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RELIGIOUS LIBERTY PROTECTION ACT OF 1998

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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SECOND SESSION

ON

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A BILL TO PROTECT RELIGIOUS LIBERTY

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The CHAIRMAN. Professor Hamilton.

STATEMENT OF MARCI A. HAMILTON

Ms. HAMILTON. Thank you, Mr. Chairman and members of the committee, for inviting me today. It is an honor to be talking about this vital constitutional issue. As my written statement makes clear, it is my view that the Religious Liberty Protection Act is clearly unconstitutional. In fact, I don't view it as a very difficult problem.

As the first panel made absolutely and abundantly clear, this is an attempt to overturn the Supreme Court's decision in *Smith*. It is the unhappiness with the Supreme Court's decision in *Smith* that motivates RLPA and that informs it, and it is obvious that this is a repetition of RFRA; it is, in fact, RFRA II, as it is referred to on the religious law ListServ. It is RFRA II because it is the same standard. It is the compelling interest test and least restrictive means test attempting to be packaged in a Commerce Clause or a spending power rationale.

So all one needs to do to understand what is wrong with RLPA is to read the *Boerne* decision and *Marbury* v. *Madison*. It is plainly a violation of the separation of powers. This body does not have the power to attempt to overturn the meaning of the First Amendment as established by the Supreme Court.

Second, as *Boerne* also made clear, this body does not have the power to amend the Constitution without undergoing ratification procedures. This is an attempt to end-run Article V of the Constitution which requires super-majorities and massive involvement of the States in order to amend the Constitution. This is an attempt to amend the Free Exercise Clause, as we understood from the first panel when we heard repeated statements that the *Boerne* decision was wrong, that RFRA was right.

Now, third, this law is a plain assault on States' rights. It is an attempt by the Federal Government to micromanage local land use. It is inconceivable how far this bill would go. Apparently, when any zoning law is generally applicable or neutral, it will now be subjected to the least restrictive means test which, as the Supreme Court said in *Boerne* at 117 Supreme Court at 2171, was not a test they have employed in prior cases.

Local zoning authorities are now going to have to prove this is the least restrictive means for this religious believer, plus they are going to have to show that there is tangible harm to neighbors, neighboring properties, and interests, whatever that means. And, in addition, one has to wonder under section 3 of the bill how many variances will churches be permitted. Is it the fifth variance that will be too much, or the sixth variance, or the seventh variance? Churches have a tendency to establish themselves and to exist for long periods of time. This bill would permit them to continually agitate against local land use laws that are truly neutral and generally applicable and enacted for the interests of the neighbors.

Now, the question that has to be asked constitutionally about this aspect of the bill under the *Boerne* decision is whether or not this is proportional to the harm that has been proved in front of Congress. The harm so far that has been proved are claims that it is difficult to prove discrimination. Because it is difficult to prove

discrimination, it will be necessary to use the Federal Government to regulate every local land use decision that affects a church. That does not sound proportional to me at all. It sounds disproportional and it sounds like a hammer going after a gnat, and that is precisely what the Supreme Court in the *Boerne* decision said this body is not permitted to do.

Now, the next problem with the bill that has to be addressed is what is its enumerated power because Congress cannot act without an enumerated power. Now, I understand Professor Laycock's argument that this is perfectly acceptable under the Commerce Clause and it is perfectly acceptable under the Spending Clause, but I don't understand where this has ever been attempted before.

Title VI does not begin to reverse the Supreme Court's interpretation of any aspect of the Constitution. It doesn't go farther. Title VI—and I have now read every page of its legislative history—was enacted for the purpose of getting rid of discrimination on the basis of race, which I understand is unconstitutional. So I don't see any precedent for this. This is a much broader attempt. It is, in fact, an attempt to expand Congress' powers beyond anything that it has done before.

Finally, the bill obviously violates the Establishment Clause. The Supreme Court in *Smith* did say that accommodation in particular circumstances can be constitutional. But if you look back at the Court's Establishment Clause jurisprudence, what they had to have meant was not that this body has the ability to pass broad-brush, across-the-board attempted exemptions, but rather that this body can consider in specific circumstances—for example, the bill that Senator Grassley brought up—in specific circumstances, is it necessary to provide an exemption?

That is not what this bill is. This was not invited by the Court in *Smith*. This is, in fact, an attempt to solve all of the social problems being brought before this panel in one fell swoop. That certainly, in my view, does not accord with the Establishment Clause.

RLPA is, in fact, a re-creation of RFRA, and the single most troubling aspect of RFRA is repeated in RLPA, and that problem is its huge scope. This is a massive power shift to religion. Religion, before 1990, in the vast majority of cases, and none before the Supreme Court, did not get an opportunity to claim that government must prove the least restrictive means for this religious believer. This is new power to religion.

