OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CITY OF BOERNE, Petitioner v. P. F. FLORES, ARCHBISHOP OF SAN ANTONIO AND UNITED STATES

CASE NO: 95-2074

PLACE: Washington, D.C.

DATE: Wednesday, February 19, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF BOERNE, :

Petitioner :

v. : No. 95-2074

P. F. FLORES, ARCHBISHOP OF :

SAN ANTONIO AND UNITED STATES :

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Washington, D.C.

Wednesday, February 19, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:16 a.m.

APPEARANCES:

MARCI A. HAMILTON, ESQ., Yardley, Pennsylvania; on behalf of the Petitioner.

JEFFREY S. SUTTON, ESQ., State Solicitor of Ohio, Columbus, Ohio; on behalf of Ohio, et al., as amici curiae, supporting the Petitioner.

DOUGLAS LAYCOCK, ESQ., Austin, Texas; on behalf of the Respondent Flores.

WALTER DELLINGER, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondent.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 94-2074, the City of Boerne v. Flores. Is that the correct pronunciation of the city?

MS. HAMILTON: Boerne.

CHIEF JUSTICE REHNQUIST: Boerne. Thank you. Ms. Hamilton.

ORAL ARGUMENT OF MARCI A. HAMILTON

ON BEHALF OF THE PETITIONER

MS. HAMILTON: Mr. Chief Justice and may it please the Court:

This case is not about religious liberty. This case is about Federal power. It is about the ability of the United States Constitution to restrain Congress, the branch most likely to be controlled by interest groups and by opinion polls, from engaging in a hostile takeover of the Free Exercise Clause of the First Amendment.

The Religious Freedom Restoration Act, which was passed in an emotional and heated response to this Court's determination in Employment Division v. Smith, is a brazen attempt to reinterpret the Free Exercise Clause and to impose that reinterpretation on the courts, on the States, and to shift the balance of power between church and State dramatically in favor of the churches.

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This is the worst of legislative overreaching, which violates the fundamental structural constitutional guarantees, the separation of powers, Federalism, and separation between church and State.

The constitutional bedrock was laid long ago in Marbury v. Madison, where this Court rejected explicitly the notion that the legislature may alter the Constitution by an ordinary act. The Constitution, this Court said, is either superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislation, like other acts, and is alterable --

QUESTION: Ms. Hamilton --

MS. HAMILTON: Yes, Justice O'Connor.

QUESTION: -- certainly you have to come to grips with the fact that, in situations such as the Voting Rights Act, where this Court had said the meaning of the Constitution was that intentional discrimination violates it but had never applied the so-called effects test, yet Congress passed laws of a prophylactic nature saying that discriminatory effects would be sufficient to create a cause of action for discrimination, and we upheld those.

MS. HAMILTON: Yes.

QUESTION: And there are other similar prophylactic measures, and how do you distinguish those from what Congress now offers in amicus briefing, a

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rationale that it is a prophylactic measure?

MS. HAMILTON: Well, Justice O'Connor, I think the test to understand whether or not section 5 has been appropriately used by Congress is the text of the amendment itself. It states, the Congress shall have power to enforce by appropriate legislation the provisions of this article. Enforce means, to compel obedience to. The provisions of this article means, constitutional guarantees.

Every case in which this Court has upheld prophylactic measures fits that formulation. It has been the enforcement, the compelling of obedience to constitutional guarantees. The religious --

QUESTION: Well, Katzenbach v. Morgan I think went further than that. I mean, it said that even though Lassiter had said that literacy tests were okay, now literacy tests were not okay in New York for Puerto Ricans because of what Congress had said.

MS. HAMILTON: Well, Mr. Chief Justice, Lassiter stated that as a facial matter a particular literacy test was not unconstitutional. The Congress went back and made a factual determination that as they looked out over literacy tests they came to the conclusion that they were almost always evidence of invidious discrimination, and on the basis of that factual determination the Court in

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Katzenbach v. Morgan upheld Congress' decision to ban literacy tests.

It is the difference between the fact-finding capacities of the legislature and this Court's ability to be the final arbiter of the meaning of the Constitution.

QUESTION: Well, it's kind of unsatisfactory, really, to think that all you'd get from your argument is at best a notion that we would say Congress had to do a better job of making facts, a factual determination here, and that's kind of an uncomfortable position to be in.

I'm not sure -- I mean, they can always go back and build a bigger record. They had something they were looking at, anecdotal events, where they thought courts in general were not giving sufficient attention to laws by States and others that might impinge on the Free Exercise Clause.

MS. HAMILTON: Well, Justice O'Connor, the difference between the Religious Freedom Restoration Act and all of this Court's section 5 jurisprudence will turn on the meaning of the word appropriate legislation, which section 5 says. There must be some kind of proportional fit between the means and the end to be appropriate.

QUESTION: Well, given that, could we go back to Justice O'Connor's original question, which I think was, in effect, why isn't there an obvious analogy between the

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situation in the Voting Rights Act, section 2, section 5, and the case that we have before us?

Why -- assuming that the voting rights cases were correctly decided, why doesn't this case follow them?

MS. HAMILTON: Because Congress in the Religious Freedom Restoration Act was not aiming to ensure constitutional guarantees under the Free Exercise Clause. The purpose, patent on its face and ripe in the legislative history, was to bring into high level of scrutiny that conduct which was constitutionally appropriate.

QUESTION: So basically it was the candor of Congress which is going to result in the unconstitutionality of this statute in your view?

MS. HAMILTON: Not the candor, Justice Souter, but rather the patent purpose --

QUESTION: Well, candor in expressing the purpose.

In other words, I take it, then, your argument would be different if Congress had simply kept its cards closer to its vest and had said, we know that under Smith there is a certain standard but, in fact, to guard against violations that would escape that standard we are going to have a slightly different test. That would have been okay.

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MS. HAMILTON: That still would not pass this Court's section 5 jurisprudence.

In the civil rights cases, this Court made clear there must be some colorable evidence of some State wrongdoing that justifies prophylactic activity. There is no evidence in this record to that effect.

QUESTION: So it's timing, then. Congress might do this later on if it could point to specific instances in which, under Smith, something had passed muster, and yet later on it was determined that there really had been a motive to discriminate against religion.

MS. HAMILTON: Well, presumably --

QUESTION: They jumped the gun. Is that basically it?

MS. HAMILTON: Well, presumably, if Congress did find specific instances -- for example, there was a set of laws that almost always meant there was discrimination against a particular religion -- in that particular circumstance, Congress would be acting the way they were acting under the Voting Rights Act cases.

QUESTION: Okay. So basically I guess it does boil down to the fact that the reason there is not an analogy between the voting cases and this one is a factual record. Congress did not have a factual record. Is --

MS. HAMILTON: Well, in addition, it would have

been impossible to have gotten a factual record with respect to every law in the United States, whether passed --

QUESTION: Well, does Congress -- I assume -- I -- and that may be so, but I take it your argument is that Congress in effect has to wait. It cannot guard against what it foresees as a difficulty by legislating in advance under section 5. It's got to wait until there has been a proven record of violation for which the standard of this Court is insufficient to guard. Is that it?

MS. HAMILTON: Yes, Justice --

QUESTION: To put a finer point on it, let me ask you this. When Congress passed some of the voting rights laws, they in effect made a presumption that where there's been a discriminatory effect by a certain law they must -- that that bears on intent, and it's likely there was a discriminatory intent.

Suppose what Congress did here was to prohibit any law that disproportionately affects religious minorities.

MS. HAMILTON: If Congress --

QUESTION: Or religion. Could they have done that?

MS. HAMILTON: If Congress had evidence that there were instances where there was discrimination in a

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particular arena with respect to particular types of religions, Congress certainly could go ahead and do what you're describing, which is --

QUESTION: It could pass a law that says some State law, for example, that disproportionately affects a religious group would be subject to stricter scrutiny?

