about whether the burdened religious activity and the less burdened secular activity are sufficiently alike, or cause sufficiently similar harms, to trigger this part of the rule. The scope of hybrid rights claims remains uncertain. Burden of persuasion matters only when the court is uncertain, but the structure of the Supreme Court's rules leave many occasions for uncertainty.

The one issue on which the religious claimant always retains the burden of persuasion is burden on religion. Note that in the free exercise context, the claimant need prove only a burden, not a substantial burden. The lower courts have held that where the burdensome rule is not generally applicable, any burden requires compelling justification. *Hartmann v. Stone*, 68 F.3d

973, 978-79 & nn.3-4 (6th Cir. 1995); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994); *Rader v. Johnston*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996).

B. Land Use Regulation.

Section 3(b) enacts prophylactic rules for land use regulation. Section 3(b) is an overlapping alternative to the commerce clause provision in section 2. Many land use cases will be covered by both sections, because the burden affects commerce and because one or more of the elements of section 3(b) is satisfied. Some cases may fall under only one section, or the elements of one section may be easier to prove than the elements of the other section.

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

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

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

Legislative power to enforce constitutional rights depends on Congress having "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Note that the standard is not certainty, but "reason to believe" and "significant likelihood." This bill, and the hearing record on which it is based, satisfy that test in two ways.

First, the test is satisfied legally. Each of these subsections is designed to enforce a specific element of a constitutional right

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

as interpreted in *Smith* and *Lukumi* or in *Schad*. No further showing of constitutional power is required. In cases of discrimination, or of exclusion of first amendment activity from a jurisdiction, all or nearly all the laws affected will violate the Constitution. Similarly, in cases in which religious exercise is burdened despite a system of individualized assessments and exemptions, many of the laws affected will be unconstitutional under *Smith* and *Lukumi*. Constitutionality follows from the close connection between the legal standard in the bill and the legal standard in the Supreme Court's interpretation of the Constitution.

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

The hearing record shows that land use regulation is administered through highly individualized determinations not controlled by generally applicable rules. Land use regulation thus regularly falls within the *Smith* exception for regulatory schemes that permit "individualized governmental assessment of the reasons for the relevant conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). The hearing record also shows that these individualized determinations frequently burden religion and frequently discriminate against religious organizations and especially discriminate against smaller and non-mainstream faiths. Even without the benefit of the Congressional hearing record, some courts have recognized that land use cases can fall within exceptions to the general rule of *Employment Division v. Smith*. *See Korean Buddhist Dae Won Sa Tample v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Hawaii 1998); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879 (D. Md. 1996).

The practice of individualized determinations makes this discrimination extremely difficult to prove in any individual case, but the pattern is clear when Congress examines large numbers of cases through statistical surveys and anecdotal reports from around the country. This record of widespread discrimination and of rules that are not generally applicable shows both the need for, and the constitutional authority to enact, clear general rules that make discrimination more difficult.

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

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

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

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

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

Section 3(b)(2) would guarantee a full and fair adjudication of land use claims under subsection (b). Procedural rules before land use authorities may vary widely; any procedure that permits full and fair adjudication of the federal claim would be entitled to full faith and credit in federal court. But if, for example, a zoning board with limited authority refuses to consider the federal claim, does not provide discovery, or refuses to permit introduction of evidence reasonably necessary to resolution of the federal claim, its determination would not be entitled to full faith and credit in federal court. And if in such a case, a state court confines the parties to the record from the zoning board, so that the federal claim still can not be effectively adjudicated, the state court decision would not be entitled to full faith and credit either.

Full and fair adjudication should include reasonable opportunity to obtain discovery and to develop the facts relevant to the federal claim. Interpretation of this provision should not be controlled by cases deciding whether habeas corpus petitioners had a "full and fair hearing" in state court. Interpretation of the habeas corpus standard is often influenced by hostility to convicted criminals seeking multiple rounds of judicial review. Whatever the merits of that hostility, a religious organization seeking to serve existing and potential adherents in a community is not similarly situated.

Subsection 3(b)(3) provides that equally or more protective state law is not preempted. Zoning law in some states has taken account of the First Amendment needs of churches and synagogues, and to the extent that such law duplicates or supplements RLPA, it is not displaced.

IV. Judicial Relief

A. General Remedies Provisions.

Section 4 of the bill provides express remedies. Section 4(a) is based on the corresponding provision of RFRA; it authorizes private persons to assert violations of the Act either as a claim or a defense and to obtain appropriate relief. This section should be read against a large body of federal law on remedies and immunities under other civil rights legislation. Appropriate relief includes declaratory judgments, injunctions, and damages, but government officials have qualified immunity from damage claims.

Section 4(b) provides for attorneys' fees; this is based squarely on RFRA and is essential if the Act is to be enforced.

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

B. Prisoner Litigation.

Section 4(c) makes clear that litigation under the bill is subject to the Prison Litigation Reform Act. This provision effectively and adequately responds to concerns about frivolous prisoner litigation. In the first full year under the Prison Litigation Reform Act, federal litigation by state and federal prisoners dropped 31%. Administrative Office of the United States Courts, L. Meacham, *Judicial Business of the United States Courts: 1997 Report of the Director* 131-32 (Table C-2A). Further reductions may be reasonably expected, as the Act becomes better known; some provisions of the Act, such as the authorization of penalties on prisoners who file three or more frivolous actions, have not yet had much opportunity to work.

There has been substantial litigation over the constitutionality of some provisions of the Prison Litigation Reform Act, but that litigation does not affect RLPA. The courts of appeals have taken seriously the claim that provisions on existing consent decrees unconstitutionally reopen final judgments. Even so, six out of seven courts of appeals have upheld that part of the Act. Only the Ninth Circuit has struck it down, and only with respect to reopening final judgments, and that judgment has been vacated by the court en banc.[4]

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[4] Tyler v. Murphy, 135 F.3d 594 (8th Cir. 1998); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998), *cert. petition filed* (Apr. 13, 1998, No. 97-1693); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), *cert. petition filed* (Mar. 2, 1998, No. 97-8120); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 657-58 (1st Cir. 1997), *cert. petition filed*, 66 U.S.L.W. 3531 (Feb. 4, 1998, No. 97-1278); Benjamin v. Johnson, 124 F.3d 162 (2d Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), *cert. petition filed* (Jan. 5,

I have followed this litigation closely for my casebook, *Modern American Remedies*. I expect that the PLRA will be upheld even in the highly problematic context of reopening final decrees, because the Act addresses only the prospective effect of those decrees. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (noting Congressional power to "alter[] the prospective effect of injunctions"). But however that difficult issue is resolved, it does not affect RLPA. RLPA does not require that any final judgment be reopened, and the provisions of the Prison Litigation Reform Act most important to RLPA are not the structural reform provisions that have drawn so much litigation, but the provisions that deter frivolous individual claims. I am confident that those provisions are constitutional in all but unusual applications.

If further legislative action on prisoner claims is needed, it should follow the approach of the Prison Litigation Reform Act, which addresses prisoner litigation generally. Congress should not exclude prisoners from the substantive protections of RLPA. RFRA did not cause any significant increment to prisoner litigation. The Attorney General of Texas has stated that his office handles about 26,000 active cases at any one time. Of those, 2200 are "inmate-related, non-capital-punishment cases." Of those, sixty were RFRA claims when RFRA applied to the states. Thus, RFRA claims were only 2.7% of the inmate caseload, and only .23% (less than one-quarter of one percent) of the state's total caseload. It is also reasonable to believe that many of these sixty RFRA cases would have been filed anyway, on free exercise, free speech, Eighth Amendment, or other theories. This data is reported in Brief of Amicus Curiae State of Texas 7-8, in *City of Boerne v. Flores* (No. 95-2074), 117 S.Ct. 2157 (1997).