The other problem with the bill is that it creates a large incapacity for this body to be able to investigate it. It covers every possible spending by the Federal Government. As I read the bill, I am not sure about the answer to Senator Grassley's question about whether or not tax-exempt status or any of those sorts of tax issues will be covered by the bill. It is a huge bill and, at the very least, the people of the United States deserve to have Congress investigate through the General Accounting Office where Federal money lands. Where are all these programs that are now going to have a different standard than they would have had ever before?

Let me just quickly, because I am certain I am using up all the time that I have been afforded, tell you about pragmatic, real-life examples and where we might want to be concerned about giving religion a leg up. I would like to be realistic about religion. I am,

in fact, a Presbyterian and I am a very religious person, but there are many religions that practice activities that are not necessarily in the public's interest.

The question posed by RLPA is the following. What happens when a religion claims that children should not be immunized? What about the laws that require vaccinations? What is the least restrictive means in that circumstance, is my question. Is the least restrictive means going to include forcing them to have the vaccination, or rather is it going to say, no, they don't have to have the vaccination, but we will just quarantine them when they get the disease that is now deadly to other people?

Where is the least restrictive means when you have a religion that practices child or spousal abuse? Is the least restrictive means going to be accomplished by keeping the children and the women away from the battering spouse, or is the least restrictive means going to be accomplished by posting authorities outside the residence where the abuse is occurring?

Where is the least restrictive means when Sikh school children will ask to carry small knives to school in schools that have generally applicable laws that refuse to permit children to carry weapons? We already know the answer to that in California. In California, the least restrictive means test means that children can carry knives to school, strapped to their legs, basted in with thread.

Now, in California there is a very active activity with respect to a State mini-RFRA, as we call it. The State juvenile court has yesterday filed a letter explaining what harm will happen to children if the least restrictive means test is the one that is used.

First, under a least restrictive means test, the juvenile court of California is very concerned that parents will have more power; they will have more means and more time to abuse children. There will be a slowdown in adoption proceedings, which means more children will remain in foster care, and there will be a vast escalation in litigation costs because of the slowdowns. The furthest departure, of course, for RLPA is its departure from the Supreme Court's decision in *Turner,* where the Supreme Court said that the prisons are not going to be subject to strict scrutiny, but to a very much lower standard.

In sum, the only reason that I can understand that RLPA looks attractive is because it is stated in legalistic and abstract language. This body has a constitutional obligation to investigate its impact independent of the factions that are pushing for it and for the sake of the civil liberties of all those who will be affected by such a law.

Thank you very much.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Hamilton follows:]

PREPARED STATEMENT OF MARCI A. HAMILTON

Thank you, Mr. Chairman and members of the Committee, for inviting me to speak today on this important constitutional law topic. I am a Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional law. I was also the lead counsel for the City of Boerne, Texas in the case that ultimately invalidated the Religious Freedom Restoration Act (RFRA). See *Boerne* v. *Flores,* 117 S.Ct. 2157 (1997). I have devoted the last five years of my life to writing about, lecturing on, and litigating the Religious Freedom Restoration Act and similar religious liberty legislation in the states. For the record, I am a religious believer.

As you know, the *Boerne* v. *Flores* decision unequivocally rejected RFRA. Not a single member of the Supreme Court defended the law in either the majority, the concurrences, or the dissents. The Court's decision was not a result of any hostility on the part of the Court toward this body. That is evident in its calm, evenhanded tone. Nor was it the result of mistaken understandings of its own precedents. The decision was inevitable. Contrary to Professor Laycock's and the Congressional Research Service's confident assurances in the RFRA legislative record, RFRA was plainly ultra vires.

I will not belabor RFRA's faults here, but rather refer you to the bibliography that follows this testimony.

Today I am here to tell you that I believe that RLPA violates the Constitution.

That this bill, which is a slap in the face of the Framers and the Constitution, is receiving a hearing indicates that what I say today may not make much difference. If Congress wants to be perceived as the savior of religious liberty and wants to defer to the most powerful coalition of religions in this country's history, there is absolutely nothing that I can do about it. Thus, I will not offer detailed critique of each of this bill's glaring constitutional errors. Instead, I will offer a summary of those errors.

Then I will share with you the interests that will be hurt by granting religion this unprecedented quantum of power against the government.[1] I represent none of these interests, but I have heard their stories in my travels around the country these five years.

