TESTIMONY

BEFORE THE SUBCOMMITTEE ON

THE CONSTITUTION AND CIVIL JUSTICE

OF THE

HOUSE COMMITTEE ON

THE JUDICIARY

ON

OVERSIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

BY

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My name is Gregory Baylor, and I serve as Senior Counsel with Alliance Defending Freedom, a non-profit legal organization that advocates for religious liberty, the sanctity of life, and marriage and the family through strategy, funding, training, and litigation. I appreciate the opportunity to submit this testimony regarding the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

In response to a damaging and unexpected Supreme Court decision, Congress restored robust legal protection for religious exercise when it enacted the Religious Freedom Restoration Act in 1993.[1] The coalition supporting RFRA—and the foundational principles underlying it—was remarkably broad and diverse. Over 20 years later, support for those principles (and perhaps for RFRA itself) has notably waned in some quarters. Given this unfortunate development, a look back at RFRA's enactment and the circumstances surrounding it is more than warranted.

In its 1963 decision in *Sherbert v. Verner*,[2] the United States Supreme Court held that government burdens on religious exercise violate the First Amendment's Free Exercise Clause unless justified by interests of the highest order. The case arose when Adell Sherbert, a Seventh-day Adventist, was fired from her job at a textile mill when she refused to work on her Sabbath. After her discharge, she sought unemployment compensation. The state of South Carolina denied her application pursuant to a state statute withholding benefits from those who "fail, without good cause, to accept suitable work when offered."[3] Sherbert sued, claiming that the state had violated the Free Exercise Clause. The state courts ruled against her, but she persuaded the U.S. Supreme Court to take her case.

[1] 42 U.S.C. § 2000bb *et seq*.
[2] 374 U.S. 398 (1963).
[3] *Id*. at 401 (internal quotation omitted).

In assessing Sherbert's claim, the Court utilized what came to be known as "strict scrutiny" or the "compelling governmental interest" test. In an opinion authored by Justice William Brennan, the Court first assessed whether the denial of benefits burdened her religious exercise. It answered that question in the affirmative, reasoning as follows:

> [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[4]

The Court then considered "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."[5] The Court observed that "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[6] South Carolina alleged that conferring benefits upon Sherbert under the circumstances might motivate "unscrupulous claimants" to file fraudulent claims feigning religious objections to Saturday work and thereby diminish the unemployment compensation fund.[7] The Court found that the state had presented no evidence supporting this fear. Moreover, it declared "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[8] In other words, even if

[4] *Id.* at 404.
[5] *Id*. at 406.
[6] *Id*. (quotation omitted).
[7] *Id.* at 407.
[8] *Id*.

the government identifies a compelling interest, it must prove that burdening the claimant's religious exercise is the least restrictive means of advancing that interest.

The Supreme Court applied *Sherbert*'s compelling interest test in *Wisconsin v. Yoder*,[9] a case involving Old Order Amish parents who declined, for religious reasons and in violation of state compulsory education laws, to send their children to school beyond the eighth grade. The Court found that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[10] That the burden on religious exercise resulted from a facially neutrally, generally applicable law—just as in *Sherbert*—did not warrant application of anything short of strict scrutiny.

As in *Sherbert*, the Court then examined whether "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[11] Wisconsin claimed that its interest in universal compulsory formal secondary education was sufficiently weighty to justify its infringement on the claimants' religious exercise. The state argued "that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society."[12] The Court accepted those propositions in general, but rejected the contention that two

[9] 406 U.S. 205 (1972).
[10] *Id*. at 218.
[11] *Id*. at 214.
[12] *Id*. at 221.

additional years of schooling was necessary with respect to the Amish children in question.[13] The Court thus held that Wisconsin violated the parents' rights under the Free Exercise Clause.

