FILE

RELIGIOUS FREEDOM RESTORATION ACT OF 1990

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

H.R. 5377

RELIGIOUS FREEDOM RESTORATION ACT OF 1990

SEPTEMBER 27, 1990

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RELIGIOUS FREEDOM RESTORATION ACT OF 1990

THURSDAY, SEPTEMBER 27, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:35 a.m., in room B-352, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Patricia Schroeder, Geo. W. Crockett, Jr., F. James Sensenbrenner, Jr., William E. Dannemeyer, and Craig T. James.

Also present: Stuart J. Ishimaru, assistant counsel; and Kathryn A. Hazeem, minority counsel.

OPENING STATEMENT OF CHAIRMAN EDWARDS

Mr. EDWARDS. The subcommittee will come to order.

Our hearing this morning concerns H.R. 5377, the Religious Freedom Restoration Act of 1990. The bill was introduced by our distinguished colleague from New York, Mr. Solarz, and he will be our first witness today. We are delighted to have him.

I believe, in the interest of time, I will ask unanimous consent that the remainder of my opening statement be made a part of the record.

[The opening statement of Mr. Edwards follows:]

OPENING REMARKS OF DON EDWARDS

THURSDAY, SEPTEMBER 27, 1990

Our hearing this morning concerns H.R. 5377, the Religious Freedom Restoration Act of 1990. The bill was introduced by our distinguished colleague from New York, Mr. Solarz.

The bill responds to *Employment Division v. Smith*, a recent Supreme Court ruling that weakened the long-held standard of review for religious freedom cases. H.R. 5377 restores the prior legal standard.

The First Amendment guarantees the free exercise of religion. Over the years, the Supreme Court has developed a "compelling state interest" standard to test the constitutionality of governmental restrictions on religion. Under this long-established test, a law can interfere with religious freedom *only* if it is the least restrictive means possible to protect a compelling state interest.

In the *Smith* case, the Supreme Court abandoned the prior test and established a weaker standard, holding that as long as a law appears neutral, the state need not justify encroachments on religious expression. The Religious Freedom Restoration Act re-establishes the "compelling state interest" standard.

H.R. 5377 has bi-partisan support in Congress. A broad-based coalition of political and religious groups is also supporting the measure.

At today's hearing, we will begin to explore how the *Smith* ruling might affect a wide range of religious practices in a wide range of faiths, and we will look at how those consequences might be averted.

[The bill, H.R. 5377, follows:]

I

101ST CONGRESS
2D SESSION

H. R. 5377

To protect the free exercise of religion.

IN THE HOUSE OF REPRESENTATIVES

JULY 26, 1990

Mr. SOLARZ (for himself, Mr. HENRY, Mr. EDWARDS of California, Mr. SENSENBRENNER, Mr. ACKERMAN, Mr. AUCOIN, Mr. BERMAN, Mr. CARDIN, Mrs. COLLINS, Mr. DANNEMEYER, Mr. DEFAZIO, Mr. DURBIN, Mr. EVANS, Mr. FAUNTROY, Mr. FEIGHAN, Mr. FOGLIETTA, Mr. FRANK, Mr. GINGRICH, Mr. GRADISON, Mr. HUGHES, Mr. LEHMAN of Florida, Mrs. LOWEY of New York, Mr. MARTINEZ, Mr. MCMILLEN of Maryland, Mr. MINETA, Mr. MOODY, Mr. OWENS of New York, Ms. PELOSI, Mr. SCHEUER, Mr. SMITH of Texas, Mr. TOWNS, Mr. TRAFICANT, Mr. UDALL, Mr. WOLPE, and Mr. YATES) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To protect the free exercise of religion.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1990".

SEC. 2. THE FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Except as provided in subsection (b), a governmental authority may not restrict any person's free exercise of religion.

(b) LAWS OF GENERAL APPLICABILITY.—A governmental authority may restrict any person's free exercise of religion only if—

(1) the restriction—

(A) is in the form of a rule of general applicability; and

(B) does not intentionally discriminate against religion, or among religions; and

(2) the governmental authority demonstrates that application of the restriction to the person—

(A) is essential to further a compelling governmental interest; and

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

(c) CIVIL ACTION.—A party aggrieved by a violation of this section may obtain appropriate relief (including relief against a governmental authority) in a civil action.

SEC. 3. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration

Act of 1990," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting "; and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1990" after clause (iii).

SEC. 4. DEFINITIONS.

As used in this Act—

(1) the term "governmental authority" means any authority of the Federal Government or of the government of the State, and includes political subdivisions, agencies, and municipalities of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each other territory or possession of the United States;

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

(4) the term "person" includes both natural persons and religious organizations, associations, or corporations.

SEC. 5. RULE OF CONSTRUCTION.

(a) IN GENERAL.—This Act applies—

(1) to every Federal or State law, regulation, administrative order, decision, practice, or other action previously enacted, adopted, or implemented; and

(2) to every State law, regulation, administrative order, decision, practice, or other action subsequently enacted, adopted, or implemented.

(b) FUTURE FEDERAL LEGISLATION.—Unless such law by specific reference to this Act states an intention to exclude such coverage, in whole or in part, Federal statutes enacted subsequent to enactment of this Act shall be subject to its provisions.

(c) FEDERAL ADMINISTRATIVE PROCEEDINGS.—This Act applies to every Federal regulation, administrative order, decision, practice, or other action subsequently adopted or implemented, unless adopted in compliance with a statute, or a part of a statute excluding coverage under subsection (b).

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act limits or creates rights under that portion of the first article of amendment to the Constitution that prohibits laws respecting an establishment of religion.

O

Mr. EDWARDS. Does the gentleman from California, Mr. Dannemeyer, have an opening statement?

Mr. DANNEMEYER. Yes, I do, Mr. Chairman.

Mr. EDWARDS. The gentleman is recognized.

Mr. DANNEMEYER. I would just like to commend Mr. Solarz for introducing this bill.

I notice there's an interesting group of authors on this legislation. When I looked at the list of people who were sponsoring this, knowing full well the different philosophical ideas that bring us to this forum, my first impression was to say, "Hey, wait a minute; do I belong among these folks?" The answer clearly is yes, because the decision by Justice Scalia, for whom I have the greatest respect—I don't know what he had for dinner the night before, but when he produced this decision, I think he deviated from the wisdom he has exhibited as a member of the U.S. Supreme Court.

Religious freedom is a very precious thing in our society, even for those who engage in practices that most of us in this country don't pursue as a part of our religious activity. But it is a small step from saying to somebody who genuinely believes that peyote is a useful part of a religious practice, that that suggests to those of us who take wine, believing it to be the body and blood of our Lord, Jesus Christ, may not do likewise. So, for these reasons, I support this legislation and hope our subcommittee will recommend its passage to the full committee.

Mr. EDWARDS. Thank you very much, Mr. Dannemeyer.

[The prepared statements of Messrs. Dannemeyer and Sensenbrenner follow:]

Statement by William E. Dannemeyer (R-CA)
Regarding H.R. 5377
the Religious Freedom Restoration Act of 1990
Before the Subcommittee on Civil and Constitutional Rights
of the Committee on the Judiciary

Thursday, September 27, 1990

Mr. Chairman, normally I would be more than suspect about a bill pertaining to the free exercise of religion and endorsed by the "Religion Last" crowd. Normally I would wonder what public school God was being thrown out of this time, what secular god was replacing Him, and once again reflect on how long this nation can endure such a historical downturn.

But, Mr. Chairman, this is not a normal piece of legislation and the Supreme Court decision that brings us together today was not your normal piece of reasoned jurisprudence. The embarrassment known as Employment Division v. Smith will undoubtedly go down in legal history as a case study in intellectual rigidity. Our founding fathers have been proved right again concerning the inherent fallibility of man as we read one of the greatest minds on the Court opining doctrines so false, so ill-conceived, that they only serve to humble us all.

It is because of the wisdom of our founding fathers that we are here today. Congress is the voice of the people, and while the legislative branch is not in the business of determining what is constitutional or not, we are entrusted as a check and balance to the judicial branch. Perhaps this exercise will remind the "Religion Last" crowd about the dangers of legislating by judiciary, especially as it pertains to matters of conscience. At the very least, I know this exercise will remind this Member that the label of a "conservative" does not make a Justice immune from gross errors in judgment.

It is a truism, as Justice Scalia quotes, that "laws are made for the government of actions" and not beliefs or opinions. However, to suggest that religious belief and action are mutually exclusively, as does Justice

Scalia, is to suggest a reality that has never been. Religion denotes action. For example, those citizens associated with the Christian faith are probably aware of the scripture cited as James 1:27 in the Bible (King James Version):

> "Pure religion and undefiled before God and the Father is this, To visit the fatherless and widows in their affliction, and to keep himself unspotted from the world."

The simple reason government cannot make a law concerning a belief or a thought is because a belief or a thought not tied to an action is irrelevant to societal concerns. The net effect of the majority decision in Employment Division v. Smith is that religious Americans are subject to the condescension of a Court that states "keep your religion to yourselves and you will be protected under the law, but attempt to effectuate your religion and you are at the mercy of the State, unless the activity is connected to a communicative activity or a parental right."

We are here today to overturn the Scalia doctrine just stated and return the law of the land to reason. H.R. 5377, the Religious Freedom Restoration Act, puts jurisprudence back to the future before Justice Scalia uttered his regrettable words. It says that the free exercise of religion is protected with only two exceptions. First, a restriction must be in the form of a law generally applied and one that does not intentionally or specifically discriminate against religion and, second, the State must show a compelling government interest and that its application must be the least restrictive means of furthering that interest.

This is a reasonable approach. The burden of proof as to a compelling State interest lies with the State. Religiosity is protected and preserved. I echo Justice O'Conner's enlightened rejoinder in that,

> "The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it

> occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order...Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."

This test must be restored to law. H.R. 5377 will do just that.

OPENING STATEMENT

OF

F. JAMES SENSENBRENNER, JR.

September 26, 1990

Thank you, Mr. Chairman.

I am pleased to have joined with the Chairman as an original co-sponsor of H.R. 5377, the "Religious Freedom Restoration Act."

The purpose of this bill is to reinstate the "compelling state interest" test for free exercise claims that was eviscerated by the Supreme Court in Unemployment Division v. Smith, 58 LW 4433 (1990).

This test has been the law for over 25 years, and Justice Scalia's assertions to the contrary, has not lead to "anarchy" and the courts have not been overcome with an endless parade of particularized requests for free exercise exemptions. As Justice O'Conner, expressed in her concurring opinion, the test has worked quite well to preserve the delicate balance between an individual's right to exercise his or her religion and the state's interest in prohibiting or mandating a particular course of action.

Admittedly, there is some accuracy to Justice Scalia's "reinterpretation" or better, "restatement" of the Supreme Courts' free exercise jurisprudence. More often than not, the Court has found that the government has met its burden in proving the existence of a compelling state interest sufficient to override a

free exercise claim. Nevertheless, the fact that it is difficult to has prove does not justify throwing out the test, and with it, the rights which the test sought to protect.

I am pleased that we are getting a head start on hearings so that if it is necessary to make any changes or adjustments to the legislation, this can be done, prior to reintroduction in the next Congress.

I welcome the testimony of each of the distinguished witnesses, especially my current and former colleagues and look forward to working together to see that this legislation is enacted.

Thank you, Mr.Chairman.

Mr. EDWARDS. Our first witness this morning is our good friend from Brooklyn, Steve Solarz. He is in his seventh term in Congress and chairs the Foreign Affairs Subcommittee on Asian and Pacific Affairs. Mr. Solarz is one of the distinguished leaders here in Congress and elsewhere in the world. Mr. Solarz is the chief sponsor of H.R. 5377.

We welcome you, Mr. Solarz, and you may proceed.

STATEMENT OF HON. STEPHEN J. SOLARZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. SOLARZ. Thank you very much, Mr. Chairman.

I have a formal statement which, with your permission, I would like to have included in the record.

Mr. EDWARDS. Without objection, so ordered.

Mr. SOLARZ. Thank you.

Let me just offer a few informal observations, if I might.

First I would like to thank you very much not only for holding this hearing but also for your sponsorship of this legislation. That, of course, applies to Mr. Dannemeyer as well.

I might take note of the fact, Mr. Chairman, that just yesterday the Supreme Soviet adopted a law to protect religious freedom in the Soviet Union. I never thought the day might come when the Congress of the United States was a little bit behind the Supreme Soviet in protecting fundamental religious liberties, but I certainly hope that through the enactment of this legislation we will catch up with them.

You know, Mr. Chairman, it took Deng Xiaoping, through the massacre in Tiananmen Square, to bring Mr. Dannemeyer and myself together on a China policy. I see it has now taken Mr. Justice Scalia, in his opinion in *Oregon Employment Division* v. *Smith,* to bring us together on the question of religious freedom.

Indeed, the bill, with respect to which you're holding this hearing today, has facilitated the establishment of an extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended the interests of the various religious faiths in our country, as well as those who champion the cause of civil liberties.