MS. HAMILTON: I think that's possible. It's -- that's certainly not RFRA.

QUESTION: But you think that's not what was done?

MS. HAMILTON: That is not what was done here. The point here was to eviscerate any proof of discrimination of any kind.

QUESTION: Ms. Hamilton, in your brief you say that the Court should lay to rest the substantive power theory, i.e. the notion that Congress may expand the scope of constitutional guarantees. I take it you would then opt for a very narrow reading of the opinion in Katzenbach.

MS. HAMILTON: Yes. I -- Katzenbach actually had two implicit readings.

QUESTION: Yes.

MS. HAMILTON: I would hold it to the much narrower holding of the fact-finding capacity of Congress.

QUESTION: Ms. Hamilton, when Congress wrote

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this provision that's central here -- Congress shall have power to enforce by appropriate legislation the provisions of this article -- and when that was ratified by the States, was it understood that the provisions of this article included the First Amendment?

I mean, it was clearly understood that it included the Equal Protection Clause, which was at issue in the civil rights cases.

MS. HAMILTON: It's not at all clear in the legislative history. We do know that the First Amendment's only included at this point under the Fourteenth Amendment by judicial incorporation.

QUESTION: Which is a development of this century.

MS. HAMILTON: Right.

QUESTION: And, indeed, of the latter two-thirds of this century, isn't it?

MS. HAMILTON: Right. There's no --

QUESTION: Well, why isn't that the argument you're making, then, that --

MS. HAMILTON: Oh, we do make that in a footnote in the opening brief. There are so many things to say --

(Laughter.)

MS. HAMILTON: -- about RFRA that it's hard to find which one is the most appropriate.

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QUESTION: Yes, but certainly that's a major point, that when Congress has adopted a provision which it -- or has proposed for a constitutional amendment a provision that enables Congress to prevent the unequal treatment of any citizen, but especially of blacks, which is what was at issue at the -- to convert that into the power of Congress to enforce any provision of the Bill of Rights, isn't that a massive alteration of the original meaning of it?

MS. HAMILTON: It's staggering.

QUESTION: Ms. Hamilton --

(Laughter.)

QUESTION: Ms. Hamilton, the historical record is not all one way on that point, isn't that so?

MS. HAMILTON: No. One of the problems with the history of the Fourteenth Amendment, I'm sorry to say, is that John Bingham did say several things that contradicted himself several times, but I think it's clear that if you look at the discussions of the history of the Fourteenth Amendment regarding religion, the concerns about religion were not religious liberty per se, they were concerns about discrimination against particular groups on the basis of religion, so the notion that religious liberty per se is protected by the Fourteenth Amendment and now there's broad expansive power to enforce, that's certainly

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not in the legis --

QUESTION: Why is --

MS. HAMILTON: -- in the history of the Fourteenth Amendment.

QUESTION: Why is it staggering, even under a pre-Fourteenth Amendment view -- I mean, sorry, the ancient view that was being described.

(Laughter.)

QUESTION: Why, even under that view, is it a staggering thing to say, well, there's certainly some protection in due process liberty of people's religious freedom, and Congress finds that when you have laws that significantly affect that freedom, they should be looked at very closely to make certain there's good reason for not making an exception.

I mean, if you just heard it just like that, you'd think that's a -- not an unreasonable or a staggering thing to say as a way of enforcing the protection that was originally in that word liberty, whether then or now.

MS. HAMILTON: Well --

QUESTION: And why is it such an odd thing that we should look to the -- scrutinize the evidentiary records of --

MS. HAMILTON: Well, Justice Breyer, I think the

point that Justice Scalia was leading me to with the -- and I was able to get in staggering was that the question of the definition of appropriate, how far can Congress go to enforce constitutional guarantees, and the real question in this case is what does prophylactic mean if, in fact, they have a prophylactic power?

It would seem like they should have the most expansive power that they could have under the meaning of the Fourteenth Amendment with respect to racial discrimination. The history supports that.

Then the question is, well, how far does that prophylactic power go in other areas of section 1, and our argument is that it certainly can't go to the point where Congress gets to redefine the meaning of the Constitution rather than attempting to enforce it in some way.

QUESTION: As far as our prior holdings go, have we ever extended that power to anything except the equal protection provisions of the Constitution?

MS. HAMILTON: The only case that would indicate that it was extended at all would be Hutto v. Finney, and there's no prophylactic power question in that case.

QUESTION: Well, I take it -- I want to make sure I understand your argument. Your argument is that with respect to the protection of rights incorporated under the incorporation theory there can be no substantive

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expansion. There simply can be a kind of reasonable means ends jurisdiction to enforce, and I take it that is basically what you would say the Necessary and Proper Clause would have provided by its own force.

MS. HAMILTON: I think that's right.

QUESTION: Why --

MS. HAMILTON: I think McCulloch v. Maryland applies in both instances.

QUESTION: Yes, and I guess where I'm not sure is, why is it that you make this distinction between the protection of incorporated rights and the protection of rights which are spelled out in the text of the amendment?

I mean, if the incorporation theory is wrong, then it's wrong, but if the incorporation theory is right, why can we draw a line between what section 5 provides?

MS. HAMILTON: Well, the city certainly does not challenge incorporation per se. We're certainly not saying --

QUESTION: Okay, then how can we draw the line between the rights with -- as to congressional powers to incorporated rights and nonincorporated --

MS. HAMILTON: I think the argument is that Katzenbach v. Morgan was applied to equality rights, and if there's going to be a broad reading under the Fourteenth Amendment for enforcement, it would have to be

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with equality rights, and if that's right, Katzenbach must be the upper limit.

If Katzenbach is the upper limit, the Religious Freedom Restoration --

QUESTION: No, but that still assumes -- when you say it's the upper limit, I assume you're talking in terms of categories, and you are still drawing a line between Congress' power with respect to incorporated rights and with respect to section 1 rights, and I don't understand -- if incorporation is not to be overruled, I don't understand how that line can be drawn on a principled basis.

MS. HAMILTON: Your Honor, the city's argument does not center on extinction. Even taking the broadest power that the Congress has been permitted with respect to equality rights, Congress has not been permitted, indeed hasn't tried what it has done with the Religious Freedom Restoration Act, which is to completely redefine the meaning of an entire clause of the Constitution.

QUESTION: Is your main point, then, with respect to that branch of your argument that what Congress may be able to do in a particularized way, focusing on a discrete problem, it can't do wholesale? Is that --

MS. HAMILTON: That is exactly our argument, Justice Ginsburg.

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QUESTION: Is that a separation of powers argument in part, that we must proceed on a case-by-case basis? Is there something of that in your --

MS. HAMILTON: I think --

QUESTION: -- separation of powers argument?

MS. HAMILTON: I -- Justice Kennedy, there -- the separation of powers argument is that the one thing that Congress cannot do is to enact a standard that will apply across every law in the country and will, in fact, mimic the Constitution in its scope.

QUESTION: And does that apply to the validity of the law in its Federal aspect, or just vis-a-vis the States?

MS. HAMILTON: The separation of powers argument would in fact invalidate this law as applied to both State and Federal law.

QUESTION: Well, you are saying in effect I think that Congress under section 5 cannot anticipate what it sees as a likely difficulty and provide for it by legislation, but Congress can do that generally. Why do you draw that distinction?

MS. HAMILTON: Justice Souter, I'm confused about when Congress has been able to do that generally. Are you thinking about cases like --

QUESTION: We don't generally except in very

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specific instances -- the First Amendment I suppose is a good example. We do not generally require Congress to make the kind of factual record that I think you're talking about.