The Supreme Court unexpectedly abandoned the *Sherbert*/*Yoder* approach to free exercise in *Employment Division v. Smith*.[14] The case arose when two members of the Native American Church were fired from their jobs for ingesting peyote (an illegal drug) for sacramental purposes. The state of Oregon rejected their applications for unemployment compensation, concluding that they had been discharged for work-related "misconduct," and were thus statutorily ineligible for benefits.[15] Invoking (among other cases) *Sherbert v. Verner*, the claimants argued that Oregon violated the Free Exercise Clause by withholding benefits.[16]

Their case reached the U.S. Supreme Court, which shocked most observers by largely abandoning "strict scrutiny." The Court concluded that facially neutral laws of general applicability burdening religious exercise generally require no special justifications to satisfy Free Exercise scrutiny.[17] The majority declared that:

> the sounder approach [to challenges to generally applicable criminal prohibitions], and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.[18]

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[13] *Id*. at 222.
[14] 494 U.S. 872 (1990).
[15] *Id*. at 874.
[16] *Id*. at 876.
[17] *Id*. at 876 *et seq.*
[18] *Id*. at 885 (citations and quotations omitted).

Justice O'Connor took strong exception to the majority's abandonment of strict scrutiny. Rejecting the Court's distinction between laws targeting religion and those "incidentally" burdening religion, she stated:

> few States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.[19]

Disappointment with—even anger at—the majority's opinion was not limited to other Justices. A large number of religious and civil rights organizations promptly formed the Coalition for the Free Exercise of Religion to urge Congress to restore strong legal protection for religious liberty. The 68-member Coalition included the Baptist Joint Committee for Religious Liberty, the American Jewish Congress, Americans United for Separation of Church and State, Christian Legal Society, the American Civil Liberties Union, Agudath Israel of America, and the National Association of Evangelicals.[20]

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[19] 494 U.S. at 893 (O'Connor, J., concurring).

[20] Coalition members were: Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social

Legislation designed to restore strict scrutiny to free exercise cases was first introduced in the 101st Congress.[21] It was re-introduced in the 102d Congress, and the Senate Judiciary Committee held a hearing on September 18, 1992. Witnesses included Hmong practitioner William Nouyi Yang; Dallin H. Oaks, quorum of the twelve apostles, Church of Jesus Christ of Latter-Day Saints; Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs; Douglas Laycock, professor, University of Texas School of Law; Mark E. Chopko, general counsel, U.S. Catholic Conference; attorney Bruce Fein; Forest D. Montgomery, counsel, Office of Public Affairs, National Association of Evangelicals; Michael P. Farris, president, Home School Legal Defense Association; Nadine Strossen, president, American Civil Liberties Union; and James Bopp, Jr., general counsel, National Right to Life Committee, Inc.

In his opening statement, Senator Edward Kennedy (D-MA) observed that RFRA:

> is strongly supported by an extraordinary coalition of organizations with widely differing views on many issues. The National Association of Evangelicals, the American Civil Liberties Union, the Coalitions for America, People for the American Way, just to name a few support the legislation. They don't often agree on much, but they do agree on the

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Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 n.9 (1994) (listing groups).

[21] S. 3254.

> need to pass the Religious Freedom Restoration Act because religious freedom in America is damaged each day the *Smith* decision stands.[22]

Senator Orrin Hatch (R-UT) similarly remarked:

> I will conclude [my opening remarks] by observing that a broad spectrum of organizations support this bill. When the American Civil Liberties Union and the Coalitions for America see eye to eye on a major piece of legislation, I think it is certainly safe to say that someone has seen the light . . . .[23]

Oliver Thomas, general counsel of the Baptist Joint Committee and co-chair of the Coalition likewise observed:

> The support for this piece of legislation is, as Senator Kennedy has characterized it, extraordinary. Never have I seen a coalition quite like the Coalition for the Free Exercise of Religion—People for the American Way on the one hand; the Traditional Values Coalition and Concerned Women for America, on the other; the American Civil Liberties Union, the Southern Baptist Convention, Agudath Israel, and the American Muslim Council; 54 organizations, Mr. Chairman, 54 organizations willing to set aside their deep political and ideological differences in order to unite in a common vision for the common good—religious liberty for all Americans. Let us face it. What else can Nadine Strossen, Paul Weyrich, Norman Lear, and Beverly LaHaye agree on?[24]

Large numbers of both Democratic and Republican Congressmen and Senators co-sponsored RFRA. The version of RFRA ultimately passed by the 103d Congress was introduced by Senators Kennedy and Hatch, and was co-sponsored by Senators Akaka, Bennett, Bond, Boxer, Bradley, Breaux, Brown, Bumpers, Campbell, Coats, Cohen, Danforth, Daschle, DeConcini, Dodd, Dorgan, Durenberger, Exon, Feingold, Feinstein, Glenn, Graham, Gregg, Harkin, Hatfield, Inouye, Jeffords, Kassebaum, Kempthorne, Kerrey, Kerry, Kohl, Lautenberg, Levin, Lieberman, Lugar, Mack, McConnell, Metzenbaum, Mikulski, Moseley-Braun,

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[22] Hearing Before the Committee on the Judiciary, United States Senate, 102d Congress, 2d Sess., on S. 2969, A Bill to Protect the Free Exercise of Religion (Sep. 18, 1992), at 2 (hereinafter "Hearing").
[23] *Hearing* at 8.
[24] *Hearing* at 41.

Moynihan, Murray, Nickles, Packwood, Pell, Pryor, Reid, Riegle, Rockefeller, Sarbanes, Sasser, Specter, Wellstone, and Wofford.[25]

Lawmakers and hearing witnesses emphasized a number of key themes. First, they observed that pervasive governmental regulation adversely affects adherents of all faiths, large and small.[26] Prof. Laycock observed that *Smith*'s errors "affect not only minority or immigrant religions that are well outside the mainstream, but also mainstream faiths. In a pervasively regulated society, *Smith* means that churches and religious believers will be pervasively regulated because every generally applicable [law] that applies to anybody else applies to the churches."[27]

Second, they stressed that RFRA merely set forth the relevant test for assessing free exercise claims, without dictating results in particular disputes. For example, Oliver Thomas testified that RFRA "would restore the time-honored compelling interest test and ensure its application in all cases where free exercise of religion is burdened—nothing more, nothing less. The bill expresses no opinion on the merits of particular free exercise claims but rather leaves such decisions to the courts after consideration of all pertinent facts and circumstances. The beauty of [RFRA] is its commitment to a principle—religious liberty for <u>all</u> Americans."[28] ACLU President Nadine Strossen testified:

> [RFRA] merely returns judicial decision-making in the religious freedom area to the compelling interest standard that the courts apply to all fundamental rights. It does not decide how those claims will be evaluated when the courts balance those interests against legitimate compelling state

[25] S. Rep. No. 111, 103d Cong., 1st Sess. (Jul. 27, 1993).
[26] *See, e.g., Hearing* at 63-64 (describing infringements experienced by Mormons, Catholics, Jehovah's Witnesses, Orthodox Jews, Evangelical Protestants, and the Hmong) (Statement of Prof. Laycock).
[27] *Id*. at 63.
[28] *Hearing* at 45-46. *See also id*. at 2 ("Not every free exercise claim will prevail.")(Statement of Sen. Kennedy).