It it perhaps not too hyperbolic to suggest that in the history of the Republic, there has rarely been a bill which more closely approximates motherhood and apple pie than the legislation now before you. In fact, I know, at least so far, of no one who opposes the legislation. There may be some who have not yet been willing to publicly endorse it, but I have yet to hear of any opposition which has surfaced to it.

Mr. Chairman, I find Mr. Justice Scalia's majority opinion in this case to be incredible, because it really represents a fundamental retreat in terms of the ability of our country to protect one of our most fundamental freedoms, the right to not only worship the God of one's choice, but to implement the requirements of one's faith.

In his opinion, Mr. Justice Scalia said that this was the unavoidable consequence of democracy, that if laws of general applicability

are adopted which have the unfortunate consequence of restricting the ability of an individual to fulfill the obligations of his religious faith, this simply had to be accepted.

I don't consider it the unavoidable consequence of democracy at all. For close to 200 years now, we have protected the religious freedoms of the American people without in any way compromising the democratic character of our country. I think, therefore, that this legislation, which would not enact a new amendment to the Constitution but which would simply reinstate the standard which for close to three decades the Supreme Court has used to determine whether a law of general applicability which restricts the religious rights of Americans should be upheld is reestablished. We have lived with it before and I think we can live with it in the future.

Nobody in this day and age believes that there is any threat to religious liberty in our country through the enactment of legislation which would proscribe an entire faith. Nobody would think of suggesting, let alone enacting, a law which prohibited the practice of Catholicism or of Judaism or of Islam, of any of the many other religious faiths which we have in our country. The threat to religious freedom, to the extent there is one, precisely comes from the enactment of laws of general applicability which make it impossible for individuals to carry out the requirements of their faith.

It is precisely, therefore, the decision in *Oregon Employment Division* v. *Smith* which constitutes a threat to religious liberty by, in effect, saying that any law of general applicability, no matter how much it traduces the religious rights of American citizens, must be upheld if the law is otherwise constitutional.

This is not just a hypothetical problem. It is not just, as a professor of constitutional law I had in college used to say, an "imaginary horrible." There are concrete situations in which, unless this legislation is enacted, the religious rights of Americans could be adversely affected.

There is, for example, a case right now in Minnesota in which the Minnesota Legislature apparently enacted a law requiring people who drive on the roads with certain conveyances to have a bright orange strip on the back, which probably makes sense because they want to avoid accidents. Yet, this appears to violate the religious obligations of Amish people living in Minnesota. They believe there are other ways that they can meet the concerns of the State to provide protection for drivers without having to put this orange strip on the back of their vehicles. Yet, if this decision is permitted to stand, their religious rights will be overcome.

In the past, when we enacted the constitutional amendment to enact Prohibition, an exception was made for the sacramental use of wine. Yet under this Scalia decision, if there are restrictions on the right of people to use liquor or wine in the future that don't provide an exception for the sacramental use of wine, we could find ourselves in a situation in which those religions which require the sacramental use of wine are precluded from using it. So I think this is a very important issue. It is an effort to reestablish one of our most fundamental freedoms.

When the Constitution was first enacted—and I will say this in conclusion, Mr. Chairman—it was the understanding of the Representatives in Congress and of the American people who approved

the Bill of Rights that there were certain issues which were supposed to be removed from the political debate, as it were—freedom of speech, freedom of press, freedom of assembly, and freedom of religion was one of them.

That's what this bill attempts to do. It will still enable States to insist that their laws of general applicability be applied even when individuals say this would obligate them to violate the tenets of their faith if they can demonstrate they have a compelling interest in doing so and if they can demonstrate that they've chosen the least restrictive way of achieving that objective.

What is wrong with that? What is wrong with requiring the State to demonstrate—and the Federal Government, for that matter—that if it's going to restrict this precious freedom, this fundamental freedom, our first freedom, that it has to demonstrate it has a compelling interest to do so and has chosen the least restrictive means. If it can demonstrate it has a compelling interest, then it can do what it wanted to do all along. But if it doesn't have a compelling interest, then surely the religious rights and practices of those Americans who would be adversely affected ought to be given a priority.

The Supreme Soviet is moving in this direction, Mr. Chairman, and I hope and trust that, with your support and leadership, and the able assistance of my friend, Mr. Dannemeyer, we will be able to protect this right and freedom as well.

Thank you.

Mr. EDWARDS. Thank you, Mr. Solarz. That's wonderful testimony and it gets us off to a fine start in these important hearings.

[The prepared statement of Mr. Solarz follows:]

**STATEMENT BY CONGRESSMAN STEPHEN J. SOLARZ
CONCERNING THE RELIGIOUS FREEDOM RESTORATION ACT
BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
SEPTEMBER 27, 1990**

First I want to thank you, Mr. Chairman, for holding this hearing, and for the tremendous concern you and the Gentleman from Wisconsin have shown on this critical question. The diversity and intensity of support that the Religious Freedom Restoration Act has attracted in Congress, and from a wide range of religious and civil rights organizations, indicate just how fundamental are the values at stake in this effort.

On April 17, the Supreme Court dealt a devastating blow to religious freedom in the United States. In the case of Oregon Employment Division v. Smith, a majority of the Justices discarded the longstanding application of strict scrutiny to free exercise cases involving neutral, generally applicable laws. The strict scrutiny standard prevented governmental authorities from imposing burdens on the free exercise of religion unless they could demonstrate that they were furthering a compelling governmental interest and had used the least restrictive means to further that interest.

The Religious Freedom Restoration Act would correct the Court's unwise and unwarranted action by simply reinstating the compelling interest test that has served our country so well. The legislation would make the test applicable to both federal and state laws and would allow individuals to seek court enforcement of their rights.

This legislation restores the religious rights of all Americans as they were prior to Smith without tampering with the Bill of Rights. Rather, H.R. 5377 would simply create a statutory right consistent with the Congress' powers under section five of the fourteenth amendment. It is a narrowly crafted, legislative response to the radical work of an activist Supreme Court majority.

The diverse coalition that has formed in support of H.R. 5377 demonstrates just how fundamental this approach to religious tolerance is to the American way of life. Our list of more than 75 cosponsors in the House includes members from both sides of the aisle, liberals and conservatives, and members from all parts of the country, including several distinguished members of this Committee. The Coalition for the Free Exercise of Religion, which has been formed to support the bill, is "ecumenical" in both the political and religious sense of that term. It is composed of more than 35 organizations representing diverse religious and political viewpoints. In fact, to date, I am aware of no opposition to this legislation in or out of government.

America cannot afford to lose its first freedom - the freedom not just to believe but to act according to the dictates of one's religious faith - free from the unwarranted and unjustified restrictions of governmental regulation and interference.

Unfortunately, with the stroke of a pen, the Supreme Court has virtually removed religious freedom from the Bill of Rights. It is precisely within the context of neutral laws of general applicability that church-state conflicts usually arise. By refusing to balance free exercise rights against the interests being advanced by laws of general applicability, the majority in Smith has slammed shut the courthouse door on virtually every governmental violation of religious freedom likely to arise in the future.

These concerns are far from hypothetical. In addition to Smith, the Supreme Court has already sent one case back to a state with instructions to reconsider in light of the Smith ruling. That case, Minnesota v. Hershberger, concerned religious objections raised by the Amish to a state law requiring the placement of a bright orange triangle on their buggies. The Minnesota Supreme Court had identified a less restrictive alternative which would serve the state's goals.

Earlier accommodations, based on the strict scrutiny test, have now been called into question. The Tennessee Attorney General issued a formal ruling in 1984 that the Free Exercise Clause required an exemption from the sacramental use of wine from

a legal drinking age of 21. A U.S. District Court intervened when a student was penalized for missing an exam to observe a religious holiday. School officials in South Carolina relented in their application of a "no hats" policy to an Orthodox Jewish student when faced with a suit relying on the Free Exercise Clause.

The Court's reading of the First Amendment is out of step with the nation and with our commitment to religious liberty. Our nation has historically accommodated religion, even when religious practices have conflicted with important national goals. We have allowed the Amish to withdraw their children from compulsory education. We have allowed the use of wine in religious ceremonies during Prohibition. We have allowed deferments from conscription to accommodate religious pacifism even in times of war.

Justice Scalia's observation that the loss of liberty likely to be suffered by minority religions as a result of the court's ruling is an "unavoidable consequence of democratic government" demonstrates an appalling lack of regard for this proud American heritage. We have been strengthened rather than weakened as a nation by this remarkable record of accommodation. Yet Justice Scalia derided this outstanding and uniquely American tradition of religious tolerance as a "luxury" we cannot afford, "precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.'"

Religious freedom is the foundation of our way of life. This nation has always provided a haven for refugees from

religious persecution. We are Americans because those who came before us voted for freedom with their feet. My family, like many of yours, came here to worship freely. Even today, Jews from the Soviet Union, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahais from Iran, and many more, willingly renounce their homelands and risk their lives for the "luxury" of religious freedom.

Respect for diversity, and particularly religious diversity, was one of the fundamental principles that guided the framers of the Constitution. The Constitution's guarantee of religious freedom is as much a practical guide for good government and social stability as it is a moral imperative. By restoring the workable constitutional standard that protected the free exercise of religion in this country for nearly 30 years, the Congress will celebrate the 200th birthday of the Bill of Rights in a most appropriate manner.

Mr. EDWARDS. Mr. Dannemeyer, do you have any questions?

Mr. DANNEMEYER. I just have a little amendment here that I would like to have you think about supporting.

You know, setting aside a decision of the U.S. Supreme Court is not something any of us take lightly. This citizen in America happens to believe that there are products of our U.S. Supreme Court going back, just for a starting point, to 1962, that should be reversed. For instance, voluntary prayer in public schools is the decision in 1962 whereby we Americans kicked the Creator out of the public education process in America. I mention this because, should we be surprised that the current generation of people in America is having difficulty in conforming to a standard of not using drugs, which is recognizing a standard on how we treat our body, when we as a society have kicked the Creator of the standards out of the public schools of America. That decision, I think, was the cornerstone of the expansion of secular humanism which some contend, as I do today, is the religion of America, that there is no God.

So this modest little amendment just adds to this bill a provision that we reverse *Engel* v. *Vitale* in 1962. Would you support that?

[Laughter.]

Mr. SOLARZ. If we can assemble the same coalition in support of your proposal, Mr. Dannemeyer, I would certainly be prepared to consider it.

[Laughter.]

Mr. EDWARDS. How about throwing in *Roe* v. *Wade?*

[Laughter.]

Mr. DANNEMEYER. It says we can't even post the Ten Commandments, the foundation of the Judeo-Christian ethic, on the walls of the public classrooms of America. How silly can we get in how we raise the next generation in this country?

Mr. SOLARZ. If we're really going to go after all of the Supreme Court decisions using this bill as a vehicle, let me say, as a Representative from a State scheduled to lose at least three seats in the House of Representatives, you might want to consider *Baker* v. *Carr* in it as well.

[Laughter.]

Mr. DANNEMEYER. Why don't you move to California.

Mr. SOLARZ. Actually, if I have to move, Mr. Dannemeyer, I would probably go to Florida, where most of my constituents have gone over the last 10 years.

[Laughter.]

Mr. SOLARZ. I appreciate the invitation.

Mr. DANNEMEYER. I have no further comments.

Mr. EDWARDS. I have no questions, I think your points are so well made, Mr. Solarz. We have to be awfully alert in this country, and vigilant, as these crises come along. I have been here in Congress long enough to have lived through quite a number of them, that if we're not very careful, we're not quite as free the next morning. Now the drug crisis has already caused random and systematic drug testing with all sorts of fourth amendment problems that we have accepted, accepted unwillingly. Now to have another like this because of the drug crisis is something that we have to be careful about. I think we have to be careful about the crisis in the gulf. Are we going to be less free because of the crisis in the gulf?

Is something going to come along, a court decision or an executive decision, a congressional decision, that will take away one of our liberties?

So I think it is very appropriate for you to offer this kind of leadership that you are offering. I do hope that we can move ahead. On behalf of the subcommittee, we thank you for your splendid testimony.

Mr. SOLARZ. I just want to say one thing, Mr. Chairman, because I would feel somewhat remiss if I didn't say it. I really think that throughout the course of your very distinguished career in the Congress you have made an inestimable contribution to the protection of fundamental American freedoms at times when it often wasn't very popular to do so. So I know it must be with a sense of unalloyed joy that you now see an opportunity to enshrine a fundamental freedom under circumstances in which you will be hailed as a hero for doing so.

Mr. EDWARDS. Thank you very much.

Our next witness is a distinguished colleague from the Judiciary Committee, Lamar Smith, from San Antonio, TX. Mr. Smith is a valued member of the Judiciary Committee and also serves on the Science, Space and Technology Committee. Mr. Smith is also a cosponsor of this legislation.

Mr. Smith, we welcome you and you may proceed.

STATEMENT OF HON. LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. SMITH of Texas. Thank you, Mr. Chairman.