1998, No. 97-7420); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 2460 (1997); *but cf.* Taylor v. United States, 1998 Westlaw 214578 (9th Cir., May 4, 1998).

Members are well aware that prisoners sometimes file frivolous claims. But they should also be aware that prison authorities sometimes make frivolous rules or commit serious abuses. Examples include *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), in which jail authorities surreptitiously recorded the sacrament of confession between a prisoner and the Roman Catholic chaplain; *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997), in which a Wisconsin prison rule prevented prisoners from wearing religious jewelry such as crosses, on grounds that Judge Posner found barely rational; and *McClellan v. Keen* (settled in the District of Colorado in 1994), in which authorities let a prisoner attend Episcopal worship services but forbad him to take communion.

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

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

V. Rules of Construction.

The rules of construction in §5 clarify the bill and greatly reduce the risk of misinterpretation.

Section 5(a) is based on RFRA. It provides that the Act does not authorize government to burden any religious belief, avoiding any risk that the compelling interest test might be transferred from religious conduct to religious belief. Section 5(b) provides that nothing in the bill creates any basis for regulating or suing any religious organization not acting under color of law. These two subsections serve the bill's central purpose of protecting religious liberty, and avoid any unintended consequence of reducing religious liberty.

Sections 5(c) and 5(d) keep this bill neutral on all disputed questions about government financial assistance to religious organizations and religious activities. Section 5(c) states neutrality on whether such assistance can or must be provided at all. Section 5(d) states neutrality on the scope of existing authority to regulate private entities as a condition of receiving such aid. Section 5(d)(1) provides that nothing in the bill authorizes additional regulation of such entities; §5(d)(2), perhaps in an excess of caution, provides that existing regulatory authority is not restricted except as provided in the bill. Agencies with authority to regulate the receipt of federal funds retain such authority, but their specific regulations may not substantially burden religious exercise without compelling justification. These provisions were carefully negotiated with Americans United for Separation of Church and State, People for the American Way, and the American Civil Liberties Union, in exchange for their commitment to vigorously support the bill.

Section 5(e) states explicitly what would be obvious in any event -- that a government that burdens religious exercise has discretion over the means of eliminating the burden. Government can modify its policy to eliminate the burden, or adhere to its policy and grant religious exceptions either on the face or the law or in application of the law, or make any other change that eliminates the burden. The bill would not impose any affirmative policy on the states, nor would it restrict state policy in any way whatever in secular applications or in religious applications that do not substantially burden religious exercise. The bill would require only that substantial burdens on religious exercise be eliminated or justified.

Section 5(f) provides that proof that a burden on religious exercise affects commerce for purposes of this bill, or that removal of such a burden would affect commerce for purposes of this bill, does not give rise to an inference or presumption that the religious exercise is subject to any other statute regulating commerce. Different statutes exercise the commerce power to different degrees, and the courts presume that federal statutes do not regulate religious organizations unless Congress manifested the intent to do so. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1990).

Section 5(g) states that the Act should be construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution."

Section 5(h) states that each provision and application of the bill shall be severable from every other provision and application.

Section 6 is also a rule of construction, taken directly from RFRA, insuring that this bill does not change results in litigation under the Establishment Clause.

VI. Amendments to Religious Freedom Restoration Act.

Section 7 of the bill amends RFRA to delete any application to the states and to leave RFRA applicable only to the federal government. Section 7(a)(3) amends the definition of "religious exercise" in RFRA to conform it to the RLPA definition, discussed below.

VII. Definitions.

Section 8 contains definitions. Section 8(1) defines "religious exercise" by incorporating the first amendment definition, with two clarifications of issues that have been the subject of litigation. First, religious exercise "need not be compelled by, or central to, a larger system of religious belief." Second, "the use, building, or converting of real property for religious exercise shall itself be considered religious exercise."

The current draft of the bill introduces these clarifications with the word "however," which might be taken to suggest that these clarifications would not be included in the basic definition. I believe they are included in the basic definition, and are set out here to avoid unnecessary litigation. The word "however," in section 8(1) and also in section 7(a)(3), should be changed to "provided that".

This definition, with the provisos, codifies the intended meaning of RFRA as reflected in its legislative history. The decisions that most thoroughly examined the legislative history and precedent concluded that Congress intended to protect conduct that was religiously motivated, whether or not it was compelled.[5]

The Supreme Court's cases have not distinguished religiously compelled conduct from religiously motivated conduct. The Congressional Reference Service marshalled these opinions for the RFRA hearings, noting that the Court has often referred to protection for religiously motivated conduct. Letter from the American Law Division of the Congressional Research Service to Hon. Stephen J. Solarz (June 11, 1992), in *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 131, 131-33 (1992). Since that compilation, justices on both sides of the issue have treated the debate as one over protection for religious motivation, not compulsion.[6]

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[5] Sasnett v. Sullivan, 908 F. Supp. 1429, 1440-47 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997); Muslim v. Frame, 891 F. Supp. 226, 229-31 (E.D. Pa. 1995), *rehearing denied*, 897 F. Supp. 216, 217-20 (E.D. Pa. 1995), *aff'd mem., possibly on other grounds*, 107 F.3d 7 (3d Cir. 1997); Mack v. O'Leary, 80 F.3d 1175, 1178-80 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997).

[6] City of Boerne v. Flores, 521 U.S. 507, 538 (Scalia, J., concurring) ("religiously motivated conduct"); *id.* at 540 (same); *id.* at 546 (O'Connor, J., concurring) (same); *id.* at 548 (same); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 ("conduct motivated by religious beliefs"); *id.* at 533 ("religious motivation"); *id.* at 538 (same); *id.* at 543 ("conduct with religious motivation"); *id.* at 545 ("conduct motivated by religious belief"); *id.* at 546 ("conduct with a religious motivation"); *id.* at 547 ("conduct motivated by religious conviction"); *id.* at 560 n.1 (Souter, J., concurring) ("conduct motivated by religious belief"); *id.* at 563 ("religiously motivated conduct"); *id.* ("conduct . . . undertaken for religious reasons") (quoting Employment Div. v. Smith, 494 U.S. at 532); *id.* at 578 (Blackmun, J., concurring) ("religiously motivated practice").

Congress nowhere expressed any intention to confine the protection of RFRA to practices that were "central" to a religion. This concept did not appear either in statutory text or legislative history; it was read into the statute by some courts after RFRA's enactment. Other courts rejected or ignored this misinterpretation; the most extensive opinion concluded that Congress did not intend such a requirement, that pre-RFRA cases did not contain it, and that courts could not resolve disputes about the centrality of religious practices. *Muslim v. Frame*, 891 F. Supp. 226, 230-31 (E.D. Pa. 1995), *aff'd mem., possibly on other grounds*, 107 F.3d 7 (1997).

Insistence on a centrality requirement would insert a time bomb that might destroy the statute, for the Supreme Court has repeatedly stated that courts cannot hold some religious practices to be central and protected, while holding other religious practices noncentral and not protected. *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1985). The Court in *Smith* unanimously rejected a centrality requirement. 494 U.S. at 886-87 (opinion of the Court); *id.* at 906-07 (O'Connor, J., concurring); *id.* at 919 (Blackmun, J., dissenting). The Court's disagreement over whether regulatory exemptions are constitutionally required does not depend on any disagreement about a centrality requirement.

In the practical application of the substantial burden and compelling interest tests, it is likely to turn out that "the less central an observance is to the religion in question the less the officials must do" to avoid burdening it. *Mack v. O'Leary*, 80 F.3d 1175, 1180 (1996), *vacated on other grounds*, 522 U.S. 801 (1997). The concurring and dissenting opinions in *Smith* imply a similar view, in the passages cited in the previous paragraph. But this balancing at the margins in individual cases is a very different thing from a threshold requirement of centrality, in which all religious practices are divided into two categories and cases are dismissed as a matter of law if the judge finds, rightly or wrongly, that a practice falls in the noncentral category. Such an either-or threshold requirement greatly multiplies the consequences of the inevitable judicial errors in assessing the importance of religious practices. RLPA properly disavows any such interpretation.