> interests. The courts have had little difficulty in finding a compelling state interest to exist when the government has sought to protect health, safety, or even national security.[29]

Strossen also declared:

> It should be clear to this Committee that enactment of [RFRA] will not guarantee that claims of religious liberty will always prevail. We invest government with broad and important powers that sometimes override individual liberty.[30]

Third, and relatedly, Congress and RFRA's diverse supporters were well aware that the statute's protections might be relevant in cases involving emotionally charged "culture war" issues. After recounting how facially neutral, generally applicable laws had been used at certain points in American history to infringe the religious exercise of Mormons, Catholics, and Jehovah's Witnesses, Prof. Laycock (who is not a political or religious conservative) stated:

> The contemporary examples span the range of religious faiths and practices. Gay rights suits against Catholics, Orthodox Jews, and Conservative Protestants are going on all over the country, and the churches are often losing those cases. . . . *St. Agnes Hospital*, where a Catholic hospital loses its accreditation because it won't do abortions, is a real case. Pro-life doctors and nurses and residency programs forced out of ob-gyn are not imaginary. Catholic money supporting student gay rights groups at Georgetown is a real case. Unwed mothers suing the church for the right to teach in their elementary schools is a real case.
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> . . .
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> Culturally conservative churches, including Catholics, conservative Protestants, Orthodox Jews, and Mormons, are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior. The most aggressive elements of the pro-choice, gay rights, and feminist movements are not content to prevail in larger society; they also want to impose their agenda on dissenting churches.[31]

Nadine Strossen, president of the ACLU, testified:

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[29] *Hearing* at 199.
[30] *Hearing* at 200.
[31] *Hearing* at 64-65, 72.

> In the aftermath of the Smith decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as . . . religious preferences in church hiring, . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services, . . . [and] a church's refusal to ordain women or homosexuals.[32]

And certain of the post-*Smith* reported adverse judicial decisions cited by witnesses supporting RFRA involved claims under non-discrimination laws.[33]

Of course, Congress subsequently voted overwhelming to enact RFRA. It passed the Senate by a vote of 97-3 and the House by unanimous voice vote.[34] In his remarks upon signing RFRA on November 16, 1993, President Bill Clinton rightly echoed earlier observations about the diverse coalition that supported RFRA:

> It is interesting to note . . . what a broad coalition of Americans came together to make this bill a reality . . . . I'm told that, as many of the people in the coalition worked together across ideological and religious lines, some new friendships were formed and some new trust was established, which shows, I suppose that the power of God is such that even in the legislative process miracles can happen.[35]

He concluded:

> [L]et us never believe that the freedom of religion imposes on any of us some responsibility to run from our convictions. Let us instead respect one another's faiths, fight to the death to preserve the rights of every American to practice whatever convictions he or she has, but bring our values back to the table of American discourse to heal our troubled land.[36]

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[32] *Hearing* at 192.
[33] *Hearing* 50-58, citing *inter alia*, *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990); *Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); and *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991).
[34] 139 Cong. Rec. 26,416 (cumulative ed. Oct. 27, 1993); 139 Cong. Rec. H8715 (daily ed. Nov. 3, 1993).
[35] President William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993*, Nov. 16, 1993, *available at* http://www.gpo.gov/fdsys/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf
[36] *Id*.

Recounting this history will, I hope, serve as a corrective to the current impulse to doubt the wisdom of the 103d Congress and broad spectrum of individuals and organizations who labored to restore adequate legal protection of religious exercise. That impulse is driven in no small part by the Supreme Court's relatively recent decision in *Burwell v. Hobby Lobby Stores*.[37] In that case, the Court held the federal government violated RFRA by threatening to impose crippling fines upon family business owners who refused, for reasons of conscience, to include abortion-inducing drugs and devices in their employee health plans. Unhappiness with the outcome of the case has contributed to a growing skepticism—even hostility—towards RFRA and its underlying principles. Indeed, bills that would partially repeal RFRA were introduced last summer in the wake of the *Hobby Lobby* decision.[38] Thankfully, RFRA survived. I urge Congress to resist any further efforts to undermine the Religious Freedom Restoration Act's indispensable protection of our First Freedom.

Thank you.

[37] 134 S. Ct. 2751 (2014).
[38] S. 2578, 113th Cong., 2d Sess.; H.R. 5051, 113th Cong. , 2d Sess.