First of all, I would like to express my appreciation to you personally, as well as to my colleague, Mr. Solarz, who preceded me, for your efforts and initiative in drafting the bill that you have brought to your colleagues' attention, and also a personal thanks to you for the opportunity to testify. As you said, we are colleagues on the Judiciary Committee and I certainly respect and admire what you are doing here today.

I am pleased to speak out in defense of our religious freedom.

On April 17, the U.S. Supreme Court issued a ruling that will have a devastating effect on the free exercise of religion in this country. According to the Supreme Court, religious expression is now a "luxury" that Government is free to ignore.

The Religious Freedom Restoration Act responds to this ruling by restoring the standard that required the Government to prove it had a compelling interest in enforcing a statute that restricted our first amendment right of free exercise of religion. The free exercise of religion is one right that separates a free nation from a totalitarian, suppressive regime. For over 40 years we have condemned Communist countries for their official atheism and persecution of religious minorities and, in fact, during World War II we fought to end the Jewish Holocaust. We have to practice what we preach.

How can we tolerate, even for a second, a ruling that allows the political majority to turn individual expression of religion into criminal behavior? The Bill of Rights was created to stop the majority from tyrannizing the minority, and to make room for people

to express unpopular opinions or even to hold differing religious views.

The new ruling limits one's religious freedom to private thought, not expression. To treat religion as if it should not be seen or heard is to deny its essential power, for one's faith means little unless it is put into practice.

Without the restoration of the "compelling interest" standard, all religious activity is at risk. Government employees could be forced to work on religious holidays like Yom Kippur; Catholic children could be prevented from taking wine for communion because they are under the legal drinking age; individuals could be denied the right to pray for healing; Moslems, whose religion mandates ritual slaughter, could be unable to obtain religiously sanctioned food; people, in fact, could be prevented from reading religious literature in public places. This list could go on and on. Clearly, every American's personal freedom is at stake.

Let's remember our Pledge of Allegiance and restore our freedom of religious expression. We are "one Nation, under God, indivisible, with liberty and justice for all."

I thank you again, Mr. Chairman, for the opportunity to be with you.

Mr. EDWARDS. That is very helpful testimony, Mr. Smith. Thank you.

[The prepared statement of Mr. Smith follows:]

STATEMENT FOR REP. LAMAR SMITH
ON THE H.R. 5377
RELIGIOUS FREEDOM RESTORATION ACT OF 1990
BEFORE THE CIVIL RIGHTS SUBCOMMITTEE

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Mr. EDWARDS. Some people are going to say this is a matter that should be left up to the States and localities. How do you respond to that? Why do you think it's a national issue?

Mr. SMITH of Texas. Mr. Chairman, I think this is a national issue for a couple of reasons. First of all, as we know from past precedent, any issue that is, say, of overriding importance to every single individual in the country should be dealt with in the same manner. We should have a clear standard that applies to all and not have a situation where we have perhaps, conceivably, 50 different standards.

I think that this right we're talking about is so—I say universal, but, of course, technically it's national—so much a part of our heritage, so much a part of our history—I mentioned the Pledge of Allegiance, but we're all familiar, of course, with the Constitution and other rights that have been approved in the past—that I see really no alternative but for it to be applied federally. Again, that's the precedent and that's the importance.

Mr. EDWARDS. That's a very helpful answer. Not only the 50 States but, the way I read it, you could have local ordinances, many thousands of them, apply. Is that correct?

Mr. SMITH of Texas. That's the way I understand it as well, Mr. Chairman. There could be a proliferation of rules or laws that would try to either establish or not establish the freedom of religion. So again, it's another good argument for Federal protection.

Mr. EDWARDS. Thank you very much, Mr. Smith.

Mr. SMITH of Texas. Thank you, Mr. Chairman.

Mr. EDWARDS. Our next witness, Dean Kelley, is a Methodist minister and the director for Religious Liberty of the National Council of Churches. Dean Kelley is also an author and is completing a five-volume treatise on the law of church and State.

Five volumes, Dean. How long are they going to be?

[Laughter.]

Reverend KELLEY. Twenty-six hundred typed script pages. I don't know how many it will be in print.

Mr. EDWARDS. Are you going to put it on "Walkman?"

[Laughter.]

Mr. EDWARDS. That's the way I read my books nowadays.

Reverend KELLEY. You can listen to it while walking to work.

Mr. EDWARDS. We welcome you.

We are going to have three of you as a panel. The next member of the panel will be Robert Dugan, former president of the Conservative Baptist Association of America, and currently the public affairs director of the National Association of Evangelicals. He is a Baptist minister and is on the boards of the Denver Seminary and the Colorado Christian University. We are glad to have you, Mr. Dugan.

Then the final witness and a member of the panel is our good friend, John Buchanan, who represented Alabama here in the House for many years and was a valued colleague. When Mr. Buchanan was here, he served on the Education and Labor Committee and the Foreign Affairs Committee. He is currently president of the Council for the Advancement of Citizenship and vice-chair of the Republican Mainstream Committee. Mr. Buchanan comes to us

today as chairman of the board of People for the American Way. Mr. Buchanan, we're delighted to have you also.

I believe that Dean Kelley is first, and you may proceed.

STATEMENT OF REV. DEAN M. KELLEY, COUNSELOR ON RELIGIOUS LIBERTY, NATIONAL COUNCIL OF CHURCHES

Reverend KELLEY. Thank you, Mr. Chairman.

Could I ask that my prepared testimony be included in the record.

Mr. EDWARDS. Without objection, all three statements will be made a part of the record.

Mr. SENSENBRENNER. If the gentleman would yield at that point, I'm wondering if you all could cite which 32.4 percent of your prepared statement can be omitted from the record when our printing budget is sequestered.

[Laughter.]

Reverend KELLEY. I have already eliminated that, sir.

[Laughter.]

Reverend KELLEY. You have only the other 68 percent.

I will try to summarize what I was asked to do in laying the groundwork for the concerns of a very broad coalition, representing the widest spectrum of agreement among voluntary organizations and religious groups that I have ever seen in more than 30 years of work in this area. Might I add that during those 30 years I have often had occasion to admire the chairman's leadership in this field and his dedication to the protection of civil liberties, one of them being the free exercise of religion. So I think it's especially appropriate that this is the forum in which we have an opportunity to assert these concerns.

I have been surprised that there has been such a widespread consensus among the people who are alert to the damage that has been done to the free exercise of religion on April 17 of this year. They are perhaps in agreement on very few things, but they do appear to be in vehement agreement on this.

I won't need to repeat what Mr. Solarz and Mr. Smith have so eloquently stated, but I think it is useful to point out what they did not clearly indicate in their oral remarks, that it can hardly be a luxury for this Nation to preserve and protect the free exercise of religion which was insisted on by several of the original States in their agreement to ratify the Constitution. Thank goodness they didn't hold out until the Bill of Rights was written and included. As an effort of good faith, they said go ahead and ratify it, but we want a Bill of Rights, and we want it to include a protection of the freedom of conscience and the free exercise of religion.

And so it was in fulfillment of that understanding that Mr. Madison and others drew up a Bill of Rights which, indeed, was in its turn ratified 200 years ago next year. It is a dubious observance of that two-century anniversary that we are now told the free exercise clause is a "luxury." That clause was demoted from its high position, that was virtually a condition of the ratification of our Constitution, in three respects. Perhaps most important, it was demoted from the high level of strict scrutiny which is designed in

our jurisprudence to protect those interests that are inscribed in the Bill of Rights.

It wasn't demoted just to the next lower or intermediate stage of requiring an important State interest to trump it, but demoted all the way down to the level of those interests that are not protected by the Bill of Rights, where the Government need show only a rational means to protect the legitimate end of government. Now, that's a pretty thoroughgoing demotion and one that I think we ought not to accept without an expression of outrage.

The governing board of the National Council of Churches met in May, and I was given an unprogrammed slot on the agenda at the head of the first day's meeting to bring to the attention of those representatives of the 32-member denominations notice of what had happened a few weeks before. After I had explained it to them, there were expressions of distress from the members, and 2 days later they adopted unanimously a resolution of protest, which I have quoted in my testimony. In that resolution we called attention to the three types of demotion that had occurred. I have outlined the first.

The second was that in the past, the Court said, when we have appeared to be protecting the free exercise clause, it was only because it was a dual protection in which free speech was apparently the important element and free exercise was just sort of an auxiliary kicker to that protection, or when, as in *Wisconsin* v. *Yoder,* we were protecting the rights of parents to perpetuate and protect their faith in the bringing up of their children. But the rights of parents is not inscribed explicitly in the Bill of Rights, but now apparently it outranks the free exercise of religion, which is an ironic situation.

The third respect in which free exercise was demoted—the second being that if it has to be accompanied by another right that apparently does count, that makes it so much surplusage.

Third, the Court said that leaving accommodation to the political process, letting the legislature protect free exercise, will place at a relative disadvantage those religious practices that are not widely engaged in. But that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Justice O'Connor, I think rightly, chided Justice Scalia and the narrow majority of five for that sentiment, that minorities and nonconforming individuals are no longer protected by the free exercise clause, by quoting a historic sentence from Justice Jackson in the second flag-salute decision, *West Virginia* v. *Barnette,* where he said "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

So those are the three respects in which the Court, without being asked by any of the parties, without briefing or argument, sua sponte just suddenly demoted the free exercise clause, on the pre-

tense that to do otherwise was not only a luxury but would make each conscience a law unto itself. Justice O'Connor rightly pointed out that that's not the way the test works; Government has the opportunity to show a compelling State interest that would override claims of religious liberty, but at least the justification had to be made. That is the purpose of this bill, to reinstitute as a Federal cause of action what the Court has now dropped out.

I think it unfortunate that many people are not aware of what has happened. The Court, rather cleverly perhaps, disguised what it was doing behind this "stalking horse" of a peyote decision, so that many people, if they were even aware of it, all thought of maybe a few of those drug-using Indians in Oregon, without realizing what it did to all the rest of us as well.

I think it is also important to note that there are some people within the coalition among the religious groups, like myself, who sometimes have thought the Court has diluted the compelling State interest threshold in the past 27 years, when that was settled law, the free exercise clause, and wished that there were some way to build the threshold a little higher, maybe to say a truly compelling interest is necessary. But as we have already noted in the hearing between Mr. Solarz and Mr. Dannemeyer and others, every suggested departure from the status quo creates more problems than it solves. So most of us in the coalition have gratefully wanted to settle for simply restoring, as nearly as can be done, what was the law before April 17.

I think it also important to note that that restoration does not guarantee how any specific case will come out. But when every branch of government and every agency likes to think that it is, by definition, expressing the public interest, and the public interest in its most compelling level, there is need for a neutral referee to judge that claim against the private claims of religious liberty. That's the purpose of the compelling interest test.

But in that weighing, it should be made note of that the First Congress, in proposing the Bill of Rights, and the States then ratifying them, have determined that the free exercise of religion is the highest public interest except for, say, the protection of health and safety. As the Court said in *Wisconsin* v. *Yoder,* interests of the highest order, not just high but highest. That is the standard to which I hope this bill will enable us to repair.

I think there can probably be improvements made to the wording and that the subcommittee will doubtless have proposals to that effect as it considers this legislation. But as it stands, I think it is a major achievement on the road to try to return to the settled law as it was before April 17.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Reverend Kelley, and any suggestions you have, if you could transmit them to us we would appreciate your assistance.

[The prepared statement of Mr. Kelley follows:]

PREPARED STATEMENT OF REV. DEAN M. KELLEY, COUNSELOR ON RELIGIOUS LIBERTY, NATIONAL COUNCIL OF CHURCHES

Introduction

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to present this testimony as you consider the Religious Freedom Restoration Act of 1990, H.R. 5377. I have been authorized by the General Secretary of the National Council of Churches to present this testimony in furtherance of an action taken by the General Board of the National Council of Churches at its most recent meeting on May 18, 1990, in Pittsburgh. The General Board is composed of 260 members representing the 32 national religious bodies that comprise the Council, which have an aggregate constituency of over 40,000,000 in the United States.

They do not purport to speak for everyone of those constituents any more than members of the legislature can express the views of every inhabitant of their districts, but they are chosen by their denominations, in proportion to those bodies' size and support of the Council, to take counsel together in ecumenical dialogue twice a year on matters of moral and spiritual import to the churches and to utter their consensus on such matters for the edification of the churches and anyone else who may find their thinking helpful.

In April of this year, the Supreme Court of the United States issued a decision that virtually nullified one of the foremost guarantees of the Bill of Rights, the Free Exercise Clause of the First Amendment. Most Americans did not realize at the time what had happened because the press reported only that two drug counsellors in Oregon had been denied unemployment compensation after being discharged for using peyote -- a controlled substance -- in a ceremony of the Native American Church (Unemployment

Division v. Smith, 58 LW 4433, 1990). But the rationale used by the court in reaching that result set back the cause of religious liberty in this country by thirty years. When I explained to the Governing Board on May 16, 1990, the significance of what had happened, there were immediate responses of great concern, and two days later the Board unanimously adopted a resolution that succinctly expressed that concern.