When, in fact, individual rights are being invaded as, for example, in First Amendment cases, yes, we do scrutinize rather carefully, but that is not the general rule, and I think you are saying that even though there are no individual rights being invaded here, that in fact that high level of scrutiny, that high burden on Congress to make a record, is being applied, and I don't understand why you say that.

MS. HAMILTON: Your Honor, we're not arguing for a high level on Congress. We're really not arguing for much more than this Court stated --

QUESTION: Well, you're saying it cannot anticipate a problem without in effect making a factual record to show that in a specific instance the problem has already occurred. That is what you're saying, isn't it?

MS. HAMILTON: Well, Justice Souter, that seems to me the only way to prevent massive usurpation of State law that RFRA effects. Unless Congress has a reason --

QUESTION: Well, why doesn't Congress have the same risk of massive usurpation whenever it is legislating under Article I in cases in which it's noninfringing or

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risking an infringement of individual rights?

MS. HAMILTON: Well, Your Honor, the most appropriate case would be Heart of Atlanta Motel, in which Congress did provide for rights against discrimination in the Commerce Clause context when it was acting appropriately according to that enumerated power. There were massive fact-findings in that case as to the effect on interstate commerce.

QUESTION: Well, it had an enumerated power under the Commerce Clause and the Necessary and Proper Clause, and I suppose it's got an enumerated power under section 5. What's the difference?

MS. HAMILTON: The difference is the language of section 5, which limits enforcement to the enforcement of constitutional guarantees.

QUESTION: The Necessary and Proper Clause does the same thing.

MS. HAMILTON: The Necessary and Proper Clause, Your Honor, gives Congress the ability -- may I finish my answer?

QUESTION: Finish your answer, yes.

MS. HAMILTON: Gives Congress the ability to make effective its enumerated powers, but it does not say that Congress can do what it did in the Religious Freedom Restoration Act.

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QUESTION: Thank you, Ms. Hamilton.

Mr. Sutton, we'll hear from you.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF OHIO, ET AL., AS AMICI CURIAE,

SUPPORTING THE PETITIONER

MR. SUTTON: Thank you, Mr. Chief Justice, and may it please the Court:

First of all, in response to Justice O'Connor's first question, there are two critical differences between RFRA and every section 5 case that has come before it. First, there is no predicate of a violation, and second, there is no attempt to remedy in any way.

The key problem with RFRA, what makes it different from every piece of section 5 legislation that's ever been reviewed by this Court or ever enacted, is that it's totally global in nature.

It simply creates a new standard of review for every single form of State action that ever existed before, or ever will exist. It contains no time limitations. It's simply a constitutional amendment in section 5 clothing. The Court has never approved that. I don't think they should approve it now.

Justice Scalia, with respect to your question about incorporation, I respectfully disagree about the notion that we can draw the line with respect to

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unincorporated and incorporated rights. It's true the Court has never held that section 5 applies to incorporated rights, and I've worked hard and long to figure out a way to make something out of that. I simply can't.

Section 5 applies by its terms to every provision of the Fourteenth Amendment. That includes --

QUESTION: Well, but now, when you say incorporated rights, we've been quite selective, haven't we, in what rights are incorporated. We haven't said they either all must be incorporated or none of them. We haven't incorporated all, have we? We felt free to leave out the Second Amendment, to leave out aspects of the Sixth Amendment, isn't that correct?

MR. SUTTON: That is true, Your Honor.

QUESTION: Then why can't we read section 5 the same way? Section 5 applies to certain of the provisions, those that are clearly set forth in the text of the article, but not to the ones that are sucked in by much later judicial interpretation.

MR. SUTTON: As your incorporation decisions read, section 5 in this instance is not enforcing the First Amendment. It's enforcing the Due Process Clause. That's how they read.

If the notion had been Justice Black's Adamson

notion, that you incorporate across the board, it might be different, but that's not how they read. They talk about liberty interests. One liberty interest is the Free Exercise Clause. It applies across the board to States, and the Federal Government, same standard of review. There's simply no line you can draw.

QUESTION: What if Congress were to say that we think that the grand jury provision of -- what is it, the Seventh, the Sixth Amendment? -- should be incorporated, although the Court never has, so we're going to require the States under the enforcement power for Article V, the Fourteenth Amendment, to have -- require -- all criminal prosecutions have to be initiated by a grand jury.

MR. SUTTON: Absolutely not, Your Honor. Section 5 would not allow you to enforce that because it doesn't appear in section 1. Section 1 does cover the Free Exercise Clause. But this --

QUESTION: How do we know that section 1 doesn't cover the grand jury provision?

MR. SUTTON: Excuse me, Your Honor. That's a fair point. I suppose, as a --

QUESTION: Thank you.

(Laughter.)

MR. SUTTON: To understate the matter.

(Laughter.)

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MR. SUTTON: It's true as a predictive matter I think Congress -- you're probably right that Congress could say it does incorporate, it could pass legislation saying the States have to comply with the grand jury provision, but when that piece of legislation came here, the question of a violation is up to you. It's not up to Congress.

As to violations, there is no deference. As to remedy -- and Justice Souter, I want to get to your point -- there is substantial deference.

Now, the question of the factual record is a difficult one, and it's very problematic for my side. I understand that. I think the starting point is the Court's decision in South Carolina v. Katzenbach. What did they do when they first started allowing prophylactic legislation under section 5?

First, they looked at the record. They looked at what Congress had done, what it had found. There were commissions. There were studies.

Secondly, they looked at a series of case findings from this Court, from lower courts, establishing a pervasive and systematic disenfranchisement of the minority vote.

Thirdly, they looked at commentary. As in Lopez, that is all helpful.

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If Congress does it, it's smart, because I think what it does is, it makes it easier for you to uphold what they've done, but again, as in Lopez, it's not indispensable. If they want to take their chances, be completely silent as to why they're doing something, they can take a risk, and it then becomes your job, regrettably, to figure out whether there are underlying violations.

QUESTION: And in that respect, is there some requirement that the degree of intrusion on the States must be roughly balanced by the severity of the problem they're trying to correct? Is that the calculus we use?

MR. SUTTON: Justice Kennedy, that is precisely it. As you said and Justice O'Connor said in Lopez, there is an etiquette of Federalism, and one of the principle etiquettes of Federalism is that the States, and State employees like me, are presumed to know what the Constitution means and to be able to follow it.

The only reason you can turn that presumption on its head and create an effects test as you suggested, Justice Breyer, is if we've proved we don't know what the Constitution means.

Congress can bench us. If we don't know how to follow the Constitution, if we've made mistakes in the past with respect to a certain provision, that's fine.

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Congress has significant prophylactic remedial power to come in and remedy the violation, but you can't have a remedy without a wrong.

QUESTION: Mr. Sutton, it seems to me you overestimate the sturdiness of this institution. We have here a statute unanimously passed by Congress. There was virtually no dissent, and you want us to say it's no good and to judge future statutes on the basis of such ineffable principles as the etiquette of Federalism.

I mean, it's one thing for this Court to have a clear line which we can hide behind and say that this is good and that is bad, but to expect us case-by-case to go into this kind of an analysis of whether there's sufficient factual inquiry and what-not, do you really think we can carry that much water?

MR. SUTTON: Well, first of all the unanimity behind RFRA strikes me as a wonderful opportunity from a Federalist perspective.

If you agree with our argument, I suggest there will be 51 RFRA's when all is said and done. The States aren't going to stand idle. My boss is not going to stand idle after the argument I'm making today, if it prevails, I can promise you that.

The States are -- they're doing a great job when it comes to Free Exercise Clause issues, so first of all,

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I don't think there's a -- I don't think there should be a concern about underprotection.

As to the institutional issue, I tell you, I've been thinking long and hard about this. I can't see a bright line out there. There wasn't one in Lopez. All you had was, substantially affects interstate commerce.