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

Section 8(3) defines "land use regulation". This definition was negotiated at a time when the draft bill provided different standards in section 3(b)((1)(A) and in section 2; under that draft, much more turned on what was a land use regulation. The definition is now less important, but it still matters to the application of section 3(b). The application of section 3(b)(1)(A) matters when plaintiff cannot show, or chooses not to show, that the burden or removal of the burden affects commerce. And sections 3(b)(1)(B), (C), and (D) provide protection not found in section 2.

Land use regulation is a law or decision that restricts a private person's use or development of land or structures affixed to land, where the private person has any kind of property interest in the land or a contract to acquire such a property interest. The law or decision must apply to "one or more particular parcels of land," as in spot zoning or a permit requirement, or "within one ore more designated geographical zones," as in conventional zoning rules. The intention here is to exclude regulation that applies generally to all real property, such as housing discrimination laws.

The definition of "program or activity" in section 8(4) has been discussed in connection with the spending clause provision.

The definition of "demonstrates" in §8(5) is incorporated verbatim from the Religious Freedom Restoration Act.

Section 8(6) defines government to include both state and local governments throughout the bill, and to include the federal government in sections 3(a) and 5. These are the sections shifting the burden of proof in free exercise cases and the rules of construction, some of which are not included in RFRA. The federal government is not included in the rest of the bill because it is already subject to the compelling interest test under RFRA as amended. RFRA was struck down only insofar as it attempted to enforce the Fourteenth Amendment against the states; it still applies to the federal government. *In re Young*, 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S.Ct. 43 (1998); *EEOC v. Catholic University*, 83 F.3d 455, 470-71 (D.C. Cir. 1996).

VIII. Other Constitutional Objections.

A. The Establishment Clause.

Justice Stevens suggested that RFRA might violate the Establishment Clause. *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997). He got no vote but his own, and his view has no support in the Court's precedents. Government is not obligated to substantially burden the exercise of religion, and government does not establish a religion by leaving it alone. RLPA would not violate the Establishment Clause.

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

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

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

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

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

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

B. Federalism.

RLPA is consistent with general principles of federalism that sometimes limit the powers granted to Congress.

In particular, RLPA would not violate *Printz v. United States*, 521 U.S. 898 (1997). *Printz* struck down federal imposition of specific affirmative duties on state officers to implement federal programs. It held that Congress "cannot compel the States to enact or enforce a federal regulatory program," and that it "cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935.

The proposed bill does not impose any specific affirmative duty, implement a federal regulatory program, or conscript state officers. The substantive provisions of the bill are entirely negative; they define one thing that states cannot do, leaving all other options open. The bill thus pre-empts state laws inconsistent with the overriding federal policy of protecting religious liberty in areas constitutionally subject to federal authority.

The bill operates in the same way as other civil rights laws, which pre-empt state laws that discriminate on the basis of race, sex, and other protected characteristics, and in the same way as other legislation protecting the free flow of commerce from state interference. Congress could itself regulate all transactions affecting interstate commerce, and then exempt burdened religious exercise from its own regulation; it has instead taken the much smaller step of pre-empting state regulation that unnecessarily burdens religious exercise. *Cf. New York v. United States*, 505 U.S. 144, 167 (1992):

> Where Congress has power to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

RLPA would pre-empt to the minimum extent compatible with the federal policy; it pre-empts the unjustified burden on religious exercise but leaves all other options open. As already noted, §5(e) makes explicit what would be clear in any event -- states can pursue any policy they choose, and remove burdens in any way they choose, so long as they do not substantially burden religious exercise without compelling reason.

Printz distinguishes and leaves unchanged two important pre-emption cases upholding federal statutes in the era of *National League of Cities v. Usery*, 426 U.S. 833 (1976). In each case, the *Printz* majority noted that the federal law "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." 521 U.S. at 925-26.

The first of these cases was *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), which upheld a federal statute that required states either to affirmatively implement a specific federal regulatory program or turn the field over to direct federal regulation. The Court said that "nothing" in *National League of Cities* "shields the States from pre-emptive federal regulation of private activities affecting interstate commerce." *Id.* at 291. *Hodel* is reaffirmed not only in *Printz*, but also in *New York v. United States*, 505 U.S. 144, 161 (1992).

The Court reached similar conclusions in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (the *FERC* case). The statute there went further, and required the state to "consider" implementing an affirmative federal policy. But the state was not required to adopt the policy, and law's provisions "simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals." *Id.* at 765.

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

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

Some provisions of the statutes in *Hodel* and *FERC* were directed expressly to the states and, in a sense, applied only to the states. Only the state agency could implement or consider the federal policy. But this did not render the statutes invalid for singling out the states. Congress was pursuing a policy for the appropriate regulation of private conduct, and it required the states to conform to that policy or to vacate the field. This is the classic work of federal pre-emption.

If RLPA seems in any way odd, it is because the federal policy with respect to the private sector is generally one of deregulation, not regulation. The Congressional policy is that religious exercise not be substantially burdened without compelling reason. Congress has no more affirmative or more specific regulatory policy for religion to substitute for the pre-empted regulation. But that is not unique either. As Professor Thomas Berg points out in an excellent article on a range of constitutional objections to RFRA and RLPA,[7] the statutes deregulating the transportation industries broadly pre-empted state regulation and substituted only minimal federal regulation in its place. He cites the Staggers Rail Act of 1980, 40 U.S.C. §10505 (1994), and the Airline Deregulation Act of 1978, 49 U.S.C. §41701 et seq. (1994).

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

It is instructive to compare the pre-emption provision of the Airline Deregulation Act with the central provision of RLPA:

Airline Deregulation Act, 49 U.S.C. §41713(b) (1994)	**Religious Liberty Protection Act, §2**
Except as provided in this subsection,	Except as provided in subsection (b),
a State, political subdivision of a state, or political authority of at least 2 States	a government [defined elsewhere to mean states and their subdivisions]
may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier	shall not substantially burden a person's religious exercise
that may provide air transportation under this subpart.	(1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in any case in which the substantial burden on the person's religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes;

There is no difference in structure or in principle between these two provisions. Both on their face regulate state laws and only state laws. Both in their operation pre-empt state laws that are inconsistent with a federal policy of deregulation. The Airline Deregulation Act provision was broadly construed, without constitutional challenge, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Nothing in either *Printz* or the *National League of Cities* line of cases casts doubt on federal power to pre-empt state regulation inconsistent with federal policy in areas where Congress could regulate directly if it chose. That is all the Religious Liberty Protection Act would do.

In place of the pre-empted state burdens, Congress would substitute its only policy of religious liberty. Congress has applied the same rules to itself and to federal agencies and officials, universally and across the board, whether or not there is government spending, or land use regulation, or an effect on commerce. Congress has provided similar statutory protections where needed in the private sector, most notably in the employment discrimination laws, the public accommodations laws, and the church arson act. The federal policy is one of religious liberty; that policy is pursued quite generally; and inconsistent state law is pre-empted to the extent that Congress has power to do so. There is nothing constitutionally suspect about that under existing law.

IX. Policy Objections

A. Professor Hamilton's Parade of Horribles

I wish also to address a few of the principle policy objections to the bill. They are remarkable. Professor Marci Hamilton has repeatedly testified, and presumably will testify again, that no public policy is safe from RLPA. Wives will be beaten, children will be abandoned, people will die -- all in the name of religious liberty. Of course she has no examples of these dire consequences.

The truth is that religious liberty legislation has been underenforced, not overenforced. Courts have been quite cautious about taking risks with religious liberty. The great danger with RLPA is not that important public policies will be undermined, but that courts will too often defer to bureaucratic rationalizations and permit the suppression of harmless religious practices.