> The General Board of the National Council of the Churches of Christ in the USA:
>
> 1. Expresses its extreme outrage and distress that the Supreme Court of the United States has in effect nullified the Free Exercise Clause of the First Amendment by ruling in Oregon v. Smith, April 17, 1990, that:
>
>   a. Religiously motivated conduct can be punished under any law of general application without government's being required to justify such punishment by a "compelling state interest" that can be served in no less burdensome way; government need show only a "reasonable means" to achieve a legitimate purpose -- the same standard required where no constitutionally protected rights are at stake;
>
>   b. The Free Exercise Clause protects religious conduct only when combined with the Free Speech Clause or the Due Process Clause or the Equal Protection Clause or "parental rights", which makes the Free Exercise Clause redundant -- surely not the intention of its authors;
>
>   c. The remedy for religious oppression is in the legislature, not the courts, even though the Court itself recognized that religious minorities will inevitably be "disadvantaged" in the political process -- the exact consequence the Bill of Rights was designed to prevent;
>
> 2. Urges its member communions to alert their constituents to this incredible loss of protection for religious rights -- of minority and majority -- because of an aggressive and radical exercise of judicial activism not required by the case before the Court and not briefed or argued by the parties, sweeping away the "compelling interest" standard that has been settled law for 27 years.
>
> (Resolution on "The Voiding of the Free Exercise Clause of the Constitution")

At that time the Board did not envision a specific remedy for this tragic failure of the court to uphold and effectuate one of the central guarantees of the Bill of Rights, but since that time a similar upsurge of alarm throughout the religious community and the civil-liberties community has engendered a movement to try to repair the breach in the First Amendment by creating a federal cause of action designed to replace that dropped by the court in Smith.

This effort has drawn together a coalition remarkable for its breadth, ranging from the most "liberal" to the most "conservative" of religious groups as well as advocacy organizations from the farthest flanks, including Agudath Israel, the Home School Legal Defense Assn. and Concerned Women for America on the one hand and the American Jewish Committee, the American Civil Liberties Union and People for the American Way on the other -- groups that may agree on little else but that a serious harm has been done to the basic rights of all Americans and that it must be repaired.

What the Supreme Court Did

Since 1963 the standard for applying the Free Exercise Clause has been that of "strict scrutiny": a legitimate claim under that clause -- that a sincere religious practice was burdened by government action -- required the government to justify that burden by demonstrating a "compelling state interest" that could be served in no less burdensome way (Sherbert v. Verner, 374 U.S. 398 (1963)). That has been the "settled law" of the free exercise of religion for 27 years. Suddenly, in April, 1990, without being asked to do so by the parties, who were proceeding under the Sherbert rule, without warning, without briefing or argument, the Supreme Court sua sponte announced that

strict scrutiny was no longer required when the practice of religion was inhibited or constrained by a "law of general application" that was not aimed at disadvantaging religion. Government no longer needed to justify burdening the free exercise of religion by showing a "compelling" interest not otherwise served, or even an "important" interest (the intermediate level of scrutiny), but needed only to assert a "rational means" of achieving a legitimate governmental objective -- the minimal level of scrutiny applied when ordinary private interests unprotected by the Bill of Rights come into conflict with the public interest.

By this decision the court demeaned or degraded the First Amendment's protection of the right of the people to practice their religion(s) (not merely to believe it, for they have that right in Albania). That clause was included in the Bill of Rights at the explicit insistence of several of the original states at the time of ratification, but the Supreme Court has now announced that it is impractical to effectuate that guarantee on a level commensurate with the other guarantees of the Bill of Rights. Adding insult to injury, the court remarked that when the right of free exercise of religion had been vindicated in its past decisions it was because of a "dual" protection by the Free Speech Clause or by the "rights of parents" (Wisconsin v. Yoder, 406 U.S. 205 (1972)), which latter is not even mentioned in the Bill of Rights, thus rendering the Free Exercise Clause mere surplusage.

Congress has heard much in recent days about the court's "whittling away" at the law's protections against racial discrimination, and the Civil Rights Act of 1990 is designed to restore some of what has thus been lost. But the Smith decision is not just "whittling;" it is a sudden, devastating act of near-total demolition far more sweeping than anything that has happened to civil rights. Yet so cleverly was that act disguised behind

the stalking-horse of the peyote decision that most people are entirely unaware of what happened.

The broad coalition of religious and civil-liberties groups referred to earlier is asking Congress to restore the compelling interest standard for the Free Exercise Clause before its loss is entrenched in precedent and accepted in practice by those who do not realize what has been lost. Such acquiescence is quite possible because, like most elements of freedom in the Bill of Rights, the free exercise of religion is not an issue of personal importance for most people; their religious practices are conventional, accepted, recognized by everyone. It is only the unconventional practices of minorities and nonconforming individuals that put the guarantees of the Bill of Rights to the test. And now the court has abandoned the very test it had long enunciated to protect the free exercise of religion.

Justice Scalia, writing for the narrow majority of five justices, admitted that leaving unpopular religious practices to the not-always-tender mercies of legislatures might not be much protection.

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.
>
> (Employment Division v. Smith, 58 LW 4433, 4438)

Disadvantaging minority religious practices is not an "unavoidable consequence of democratic government" so long as there is a Bill of Rights to protect them. Justice O'Connor, wrote a separate opinion criticizing the majority's rationale though concurring in the judgment. In it she chided the majority, quoting a famous line from Justice Jackson's opinion for the Court in the second flag-salute decision, West Virginia v. Barnette:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
>
> (Employment Division v. Smith, O'Connor opinion, 58 LW 4433, 4441, quoting West Virginia v. Barnette, 319 U.S. 624, 638 (1943))

Justice O'Connor also corrected Justice Scalia's glib reference to each conscience's being "a law unto itself" by pointing out that claims to the protection of the Free Exercise Clause do not always succeed.

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. (Smith, supra, at 4439).

The Religious Freedom Restoration Act is designed to restore the standard that government must meet in burdening a private interest protected by the First Amendment, the standard described by Chief Justice Burger, writing for the Court in Wisconsin v. Yoder.

> 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)).

On that scale the free exercise claim has not always won, and that is as it should be. No society based on "ordered liberty" can permit each conscience to be "a law unto itself." But the state should not distrain an individual from trying to carry out a duty to the Most High -- a duty hard enough without the government making it harder -- unless compelled to do so by the most urgent interest of the public.

Governments often proceed upon the assumption that what they seek to do is not only -- by definition -- the public interest but "of the highest order," and so a neutral referee is needed to weigh the government's assertion of the public interest against the protected private interest. And in that weighing, the First Amendment has already defined the right of individuals to practice their religion as being of the highest public interest (unless clearly threatening health or safety) -- until the Supreme Court changed the rules five months ago in a display of "judicial activism" more astounding than anything the "Warren court" ever did. The Religious Freedom Restoration Act is designed to put the rules back the way they were and to restore the Free Exercise Clause to its place of honor and effect at the head of the Bill of Rights.

What Difference Does It Make?

Scarcely was the ink dry on the Smith decision than its effects began to be felt. A case reached the Supreme Court in which the Minnesota Supreme Court had held that the state law requiring slow-moving vehicles to display a vivid orange triangle could not be enforced against the Amish religious objection to affixing such a garish emblem to their black buggies. (Grey-silver reflector strips were an alternative acceptable to the Amish and the court). The U.S. Supreme Court sent the case back to Minnesota with instructions to reconsider it in the light of the Smith decision, with the implication that the Free Exercise Clause provided no defense for the Amish against Minnesota's traffic laws. (Minnesota v. Hershberger, No. 89-804). Other examples will be given by other witnesses.

Passage of the Religious Freedom Restoration Act does not guarantee how any of those cases would come out. That is not the point. The Act would guarantee only that the free exercise claimants would have their "day in court" when the government would be obliged to demonstrate the "compelling state interest" that has been its obligation for 27 years.

Some members of our coalition have felt that the courts have not maintained a high enough threshold for "compelling state interest" and would like Congress to define that standard more rigorously in this legislation. Perhaps that would be worth trying. But after wrestling with various proposals, most members of the coalition have concluded that every gain in one direction would lead to greater losses in the other and would raise more questions than it answered. Therefore, the course on which most of us agreed was simply to restore the status quo ante, to put back the compelling interest test as it was generally accepted before Smith.

Thank you for the opportunity to express the National Council of Churches' emphatic support of the Religious Freedom Restoration Act.

Mr. EDWARDS. Now we're going to hear from Rev. Robert Dugan. We welcome you and you may proceed.

STATEMENT OF REV. ROBERT P. DUGAN, JR., DIRECTOR, OFFICE OF PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS

Reverend DUGAN. Thank you very much, and also for your inclusion of our entire statement; we appreciate that.

On behalf of the National Association of Evangelicals I do want to express deep gratitude to you and for the opportunity to testify before your distinguished committee on the pressing need for enactment of the Religious Freedom Restoration Act.

NAE is an association of some 50,000 U.S. churches from 78 denominations. Through commissions and affiliates, such as the National Religious Broadcasters and World Relief, we serve an evangelical constituency of 15 million.

Beyond that, Gallup polls have consistently shown evangelicals to be 20 percent of the Nation's population, although a recent Gallup poll even surprised us by estimating that maybe 38 percent should be labeled "evangelical."

In the last decade we've appeared many times to give testimony before congressional committees. And NAE has been involved as amicus curiae in many religious liberty cases considered by the Supreme Court. But our previous involvements pale by comparison to this hour. We are here today to speak candidly and unequivocally about the need to correct the present course of the Supreme Court.

Let us not mince words. In *Employment Division* v. *Smith* five Justices of the Supreme Court eviscerated the free exercise clause of the first amendment. In the post-*Smith* world, Government no longer needs to demonstrate a compelling governmental interest to justify an erosion of religious freedom. Now all that's needed is to restrict religious exercise as a neutral law of general applicability. Our ability to put our faith into action is now totally subject to majoritarian rule.

The issue in *Smith* was whether the sacramental use of peyote by members of the Native American church was protected under the free exercise clause. Reversing the State supreme court, the U.S. Supreme Court ruled that Oregon could deny unemployment benefits to persons discharged from their jobs for sacramental peyote use.

If that is all the Court had done, we wouldn't be here today. But the Court, on its own volition, and without benefit of briefing or argument, discarded decades of precedent and announced a sea change in first amendment law. This is a new rule of law. If prohibiting the exercise of religion is merely the incidental effect of a generally applicable and otherwise valid provision, the first amendment has not been offended.

The Government no longer has to justify any burden it imposes on free exercise, no matter how adverse.

Thus did the Court metamorphose the free exercise clause from fundamental right to hollow promise.

Had we the slightest inkling that the Supreme Court was considering scrapping established free exercise precedent, we would have

filed an amicus brief to try and persuade the Court otherwise. We were not given notice or opportunity to do so.

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

To add insult to injury, the majority opinion callously characterizes the compelling governmental interest test, as everyone so far has noted, as a luxury which we as a people can ill afford. But what we can ill afford is a Court that misconstrues precedent and guts our free exercise rights.

As matters stand now, the free exercise of religion cannot be used as an effective defense against unwarranted government action. According to the Court, if free exercise is burdened by a generally applicable law, that's just too bad. It apparently doesn't want to be bothered with balancing government's interest against the religious liberty interests of individuals. No religious Americans need apply.

According to Justice Scalia, applying the compelling interest test to all actions thought to be religiously commanded would be courting anarchy. It is ironic that Scalia's professed fear of courting anarchy instead courts despotism.

Contrast this attitude with that of the Supreme Court in an earlier and more enlightened day: "The very purpose of a Bill of Rights was to withdraw certain practices from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

This familiar quotation, as Dean Kelley has already pointed out, is drawn from *West Virginia State Board of Education* v. *Barnette,* the famous flag salute case decided on Flag Day, 1943.

The Court held that schoolchildren could not be forced, against their religious beliefs, to salute the flag. Besides ignoring the teaching of *Barnette,* Justice Scalia unaccountably relies on the *Gobitis* case which was reconsidered and expressly overruled in the *Barnette* case. Incredibly, in citing and relying on *Gobitis,* the majority opinion did not even note that it had been expressly overruled.

In his able dissenting opinion, Justice Blackmun pointedly observes that the majority opinion "effectuates a wholesale overturning of settled law" concerning the free exercise clause, and expresses the hope that the majority is "aware of the consequences." Let's look at some of those consequences—omitting the sacramental use of wine and the Amish reflector case which has been mentioned.

First and foremost, claims to include free exercise exemptions in future statutes are likely to fall on deaf ears, now that the Court has ruled that they have no constitutional basis.

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

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

Are certain evangelical denominations going to be forced to ordain female ministers, or the Catholic church to ordain female priests?

Are public school students going to be forced to attend sex education that is antithetical to their religious beliefs and practices?