The only bright line I can offer --

QUESTION: You're sure that one's going to hold, too, aren't you?

(Laughter.)

MR. SUTTON: I do. I do for -- but -- well, actually, there is one bright line. The one bright line which clearly has not been crossed here is a record of violations. They can't show them. All the record shows -- I mean, when they wrote this statute, they were looking in this direction. They didn't like Smith. They thought there would be problems with Smith.

But their big concern about the States was not that they'd violate Smith. They were concerned we would respect Smith, and that alone, and wouldn't do anything more.

When they enact section 5 legislation, they've got to be looking in this direction, and you've got to look this direction.

QUESTION: When you say, looking in this

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direction, you mean looking towards decisions of this Court which interpret the provision in question, the --

MR. SUTTON: That is absolutely correct, and once they establish what the right interpretation of the provision is, they've got to establish that the States were violating --

QUESTION: They cannot, then, come forth with their own interpretation, you're saying. They must depend on the interpretations from this Court.

MR. SUTTON: That has to be correct, Your Honor. If it's not correct, two things happen. First of all, Congress has permission to effectively overrule Marbury v. Madison, interpret the Constitution as it wishes, and make that interpretation binding on this Court and throughout the country.

Secondly, it transforms the Federal Government, and specifically Congress, from one of limited to one of totally unlimited powers.

QUESTION: If we can separate them, your Marbury argument from your Federalism argument, suppose Congress said, we want to lead by example, so we're going to have a wholesale exemption that will cover all Federal legislation, that will cover all regulations by all Federal agencies, and these will be the standards, the standards that are in RFRA, and just on the Federal level.

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We're leaving the States alone.

Would there be any constitutional infirmity in that?

MR. SUTTON: Not at all, Your Honor.

QUESTION: Even though Congress has again said what it thinks should have been the Smith doctrine, instead of what was?

MR. SUTTON: Excuse me. I didn't speak as precisely as I should have. Clearly the Court still would have to review, I think, the question as to what Smith means. I don't think as a matter of Federal power they can reinterpret the Constitution with respect to what it means as to Federal agencies, so I --

QUESTION: But they're not saying they're reinterpreting the Constitution. They're saying, we know we can give exemptions, but we don't want to have to go through all these statutes. We may miss some. So we just have this wholesale exemption.

MR. SUTTON: You're right, I should have stopped the first time. You're absolutely correct.

(Laughter.)

MR. SUTTON: And the reason you're absolutely correct is they don't need to rely on the Free Exercise Clause. Who cares what the Free Exercise Clause means? Congress has authority to regulate Federal employees,

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Federal agencies, and if they want to create exemptions, they can.

QUESTION: Consistently with the Establishment Clause.

MR. SUTTON: Yes, consistent with the Establishment Clause. That's absolutely correct.

QUESTION: Can I go back for a second to your answer to the Chief Justice? Does Congress have a degree of leeway? Perhaps it can't make up any interpretation of the First Amendment or the Fourteenth. But where the Court itself has been shifting back and forth over time, might they not have leeway to determine what the interpretation that they're trying to enforce is?

If not, of course, statutes will become constitutional today, and unconstitutional tomorrow, and reconstitutional the next day, if this Court doesn't perfectly and always hew precisely to the same interpretation, which I suspect in the past it has not always done.

MR. SUTTON: Your Honor, the first answer to that question is, it's a good reason to respect the Jeffersonian vision for this country. Let the States be the principal bulwark when it comes to protecting civil liberties. I think that's an important starting point.

The second question's answer is, clearly as a

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predictive matter they can take their chances. They can take the view that here's what the Free Exercise Clause means when it gets to this Court. If they're right, the legislation's sustained. If they're wrong, the legislation falls.

QUESTION: And if this Court changes its mind over the course of months or years, the legislation becomes revalid, then invalid, then revalid, et cetera?

MR. SUTTON: No. Excuse me, Your Honor. I don't think that's correct. Once it gets to the Court, the day it's here at the Court to be reviewed, if it's inconsistent with what the Free Exercise Clause -- it's struck. It doesn't sit on the books waiting for a new interpretation of the Free Exercise Clause.

I don't think I know of any precedent that allows statutes to languish and effectively --

QUESTION: Two quick questions, please. Do you agree with Ms. Hamilton that Congress certainly could pass some law that would affect State laws as well, that an apparently neutral law that disproportionately affects religious groups would be required to meet a higher test?

MR. SUTTON: No, Your Honor, I do not, and the reason is that there are no underlying violations that would sustain such a remedial power. If there were, it would be appropriate for Congress to come in, pass a

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statute, and say, an effects test is sufficient. If you don't require an underlying violation, you're presuming State employees are going to violate the Constitution.

QUESTION: Well, a second very quick question you can answer yes or no. Are you relying at all, either you or Ms. Hamilton, on an Establishment Clause violation in your argument?

MR. SUTTON: We are not, and personally I hope you reject it, because that's our mission. We want to be able to overprotect free exercise rights. Ohio, and I think most States, would say they're not in the business of beating the --

QUESTION: Well, are you suggesting that if you overprotect you have an Establishment Clause problem?

MR. SUTTON: I certainly hope not. I hope we've got a lot of room to overprotect religious liberties. It's something we think is important. It's something we want to do. We obviously don't want to do it in a way that it violates the Establishment clause, though.

Your visual cues aren't good. The -- I

(Laughter.)

MR. SUTTON: Let me try to restate that. I'm not sure I stated it very well.

The -- I -- my view of the Establishment Clause is that clearly the --

QUESTION: I can't quite see your eyes.

(Laughter.)

MR. SUTTON: My view of the Establishment Clause is that States are entitled to overprotect free exercise. In fact, I think that's exactly what Smith says. We will leave this to the States and localities to overprotect.

But I agree with you, there is a line. There is a ceiling, and we can't go over it. We can't so overprotect that in a way we're establishing a religion which violates --

QUESTION: But if religious adherents have a preference under every regulation, every statute, every ordinance, does that not raise free exercise -- or establishment problems that are very significant?

MR. SUTTON: I would submit RFRA in that respect is no different from the Free Exercise Clause itself. The Free Exercise Clause does no more than just protect religion. It has no other purpose. RFRA does exactly the same thing, but just goes a little further. That's fine. It's good as long as you don't go too far and establish a religion.

Now, it may be that my view of overprotecting is going to push us into the Establishment Clause, and at that point I'm in trouble, but until then, I think it's appropriate and quite legitimate for States to overprotect

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free exercise rights. That's why we support the policy behind RFRA. That's why we'll enact it at the State level if it's invalidated.

QUESTION: What do you mean, overprotect? What does that word mean as you're using it?

MR. SUTTON: Well, as many of the dissenters indicated in Smith, as the Congressmen and Congresswomen indicated in pass -- may I finish the question?

QUESTION: Yes.

MR. SUTTON: As they indicated in passing --

QUESTION: You can finish the answer.

MR. SUTTON: In passing RFRA, Smith allows generally applicable neutral laws to pass free exercise scrutiny. They may be instances where exemptions are appropriate, even though it happens to be a generally applicable law, and I think a State's entitled to --

QUESTION: So you just mean an exemption is an overprotection. Is that what you're saying?

MR. SUTTON: Yes.

QUESTION: Okay.

QUESTION: Thank you, Mr. Sutton.

Mr. Laycock, we'll hear from you.

ORAL ARGUMENT OF DOUGLAS LAYCOCK

ON BEHALF OF THE RESPONDENT FLORES

MR. LAYCOCK: Mr. Chief Justice, and may it

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please the Court:

This case is controlled by an unbroken tradition of congressional practice and judicial decision that begins with the Civil War amendments themselves. From the Civil Rights Act of 1866 to RFRA in 1993, Congress has always understood that it has power to make constitutional rights effective in practice and to go beyond the floor set by this Court.