When confronted with the long history of judicial underenforcement of religious liberty rights, or with precedents holding certain government interests to be compelling, Professor Hamilton tends to say that those cases were decided without benefit of the least restrictive means test. With respect to the RFRA cases, this is obviously false; RFRA had an express least restrictive means test. With respect to the pre-*Smith* free exercise cases, it is also false. Least restrictive means and similar formulations were a regular part of the Court's formulation of the pre-*Smith* free exercise standard, as she well knows.[8] The least

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[8] *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 19 (1989) (Brennan, J., for plurality) ("We noted that '[n]ot all burdens on religion are unconstitutional, and held that 'the state may justify a limitation on religious liberty by showing that it is *essential to accomplish* an overriding governmental interest;"); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 142 (1987) ("Only those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion."); *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., for plurality) ("Once it has been shown that a governmental regulation burdens the free exercise of religion, 'only those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion.' This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector 'is *essential to accomplish* an overriding governmental interest,' or represents 'the *least restrictive means* of achieving some

restrictive means test never had the terrible consequences that

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compelling state interest.'"); *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983) ("The state may justify a limitation on religious liberty by showing that it is *essential to accomplish* an overriding governmental interest. . . . The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and *no 'less restrictive means'* are available to achieve the governmental interest."); *United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is *essential to accomplish* an overriding governmental interest. . . . This mandatory participation is *indispensable to* the fiscal vitality of the social security system."); *Thomas v. Review Board*, 450 U.S. 717, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the *least restrictive means* of achieving some compelling state interest."); *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (Burger, C.J., for plurality) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion."); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion."); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ("For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights.") (all emphases added). Professor Hamilton has seen this list of quotations, but she continues to misstate the prior law.

In *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), the Supreme Court actually said -- in a parenthetical phrase inserted without citation of any authority -- that least restrictive means was not part of the pre-*Smith* law. This erroneous statement was taken from the City's brief, written by Professor Hamilton. The Court can change the law for the future, but neither the Court nor Professor Hamilton can rewrite the past, and the Court's own past opinions are clear. Least restrictive means, or equivalent formulations such as "no alternative forms of regulation," "essential to accomplish," "not otherwise served," or "indispensable to," were part of nearly every significant Supreme Court case on the free exercise of religion prior to 1990. Least restrictive means is not a new and untried standard; it was the law for thirty-one years, under the federal Constitution and under RFRA, with no untoward consequences.

Professor Hamilton predicts, and it was not interpreted in the bizarre way that she claims to interpret it. The conclusive answer to her parade of horribles is that for four years under RFRA and for twenty-seven years under the free exercise clause, they did not happen.

B. The Demand for a Civil Rights Exception

Other witnesses have demanded an exception for civil rights claim, across the board, without regard to context, wholly subordinating any exercise of religious liberty to any interest that can be slipped into a civil rights law. This demand is a betrayal of the fundamental agreement on which the Coalition for Free Exercise has depended -- neither right nor left would demand carveouts for its own special interests. A civil rights carve out would be wholly unnecessary in the great bulk of cases, and wrongheaded in those few cases where the religious liberty interest is entitled to a respectful hearing.

A civil rights exception is unnecessary, because most civil rights claims satisfy the compelling interest test. The Supreme Court has held, in a free exercise case, that eradicating racial discrimination in education serves a compelling interest by the least restrictive means. *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). The Court has held, in free speech cases, that eliminating sex discrimination in places of public accommodation serves a compelling interest by the least restrictive means. *Board of Directors v. Rotary Club*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623-29 (1984). Dictum in *Rotary Club* said generally (without regard to the basis of discrimination) that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order.'" 481 U.S. at 549. Race discrimination is even more suspect than sex discrimination, and employment is at least as important as public accommodations. Those who resist civil rights laws in the name of religion will, in nearly every case, lose.

An across-the-board civil rights exemption would take RLPA out of cases in which the religious practice should clearly be protected. The example that is hardest to argue with is the line of cases typified by *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). Similar cases have arisen on college campuses around the country. Each such case involves a student religion club of a particular faith, which requires a statement of faith for membership, for voting, and/or for holding office. In the name of civil rights, the school argues that the statement of faith is a form of religious discrimination, and demands that the club abandon the statement of faith or be dissolved as a campus organization. In *Hsu*, the court reached the remarkable conclusion that a Christian club could require that its President, Vice-President, and Music Coordinator be Christians, but that it could not require that its Secretary, its Activities Coordinator, or its members be Christian. On the same theory pursued in *Hsu*, a church may be a place of public accommodation that discriminates on the basis of religion. These cases mistake the existence of religious organizations for religious discrimination. In *Hsu*, the club relied on the Equal Access Act, but that does not apply to the college cases. RLPA should not be available; a civil rights amendment would make it unavailable.

A civil rights amendment would also invite challenges to core religious practices, presenting difficult issues that should be left unresolved until and unless they arise. Catholics and Orthodox Jews restrict the priesthood and rabbinate to males, in violation of the literal language of the employment discrimination laws. Convents and monasteries rent dwellings, within the definitions in some fair housing acts, to only one sex and to adherents of only one religion. Religious organizations operate retirement residences and nursing homes, and some may give priority to their own members. Some churches and other religious organizations require church employees to adhere to the religion's moral code; as applied to unwed mothers, this is easily converted to a claim of pregnancy discrimination.

Current law permits religious organizations to prefer employees of their own faith to do the organization's work, but there are many ambiguous limits to that exemption. A preference for Jews might be attacked as racial rather than religious. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). The Texas Attorney General has attacked a preference for Christians as unprotected, insisting that only a preference for particular denominations is within the statutory exception. *Speer v. Presbyterian Children's Home*, 847 S.W.2d 227 (Tex. 1993). That issue remains unresolved. A preference for persons of any faith so long as they are not overtly hostile to the religious mission is probably unprotected.

Reasonable people can disagree about how such issues should be resolved. If such cases arise, both sides will be fully heard under the statutory standards of substantial burden and compelling interest. Fair and just results may depend on context: a pastor is different from a youth director, and both are different from a custodian; a convent is different from a retirement home. There are few occasions for religious exceptions from the civil rights laws, but it would not be right to simply enact that **any** civil rights claim automatically trumps **any** religious liberty claim without debate or discussion.

Any exception to RFRA violates the core agreement that has held together supporters of religious liberty legislation. This bill has broad support across the political spectrum from left to right, bipartisan, interfaith, religious and secular. The core agreement that has held that broad coalition together is that RFRA bills should enact uniform standards, applicable to all religious practices and all governmental interests, and that the groups within the coalition will argue out their disagreements under those standards. Every private interest group and every government agency has an agenda that could be insulated from future argument by an exception exempting that agenda from RFRA. Some of those potential exceptions involve deep moral commitments, as deeply felt as civil rights. It is impossible to make one exception without inviting many others. It is impossible even to consider many exceptions without abandoning the principle of religious liberty and substituting a series of votes on what religious practices can hold a majority vote in a crowded legislative session. Rep. Stephen Solarz, the sponsor of RFRA, explained the most fundamental reason why he would not entertain proposed exceptions to his bill:

> If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeeded in codifying rather than reversing *Smith*.

He correctly described the effect of exceptions then, and that would still be the effect of exceptions today.

Let me say that this should not be an issue that divides left and right. It should not be a litmus test of support for civil rights. I spent most of April helping to write a brief defending the constitutionality of affirmative action in a renewed appeal in *Hopwood v. Texas*, and I worked publicly and privately for three years to make that renewed appeal happen. Turning to the agenda that is principally driving the demand for a civil rights carve out, I voted for my city's gay rights ordinance, and I have publicly defended the constitutional rights of sexually active gays and lesbians. This is not about whether one supports civil rights; it is about whether civil rights is for all Americans and all their fundamentally personal beliefs and activities, or only for selected groups, selected beliefs, and selected activities.