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

Are schoolchildren, contrary to their religious beliefs, to be forced to salute the flag?

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

Under the Court's edict, "the land of the free" no longer honors free exercise of religion. Yet the Declaration of Independence proclaims our God-given, unalienable right. Unalienable, because government—including the Supreme Court—cannot legitimately deprive us of our birthright as Americans.

We, therefore, applaud the bipartisan bill introduced by Representatives Stephen Solarz and Paul Henry, which would restore the balancing process which formerly prevented Government from running roughshod over religious freedom. Congress must send a message to the Supreme Court which has turned its back on the free exercise clause.

Enactment of the Religious Freedom Restoration Act will enable us once again, in this 20th century, to do what the Founding Fathers accomplished—"secure the blessings of religious liberty to ourselves and our posterity."

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Reverend Dugan. That's clearly very lawyer-like, and represents your organizations very well, too. It certainly suits us as testimony soundly based on law.

[The prepared statement of Reverend Dugan follows:]

PREPARED STATEMENT OF ROBERT P. DUGAN, JR., DIRECTOR, OFFICE OF PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS

1

Mr. Chairman and Members of the Committee:

On behalf of the National Association of Evangelicals (NAE) I want to express deep appreciation for the opportunity to testify before this distinguished Committee on the pressing need for enactment of H.R. 5377, the Religious Freedom Restoration Act of 1990.

NAE is an association of some 50,000 U.S. churches from 78 denominations. Through commissions and affiliates, such as the National Religious Broadcasters and World Relief, we serve an evangelical constituency of 15 million.

Evangelicals are characterized not only by their emphasis on a personal conversion to Jesus Christ, but also by a high view of Scripture. The Bible is to us the infallible Word of God, our absolute standard for belief and behavior. Gallup polls have consistently shown evangelicals to be 20% of the nation's population, although a recent poll estimated that 38% of the population should be labled evangelical.

In the last decade we have appeared many times to give testimony before congressional committees. And NAE has been involved as amicus curiae in many religious liberty cases considered by the Supreme Court. But our previous involvements pale by comparison to the present hour. We are here today to speak candidly and unequivocally about the need to correct the present course of the Supreme Court.

Let us not mince words. In Employment Division v. Smith five Justices of the Supreme Court eviscerated the Free Exercise

Clause of the First Amendment. In the post-Smith world, government no longer needs to demonstrate a compelling governmental interest to justify an erosion of religious freedom. Now all that is needed to restrict religious exercise is a neutral law of general applicability. Our ability to put our faith into action is now totally subject to majoritarian rule.

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

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

This is the new rule of law: If prohibiting the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." The government no longer has to justify any

burden it imposes on free exercise, no matter how adverse.

Thus did the Court metamorphose the Free Exercise Clause from fundamental right to hollow promise.

We are dismayed. So are many others. Indeed, the religious liberty coalition supporting H.R. 5377 spans the political/religious spectrum. A common threat has galvanized ideologically diverse organizations to band together in a common cause.

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

Thus we were stunned when the Court used this seemingly innocuous case to announce a complete overhaul of established First Amendment law. No liberty is more precious in the American experience that religious liberty -- our First Freedom. Yet the Supreme Court, the very guardian of our liberties, has taken the Free Exercise Clause and emptied it of meaning.

Had we the slightest inkling that the Supreme Court was considering scrapping established free exercise precedent, we would have filed an amicus brief to try and persuade the Court otherwise. We were not given notice or opportunity to do so.

We were ambushed. Justice O'Connor is right on target when she says the Court's holding "not only misreads settled First

Amendment precedents," but also "appears to be unnecessary to this case."

Religious liberty remains a God-given right, as the Declaration of Independence indicates, but it is no longer secured by the Constitution as interpreted by the 5-4 majority. It is now to be bestowed by a beneficent majority as a matter of legislative grace, or denied by majoritarian rule unpersuaded by the claims of a religious minority.

To add insult to injury, the majority opinion callously characterizes the compelling governmental interest test as a "luxury" which we as a people can ill afford. But what we can ill afford is a Court that misconstrues precedent and guts our free exercise rights. Abundant scholarship on the origins and historical understanding of the Free Exercise Clause indicates that religious liberty was to be a preferred freedom, a fundamental right not to be submitted to rule by legislative majorities. We wish that the Court had taken that scholarship into account.

As matters stand now, the free exercise of religion cannot be used as an effective defense against unwarranted government action. According to the Court, if free exercise is burdened by a generally applicable law, that's just too bad. It apparently doesn't want to be bothered with balancing government's interest against the religious liberty interests of individuals. No religious Americans need apply.

According to Justice Scalia, applying the compelling interest test to all actions thought to be religiously commanded would

be "courting anarchy." We are told that in our religiously pluralistic society, we cannot afford the "luxury" of the compelling governmental interest test. Justice Scalia is dead wrong.

While the articulated compelling governmental interest test has been around for about three decades, the principle embodied in that verbal construct is almost a half century old. If we have not experienced anarchy over this long period, it seems highly unlikely that we need fear the future. His speculation has no basis in fact.

Justice Scalia concedes that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." But he shrugs this concession off with the callous comment that this result is the "unavoidable consequence of democratic government." It is ironic that Scalia's professed fear of courting anarchy instead courts despotism.

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

This familiar quotation is drawn from West Virginia State

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

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

First and foremost, claims to include free exercise exemptions in future statutes are likely to fall on deaf ears, now that the Court has ruled they have no constitutional basis.

Generally applicable laws prohibiting the serving of alcoholic beverages to minors threaten the sacramental use of wine.

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

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

Are certain evangelical denominations going to be forced to ordain female ministers, or the Catholic Church to ordain female priests?

Are public school students going to be forced to attend sex education that is antithetical to their religious beliefs and practices?

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

Are school children, contrary to their religious beliefs, to be forced to salute the flag?

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

These are are but a few of the consequences which Smith would apparently visit on the religious community. The worst, of course, is that government officials who were formerly under obligation to be reasonable and attempt, if possible, to accommodate religious practice, are now free to impose laws without any regard whatsoever to the religious sensibilities of minorities.

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

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

the abridgement of religious freedom, and will -- I repeat --lead inevitably to civil disobedience.

Under the Court's edict, "the land of the free" no longer honors free exercise of religion. Yet the Declaration of Independence proclaims religious freedom our God-given, unalienable right. Unalienable, because government -- including the Supreme Court -- cannot legitimately deprive us of our birthright as Americans.

We applaud the bipartisan bill introduced by Representatives Stephen Solarz and Paul Henry. H.R. 5377 would restore the balancing process which formerly prevented government from running roughshod over religious freedom. Congress must send a message to the Supreme Court which has turned its back on the Free Exercise Clause.

Enactment of the Religious Freedom Restoration Act will enable us once again, in this 20th Century, to do what the Founding Fathers accomplished -- "secure the blessings of [religious] liberty to ourselves and our posterity."

Mr. EDWARDS. Mr. Buchanan, you may proceed; we welcome you.

STATEMENT OF REV. JOHN H. BUCHANAN, JR., CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND

Reverend BUCHANAN. Thank you, Mr. Chairman. I'm pleased to appear on behalf of the People for the American Way Action Fund in strong support of this legislation.

Let me begin, Mr. Chairman, by being a "me too" Republican and echoing what the gentleman from New York, Mr. Solarz, earlier said. You personally have been a tower of strength and a force for good in the protection of the constitutional rights and liberties of American citizens through the years. And I think all of us who know about that are deeply grateful.

Certainly I must say for those of us who are part of the civil rights and civil liberties community that everything I know about the present Court, and everything I know about the mindset of the Federal judiciary more generally, leaves me to believe that not only in this matter, and in such matters as the Civil Rights Act of 1990, but in a series of cases over a series of years, I fear we shall have to come back to you, and to the Congress, for the sure protection of the constitutional rights and liberties of American citizens—and we shall.

This is an act that unites a great many people. The Supreme Court's unwarranted attack on the constitutional right to free exercise of religion in the *Oregon* v. *Smith* has united people who are not often united in this society. The breadth of support for this legislation stretches from People For to the Concerned Women for America—all across the spectrum—people who seldom agree on public policy matters involving church and State.

Now, how is it that we agree on this? What does unite us?

We are united in support of this legislation because it seeks to protect the fundamental principle of religious freedom, which was indeed undermined by the Supreme Court in the *Smith* decision. It does not grant government approval or disapproval to any particular religious practice or belief, but it is our shared commitment to the free exercise clause that enables us to beat our swords into plowshares and stand united in support of this legislation.

The history of the American struggle for religious freedom perhaps is worth revisiting. Our Pilgrim Fathers, many of them came to these shores fleeing religious persecution and seeking a place to live and work and worship in freedom. But then the colonists, in their wisdom or unwisdom, began to establish churches in the American colonies. Across the river in Virginia, Baptist preachers like Bob Dugan were beaten, imprisoned, and run out of town, while Anglican ministers were paid from the State treasury with tax funds.

In Delaware, every public officer was required to swear to a belief in the Trinity. Puritans in Massachusetts created a society which was governed by religious principles, such as restricting voting enfranchisement to church members only. And there was outright persecution of the centers which caused Roger Williams to leave Massachusetts and establish the Rhode Island Plantation as a refuge for freedom of conscience—what he called soul freedom.

The first amendment of the Constitution forbade government for establishing religion or prohibition of its free exercise. It is ironic as we celebrate the Bicentennial of the Constitution of the Bill of Rights that, as Dean Kelley pointed out, the Bill of Rights, the promise of which was a precondition to ratification of the Constitution by a series of States, that here as we celebrate the Bicentennial, we must defend it through this act of the Congress. But that is where we find ourselves.

Our Nation's charter is revered around the globe because it defines the rights of individuals to live free of unwarranted government interference in matters of religious freedom and establish systems of justice to ensure that our rights are protected.

One of Thomas Jefferson's greatest achievements, the Virginia Statute of Religious Liberty, served as the model for the Constitution's delicate balancing of religious interests. Jefferson's principles of individual religious liberty and his wall of separation between church and State has survived through time through eternal vigilance.

As a Nation, we hold the Government must not compel, or interfere with, any religious belief, and that the advancement of any church must be the sole result of voluntary support of individuals.

Since the early 1940's, the Supreme Court has recognized that close scrutiny must be applied when considering laws and other government actions which conflict with the freedom of religion protected by the first amendment.

As Justice O'Connor explained in her opinion in *Oregon* v. *Smith:* The majority opinion in *Smith* "dramatically departs from well settled first amendment jurisprudence and is incompatible with our Nation's fundamental commitment to individual religious liberty."

As a result of *Smith,* the Government today needs merely to articulate a rational basis to justify any burden it imposes on religious activity. Few burdens on religious activity will be outlawed under this weak test. That is why the Religious Freedom Restoration Act is so important. It would effectively reestablish the standard that's been used by the Court for decades when reviewing government restrictions on religious activity.

A compelling State interest and means narrowly tailored to promote that interest would have to be proven by the Government to enforce a generally applicable law which infringes on religious liberty.

Only by applying this highest level of scrutiny, which was abandoned by Justice Scalia in his majority opinion in *Smith,* will the Nation continue to protect religious freedom. Incredibly, Justice Scalia used the word "luxury" to describe the fundamental right to free exercise of religion.

Mr. Chairman, religious faith and the free exercise thereof is not a luxury to millions of Americans—it is the vital necessity central to their lives. And this Government must never treat it as such.

Scalia went on to list several types of government rules: The payment of taxes, child labor laws, animal cruelty laws, where the Court has found a compelling State interest in uniform application of the law despite free exercise claims. In so doing, he unwittingly proved the very point at issue today: The system works. The compelling interest test balances two crucial concerns: Individual inter-

est in religious liberty and the Government interest in uniformly applying its laws.

Without prejudging either as being, as Scalia puts it, "presumptively invalid"—this test applies.

In the past, the Court had properly applied the strict scrutiny test, and had guaranteed the public that a thoughtful balancing test had been applied. This act will restore that crucial guarantee.

As a former Member of Congress, I am particularly sensitive to the separation of powers issue raised by this act. It's a very serious undertaking by Congress to effectively overturn a constitutional interpretation by the Supreme Court.

Credible answers must be provided to two basic questions: Does the Congress have the authority to pass this legislation? And has the *Smith* decision substantially undermined the free exercise of religion, and does it pose a substantial risk for the future of religious liberty?

Section 5 of the 14th amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

In *Katzenbach* v. *Morgan,* the principal decision interpreting the power of Congress under this provision, the Supreme Court determined that section 5 "is a positive grant of legislation power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the 14th amendment."

Because the 14th amendment applies the Bill of Rights to the States, 1st amendment rights are legitimate subjects of legislative protection. Since the Religious Freedom Restoration Act seeks to "secure the guarantees" of the free exercise clause, Congress has the authority to adopt this legislation. Of course, the legislation does not literally overturn the *Smith* decision or conflict with the Court's authority as interpreter of the Constitution, but instead creates a new statutory right which secures the protection of the free exercise clause.