QUESTION: Well, certainly some of the early cases on which Katzenbach relied are not to that effect. The -- Ex parte Virginia was simply a case where Congress had decided that State officials who violated the Fourteenth Amendment should be subject to criminal prosecution. That's no extension of the Fourteenth Amendment at all.

MR. LAYCOCK: I agree the holding in Ex parte Virginia did not present the question we have presented here, but the standard the Court announced in Ex parte Virginia was that the congressional power reaches whatever is adapted to carry out the objects the amendments have in view, and by the next case 4 years later, the civil rights cases adopted the badges and incidents theory of the enforcement power under the Thirteenth Amendment, which plainly goes vastly further than anything this Court would ever consider doing under

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the Thirteenth Amendment.

QUESTION: Well, there is that word appropriate in there, in section 5, I guess, that might bear some interpretation or weight.

MR. LAYCOCK: It --

QUESTION: It has to be appropriate.

Now, you admit, I suppose, that Congress cannot come in and overrule a decision of this Court it doesn't like by legislation.

MR. LAYCOCK: That is not contested.

QUESTION: Excuse me?

MR. LAYCOCK: Everyone agrees with that.

QUESTION: Yes.

MR. LAYCOCK: Congress cannot overrule the Court.

QUESTION: And there's some indication that that was what Congress was all about here, if you read the purpose clause. Does that concern us at all? Do we have to address that concern?

It also made it retroactive, so presumably the effect would be to overturn Smith --

MR. LAYCOCK: The effect is to --

QUESTION: -- retroactively.

MR. LAYCOCK: The effect is to achieve a different result in some cases than Smith would achieve --

QUESTION: Well, and indeed, in Smith.

MR. LAYCOCK: Pardon?

QUESTION: And in Smith itself. If that were to come up again, I guess this would be an effort by Congress to overturn that decision.

MR. LAYCOCK: Well, it would be -- overturn is shorthand.

QUESTION: Directly and retroactively.

MR. LAYCOCK: Pardon?

QUESTION: And retroactively.

MR. LAYCOCK: Yes. Overturn is shorthand, but yes, to achieve a different result on similar facts under the statute than we would achieve under the Constitution itself, that's correct, but that's no different from the Voting Rights Act or from Title VII.

QUESTION: Mr. Laycock, do you think it overturns Reynolds?

MR. LAYCOCK: Do I think it overturns Reynolds?

QUESTION: Yes.

MR. LAYCOCK: No, I don't think it overturns Reynolds, but the -- that's a compelling interest question. That's a question whether protecting women is -- and the other harms of polygamous marriage would be a compelling interest.

QUESTION: Well, of course, Reynolds didn't reason on that basis. I mean, there wasn't any compelling interest standard at the time of Reynolds.

MR. LAYCOCK: You would write a different opinion than you wrote in Reynolds, but it's not at all clear the result would be any different than in Reynolds, but that would be up to this Court. This Court retains the final decisionmaking power on all the cases brought under the statute or brought under the --

QUESTION: How about cases involving prisoners who -- and I've seen several of these since I've been here, and petitions claiming a right in prison to smoke marijuana as part of their religious practices and beliefs.

Now, presumably, a refusal by prison authorities to make marijuana available to a prisoner based on religious belief would now be subject to strict scrutiny.

MR. LAYCOCK: We all know that prisoners file frivolous claims. We all know they lose those claims --

QUESTION: Well, it would require that, would it not?

MR. LAYCOCK: It requires a claim, but the one piece of data on that is in the brief of the State of Texas, which reports that of all the cases pending against the State and its agencies, less than one-quarter of 1

percent are RFRA claims. Most of those are joined with other claims that would have been filed anyway, and many of them are frivolous prisoner claims that would --

QUESTION: Well, certainly it would be open in the future for that claim to be made, or for some child to claim that their religious beliefs require them to take weapons to school, or that somebody has an absolute right under the Free Exercise Clause in the military context to wear yarmulkes, or other religious dress or head gear as their religion dictates, and that would overturn, I guess, a decision of this Court on that subject.

MR. LAYCOCK: Well, it would require the Court to apply a different standard under the statute, but the district judges --

QUESTION: Excuse me. A different standard from Goldman? I thought Goldman applied exactly the standard that the statute wants. Would Goldman be overruled by this statue, which was the yarmulke case, whether an Air Force officer can wear --

MR. LAYCOCK: Goldman was overruled by a particular statute shortly after it was decided.

QUESTION: I'm not talking about that one. Would this statute overrule Goldman?

MR. LAYCOCK: RFRA -- It's hard to imagine a compelling interest in --

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QUESTION: But we held there was one. We held there was one. Would our holding that there was a compelling interest in the Air Force not to have anybody wearing a yarmulke, would that holding be overturned?

MR. LAYCOCK: If that's how you read Goldman, it is not overruled. I always read Goldman as the military exception in refusing to apply the compelling interest test, but if there's a compelling interest, then Goldman is not changed.

QUESTION: Well, compelling interest has an institutional, a juridical meaning based on our past cases, and I assume under ordinary principles of statutory construction that that is what Congress intended.

MR. LAYCOCK: That is correct.

QUESTION: So Congress really hasn't tied our hands very much. I mean, if we can say that there's a compelling State interest in not having somebody wear a yarmulke, I guess we have a lot of running room still, don't we?

(Laughter.)

MR. LAYCOCK: You might reconsider that holding if it ever comes up.

(Laughter.)

MR. LAYCOCK: But yes, you still have a lot of running room, and this Court interprets RFRA and retains

its independence as it interprets RFRA.

QUESTION: I'd like to hear your response --

QUESTION: One -- if I can, just one moment, Justice Breyer, Congress does -- this Court doesn't have independence if it's construing a statute which has imported into its terms a term of art that had fairly specific meaning, i.e., compelling interest. It was watered down considerably, but that's the statutory standard we must follow, is it not?

MR. LAYCOCK: That's the statutory standard you must follow, but you have the same independence in interpreting that statute that you have in interpreting any other statute, which isn't to say unconstrained freedom. Of course the Court has precedents that it follows, canons of interpretation it follows. It tries to achieve congressional intent. But none of that is a threat to the independent judiciary --

QUESTION: Well, but -- compelling -- we're interpreting what Congress meant by compelling interest in the statute --

MR. LAYCOCK: That's correct.

QUESTION: -- rather than, as we had previously thought, what we meant by a compelling interest under the Constitution. That's quite different.

MR. LAYCOCK: Well --

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QUESTION: It's dramatically different.

MR. LAYCOCK: It's a different task, but it's no less judicially independent. You still get the final word on what the statute means.

QUESTION: Well, except if we're faithful to our oaths we've got to say, we're looking at what Congress meant by this. We have the final word on what a statute means, too, but that's not nearly the same thing as having, as Marbury said, the final word on what the Constitution means. There we cannot be overridden except by an amendment.

MR. LAYCOCK: I don't think we disagree, Mr. Chief Justice. I think that -- I think we may be talking about two different senses of independent.

QUESTION: Well, certainly under this Court's notion of the needs and authority of the military we've given a good deal of deference to military requirements, just as we have to prison disciplinary requirements in the prison context, and so our balance might well come out differently in those cases in the past.

But there appears to be no room for that kind of thing under the law Congress has passed, and that isn't the test employed. Congress did not, in fact, return faithfully to this Court's interpretations in the past. It did something else.

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MR. LAYCOCK: Congress attempted to apply the compelling interest test across the board, but Congress is also quite clear that what is a compelling interest depends upon context. It's easier to show a compelling interest in a prison or in the military than in --

QUESTION: I'm not even sure what compelling interest means in the peyote case itself, because the Court was divided on that issue. I'm not sure this is quite as clear a concept as everyone assumes.