Civil rights and religious liberty are both about living together with our differences. There should be legal protection for gays and lesbians and also for persons with religious commitments to traditional sexual morality. There should be a general gay rights law, and there should be religious exemptions. And it should be obvious that gay rights laws will be far easier to enact if there are exemptions for religious objectors -- the most legitimate and often the most intensely felt source of opposition.

It should also be clear that gays and lesbians also have religions, and exercise them, and are especially likely to need the protection of religious liberty legislation. I have already mentioned the zoning problems of the Metropolitan Church. Let me describe another case, in which I have committed to file a friend of the court brief.

LG v. G, now pending in the state court of appeals in Texas, involves a lesbian mother, now divorced from her former husband. She and the father have joint custody, and a complicated agreement concerning their respective rights to guide the religious instruction of the child. The mother was taking the daughter to the Metropolitan Church. The father objected. The mother offered in evidence the tape of a typical service, and expert testimony on the best interests of the child; there is no suggestion of any age-inappropriate content at the church. The father offered no evidence about the church and refused to visit a service; he simply objected. The court decided that the mother could take the daughter to "mainline" churches and no others, and that the court would decide what counted as mainline. The Metropolitan Church was unacceptable.

The source of hostility here is the sexual orientation of the mother. But the target of discrimination is her church and her religious exercise. The court has not suppressed her sexual behavior; it has suppressed her religious behavior. In the course of doing that, it has undertaken to decide what are acceptable religions and what are not.

I doubt that RLPA can reach that case, although the Constitution might, and state law surely could. The point is not that this particular bill will fix that particular case, but that religious liberty should be important to both sides of the dispute over sexual orientation. I will join in defending the rights of gays and lesbians. I wish their leaders would join me in defending the rights of religious believers. And I wish that all concerned would recognize that these are not mutually exclusive categories.

X. Conclusion.

This bill is needed for the reasons set forth by other witnesses and in earlier hearings. The bill's opponents seem to be few in number, but they are able and creative; they can think of many arguments. In this testimony, I have tried to anticipate those arguments.

No one can predict how the Supreme Court might change the law in the future. But Congress should not be intimidated into not exercising powers that have been established for decades because of the risk that the law might change in the future. The bill is clearly within Congressional power under existing law, and I urge its enactment.

TESTIMONY SUBMITTED TO THE HOUSE JUDICIARY COMMITTEE, SUB-COMMITTEE ON THE CONSTITUTION REGARDING H.R. 1691 (THE "RELIGIOUS LIBERTY PROTECTION ACT OF 1999")

Lawrence G. Sager
Robert B. McKay Professor of Law, New York University School of Law

Christopher L. Eisgruber
Professor of Law, New York University School of Law

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We thank the Chair and the Committee for providing us with the opportunity to submit our views regarding the the "Religious Liberty Protection Act" (H.R.1691) (hereafter, "RLPA").

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

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[1] Flores clearly invalidated RFRA with respect to the regulation of state and local government behavior. Courts have divided about whether Flores should be understood to invalidate RFRA with regard to regulation of federal behavior. Yet, regardless of whether RFRA's federal applications survived Flores, we expect that the federal courts should, and will, ultimately declare them to be unconstitutional. For reasons that are equally applicable to RLPA and so are discussed in this memorandum, we believe that RFRA is unconstitutional under the Supreme Court's Establishment Clause doctrine.

I. Congress, Religious Liberty and the Mistaken Turn to RFRA and RLPA.

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

Congress has played a commendable role in protecting these more vulnerable commitments. Thus for example: Congress directed the armed forces to make reasonable accommodation for the wearing of religiously mandated apparel (see 10 U.S.C. §774); and thus, Congress withdrew funding for a Forest Service road that would have harmed a sacred Native American site (see House Committee on Appropriations, Dept. of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Congress, 2d Sess. 72 (1988)); and thus, Congress has provided church employers with exemptions from certain tax obligations that are inconsistent with their religious beliefs (see 26 U.S.C. §3121(w)(1)); and thus, Congress acted to specifically make it possible for members of the Native American Church to use Peyote as part of their sacrament of worship (see 42 U.S.C. §1996). In each of these cases, Congress had reason to believe that the concerns of minority religious believers were being slighted; and in each, Congress moved to accommodate those concerns in a way that was entirely consistent with the general capacity of state, local and federal governmental entities to govern fairly and well.

But RFRA and now RLPA represent a sharp and mistaken turning away from this traditional congressional role of vigilant and nuanced oversight. They both involve a radical, sweeping and dangerous invocation of the "compelling state interest test" whenever religiously-motivated persons find their projects blocked or substantially burdened by perfectly legitimate, thoroughly even-handed, entirely reasonable laws. RLPA goes even further - and in the process amends whatever survives of RFRA in this regard as well - by insisting that the projects of religiously-motivated persons need not be compelled by or central to the beliefs of those persons in order to qualify for protection under the act.

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

- RLPA would create two classes of citizens: those who have religious reasons of just the right sort for their actions and those whose reasons for acting - however laudable and heartfelt - do not so qualify. The former would be entitled by RLPA to defy otherwise perfectly valid governmental regulations which the latter would be required to obey. In some cases the selective conferral of this privilege to defy the law would be especially inequitable: RLPA could, for example, be invoked by landlords who would justify their violation of some anti-discrimination laws on the basis of their religiously-inspired objections to would-be tenants, even when those objections were neither compelled by nor central to their religious beliefs. RLPA would undermine the capacity of governmental entities at every level to pursue perfectly legitimate, democratically-endorsed goals; and RLPA would do so on behalf of persons privileged by virtue of the content of their systems of belief. This would be in stark violation of the establishment clause of the First Amendment.

- RLPA reaches in desperation for a source of congressional authority to replace section 5 of the Fourteenth Amendment; it would surely be struck down by the Supreme Court on enumerated powers grounds, and would invite the Supreme Court to place new inhibitions on the capacity of Congress to act as the Court's partner in addressing questions of constitutional justice. No one believes that RLPA is addressed to increasing interstate commerce, to the control of interstate commerce, or to the benefit of the economy generally. RLPA seizes on the entirely coincidental fact that some laws which regulate religiously motivated conduct will thereby have some effect on interstate commerce in order to find a commerce clause rationale for the blanket exemption from the force of such laws that it grants religiously-motivated persons. This flies in the face of the Supreme Court's decision in United States v. Lopez, 115 S.Ct. 1624 (1995). Alternately, RLPA restricts itself to programs or activities that receive Federal monies, and relies on Congress's broad spending power authority. But even the spending power requires a nexus between Federal restrictions and the goals of any particular spending program, and RLPA is unsupported by any such connection. Finally in what are likely its most important provisions, involving land use regulation, RLPA, like RFRA before it, depends upon section 5 of the Fourteenth Amendment. Especially given RLPA's insistence that religiously-motivated behavior need not be central to or required by an individual or group's religious commitments, the land use provisions are plainly and flagrantly in violation of the Supreme Court's ruling in the Flores case.

- RLPA tells the federal judiciary how it is to proceed in hearing claims that arise directly under the free exercise provisions of the Constitution, as well as those that arise under RLPA itself. RLPA's effort to choreograph constitutional adjudication is an obvious, back-door attempt to accomplish precisely what the Flores decision prohibits, and would violate settled principles of separation of powers.

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

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

RLPA, even more so than RFRA, indefensibly favors religious commitments over the other deep concerns and interests of member of our society - concerns and interests like the welfare and integrity of one's family, deep moral and political commitments not recognizably grounded in religious beliefs, and a myriad of human projects to which individuals may be deeply and passionately committed. Imagine two sets of parents, both of whom have deep and conscientious reasons for wanting to exempt their children from sex education classes; or two groups of people who are profoundly upset by the thought of the homeless and the hungry, and who wish to open shelters and food kitchens in residential neighborhoods but are barred by zoning law from so doing; or two landlords, each of whom is deeply offended by the sexual relationship between two unmarried persons who wish to share an apartment; or two persons on the brink of bankruptcy, each of whom badly wishes to contribute what remains of their resources to charitable causes that occupy a central place in their life.