The actual and potential damage of the *Smith* decision provides a sound basis for congressional remedial action. The Supreme Court denied a petition for rehearing of the case on June 4 of this year, thereby indicating that it stands by its abdication of the highest level of scrutiny for free exercise claims.

Shortly after announcing *Smith,* the Court remanded a free exercise case—*Minnesota* v. *Hershberger*—to the Minnesota Supreme Court based expressly on *Smith.* Unless the Congress acts on the Religious Freedom Restoration Act here before you, we will witness a further erosion of the constitutionally guaranteed right to the free exercise of religion.

In 1954, constitutional historian Henry Steele Commager wrote: "Freedoms vindicated anew are more precious than those achieved without effort, and only those who are required to justify freedom can fully understand it."

Mr. Chairman, the expressed constitutional right to free exercise of religion is in jeopardy. The compelling State interest test must be restored. We appreciate your cosponsorship and that of the other members of your subcommittee of this act, and we whole-

heartedly support this worthy effort to vindicate anew this precious freedom.

Thank you, sir.

Mr. EDWARDS. Thank you very much, Mr. Buchanan.

[The prepared statement of Reverend Buchanan follows:]

PREPARED STATEMENT OF JOHN H. BUCHANAN, JR., CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND

Good morning, Mr. Chairman. As Chairman of People For the American Way Action Fund, a nonpartisan constitutional liberties organization, as a Baptist minister, and your former colleague, I am honored to address the Subcommittee today in strong support of the Religious Freedom Restoration Act. The Religious Freedom Restoration Act is an appropriate and most needed remedy for the Supreme Court's recent unwarranted attack on the constitutional right to free exercise of religion in the Oregon v. Smith decision.

The breadth of support for this legislation, from People For to Concerned Women for America, has raised many an eyebrow. How could it be possible that we, who so seldom agree on public policy matters involving church and state, could agree on the need for this legislation? The Religious Freedom Restoration Act unites us, however, because it seeks to protect the fundamental principle of religious freedom undermined by the Supreme Court in the Smith decision and does not grant government approval or disapproval to any religious practice or belief. Nor will this amazingly diverse coalition support or seek an amendment to that end. It's our shared commitment to the Free Exercise Clause that enables us to "beat our swords into plowshares" today.

The history of the American struggle for religious freedom is well known but worth revisiting as Members of the Subcommittee consider the Religious Freedom Restoration Act. Many of the earliest settlers came to this land seeking escape from religious persecution. They sought to live, work and worship in freedom. Before the Constitution was ratified, Americans had suffered through government-sanctioned religious repression. In Virginia, Baptist ministers were beaten and run out of town while Anglicans were funded by the colonial government. In Delaware, every public officer was required to swear to a belief in the Trinity. Puritans in Massachusetts created a society which was governed by religious principles, such as restricting voting enfranchisement to church members only, thus prompting Roger Williams to leave Massachusetts and establish Rhode Island Plantation as a religious refuge. The First Amendment to the Constitution, however, forbade government establishment of religion or prohibition of its free exercise. The nation's charter is revered around the globe because it defines the rights of individuals to live free of unwarranted government interference in matters of religious freedom, and establishes systems of justice to ensure that our rights are protected.

One of Thomas Jefferson's greatest achievements, the Virginia Statute of Religious Liberty, served as the model for the Constitution's delicate balancing of religious interests. Jefferson's principles of individual religious liberty and his wall of separation between church and state have survived erosion from the sands of time only through eternal vigilance. As a nation, we hold that government must not compel or interfere with any religious belief and that the advancement of any church be the sole result of the voluntary support of individuals. Perhaps

the finest defense of the First Amendment was Justice Jackson's decision in Board of Education v. Barnette:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion of force citizens to confess by word or act their faith therein.

Since the early 1940's the Supreme Court has recognized that close scrutiny must be applied when considering laws and other governmental actions which conflict with the freedom of religion protected by the First Amendment. Justice O'Connor succinctly summarized the Court's line of precedent in her concurring opinion in Oregon v. Smith:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

As Justice O'Connor further explained, however, the majority opinion in Smith "dramatically departs from well-settled First Amendment jurisprudence" and is "incompatible with our nation's fundamental commitment to individual religious liberty." As a result of Smith, the government today needs merely to articulate a rational basis to justify any burden it imposes on religious activity. Few burdens on religious liberty will be outlawed under this weak test. That is why the Religious Freedom Restoration Act is so important. The legislation would effectively reestablish the standards that had been used by the courts for decades when reviewing government restrictions on religious activities. A compelling state interest and means narrowly tailored to promote that interest would have to be proven by the government to enforce a generally applicable law which infringes on religious liberty. Only by applying this highest level of scrutiny, which was abandoned by Justice Scalia in his majority opinion in Smith, will this nation continue to protect religious liberty.

Incredibly, Justice Scalia used the word "luxury" to describe the fundamental right to free exercise of religion. He wrote in Smith:

> Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury

> of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

However, Scalia went on to list several types of government rules -- the payment of taxes, child labor laws, animal cruelty laws -- where the Court has found a compelling state interest in uniform application of the law despite free exercise claims. In so doing, we believe that Justice Scalia unwittingly proved the very point at issue here today: the system works! The compelling state interest test balances two crucial concerns -- the individual interest in religious liberty and the government interest in uniformly applying it rules -- without prejudging either as being, as Scalia puts it, "presumptively invalid." In the past, the Court had properly applied the strict scrutiny test and had guaranteed the public that a thoughtful balancing test had been applied. The Religious Freedom Restoration Act will restore the crucial guarantee.

As a former Member of Congress, I am particularly sensitive to the separation of powers issue raised by the Religious Freedom Restoration Act. It is a very serious undertaking by Congress to effectively overturn a constitutional interpretation by the Supreme Court. Credible answers must be provided to two basic questions: Does the Congress have the authority to pass this legislation? Has the Smith decision substantially undermined the free exercise of religion and does it pose a substantial risk for the future of religious liberty?

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In Katzenbach v. Morgan, the principal decision interpreting the power of Congress under this provision, the Supreme Court determined that Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Because the Fourteenth Amendment applies the Bill of Rights to the states, First Amendment rights are legitimate subjects of legislative protection. Since the Religious Freedom Restoration Act seeks to "secure the guarantees" of the Free Exercise Clause, Congress has the authority to adopt the legislation. Of course, the legislation does not literally overturn the Smith decision or conflict with the Court's authority as interpreter of the Constitution, but instead creates a new statutory right which secures the protection of the Free Exercise Clause.

The actual and potential damage of the Smith decision also provides a sound basis for congressional remedial action.. The Supreme Court denied a petition for rehearing of the case on June 4 of this year, thereby indicating that it stands by its abdication of the highest level of scrutiny for Free Exercise infringement claims. Shortly after announcing Smith, the Court

remanded a Free Exercise case, Minnesota v. Hershberger, to the Minnesota Supreme Court based expressly on Smith. Unless Congress acts on the Religious Freedom Restoration Act, we will witness a further erosion of the constitutionally guaranteed right to free exercise of religion.

In 1954, constitutional historian Henry Steele Commager wrote, "Freedoms vindicated anew are more precious than those achieved without effort, and only those who are required to justify freedom can fully understand it." Mr. Chairman, the expressed constitutional right to free exercise of religion is in jeopardy. The compelling state interest test must be restored. We appreciate your cosponsorship and that of the other Members of the Subcommittee of the Religious Freedom Restoration Act, and we wholeheartedly support this worthy effort to vindicate anew this precious freedom.

Mr. EDWARDS. Do any of the witnesses have a problem with Congress' right to enact this legislation? Mr. Buchanan spoke to that issue.

Do you think that down the road the Court might say that Congress doesn't have this right? Has anybody said that?

Reverend KELLEY. Mr. Chairman, I have not been aware of anyone making that claim. Several of us met with persons in the Domestic Policy Office of the executive branch, and that question was raised there. We were asked to supply a memorandum of law addressing that question. And one at least that I have seen—a very trenchant opinion of about six pages, by Prof. Douglas Laycock of the University of Texas in Houston, addresses it, I think, very cogently, using the same case law basis that the previous speaker did.

And also, I think, makes a very important point that the majority opinion in *Smith* in the sense tosses the ball to Congress by saying judges cannot waive this. And if you underline "judges" that implies that the legislative branch may have the option and the initiative to do so. So that it is not necessarily construable as solely a reproach to the judicial branch if Congress undertakes that responsibility.

I hope the committee will have the opportunity to consult constitutional experts on this very question. And I think they will get the majority response that Congress does have the power to do so.

Mr. EDWARDS. We intend to have some——

Reverend BUCHANAN. Mr. Chairman, could I qualify my own remarks on the subject?

Mr. EDWARDS. Yes.

Reverend BUCHANAN. The only time—when the Court voted on this authority of Congress, it was 8 to 1 that Congress did indeed have the authority to via section 5 to apply the Bill of Rights—had statutory authority to act in this area; and has done so in other cases.

But this Court has reversed at least one 8 to 1 decision thus far; and I only brought it up because of arguments raised in some quarters in the executive branch and because of that outside chance that the Court might—so if they do, we'll be back with a constitutional amendment. But I hope that won't happen.

Mr. EDWARDS. I can understand someone reading the bill—"governmental authority may restrict any persons from free exercise of religion only if"—in itself that's a pretty radical statement. We purists on first amendment rights say that all of the rights mean what they say, and the Government may not intrude.

Now, however, we all understand sort of what we mean by "compelling governmental interest." Can one of the witnesses explain that a little more? What's the threshold? How far can a religion go without hitting the threshold where the Government may step in?

Reverend KELLEY. Mr. Chairman, I suggested in my remarks that one clear demarcation is clear matters of public health and safety. Some would add to that "public good" or "public order." I think those tend to be more diffuse and amorphous and subject to debate. But health and safety are a little more clear-cut, and I would say the Government has not only the duty but the responsibility to protect the public health and safety—and those probably outrank everything else, including religious liberty.

But I think they have to be narrowly construed, and that raises what is probably the crucial threshold question, which is that of what is narrowly tailored to serve that interest because if the Government is permitted to present its interest in the most general terms, such as its responsibility to safeguard every person's education, then that will tend to outrank the claims of individuals. But if the threshold is whether government is obliged to apply its general applicability to every specific individual, including religious objectors, I think that's a much more realistic and protective threshold.

Reverend BUCHANAN. Mr. Chairman, the Court has, I think, properly ruled that notwithstanding one's religious convictions, one must pay taxes—and that to this kind of thing, general applicability, in that instance there would clearly be a compelling State interest.

Mr. EDWARDS. Ms. Hazeem.

Ms. HAZEEM. Thank you.

Prior to the *Smith* decision, did the Court expressly recognize any exceptions to the compelling State interest test of free exercise rights, and are those exceptions codified in this bill, and should they be?

Reverend KELLEY. I don't recall.

Not since *Sherbert* v. *Verner*—they have worded the test differently in some instances, and they have varied in the degree to the strictness with which they have applied the narrowly tailored term.

In *United States* v. *Lee,* for instance, the case of the Amish employer who felt that he should not have to pay social security taxes for his employees, the Supreme Court held that that would undermine the Government's compelling interest in the integrity of the whole tax system as though it would disrupt the whole tax system if a few Amish employers were given the same exemption that Congress has given self-employed Amish persons without disrupting taxes.

But in this case, apparently the Supreme Court was trying to—we in the field call it the *Bishop Hunthausen* decision because they added gratuitously that if Amish were permitted to make an exception for themselves from a tax law, the next thing you knew they would be tax resisters refusing to pay war taxes, as *Bishop Hunthausen* had just before that recommended.

So we thought they were beating *Bishop Hunthausen* over the back of the Amishman named Lee. But that was one of the low level thresholds that the Court has observed for compelling State interest, and it's exactly an illustration of what I said about using an interest of general concern where a much more narrowly tailored one would have been appropriate, to say does it really disrupt the whole tax system if you give Amish individual employers the same exemption that Congress has given self-employed Amish from social security taxes.

Ms. HAZEEM. Thank you.

Mr. EDWARDS. We welcome the gentlewoman from Colorado, Mrs. Schroeder. Mrs. Schroeder, do you have a statement or questions?

Mrs. SCHROEDER. No, thank you, Mr. Chairman. I am delighted to see this distinguished panel here.

Mr. EDWARDS. We welcome the gentleman from Florida, Mr. James. Mr. James, do you have any questions of these witnesses?

Mr. JAMES. No, I don't, thank you.

Mr. EDWARDS. Does this bill go beyond the simple restoration of the prior standard?

Reverend DUGAN. I don't think so.

Mr. EDWARDS. You're not asking in your testimony anything further than restoration of the existing law?

Reverend KELLEY. No, that's what it was intended to do, and within the coalition there were arguments about whether it ought to do more or whether it did less, et cetera. The only thing they were able to agree on was an effort simply to restore the previous rule.

Mr. EDWARDS. Are there any religious groups that are going to be in opposition to this bill?