MR. LAYCOCK: I share that assumption. That's just further evidence of why this is not such a dramatic power grab. The power of interpreting compelling interests remains in this Court.

QUESTION: Have you considered the possibility that Congress might have been well within section 5 with respect to its insistence upon, we'll call it an effects test, but perhaps went too far when it got to enacting a compelling interest criterion? Can the baby be split?

MR. LAYCOCK: In theory the baby can be split, but there's no basis in section 5 to make that split.

What -- the compelling interest test comes out of this Court's interpretation of the Free Exercise Clause. All Congress did was change the threshold that the plaintiff must show to shift the burden. This is a burden-shifting statute like the other intention and

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effect statutes.

QUESTION: Mr. Laycock, you can say that, and I could understand it intellectually, but practically isn't it so that what this statute does is to make the Smith doctrine academic, a dead letter? It will never be applied as long as this statute lives.

MR. LAYCOCK: It will occasionally be applied. We have a free exercise claim pending in the court below. Keeler v. Maryland was just won on a free exercise claim in the District of Maryland. Rader v. Johnson was just won on a free exercise claim, because there are sometimes advantages to the litigant in proceeding under the free exercise claim under Smith, rather than under RFRA.

QUESTION: Can you explain to me a case in which the notion that a law of general application does not have to make exceptions for religious observances?

MR. LAYCOCK: Well, it --

QUESTION: Where that would -- once we have RFRA, where that doctrine would ever come into play?

MR. LAYCOCK: It is always in the litigant's interest to show that the law is not of general applicability, that in fact it discriminates, because that undermines the Government's compelling interest argument, undermines the Government's credibility.

There are a number of lower court cases that say

there's not a substantial burden here, so RFRA doesn't apply, but there's discrimination so Smith does apply.

QUESTION: Are you answering Justice Ginsburg's question? I don't think so.

MR. LAYCOCK: I thought I was. I thought she said why would there ever be again a free exercise claim.

QUESTION: Because my understanding was that this goes at least as far in protecting religious freedom as Smith does, and then goes quite a distance further.

MR. LAYCOCK: It goes some distance further. There are also -- there are also ways in which it goes not quite as far, according to some of the lower courts.

QUESTION: Well, that's what I don't understand. It seems to me it covered everything that the Smith doctrine protects, and protects more and, indeed, that was the only purpose in enacting it.

MR. LAYCOCK: That was the purpose in enacting it.

QUESTION: Could --

MR. LAYCOCK: Take -- Rader v. Johnson and Keeler v. Mayor of Cumberland are in the Government's brief, and they are really cases that proceeded under Smith and not under RFRA. There are reasons to do it.

If I could, I'd like to address the claim that both Ohio and Boerne make that this is somehow different

from all previous statutes because in all other section 5 statutes there was this massive record of widespread violations and here there are hardly any violations, and both halves of that are simply not true.

In many of the section 5 cases it is hard to imagine ever proving a constitutional violation. When Congress enacted the Pregnancy Discrimination Act it didn't discover that most pregnancy rules were motivated by an attempt to get women or exclude them.

Sometimes that is true. Occasionally there would be a pregnancy case that would satisfy this Court's constitutional standard, but basically Congress said, rules about pregnancy burden women, and that burden's severe enough, it's closely enough connected to a constitutional violation, we think it ought to be protected.

They didn't find a fact that would have persuaded this Court that there's a constitutional violation.

QUESTION: But this case --

QUESTION: But Congress enacted -- go on.

QUESTION: This case says that every law, every ordinance, every regulation in the United States must grant a religious preference if the terms of the statute are met, and it seems to me that this is quite

inconsistent with our traditions, and it has very serious Establishment Clause problems --

MR. LAYCOCK: I disagree.

QUESTION: -- with respect to zoning, with respect to the facilities that churches must have, the fire exits, et cetera, and with respect to tax exemptions and tax deductions.

MR. LAYCOCK: This does not require a massive preference. What this requires is that when Government substantially burdens religion, it has to justify it. It's not triggered without showing a substantial burden, and removing the substantial burden doesn't make the church any better off than it was before it encountered the Government --

QUESTION: But zoning imposes a substantial burden on everybody, and to say that it imposes it on churches just as on everybody else is to bring that within this act, isn't it?

MR. LAYCOCK: That's correct.

QUESTION: Any significant legislation comes within this act, and you must make an exception for religious entities.

MR. LAYCOCK: And when you make that exception, the church is no better off than it was before Government started imposing the burden in the first place.

QUESTION: Well, or be in the state of nature, you might say.

(Laughter.)

MR. LAYCOCK: Well --

QUESTION: No better off than it would be if it were exempt from all laws, you're quite right.

MR. LAYCOCK: But this is -- but not nearly as well off as it would be if it were getting money from the Government.

QUESTION: But an establishment violation is measured by whether there's a preference.

MR. LAYCOCK: This Court --

QUESTION: And if we were all in the state of nature, then that wouldn't be the -- wouldn't be a problem, but only the churches are.

MR. LAYCOCK: The Court unanimously rejected that understanding in Amos. Simply relieving a burden or exempting the church is not an establishment, nine-zero.

QUESTION: While we're on the Establishment clause, I assume Congress can enforce the Establishment Clause the same way it can enforce the Free Exercise Clause, right?

MR. LAYCOCK: I think that's right.

QUESTION: So it could pass a law saying that no State shall give churches a tax exemption.

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MR. LAYCOCK: Well, the question -- you could pass that law, and this Court would then have to decide whether it violated the Free Exercise Clause, but -- and this Court would --

QUESTION: Well, if it didn't violate the Free Exercise Clause, then -- you think -- is that a substantial argument? Must a State give a tax exemption?

MR. LAYCOCK: After Swaggert, I suppose not.

QUESTION: Yes. I suppose not, too. So Congress could pass such a law, under the theory that you're proposing.

MR. LAYCOCK: That's correct.

QUESTION: And by the same token, I suppose you would say that Congress could pass a law saying that any law or regulation -- abortion is subject only to the rational basis test, no more. That's it.

MR. LAYCOCK: No. My client obviously has a problem with the abortion decisions, but as long as this Court adheres to those decisions --

QUESTION: No, I'm talking about --

MR. LAYCOCK: -- Congress can't roll them back.

QUESTION: -- the power of Congress under your theory under section 5. Could it do that, or could it do the reverse and say, any law regulating in any fashion abortions has to be tested under the strictest scrutiny

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possible?

MR. LAYCOCK: It --

QUESTION: Could it do that?

MR. LAYCOCK: Those two laws are very different, for a reason that goes to the heart of this case.

QUESTION: Could it do either of those things?

MR. LAYCOCK: It could do the second. It could not do the first. It cannot roll back a right adjudicated by this Court's decisions. That is --

QUESTION: Because of dicta in Katzenbach?

MR. LAYCOCK: Because of Marbury v. Madison. That really is Marbury v. Madison.

But when Congress expands on the rights that this Court has created, you're not in Marbury land at all. You are in section 5.

QUESTION: I don't understand that at all, why Congress may move in one direction a constitutional right but may not move it in another.

MR. LAYCOCK: Because to move it, to roll back this Court's decisions really would eviscerate judicial review. It would remove the independent protection for our liberty. But to move in the other direction provides a supplemental or second protection for it.

QUESTION: Well, but they would be arguing that they're enforcing another constitutional right. That is,

in rolling back the protections of freedom of religion, we're not acting under the Freedom of Religion Clause. We're acting under the Establishment Clause.

MR. LAYCOCK: They --

QUESTION: Because there are many clauses that can be used against each other. In the abortion example just given, we could say we're using the Equal Protection Clause.