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

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

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[2] 489 U.S. 1 (1989).

[3] 472 U.S 703 (19).

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

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

In this regard, RLPA perpetuates the mistaken understanding of RFRA as to the state of religious liberty jurisprudence prior to the Supreme Court's decision in <u>Department of Employment Services v. Smith</u>, 474 U.S. 872 (1990). In the three decades of religious liberty jurisprudence prior to <u>Smith</u>, the Court paid lip-service to the proposition that government behavior that penalized persons for doing that which was essential to their religious commitments should be measured against the rigors of the compelling state interest test. But while the Court spoke broadly, it acted extremely narrowly. Only one isolated group was ever permitted to defy a general legal rule on the basis of the compelling interest test. That was the

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4 <u>Kiryas Joel Bd. Of Education v. Grument</u>, 512 U.S. 687, 705 (1994).

5 Ibid.

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

Amish, who were permitted to direct the development of their teenage children outside the framework of what the State of Wisconsin recognized as a school. One other group prevailed in the Court's many pre-Smith exemptions cases. The Court protected people who were presumptively entitled to claim unemployment insurance benefits; who had deep religious reasons for refusing an available job; and who faced a serious danger that those reasons might be treated with hostility by state bureaucrats. Outside of these two small groups, every other attempt by any religious person or group to invoke the compelling state interest test failed. In every other branch of constitutional jurisprudence, the compelling state interest test was strict in theory, but fatal in fact; here it was strict in theory but notoriously feeble in fact. The Smith Court did not cause or even precipitate the compelling state interest test's demise in the area of religious liberty. The Smith Court merely announced what had always been true.

And true for good reason. If honestly applied, the "compelling state interest test" is the most demanding standard known to constitutional law. Accordingly, the test is suitable only where it is appropriate to entertain a broad presumption of unconstitutionality--where, in other words, almost all of the cases that trigger the test will be abhorrent to the best standards of government behavior. Such a presumption rightly applies, for example, to laws intended to censor speech or to discriminate against racial or religious minorities. This presumption is badly suited to religious exemption cases, however. Many perfectly sound, even-handed laws will impose incidental burdens on some religious practices. The breadth and variety of religious belief make such collisions inevitable; but this does not offer a reason for depriving ourselves of the capacity to govern. Nor does the mere fact that a person's conduct is motivated by religious belief offer a good reason for permitting that person to defy reasonable, even-handed laws. The broad dictum of Sherbert would have created an unrecognizable, unmanageable and unjust world. The Court had the best of reasons for treating that dictum as rhetorical rather than operational.

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

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

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[7] 117 S.Ct at 2171. We have criticized this use of the compelling state interest test extensively. Christopher L. Eisgruber and Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437 (1994); see also Christopher L. Eisgruber and Lawrence G. Sager, Congressional Power and Religious Liberty after City of Boerne v. Flores, 1997 S. Ct. Rev. 79 (1997).

[8] See, e.g., Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("a substantial burden on the free exercise of religion ... is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that maintains a central tenet of a person's religious belief, or compels conduct or expression that is contrary to those beliefs"); Bryant v. Gomez, 46 F. 3d 948, 949 (9th Cir. 1995) (to meet the substantial burden standard, plaintiffs must point to a burden that is "'more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.'" (quoting Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987), aff'd sub nom. Hernandez v. Commissioner, 490 U.S. 680 (1988)); Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996) ("To exceed the 'substantial burden' threshold, government regulation 'must significantly inhibit or constrain conduct or expression that manifests some central tenet of ... [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion'" (quoting Werner v. McCotter, 49 F. 3d 1476, 1480 (10th Cir. 1995) (brackets and ellisions added by the Thiry Court)); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden results if a government action "leaves ample avenues open for plaintiffs to express their deeply held belief[s]").

RLPA's definition of religious exercise threatens to increase the extent to which RFRA favored religion over non-religion. Under RFRA, it was possible to argue that a burden upon religious exercise was not "substantial" if it affected only optional practices for which adequate substitutes were available. For example, under RFRA, several churches running soup-kitchens in residential neighborhoods sought zoning exemptions which, they conceded, were unavailable to comparably situated secular charities. In these cases, it was possible to argue that no "substantial burden" upon religious practice existed: the churches were free to run soup-kitchens in other locations, and they were free to engage in other charitable practices which, as a matter of their own religious doctrine, were equally worthy. See, e.g., Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (MD Fla. 1995). When successful, arguments of this kind mitigated the RFRA's favoritism for religion.

It is unlikely that these arguments would remain available under RLPA. To be sure, Sections 8(1) and 7(a)(3) define "religious exercise," not "substantial burden." Courts might find burdens upon religious exercise insubstantial if they affected only unimportant practices or if they left religious believers other, equally acceptable means by which to pursue their religious convictions. That construction of the "substantial burden" test, however, would render both provision -- especially Section 7(a)(3) - essentially meaningless. If, as appears to be the case, RLPA makes the invocation of religious motivation talismanic, and directs attention away from the particularized and extreme burdens on religious believers, RLPA exacerbates RFRA's already troubling disparity between the treatment of religious and non-religious commitments and concerns. RLPA would violate the establishment clause even on the hypothesis that RFRA does not.

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

Not surprisingly, Congress has no power to create the kind of special and arbitrary privileges that would result if RLPA were to become law. RLPA's peculiar statutory architecture amounts to a tacit admission of this problem: Congress has broad license to act under its commerce clause and spending powers; but RLPA stands out as depending upon a tenuous and improbable connection between those powers and the subject of religious liberty. Congress has an important and generous role to play as the Court's partner in enforcing the rights and liberties of members of our political community, but RLPA plainly lies outside the scope of that authority as well. Far from curing the constitutional vices of RFRA, RLPA's somewhat desperate hunt for constitutional authority proliferates such difficulties.

Spending Power Issues. Section 2(a)(1) of RLPA attempts to regulate the ability of state and local governments to "substantially burden ... religious exercise ... in a program or activity ... that receives federal financial assistance." That Section is an effort to draw upon Congress' spending power. The Supreme Court has held that Congress has broad discretion to impose conditions upon the use of federal money by state and local governments. The leading case is South Dakota v. Dole, 483 U.S. 203 (1987). In Dole, the Court upheld a statute which provided that states would lose federal highway funds if they did not raise the drinking age to 21. South Dakota objected to the statute on the ground that, under the Twenty-First Amendment, liquor laws were a matter of state rather than national control. The Supreme Court rejected this argument, reasoning that states could retain control over their drinking ages if they were willing to reject the offer of federal funds.

The Court's construction of the spending power in Dole was generous, but it was not unlimited. The Court emphasized that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" In Dole, the Court reasoned that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended--safe interstate travel." By raising the drinking age, the Court suggested, states would further the purposes of federal transportation law. Yet, unless Dole's nexus requirement is entirely meaningless, RLPA cannot possibly satisfy it. RLPA applies to all religious conduct and it applies to all federal spending programs. It defies belief to think that accommodating religious conduct, regardless of its nature, supports the goals of every federal expenditure, regardless of its purpose. Indeed, RLPA's compelling state interest test is blatantly inconsistent with that idea: it would require states to accommodate religious conduct even at the expense of the core goals of any given program unless those goals rose to the level of a "compelling state interest."

In effect, RLPA assumes that once federal dollars touch some activity or program, the activity or program is federalized top-to-bottom: it then becomes fair game for congressional regulation regardless of whether the regulation has anything to do with the federal government's initial spending program. That is not what the Supreme Court said in Dole, and it is not a sensible reading of the Constitution.