Reverend KELLEY. No, not that we know of.

The U.S. Catholic Conference has made the comment that they thought the last section perhaps did more than simply to express neutrality toward the establishment clause. So members of the coalition had urged them to offer language they thought was truly establishment neutral. And I think they are working on that, and I urge the committee to invite them to express their views on it, as I am sure they will in due time.

Mr. EDWARDS. Does the legislation favor any particular religion or does it automatically protect any religious freedom practice?

Reverend DUGAN. Of the A and B choices, Mr. Chairman, I think B is the correct one.

Reverend BUCHANAN. Certainly I would assume it protected religious freedom in any of the expressions, and not showing favoritism toward any particular faith or practice, neither endorsing or opposing any particular faith or practice.

I think, Mr. Chairman, just said in passing, that there has always been a tension between the establishment and free expression clauses of the first amendment. You will continue to have faith issues if one is being elevated in derogation of the other. And I don't think this deals with that at all, but what is free expression to one person may appear to be establishment of a religion to another. So those debates, I think, will continue within the religious community as in the—but I don't think this act impacts on that in any way.

Mr. EDWARDS. Mr. Ishimaru.

Mr. ISHIMARU. Thank you, Mr. Chairman. Let me follow up on the chairman's last question.

This doesn't give a blanket plan to any certain practice, though, does it?

Reverend KELLEY. No, indeed.

Mr. ISHIMARU. Any challenged practice would still fall under the compelling governmental test?

Reverend BUCHANAN. Yes, as long as compelling——

Mr. EDWARDS. The burden of proof on the Government to prove the compelling State interest.

Reverend KELLEY. Not merely to assert, but to demonstrate.

Mr. EDWARDS. To demonstrate, right.

Go ahead.

Mr. ISHIMARU. Why has there been so much agreement among the diverse groups out there? We've seen support for this bill from a broad range of organizations who generally are on whole or opposite sides of the issue. Why has there been a coming together?

Reverend KELLEY. I think it is because even within that broad range, in the midst of our disagreements—one with another—I think all of us have felt we were operating within the limits of the compelling State interest test—the exercise. We would disagree about how it ought to be applied to a given practice, perhaps. But that that was the appropriate test, I have never heard anyone in our ranks dispute.

So when it was swept away, there was a reaction of universal alarm and our disagreements were for the time forgotten in an effort to restore the parameters within which we had been content to operate.

Reverend DUGAN. In a word, I think the decision of the Court was incredible—we found it so, unanimously.

Reverend BUCHANAN. I would say it's not just the religious community. I would say the American Nation, and American citizens of every point of view and every faith and of no faith, find the first amendment to be so precious and so central to our whole system of government that its derogation in this way is offensive and unacceptable to an overwhelming majority of Americans.

Mr. EDWARDS. Now let's say that a city—I won't use the name Cincinnati—but a city would pass an ordinance, and similar, I guess, to the law that this case dealt with—the bill says that "a party aggrieved by a violation of this section may obtain appropriate relief, including relief against governmental authority in its civil action."

Now that's the enforcement portion of this bill.

Does this mean an injunction or does it mean a lawsuit and a collection of damages?

Reverend KELLEY. I for one am not the best person to respond to that not being an attorney. I hope you will have better counsel than I can give on that. But I think the intention was not only to create a Federal cause of action where an individual or a group could obtain an impartial referee's weighing of their free exercise interest against the Government interest. But I think it serves an even more important prior function; that is, many of these municipal ordinances will be throttled prior to their enactment if there is this assertion by the Congress that individuals have that recourse.

In other words, at present, at this moment, in city halls across the land, we are deprived of that lever or weapon and, instead, government regulators can proceed without hindrance to enact just such ordinances that you mentioned, feeling that they are no longer restrained by mere quibbles of the first amendment—the free exercise clause—and this would restore that important leverage in preventing the enactment, the very inception, of laws that would have the effect of restricting free exercise of religion.

Mr. EDWARDS. Yes, it will not only be a defense but it will be an affirmative weapon that can be used. I understand.

Reverend DUGAN. Deterrent.

Mr. EDWARDS. I have no further questions.

Does any member have any questions?

[No response.]

Mr. EDWARDS. We thank the witnesses very much.

I believe that that will terminate this first hearing on this important piece of legislation. You witnesses have been very helpful and we're very grateful.

Reverend BUCHANAN. Thank you, Mr. Chairman.

Reverend DUGAN. Thank you.

Reverend KELLEY. Thank you.

Mr. EDWARDS. Thank you.

[The prepared statement of the Coalition for the Free Exercise of Religion follows:]

Coalition for the Free Exercise of Religion

200 Maryland Avenue, N.E. * Washington, DC 20002 * (202) 544-4226

September 26,1990

Dear Representative:

The undersigned organizations, representing a broad range of groups, both liberal and conservative, wholeheartedly endorse the Religious Freedom Restoration Act (H.R. 5377) introduced by a bipartisan coalition led by Representatives Stephen Solarz (D-NY), Paul Henry (R-MI), Don Edwards (D-CA), and James Sensenbrenner (R-WI). We strongly urge you to become a sponsor of this very necessary legislation.

The Religious Freedom Restoration Act would undo the U.S. Supreme Court's ruling in Oregon v. Smith which virtually eviscerates the First Amendment's Free Exercise of Religion clause. The court has effectively overturned more than a quarter century of settled law by ruling that a generally applicable law that incidentally burdens a religious practice raises no free exercise issues. Section 5 of the Fourteenth Amendment gives Congress the authority and the responsibility to return this nation to the pre-Smith standard for deciding free exercise cases.

Since the early 1960's, the Supreme Court had ruled that, where a law has the unintended effect of restricting the free exercise of religion, those affected must be allowed an exemption unless the state is able to prove a "compelling state interest" in restricting religious observance. This "compelling interest" test prohibited any restriction of a religious practice unless that restriction was of vital importance to the government and the government restriction could not be satisfied by a more narrowly tailored restriction. This standard drastically changed in April 1990 when the court, in Oregon v. Smith, opened the door to encroachments on the rights of all religious people.

Your support for the Religious Freedom Restoration Act would reaffirm a fundamental value at the core of the Bill of Rights that religious people should not be unduly disadvantaged by reason of their religious beliefs and practices. We ask you to support this bill as one of the most important measures in support of religious freedom which you will see in this or any session. If you would like to co-sponsor this bill, or desire additional information, please contact David Lachman in Representative Solarz's office at 5-2361 or Stephen Ward in Representative Henry's office at 5-3831.

Sincerely,

Agudath Israel of America
American Civil Liberties Union
American Humanist Organization
American Jewish Committee
American Jewish Congress
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Association on American Indian Affairs
Baptist Joint Committee on Public Affairs
Central Conference of American Rabbis
Christian Science Committee on Publication
Church of the Brethren
Concerned Women for America
Evangelical Luteran Church in America
Friends Committee on National Legislation
General Conference of Seventh-day Adventists
Home School Legal Defense Association
Lutheran Office of Government Information (LCMS)
National Association of Evangelicals
National Council of Churches
National Council of Jewish Women
National Drug Strategy Network
Native American Rights Fund
People for the American Way Action Fund
Presbyterian Church (USA), Social Justice and Peacemaking Unit
Union of American Hebrew Congregations
United Methodist Church, Board of Church and Society, Ministry to Gods Human Community

Mr. EDWARDS. The hearing is adjourned.

[Whereupon, at 11:44 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—STATEMENT OF THE AMERICAN JEWISH CONGRESS

Mr. Chairman:

The American Jewish Congress is pleased to submit this statement in support of the Religious Liberty Restoration Act (H.R. 5377)

When the Supreme Court decided last April that Native American Church members had no constitutional right to use peyote, a sacrament of their church, at religious ceremonies, it did not at first seem a matter of grave concern to most Americans or, for that matter, to most, Jews. But initial indifference rapidly turned to shock when the impact of the Court's opinion in Employment Division v. Smith became known.

The Court might have held, as did Justice O'Connor in concurring, that states have a compelling interest in stemming the flow and use of illegal drugs that would justify a prohibition on even the religious use of peyote. Such a holding, while of devastating impact to the Native American Church, would have continued to recognize that religious freedom is of fundamental significance and cannot be abridged absent some overriding governmental concern. Instead, the Court, in a single stroke, swept away some thirty years of constitutional law, holding that the Free Exercise Clause provides no protection against most types of governmental imposed burdens on religious practice. Government has no obligation, the majority said, to accommodate religious adherents when their religious practices conflict with otherwise valid laws. The guarantee of free exercise of religion embodied in the First Amendment, to use Justice Scalia's words, is but a "luxury" government cannot afford to indulge.

Responding to this dangerous concept of religious liberty, the AJCongress, along with a broad coalition of religious and civic organizations, began to seek a legislative response to the Smith decision. The Religious Liberty Restoration Act, sponsored by Representatives Solarz and Henry, and by the distinguished Chairman and Ranking Minority Member of this subcommittee, would "restore" the traditional standards for evaluating free exercise claims. The bill prohibits all governmental authorities from restricting the free exercise of religion unless a government action is "essential to further a compelling governmental interest" and is "the least restrictive means of furthering the compelling interest." At AJCongress's urging, the Act also makes clear that it in no way "limits or creates rights" under the Establishment Clause of the first Amendment.

Some may question why federal legislation to undo the Smith decision is considered so essential. But that is to underestimate the role of the courts in protecting the rights of religious minorities. Members of minority religions, Jews included, often seek religious exemptions from laws of general applicability. Before Smith, there was a legal basis for such a claim. As a result, exemptions were often granted, even without resort to the courts. For example, in Oregon, the Attorney General ordered the Board of Dentistry to reschedule a Saturday licensing exam to accommodate Sabbatarians. When the drinking age was raised to 21, religious observers in Tennessee were granted an exemption to allow minors to consume sacramental wine at religious ceremonies. And students have frequently obtained accommodations when school district rules conflict with their religious practices. Indeed, shortly before Smith, a Jewish student in South Carolina convinced his school

district to allow him to wear a yarmulke, despite a prohibition on headgear in the classroom, by alerting school authorities to the existence of a free exercise claim.

Not all religious claimants were successful in the past. The courts, even before Smith, were inclined to accept government's claim that a religious exemption would interfere with a compelling state interest. Under the Religious Liberty Restoration Act, courts would again balance the individual's religious needs against society's need to have certain laws applied without exception, and there is no guarantee that the individual would prevail. But without a legal basis for a religious claim, religious adherents have no protection against even the most capricious acts of government. All religious minorities must be alarmed when the courts are stripped of the power to require government to accommodate those religious practices, to use Justice Scalia's phrase, "not widely engaged in." The Religious Liberty Restoration Act returns that power to the courts and, with it, ensures that government does not arbitrarily interfere with religious freedom.

APPENDIX 2.—STATEMENT OF THE ANTI-DEFAMATION LEAGUE

The Anti-Defamation League is pleased to offer this statement in support of H.R. 5377, the Religious Freedom Restoration Act of 1990. ADL believes this legislation is necessary in light of the Supreme Court's decision last term in Employment Division v. Smith, and we urge its prompt adoption.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state and the right to the free exercise of religion.

More than two hundred years ago, this country was founded as a bastion of religious freedom. Freedom of religion was to be a core value of the new nation, enshrined in the First Amendment of the U.S. Constitution together with such other fundamental freedoms as the freedom of speech, freedom of the press, and freedom of assembly.

Over time, the "free exercise clause" of the First Amendment has served its purpose well, ensuring that Americans have the freedom to celebrate their religious customs and rituals without government interference. Only when a religious practice was contrary to a "compelling state interest" would the government

act to restrict this practice. Human sacrifice, polygamy, and other manifestly antisocial practices would not be tolerated; otherwise, the state would remain uninvolved.

This approach has enabled a plethora of religions to flourish across the land. Americans have supported it enthusiastically; there has been no interest in radically altering it. That is why the Smith decision came as such a shock, and that is why Congress must restore the status quo ante.

Of course, states have never been barred from enacting laws because they might interfere with an individual's religious practices. Before the Smith case, however, as a legal matter a state had to show what the courts termed a "compelling interest" in order to justify a restriction on an individual's exercise of his or her free exercise rights -- and the state's restriction had to be tailored as narrowly as possible. Failure to meet that extremely high standard would result in the individual's constitutionally-guaranteed free exercise right taking precedence over the state's law. The Smith decision effectively discarded this standard.

In the aftermath of Smith, unfortunately, an individual can no longer rely on the free exercise clause to exempt a religious practice -- even from criminal sanction -- under any law a state may pass unless that law expressly targets a specific religious

practice. The state merely has to pass a valid law; even if that law happens to threaten a religious practice, the state does not have to demonstrate a compelling interest in order to punish the practice in question.