So you can constantly adjust both downward and upward the meaning of all the provisions of the Bill of Rights by using one of the other clauses.

MR. LAYCOCK: Not constantly, but often, and when that happens the law is unconstitutional. Section 5 power, like the Article I powers, is subject to the constitutional rights adjudicated under other clauses by this Court.

QUESTION: If it makes any alteration in the nature of the other clause?

MR. LAYCOCK: No. If it reduces the protection of the other clause below the level that this Court says is the judicially enforceable meaning of that other clause. This Court gets the last word --

QUESTION: Mr. --

MR. LAYCOCK: -- when it turns to another clause.

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QUESTION: I'm sorry. I didn't mean to interrupt you.

QUESTION: Then it could prohibit States from enacting any affirmative action programs in order to protect the racial interests of the white majority.

MR. LAYCOCK: If that's this Court's understanding of Adarand --

QUESTION: That's the understanding of your argument, I'm saying.

MR. LAYCOCK: Yes.

QUESTION: Yes.

MR. LAYCOCK: My understanding is that the section 5 power is fully subject to cases such as Adarand and Richmond v. Croson, that's correct, because that's a judicially adjudicated right.

QUESTION: Mr. Laycock, could you go back to the argument that you began a while ago saying that there really is no categorical distinction that can be made between the premises, say, of the Voting Rights Act and its effect test and the present statute?

MR. LAYCOCK: Yes.

QUESTION: Could you address specifically that example?

MR. LAYCOCK: The easiest example, the '82 Voting Rights Act, is global. It mentions no particular

voting practice. It applies to any voting practice that has a discriminatory result. It is enormously intrusive, vastly more so than RFRA. It remade politics in the South. RFRA is a mile wide and an inch deep.

QUESTION: The Voting Rights Act, it's constitutionality has never been upheld by this Court.

MR. LAYCOCK: It's upheld in this Court's decision in Mississippi Republican Committee, and it's been upheld unanimously after full consideration by the courts of appeals.

QUESTION: Wasn't there a legislative record of findings of violations, and isn't that a distinction?

MR. LAYCOCK: The '82 -- the legislative record in the '82 act is a mirror image of RFRA, pages and pages of denouncing City of Mobile v. Bolden as a terrible decision. Considerable findings that motive is difficult to prove.

But what you don't find in the RFRA record you do find in that record is the Senate report says, it's difficult to prove, but that's not the real reason. The real reason we're doing this is the Court announced the wrong test.

QUESTION: Thank you, Mr. Laycock.

General Dellinger, we'll hear from you.

ORAL ARGUMENT OF WALTER DELLINGER

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ON BEHALF OF THE FEDERAL RESPONDENT

GENERAL DELLINGER: Mr. Chief Justice, and may it please the Court:

This case does not require the Court to break any new ground in upholding the statute, because the act prevents what everyone would agree is an actual violation of the Constitution as noted by this Court.

In Lukumi, this Court --

QUESTION: In what, Mr. Dellinger? You gave a case name, I believe.

GENERAL DELLINGER: I'm sorry. Lukumi.

QUESTION: Oh.

QUESTION: Babalu -- Hialeah, right.

GENERAL DELLINGER: Versus the City of Hialeah. Thank you, Justice Scalia.

In that case, as in many others, the Court said that State rules that treat some religious denominations more favorably than others violates the Constitution. This Court in Smith acknowledges that when it comes to accommodations and exceptions some denominations will predictably be treated more favorably than others and, in Kiryas Joel, you acknowledge that this inequitable favoritism will be difficult for the courts to police. That takes it right --

QUESTION: Do you take the position in this

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case, Mr. Solicitor General, that the denial of the variance from the historic site ordinance was, in fact, a violation of the act? You're here defending the act.

GENERAL DELLINGER: No, Justice Kennedy, we do not -- we have not included -- and Mr. Laycock tells me it is a substantial burden and would violate RFRA. We have not included that for the United States. We entered to defend the constitutionality of RFRA, and the trial court has not yet passed on whether there is a substantial burden in that case.

QUESTION: Assume that charitable deductions are very important for some churches. Could Congress, consistently with this act, abolish charitable deductions if that amounted -- if that would result in some closure of churches?

GENERAL DELLINGER: I think where you have -- it would be tested in this Court by the standards --

QUESTION: But this act addresses that, does it not?

GENERAL DELLINGER: This act.

QUESTION: And this act says that Congress must use the least-restrictive means in formulating its tax policy --

GENERAL DELLINGER: The Court would have to --

QUESTION: -- in order to protect religion.

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GENERAL DELLINGER: It is not clear --

QUESTION: Is that not correct?

GENERAL DELLINGER: It is not --

QUESTION: Is that not correct?

GENERAL DELLINGER: That is correct, Justice Kennedy.

It is not clear to me that relieving -- that you're imposing a substantial burden if you're cutting back on what was a previously accorded pure benefit. The substantial burden usually indicates that the Congress is relieving a burden, but as this Court --

QUESTION: Would we even get to the act if that's all Congress did? Given the fact that the treatment of the churches has been part and parcel of the treatment of other so-called charitable organizations, if all Congress did was in effect require the end of the church's tax status, I suppose we would have a suit right under Smith before we ever got to RFRA, wouldn't we?

QUESTION: No, I'd assumed they had abolished the charitable deduction completely.

GENERAL DELLINGER: Correct.

QUESTION: And your position is that taxation is not a burden?

GENERAL DELLINGER: That the --

(Laughter.)

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GENERAL DELLINGER: The relieving of a benefit may not itself constitute a burden.

QUESTION: The relieving of the benefit of being exempt from tax in particular.

GENERAL DELLINGER: The --

QUESTION: Which amounts to saying that taxation is not a burden, right, and that's --

GENERAL DELLINGER: Well, it is a burden, but we're talking about a burden on the free exercise of religion.

But here, I think the critical constitutional violation that Congress is enacting prophylactic rules to prevent, that is fully a sufficient basis for resolving this case in favor of RFRA in all of its violations, is Congress' concern expressed in --

QUESTION: Mr. Solicitor General, does that require us to assume, and that may be correct, that, as was the case with the Fourteenth Amendment and the Voting Rights Act and all -- there's a long, well-documented history of violations of the rights of the people protected by the Fourteenth Amendment. Are we -- should we assume as a predicate for our decision that there is a comparable violation of religious rights that's prevalent throughout the country?

GENERAL DELLINGER: No. You don't need to

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assume that there is a comparable prevalent violation, but what you will find when you look at the record are two kinds of agreed-upon -- that is, Court -- this Court agrees, agreed-upon violation of section 1.

One that has gone without mention here, where this Court itself has anticipated violations that can be remedied prophylactically, is that in the accommodations process more influential and politically well-connected religions, powerful sector interests, will get exemptions when more marginal religions, particularly those that represent racial and ethnic minorities, will not get exemptions.

QUESTION: How does that --

QUESTION: Well --

QUESTION: How does that point fit into an argument that's purely linguistic, I think, but very important -- I'm not saying I accept it or not, but I think a linguistic argument that is made is that Smith says that a general law not motivated in purpose against a religion does not violate -- does not violate -- the Constitution, right?

GENERAL DELLINGER: That is correct.

QUESTION: And then it says, section 2, Congress shall have power to enforce this article and so, your argument goes, where a general law that isn't motivated

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purposely is at stake, insofar as Congress forbids that, it's not enforcing the Constitution, because --

GENERAL DELLINGER: Justice Breyer, I --

QUESTION: -- the Constitution doesn't prohibit that.

Now, you're giving a response to that, and I just want you to --

GENERAL DELLINGER: Yes. My response is --

QUESTION: -- tie that response to a linguistic argument.