These considerations are sufficient to scuttle Section 2(a)(1) of RLPA, but it suffers from an additional constitutional defect. In Dole, states remained free to legislate whatever drinking age they preferred. If they departed from the federal standard, the penalty was forfeiture of federal funding. RLPA is not written that way. It does not provide that states will forfeit federal funds unless they enact state-law versions of RFRA or RLPA; instead, it subjects the states directly to private rights of action under federal law. This objection is somewhat technical in character, and there are ways around it. For example, the Court might construe RFRA as imposing conditions on every offer of funding which the national government makes to the states; on this theory, RLPA's regulation would effectively result from a "contract" between the states and the federal government, rather than from direct regulation by the federal government. It is not obvious, however, that this theory would or should succeed.[9]

Supporters of RLPA point to the example of Title VI, which stipulates in effect that no program receiving federal funds may engage in racial discrimination. But RLPA differs from Title VI in two crucial respects. First, under South Dakota v. Dole, 483 U.S. 203 (1987), Congress may impose conditions upon the receipt of federal funds only if those conditions are related "to the federal interest in particular national projects or

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[9] RLPA's use of the Spending Power may also raise additional Establishment Clause problems beyond those discussed above. RLPA in effect uses every federal spending program as a device to favor religion. The use of spending programs to favor religion (and only religion) has always been regarded as a paradigmatic example of an Establishment Clause violation. We believe that Section 2(a)(1) of RLPA would be clearly unconstitutional on this ground alone. This point is in fact related to the absence of any nexus between RLPA and the purposes of particular government spending programs. Were there such a nexus, it might be difficult to say that RLPA was designed only to benefit religion: it could be regarded as incidental to the goals of some particular program (say, an anti-discrimination program or a cultural affairs program) which bore a plausible relationship to some forms of religious conduct. Absent that nexus, however, RLPA is nothing more than a naked effort to use government spending to improve the position of religious persons and institutions.

programs." (internal quotations omitted). Because Title VI is an anti-discrimination measure, it bears an obvious relationship to the goals of <u>every</u> federal spending program. Congress has an interest in seeing that all persons are able to participate fairly and equally in federal programs. Title VI facilitates that goal. Title VI therefore satisfies <u>Dole</u>'s nexus requirement: it bears a relationship to the federal interest in national projects and programs.

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

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

<u>Commerce Clause Issues</u>. Section 2(a)(2) of RLPA attempts to substantially limit the ability of state and local governments to regulate religious exercise in any case where the presence or absence of such regulation "would affect" interstate commerce. That Section is an effort to draw upon Congress' commerce power. The Court has construed the commerce power generously including, of course, in connection with congressional efforts to prohibit discrimination. The case most often cited in this connection is <u>Katzenbach v. McClung</u>, 379 U.S. 294 (1964). In <u>McClung</u>, the Court upheld application of Title II of the Civil Rights Act of 1964 to Ollie's Barbecue, a restaurant in Birmingham, Alabama. The Court said Congress had power to prohibit race discrimination by Ollie's Barbecue on the following theory: by refusing to serve African-Americans, Ollie's Barbecue diminished the volume of business it did, and it thereby diminished demand for food products that moved in interstate commerce. The effect of one restaurant's actions might be small, but Congress was entitled to consider the aggregate effects of all restaurants similarly situated.

McClung grants Congress expansive authority, but that authority is not unlimited. Even in McClung, the Court insisted that Congress must identify some "connection between discrimination and the movement of interstate commerce." The Court upheld Title II only because the legislative record included "ample basis for the conclusion that ... restaurants ... sold less interstate goods because of ... discrimination." It is impossible to imagine, much less substantiate, any such basis for RLPA. Religious conduct varies tremendously and unpredictably. From the standpoint of interstate commerce, religious activity is a random vector. There is no reason to believe that it promotes, diminishes, obstructs, or facilitates interstate commerce. Nor is there any reason to think that requiring government to accommodate religion would have any predictable effect whatsoever upon interstate commerce.

The theory of Section 2(a)(2) of RLPA is largely parallel to the theory of Section 2(a)(1): it presupposes that once the congressional commerce power touches some activity or practice, that activity or practice becomes federalized top-to-bottom: it becomes fair game for congressional regulation regardless of whether the regulation has anything to do with promoting interstate commerce. That is not what the Supreme Court said in McClung.

RLPA is flatly inconsistent with the Supreme Court's recent decision in United States v. Lopez, 115 S.Ct. 1624 (1995), which held, inter alia, that Congress cannot regulate guns simply because they at one time entered the stream of interstate commerce. In Lopez, the Court emphasized that a "'general regulatory statute'" is defensible under the Commerce Clause only if it "'bears a substantial relation to commerce ....'" Id. at 1629, quoting Maryland v. Wirtz, 392 U.S. 183, 197, n. 27). To make this principle concrete, the Court identified "three broad categories of activity that Congress may regulate under its commerce power." The first two categories cover only laws with either "regulate the use of the channels of interstate commerce," or "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Ibid. These categories apply to laws which regulate (for example) highways, interstate telecommunications, shipping companies, interstate packages and interstate travelers. RLPA sweeps too broadly to fit within either of these categories.

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

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

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

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

Moreover, RLPA's Commerce Clause provisions sweep much more broadly than did the Gun Free School Zones Act. Those provisions have the potential to invade nearly every imaginable domain of local government. For example, the law would affect zoning (insofar as church activities substantially affect interstate commerce), education (insofar as public and private schools substantially affect interstate commerce), and family law (insofar as separation decrees and child support orders substantially affect interstate commerce). To the extent that the Court is worried about "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States," Id. at 1634, RLPA poses this threat much more vividly than did the Gun Free Schools Zone Act.

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

Surely, though, the requirements imposed by Lopez are not so formal and hollow as to be circumvented in this way. Suppose, for example, that the Gun Free School Zones Act had applied only to possession of a gun within 1000 feet of a school "substantially affecting interstate commerce." Would that have been sufficient to save the Act? It seems unlikely, to say the least. A jurisdictional proviso will bring a statute within the scope of the Commerce Power only if it creates a reasonable relationship between the goals of the statute and the goals of the

Commerce Clause. The statute in Lopez contained no jurisdictional proviso whatsoever; the Court accordingly had no occasion to analyze which provisos would create an adequate nexus between a challenged statute and the goals of the Commerce Clause. It would be a mistake to think that boilerplate references to commerce give Congress a free hand to regulate can save an otherwise unconstitutional statute.

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

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

Issues Pertaining to Section Five of the Fourteenth Amendment. In Section 3(b), RLPA purports to limit the zoning authority of state and local governments. This provision is freestanding, proceeds under the general heading in Section 3 of "Enforcement of Constitutional Rights", and is not limited to programs which receive federal monies or to regulations that affect interstate commerce. Apparently, Section 3(b), like RFRA before it, depends for its validity on Congress' power to enforce the Fourteenth Amendment. That power was, of course, the focus of the Supreme Court's decision in Flores. There, the Court emphasized that Section Five does not permit Congress to displace the Court's judgments about the content of constitutional rights. Exercises of power under Section Five are valid only so long as they serve to put in place a scheme of remedies for rights which the Court itself is willing to recognize. Flores, 117 S. Ct. at 2163-64, 2171-72.