The potential implications of this decision for general religious practice in this country are significant and disturbing. A few examples will serve to highlight the need for corrective legislation. In the absence of the Religious Freedom Restoration Act, laws presently on the books which bar the consumption of alcohol by minors could prevent priests from giving sacramental wine to children during Communion. Similarly, neutral laws could render vulnerable conscientious objection, Jewish circumcision rituals, kosher slaughter, a variety of accommodations traditionally afforded the Amish, and countless other religious practices.

The Religious Freedom Restoration Act would simply restore the pre-Smith standard of analysis in free exercise cases. It would not favor any individual faith or religious practice. It would not prevent a state from enacting statutes promoting general welfare. Importantly, however, it would ensure that government will not interfere with an individual's freedom to practice his or her religion unless a compelling interest is at stake which cannot be served in a less intrusive manner.

As noted earlier, the Supreme Court decision in Smith came as a surprise; the Court changed its free exercise standard on its own initiative -- without the benefit of briefs and oral argument. The Anti-Defamation League was one of dozens of organizations and prominent legal scholars from across the religious spectrum urging reconsideration of the case and a restoration of the "compelling state interest" standard in a petition for rehearing filed with the Court. Since that petition was denied in June, it is incumbent upon Congress to act.

The Anti-Defamation League commends Representatives Solarz, Henry, Edwards, and Sensenbrenner for their leadership in introducing this legislation. We view this measure as a priority item, and look forward to its passage.

APPENDIX 3.—LETTER TO CHAIRMAN DON EDWARDS FROM DOUGLAS LAYCOCK, ALICE MCKEAN YOUNG REGENTS CHAIR IN LAW, SCHOOL OF LAW, UNIVERSITY OF TEXAS AT AUSTIN

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October 3, 1990

Hon. Don Edwards, Chair
Subcommittee on Civil and Constitutional Rights
A806 House Office Building
Annex 1
Washington, DC 20515-6220

Dear Representative Edwards:

I understand that you recently held hearings on H.R. 5377, the proposed Religious Freedom Restoration Act, and that the question arose at those hearings whether the Act is within the power of Congress. I am able to speak to that issue, and I request that you include this letter in the official record of the hearings on H.R. 5377.

I have taught constitutional law for fifteen years, and I have published widely in the leading law reviews, especially on questions of religious liberty. The views expressed in this letter are my personal judgments as a scholar; it should be obvious that The University of Texas takes no position on the question.

The Act would restrict the power of states to regulate or prohibit religious exercise pursuant to facially neutral laws. It is my judgment that Congress has power to enact such a law under section 5 of the fourteenth amendment. Repeated majorities of the Supreme Court have upheld analogous exercises of Congressional power to enforce the reconstruction amendments, and every justice has joined in such opinions (with the obvious exception of Justice Souter, who is confirmed but not yet sworn in as I write). Some justices have raised questions about the boundaries of Congressional power in separate opinions, but the proposed Act appears to be within the bounds that these justices have recognized.

I. Cases Recognizing Congressional Power

Section 5 gives with respect to the fourteenth amendment "the same broad powers expressed in the Necessary and Proper Clause" with respect to Article I. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view," is within the power of Congress, unless prohibited by some other provision of the Constitution. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879). Similar enforcement provisions in sections 2 of the thirteenth and fifteenth amendments have been given similar interpretations, and the cases are often cited interchangeably. *See Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (plurality opinion); *id.* at 500 (Powell, J., concurring); *City of Rome v. United States*, 446 U.S. 156, 207-08 n.1 (Rehnquist, J., dissenting).

It is the fourteenth amendment that makes the free exercise clause binding on the states. *Employment Division v. Smith*, 110 S. Ct. 1595, 1599 (1990); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Thus, Congressional power to enforce the fourteenth amendment includes Congressional power to enforce the free exercise clause. The proposed Act is well adapted to carry out the objects of the free exercise clause -- to protect religious liberty and to eliminate laws "prohibiting the free exercise" of religion.

The Supreme Court of Oregon recently passed on the precise question: "Congress, of course, has the power under section 5 of the Fourteenth Amendment to protect against state infringement what it believes to be free exercise of religion under the First Amendment." *Smith v. Employment Division*, 307 Or. 68, 763 P.2d 146, 149 (1988), *rev'd on other grounds*, 110 S. Ct. 1595 (1990). The Oregon court thought that mere legislative history was enough to bind it, and that a statute was unnecessary. The Supreme Court of the United States did not consider the issue, presumably because Congress must enact a statute before the issue is properly posed. The Religious Freedom Restoration Act would be such a statute.

What may make the Act seem anomalous at first blush is that it seems to attempt to overrule the Supreme Court's decision in *Smith*. But the statute would not overrule the Court; rather, it would create a statutory right where the Court declined to create a constitutional right. This distinction is not a mere formality; it has real consequences that I explore in part III of this letter. And there is nothing unusual about Congress exercising its section 5 power in this fashion.

The express Congressional power to "enforce" the amendment is independent of the judicial power to adjudicate

cases and controversies arising under it. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966). Thus, Congress may sometimes provide statutory protection for constitutional values that the Supreme Court is unwilling or unable to protect on its own authority.

The clearest illustration of this power is the Voting Rights Act, in which Congress has forbidden discriminatory practices that the Supreme Court had been prepared to tolerate. The Supreme Court has held that literacy tests for voting do not violate the equal protection clause, *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959), but that Congress may ban literacy tests for voting, *Oregon v. Mitchell*, 400 U.S. 112, 131-24, 144-47, 216-17, 231-36, 282-84 (1970) (five separate opinions, collectively joined by all nine justices); *Gaston County v. United States*, 395 U.S. 287 (1969); *Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Similarly, the Court has held that electoral practices with racially discriminatory effect do not violate the Constitution, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), but that Congress may forbid such practices pursuant to its section 5 powers, *Thornburg v. Gingles*, 478 U.S.. 30 (1986); *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980).

Much of the law of private racial discrimination depends on Congress's analogous powers under section 2 of the thirteenth amendment. No one would suggest that the Supreme Court could, on its own authority to adjudicate cases arising under the thirteenth amendment, prohibit all private discrimination in the making of contracts or the sale and ownership of property. There is no case rejecting such a claim because no one has been bold enough to present it. But Congress has banned all such discrimination pursuant to its power to enforce the amendment. *Runyon v. McCrary*, 427 U.S. 160, 179 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968).

These holdings were not limited -- indeed, they were implicitly reaffirmed -- by *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2371 (1989). *Patterson* unanimously reaffirmed *Runyon's* holding that the Reconstruction civil rights acts forbid private discrimination, which necessarily assumes that Congress has power to forbid private discrimination not forbidden by the Constitution itself. The controversial holding in *Patterson* went only to the range of private conduct covered; it cast no doubt on the constitutional rule that Congress can reach private discrimination pursuant to its power to enforce the thirteenth amendment.

Most recently, the Court relied on section 5 of the fourteenth amendment to explain why Congress may, but state and local governments may not, authorize preferences for racial minorities without a finding of past discrimination. *Compare Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3008-09 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (plurality opinion joined by Justices Burger, White, and Powell), *with City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1990), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). The Court has never said that the Constitution requires such preferences of its own force.

All incumbent members of the Court have recognized Congress's section 5 power to go beyond the limits of Supreme Court decisions; the only disagreement is over how far beyond. Just this June, the Court was unanimous on the point in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). The five-justice majority relied on section 5 to uphold racial preferences in the award of broadcast licenses. *Id.* at 3008-09. The four dissenters thought the section 5 power irrelevant to a statute governing federal agencies, but they recognized that "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers under section 5.'" *Id.* at 3031, quoting the plurality opinion in *J.A. Croson v. City of Richmond*.

The *Croson* plurality, consisting of Justices O'Connor, Rehnquist, and White, stated that: "The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." 109 S. Ct. 706, 719 (1989) (emphasis in original). Justices Kennedy and Scalia recognized the accuracy of the plurality's account, but questioned its application to racial preferences. *Id.* at 734 (Kennedy, J., concurring), *id.* at 736 (Scalia, J., concurring). As Justice Kennedy put it, "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me."

II. The Limits of Congressional Power

Only a few opinions suggest limits to the reach of Congressional power to enforce the fourteenth amendment. The most obvious is that Congress may not "restrict, abrogate, or dilute" the protections of the bill of rights in the guise of enforcing them. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). Thus, Congress cannot evade Supreme Court decisions protecting constitutional rights, although it can supplement Supreme Court decisions refusing

to protect constitutional rights. It is this limitation that fuels Justice Kennedy's doubts about Congressionally mandated racial preferences. If racial preferences actually violate the equal protection clause, as he apparently believes, then mandating these violations of the clause is not a means of enforcing the clause.

Congressional power under section 5 is also subject to other express allocations of power in the Constitution. Thus, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a majority of the Court invalidated a provision requiring states to extend voting rights to citizens aged eighteen and over. The justices in the majority concluded that the text of the Constitution or the clear intent of the founders reserved to states the power to determine the qualifications of their own electors, subject only to the express amendments concerning race, sex, and poll taxes. *See* 400 U.S. at 124-31, 154-213, 293-96 (three opinions joined by Justices Black, Harlan, Stewart, Burger, and Blackmun).

Finally, Congress may not assert its section 5 powers as a sham to achieve ends unrelated to the fourteenth amendment. Congress may not act under section 5 where it does not believe that a constitutional right is at stake, or perhaps where there could be no plausible claim that a constitutional right is at stake.

This is the point of dissenting opinion in *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (1983) (joined by Justices Burger, Powell, Rehnquist, and O'Connor), rejecting Congressional power to prohibit mandatory retirement for state employees. The dissent said that "Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one -- not the Court, not the Congress -- has determined that mandatory retirement plans violate any rights protected by these amendments." *Id.* at 260. The opinion pointed to Congressional enactment and retention of mandatory retirement for several classifications of federal employees to show that Congress did not think that mandatory retirement was unconstitutional. The dissent recognized that the Court's decisions "allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards." *Id.* at 262. The majority upheld the statute on commerce clause grounds and did not speak to the section 5 issues.

III. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act does not run afoul of these limitations. First, there is no plausible claim that the Act would violate the court's interpretation of the free exercise clause or any other right incorporated into the fourteenth amendment. *Employment Division v. Smith*

reaffirms that legislative exemptions to protect religious exercise are "expected . . . permitted, and even . . . desirable." 110 S. Ct. at 1606. The Court unanimously rejected an establishment clause challenge to legislative exemptions in *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987).

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

Third, the Act does not assert fourteenth amendment power where there is no plausible fourteenth amendment claim. Quite the contrary, it is plain that the Act protects religious exercise from prohibitions; there is no plausible claim that it does anything else.

The Act is necessary because the Supreme Court refused to provide similar protection as a matter of independent constitutional interpretation. But the opinion unambiguously acknowledged that the conduct at issue is religious exercise. "The 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." 110 S. Ct. at 1599.

The Court interprets the Constitution of its own force to protect these religious acts at least from discriminatory regulation. "A state would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* It is equally clear that the Court would find a constitutional violation if a state banned a religious act for some denominations but not for others. The *Smith* opinion upholds only "neutral law[s] of general applicability." *Id.* at 1600.

From the perspective of a believer whose religious exercise has been prohibited, it makes little difference whether the prohibition is found in a discriminatory law or in a neutral law of general applicability. Either way, he must abandon his faith or risk imprisonment and persecution. Either way, it is undeniably true that his religious exercise has been prohibited. The *Smith* opinion does not deny that this is a plausible reading of the constitutional text. The Court says only that "we do not think the words *must* be given that meaning." *Id.* at 1599 (emphasis added).

The Court's reason for avoiding that reading is institutional. The opinion is quite clear that the Court

does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which *judges* weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 1606 (emphasis added); *see also id.* n.5. To say that an exemption for religious exercise "is permitted, or even that it is desirable, is not to say that it is constitutionally required, *and that the appropriate occasions for its creation can be discerned by the courts.*" *Id.* at 1606.

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

Of course the courts would apply the compelling interest test under the Act, and these decisions would require courts to balance the importance of government policies against the burden on religious exercise. But striking this balance in the enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.

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

Our Constitution addresses the Madisonian dilemma of protecting the minority from the majority without subjecting the majority to control by the minority. The Court's insulation from the normal political processes is an essential virtue in protecting the minority. But in the difficult balancing of interests required by some free exercise cases, the Court now feels the need for a majoritarian voice. Because of the size and diversity of the national polity, Congress can provide more reliable majoritarian protection for individual rights than the states can provide. For a recent judicial explanation of this essential Madisonian idea, *see City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 736-37 (1989) (Scalia, J., concurring).

By creating judicially enforceable statutory rights, Congress can call on the powers of the judiciary that the Court feared to invoke on its own. Because the rights created would be statutory, Congress can retain a voice that it could not have retained if the Court had acted on its own. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress can reduce the danger that it will not respond to the needs of small faiths. If Court and Congress cooperate in this way, then the oppression of small faiths need not be, as the Court feared, "an inevitable consequence of democratic government." 110 S. Ct. at 1606. One function of section 5 of the fourteenth amendment is to provide for just such interbranch cooperation.

Very truly yours,

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