GENERAL DELLINGER: My response is quite clearly --

QUESTION: Yes.

GENERAL DELLINGER: -- Congress has prohibited requiring exemptions not otherwise required to some laws that would not violate section 1, but it is doing so prophylactically, as this Court does in cases like Miranda and many others. It is doing so prophylactically --

QUESTION: Well, how many others -- how many others, other than Miranda are there, where they -- we have imposed a prophylactic rule?

GENERAL DELLINGER: I believe that a number of your rules are prophylactic. In a case like North Carolina v. Pearce, where all harsher sentencing after a pretrial are prohibited --

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QUESTION: Well, that was a constitutional holding.

GENERAL DELLINGER: Yes. Yes, but the violation about which you were concerned is the threat of retaliatory sentencing, so you later noted in Michigan v. Payne that that rule was greatly overinclusive in terms of the actual violations. That is, hostile sentencing.

But to, if I may, Mr. Chief Justice, return to Justice Breyer's question, what is critical here is that Congress has -- in the Voting Rights Act and in others, it prohibits a broader range of practices in order to get at those that clearly violate the Constitution.

QUESTION: Let me take just what you're saying and put it in this linguistic framework. Congress passed this law prophylactically to prevent the violation -- and now, fill in the blank. What violation?

GENERAL DELLINGER: The violation of treating -- more than one. The first one is the violation of treating some religious denominations more favorably than others.

QUESTION: But according to Smith that doesn't violate the Constitution.

GENERAL DELLINGER: No. I -- no, that I beg to differ. Where different religious denominations aren't treated differently there's no question before, after, and during Smith it violates the Constitution. It may be

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difficult to remedy on a case-by-case judicial approach where you're trying to prove it, but it clearly is a constitutional violation if an exemption is made for the Methodist Church and the exemption is not made for the Santorias.

If you -- take a case, for example, like the district court case, Rader v. Johnson, from the State of Nebraska, where the university has a rule that all freshmen must live on campus, and the -- Mr. Rader is a Fundamentalist Christian. His sincerity is beyond doubt. His family have prayer services every morning throughout high school.

For him, it is an occasion of sin to be forced to go into a dormitory where there is alcohol, and profanity, and co-ed living, and partying. It was really going to cost him his ability to go to this university, and his alternative is to live a few blocks off campus at the Christian Fellowship House.

QUESTION: Can I --

GENERAL DELLINGER: Yes. Now -- if may just finish up. This is more often the -- he is not given an exemption.

When it turns out that the important booster calls up because he wants his son to live with a relative. It turns out that a student who wants to drive his sister

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to school -- all these are allowed exemptions from living off-campus.

In this case, he was able to prove it, but Congress can worry particularly about the marginal religious groups that won't get the accommodations.

This is not a made-up issue. There are many accommodations that are made, exceptions from zoning laws, accommodations all the time. Kiryas Joel says --

QUESTION: Well --

GENERAL DELLINGER: -- we are concerned that we won't be able to police those in the future.

QUESTION: Well, let's go back to the tax issue, and suppose the record shows that only a couple of major churches have extensive businesses that are ordinary businesses but the income from those businesses is used to support the church, ultimately, but they're ordinary businesses. They run hotels, or they run gambling casinos, or have bingo games, or whatever, and it affects primarily the Catholic Church and the LDS Church. Let's say the facts show that.

And what the State has done is to pass laws saying that all businesses that are not part and parcel of the church itself, but outside businesses that produce money for the church, will be taxed like every other business is taxed.

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Now, this law apparently would require the strictest scrutiny of that tax law. Is that right?

GENERAL DELLINGER: Justice O'Connor, only if you conclude --

QUESTION: You can say yes or no.

GENERAL DELLINGER: Would it require? I think the answer's no, and assuming that you would conclude --

QUESTION: How can you read it that way, as broadly as it's written?

GENERAL DELLINGER: On the assumption that you would conclude that it is not a burden on religiously motivated conduct if you limit the ways as a part of a general law in which people can raise money, that a substantial -- the substantial part of the substantial burden --

QUESTION: You mean, you'd construe the statute to say the same thing Smith says. That's what you're saying.

GENERAL DELLINGER: Oh, no.

QUESTION: No, but you are saying some general laws are okay.

GENERAL DELLINGER: Yes, indeed, because this -- there's a lot -- this case comes up.

QUESTION: And where -- how do we know which?

GENERAL DELLINGER: Justice Souter, I want to

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remind you, and Justice O'Connor, that the case comes up on a facial challenge, so that this Court has had no occasion to interpret what constitutes --

QUESTION: No, I just want to interpret what you're saying, and you're saying there are two classes of cases here, and some general and neutral laws are okay, and what's your criterion for drawing that line?

GENERAL DELLINGER: My criteria would be, again without having addressed this, whether a substantial burden is one that really goes to religiously motivated conduct and restricts that religiously motivated conduct.

QUESTION: But it is --

QUESTION: -- a substantial burden --

QUESTION: -- discrimination.

GENERAL DELLINGER: I mean, Amos itself said that, you know, economic activity is different and may raise Establishment Clause problems if you allow people to --

QUESTION: But even if it's economic activity to raise money for the church? What difference is there between a church that runs a business, all of the money of which is devoted to the church, and a church that solicits contributions, all of which is devoted to the church?

Is -- you're saying that somehow the latter is more religiously motivated than the former?

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GENERAL DELLINGER: There are instances, I think, where the Establishment Clause would require you to treat even-handedly the raising of money. That is an issue that, before Smith, this Court knew, I think, how to handle.

What you see in RFRA, if I may return, because I thought the theoretical questions about section 5 were interesting, but where you have a process that where RFRA gives the following solution to the problem anticipated in Smith and in Kiryas Joel of inequitable accommodations, and what RFRA says is that everyone whose free exercise of religion is substantially burdened gets the same treatment, whether they're a powerful, traditional sect or a marginal religion.

Now, they say that we haven't shown violations yet, but this is a process where Congress actually anticipated that State and local legislative bodies -- this is from the Senate report, at page 8.

State and local legislative bodies cannot be relied upon to craft exemptions from laws of general application that will protect the ability of religious minorities to the same extent as the majority.

QUESTION: The irony to that argument is, they did it in the peyote case.

GENERAL DELLINGER: In the -- well --

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QUESTION: After our decision.

GENERAL DELLINGER: And Congress -- yes, but Justice Stevens, Congress was concerned -- and they are the specialists on the perils of special interest exemption processes. They were concerned that if you have a case-by-case process, religions that, for whatever reasons, have more political influence are able to get their specific exemptions.

QUESTION: General --

QUESTION: Well, certainly the peyote smokers don't have a great deal of influence, and yet they succeeded in Oregon.

GENERAL DELLINGER: It is not clear to me how well one can parse what -- sometimes some minorities are particularly well-situated. Others, like the Amish, have a very difficult time in the legislative process --

QUESTION: Perhaps the peyote smokers had help from those outside of religion.

(Laughter.)

QUESTION: General Dellinger, we've just been told by the representative of the Ohio Attorney General that the States want to do even more than Congress has done, but they don't want Congress to tell them.

That's where they say they see the principle constitutional problem, and you've just said that the

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States -- you know, we can't trust them, and I'm asking you what basis is there for making that judgment when we're being told by the States, leave us alone. We'll do even better.

GENERAL DELLINGER: Justice Ginsburg, there was an 800-page record of testimony, groups -- one religious group after another testified as to the difficulties that particularly marginal religious groups have getting accommodations.

The Lukumi had to come all the way to this Court before they got a single person, a single judge to vote for them, and it's -- I see my time has expired.

Thank you.

QUESTION: Thank you, General Dellinger.

The case is submitted.

(Whereupon, at 11:28 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 95-2074

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BY _____

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