RLPA'S MOST SEVERE CONSTITUTIONAL DEFECTS

RLPA Violates the Separation of Powers

Like RFRA, RLPA is an undisguised attempt to reverse the Supreme Court's interpretation of the Free Exercise Clause in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and to take over the Court's core function of interpreting the Constitution. See Secs. 2(a) and 3(a). For a clear discussion explaining why this is beyond Congress's power, see *Boerne* v. *Flores*, 117 S.Ct. at 2172.

RLPA Violates the Constitution's Ratification Procedures

Like RFRA, RLPA attempts to amend the Constitution by a majority vote, bypassing Article V's required ratification procedures in direct violation of *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). For a plain discussion in which the Court reasserts its allegiance to *Marbury*, see *Boerne* v. *Flores*, 117 S.Ct. at 2168.

RLPA Is an Assault on States' Rights

Despite its rote recitation of language from cases addressing federalism issues, see, e.g., Sec. 2(d) ("state policy not commandeered"), this bill federalizes local land use law and (if good law) would eviscerate one of the final stronghold's of local government. It violates the letter and the spirit of the modern Court's emerging structural constitutional jurisprudence. See *Printz* v. *United States* 117 S.Ct. 2365 (1997), *United States* v. *Lopez*, 514 U.S. 549 (1995); *New York* v. *U.S.*, 505 U.S. 144 (1992). If good law, RLPA's micromanagement of local land use law would set the pace for an expansive invasion of state and local government authority.

If RLPA becomes law, it will haunt any representative who attempts to climb onto the limited federal government platform.

RLPA Fails to Satisfy the Enumerated Power Requirement

RLPA is ultra vires. There is not a single statute that provides a model for RLPA's claim to be grounded in either the Spending Clause or the Committee Clause. Congress has not identified any specific arena of spending or commerce. Rather, is has identified all religious conduct as its target and attempted to cover as much religious conduct as possible by casting a net over all federal spending and commerce. See Hearings, H.R. 4019, The Religious Liberty Protection Act, Subcommittee on the Constitution, House Committee on the Judiciary (June 16, 1998). Like RFRA, its obvious purpose is to displace the Supreme Court's interpretation

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[1] Professor Douglas Laycock tilts at windmills when he attempts to argue that the test instituted by RLPA (and RFRA), the compelling interest/least restrictive means test, was the test regularly employed in all free exercise cases before 1990. He neglects to mention *Turner* v. *Safley*, 482 U.S. 78 (1987), which makes explicit that strict scrutiny does not apply in the prison context or any of other cases in which the Court demonstrated great deference to government interests. See, e.g., *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), *Bowen* v. *Roy* 476 U.S. 693 (1986). Whatever Professor Laycock's interpretation of the Supreme Court's free exercise jurisprudence may be, the Supreme Court itself made absolutely clear in *Boerne* v. *Flores* that the least restrictive means test is "a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 117 S. Ct. at 2171.

of the Free Exercise Clause in as many fora as possible. It is a transparent end-run around the Supreme Court's criticism of RFRA in *Boerne* v. *Flores.*

The specious argument that Congress may grant religion this windfall under the Commerce Clause because religion generates commerce attempts to transform the First Amendment, a limitation on congressional power, into an enumerated power.

RLPA Violates the Establishment Clause

RLPA privileges religion over all other interests in the society. While the Supreme Court indicated in *Smith* that tailored exemptions from certain laws for particular religious practices might pass muster, it has never given any indication that legislatures have the power to privilege religion across-the-board in this way.

RFRA's and RLPA's defenders rely on *Corporation of the Presiding Bishop* v. *Amos,* 483 U.S. 327 (1987), for the proposition that government may enact exemptions en masse. This is a careless reading of the case, which stands for the proposition that religion may be exempted from a particular law (affecting employment) if such an exemption is necessary to avoid excessive entanglement between church and state. RLPA, like RFRA, creates, rather than solves, entanglement problems. RLPA, which was drafted by religion for the purpose of benefitting religion and has the effect of privileging religion in a vast number of scenarios, violates the Establishment Clause. For the Court's most recent explanation of the Establishment Clause, see *Agostini* v. *Felton,* 117 S.Ct. 1997 (1997).

The following is a list of interests that will be affected adversely if RLPA is adopted because it elevates religion above all other societal interests. As Oregon recently discovered when a prosecutor attempted to prosecute a religious community for the death of three children, particular exemptions from general laws can have real consequences. This is a zero-sum game: by granting religion expansive new power against generally applicable, neutral laws, Congress inevitably subtracts from the liberty accorded other societal interests.