In Flores, the Court emphasized that "Congress must have wide latitude in determining" what measures are well-suited to remedy constitutional violations. Id., at 2164. Nevertheless, Section 3(b)(1)(A) of RLPA unquestionably repeats the vices that proved fatal to RFRA. Section 3(b)(1)(A) involves a sweeping and unwarranted federalization of local decision-making. It is no exaggeration to say that, under this provision, any contentious encounter between a religious organization and a local zoning authority would become a matter for federal adjudication. This remarkable preemption of local authority cannot be defended as a reasonable mechanism to remedy or prevent discrimination against religious interests. No doubt zoning administrators sometimes abuse their authority to harm unpopular churches. But that problem is not reasonably attacked by extending all churches--no matter how rich, how powerful, or how favored in law--a blanket writ to challenge the zoning ordinances which every other citizen and institution must respect. What the Court said about RFRA is equally true of Section 3(b)(1)(A) of RLPA: "The stringent test [it] demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." 117 S. Ct. at 2171. Section 3(b)(1)(A) of RLPA is therefore clearly unconstitutional under Flores.

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

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

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

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

Section 3(a) contains a remarkable assault on the judiciary's authority to make independent judgments about the meaning of the Constitution. It presumes, under the guise of enforcing the Fourteenth Amendment, to articulate "presumptions" which courts must respect when applying its First Amendment jurisprudence. In particular, the Section purports to increase the government's burden of persuasion in Free Exercise Clause cases. Because Section 3(a) attempts to deprive the courts of the authority to interpret the Constitution, it is patently unconstitutional. There are two doctrinal paths to that conclusion. The simplest runs through Flores. The Court said clearly in Flores that Congress may not use its Fourteenth Amendment powers to alter the substance of the Court's interpretations of the Fourteenth Amendment. Section 3(a) of RLPA offends this conclusion more blatantly than RFRA did, and the

Court would undoubtedly find it unconstitutional.

There is, however, an even more fundamental doctrinal objection to Section 3(a). In United States v. Klein, 80 U.S. (3 Wall.) 128 (1871), the Supreme Court held that Congress may not specify a "rule of decision" for courts. Courts must be able to decide for themselves how to apply statutes or the Constitution. In the realm of statutory interpretation, Klein is difficult to apply: in some sense, of course, Congress specifies a "rule of decision" for courts every time it writes a statute. Christopher L. Eisgruber and Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 470 (1994). RLPA, however, is a text-book violation of Klein. See Klein's First Principle: A Proposed Solution, 86 Georgetown L.J. 2525 (1998). It attempts to compel judges to respect Congress' judgment, rather than their own, when interpreting the Constitution. And it forces judges to act as though they and adopted Congress' constitutional judgment as their own. Congress has the power and responsibility to arrive at its own view of constitutional substance, of course. But Congress is obliged to permit the Court this same independence of judgment.

CONCLUSION

RLPA's constitutional defects are not technicalities. On the contrary, they all reflect strong claims on the judgment of the members of Congress who wish to act on behalf of religious liberty. Congress may well want to assure that religiously-motivated persons are treated fairly and that their interests are reasonably accommodated. But Congress surely does not want to sweepingly favor religiously-motivated persons over the vast majority of citizens conscientiously leading their lives, and to do so at the expense of the democratically-shaped rule of law. Likewise, Congress surely does not want to generate what Justice Kennedy in Flores correctly characterized as "... a considerable intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." And finally, Congress should want to act as the Supreme Court's partner in the pursuit of political justice for American citizens, not as its adversary. That is the admirable tradition into which, for example, Title VII and the Voting Rights Act fall. RFRA was a false start, and Congress need not and should not perpetuate RFRA's mistakes.

Of course, RFRA was motivated by a legitimate and important goal: the goal of assuring that religiously-motivated conduct is reasonably accommodated, that governmental actors are not insensitive or hostile to religious beliefs and commitments. Congress has an extremely important role to play in pursuing that goal. It can play that role in two different ways.

First, Congress can continue to police state and federal conduct for egregious failures of the duty of reasonable accommodation and correct those failures. This is a role that Congress has traditionally played to the great benefit of constitutional justice in the United States. This effort requires ongoing vigilance and nuance of legislative response, and Congress' performance in this context has been superb.

Second, Congress can enact more general legislation that offers broad protection to religiously-motivated persons against the possibility that their beliefs and commitments will be treated with insensitivity or hostility. This memorandum is not a good setting in which to explore the content of such legislation, but we would be glad to pursue the question with the Committee or any of its members.

What is critical to recognize for the moment is that RLPA is not such legislation. RLPA offers a distorted and untenable view of what religious liberty is, a view that Congress on reflection should not endorse; and RLPA streches notions of congressional authority to their breaking point, inviting the judicial articulation of constitutional limitations that Congress should not welcome. RLPA is unconstitutional, and if it were enacted, the Court would find it so to be. Congress has good reasons at the outset to choose a different vehicle to realize its altogether laudable concern for religious liberty.

Lawrence G. Sager
Robert B. McKay Professor of Law
New York University School of Law

Christopher L. Eisgruber
Professor of Law
New York University School OF Law

~~April 28, 1999~~
May 5, 1999

106TH CONGRESS
1ST SESSION

H. R. 1691

IN THE HOUSE OF REPRESENTATIVES

________ introduced the following bill; which was referred to the Committee on ________________

A BILL

To protect religious liberty.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Liberty Protection Act of 1999".

SEC. 2. PROTECTION OF RELIGIOUS EXERCISE.

(a) GENERAL RULE.—Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise—

(1) in a program or activity, operated by a government, that receives Federal financial assistance; or

(2) in any case in which the substantial burden on the person's religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes;

even if the burden results from a rule of general applicability.

(b) EXCEPTION.—A government may substantially burden a person's religious exercise if the government demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) REMEDIES OF THE UNITED STATES.—Nothing in this section shall be construed to authorize the United States to deny or withhold Federal financial assistance as a remedy for a violation of this Act. However, nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or the United States or any agency, officer, or employee thereof under other law, including section 4(d) of this Act, to institute or intervene in any action or proceeding.

SEC. 3. ENFORCEMENT OF CONSTITUTIONAL RIGHTS.

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

(b) LAND USE REGULATION.—

(1) LIMITATION ON LAND USE REGULATION.—

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

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

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

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

(2) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of the Free Exercise Clause or this subsection in a non-Federal forum shall be entitled to full faith and credit in a Federal court only if the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(3) NONPREEMPTION.—Nothing in this subsection shall preempt State law that is equally or more protective of religious exercise.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting "the Religious Liberty Protection Act of 1998," after "Religious Freedom Restoration Act of 1993,"; and

(2) by striking the comma that follows a comma.

(c) PRISONERS.—Any litigation under this Act in which the claimant is a prisoner shall be subject to the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

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

SEC. 5. RULES OF CONSTRUCTION.

(a) Religious Belief Unaffected.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) Religious Exercise Not Regulated.—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization, including any religiously affiliated school or university, not acting under color of law.

(c) Claims to Funding Unaffected.—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require government to incur expenses in its own operations to avoid imposing a burden or a substantial burden on religious exercise.

(d) Other Authority To Impose Conditions on Funding Unaffected.—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

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

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

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

(h) SEVERABILITY.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–2) is amended—

(1) in paragraph (1), by striking "a State, or subdivision of a State" and inserting "a covered entity or a subdivision of such an entity";

(2) in paragraph (2), by striking "term" and all that follows through "includes" and inserting "term 'covered entity' means"; and

(3) in paragraph (4), by striking all after "means," and inserting "conduct that constitutes the exercise of religion under the first amendment to the Constitution; however, such conduct need not be compelled by, or central to, a system of religious belief; the use, building, or converting of real property for religious exercise shall itself be considered religious exercise of the person or entities that use or intend to use the property for religious exercise.".

(b) CONFORMING AMENDMENT.—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–3(a)) is amended by striking "and State".

SEC. 8. DEFINITIONS.

As used in this Act—

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

(2) the term "Free Exercise Clause" means that portion of the first amendment to the Constitu-

tion that proscribes laws prohibiting the free exercise of religion and includes the application of that proscription under the 14th amendment to the Constitution;

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

(4) the term "program or activity" means a program or activity as defined in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d–4a);

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

(6) the term "government"—

(A) means—

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

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

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

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