Before blindly passing this law with its mandate to exempt religion from general laws in an infinite number of scenarios, Congress should know that it risks responsibility for harming the following constituencies:

Children in religions that advocate and practice abuse

Women in religions that advocate male domination

Children in religions that refuse medical treatment, including immunizations

Pediatricians, who have lobbied vigorously for mandatory immunizations

The handicapped, women, minorities, and homosexuals, whose interests are currently protected by antidiscrimination laws and may well be trumped by religions exercising the compelling interest/least restrictive means test

Departments of correction and prison officials attempting to ensure order in prisons populated by increasingly violent criminals

Artistic and historical preservation interests, including whole communities that depend on historical districts for revenue and jobs

Neighborhoods attempting to enforce neutral rules regulating congestion, building size, lot size, and on- and off-street parking

School boards desperately attempting to ensure order and safety in the public schools

State, local, and municipal officials who will be forced to bear the cost of accommodating every religious request (whether from a mainstream religion or a cult) or bear the cost of litigating refusals to do so

Last, but not least, citizens who will bear the extreme increase in litigation costs created by these new rights coupled to an attorney's fees provision (a virtual invitation to sue)

In sum, RLPA is no better than RFRA. In fact, it is worse. Congress has a duty to investigate its wide-ranging effects with care before taking this plainly unconstitutional path.

For those who take comfort from the fact that RLPA is supported by a wide cross-section of religions, I leave you with the words of Framer Rufus King, one of the youngest members of the Constitutional Convention but a Harvard graduate who was highly respected on structural issues: "[I]f the clergy combine, they will have their influence on government."

Bibliography of works by Marci A. Hamilton addressing the Religious Freedom Restoration Act and *Boerne* v. *Flores: The Religious Freedom Restoration Act is Unconstitutional, Period,* 1 U. Penn. J. Constl. L. 1 (1998). *City of Boerne* v. *Flores: A Landmark for Structural Analysis,* 39 Wm. & Mary L. Rev. 699 (1998). *Religion's Reach,* Christian Century 644 (July 16–23, 1997). *The Constitution's Pragmatic Balance of Power Between Church and State,* 2 Nexus, A Journal of Opinion 33 (1997). *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under*

Cover of Section Five of the Fourteenth Amendment, 16 Cardozo L. Rev. 357 (1994). *The Constitutional Rhetoric of Religion*—U. Ark. Little Rock L.J.—(forthcoming 1998).

The CHAIRMAN. Professor Eisgruber.

STATEMENT OF CHRISTOPHER L. EISGRUBER

Mr. EISGRUBER. Thank you. I would like to thank the committee for the opportunity to present my views this morning. In my oral remarks, I would like to emphasize three points which are made at greater length, along with some others, in my written remarks.

The first of those is that RLPA repeats a fundamental problem with RFRA by invoking the compelling State interest standard. RFRA's constitutional difficulties in the Supreme Court were very closely linked to its use of that standard. The Supreme Court said of that stringent test that it, "reflects a lack of proportionality or congruence between the means adopted and the legitimate ends to be achieved."

I think Professor Hamilton has already indicated the potentially dramatic reach of this test. I would like to supplement her remarks by calling attention to the dramatic way in which it departs from other more traditional standards used in comparable areas in American constitutional and civil rights law.

So, for example, the Americans With Disabilities Act, which this body enacted in order to protect handicapped Americans from the burdens imposed by neutral and generally applicable laws, uses the reasonable accommodation standard, not the compelling State interest standard. For example, when the Supreme Court protects expressive conduct under the Free Speech Clause from the reach of neutral and generally applicable laws—that is, those that do not specifically target speech or expressive conduct, in particular—it does use the compelling State interest test, but instead uses the much more deferential *O'Brien* standard.

Indeed, when the Supreme Court tests the constitutionality of laws that explicitly and intentionally discriminate on the basis of sex, it uses not the compelling State interest standard, but the more deferential intermediate scrutiny test. I have yet to have heard any plausible explanation as to why it is that incidental burdens upon religious conduct should be subject to a far more demanding constitutional standard than is applied to explicit and intentional sex discrimination.

The second point is RLPA's use of this stringent and extremely demanding standard would create inequalities that are certainly unfair and, in my judgment, are most likely unconstitutional under the Establishment Clause. Let me offer the following example.

Suppose that there are two mothers, each of whom sends her children to the public schools and each of whom has conscientious reasons for wishing to exempt her children from sex education classes. Suppose, though, that only one of these two parents regards her objection to sex education as religious in character.

Because public schools receive financial assistance from the Federal Government, the religiously-motivated mother might be able to invoke the statute to claim an exemption. The other mother could not. I think creating that kind of special privilege is unfair in a way that should concern this body even apart from the question of