RELIGIOUS FREEDOM RESTORATION ACT OF 1991

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

H.R. 2797

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STATEMENT OF HERBERT W. TITUS, DEAN, REGENT UNIVERSITY SCHOOL OF LAW, VIRGINIA BEACH, VA

Mr. TITUS. Mr. Chairman, thank you very much for the privilege of being here.

As you have indicated, I am the dean of the College of Law and Government at Regent University in Virginia Beach. I'm a graduate of the Harvard Law School and have taught constitutional law for 25 years. I'm not appearing on behalf of the Regent University or its close affiliate, the Christian Broadcasting Network, but I'm appearing as a constitutional lawyer, as a Christian, and as a citizen of the United States committed to free exercise of religion.

While I have limited my written statement to opposition to H.R. 2797, what I have to say in that written statement is equally applicable to H.R. 4040.

In my oral remarks, I wish to concentrate and elaborate upon my first point, that, as a matter of fact, H.R. 2797 or H.R. 4040, if enacted by this Congress, would actually debase the free exercise of religion as an unalienable right, not enhance it. H.R. 2797 purports to provide greater security for the protection of the constitutional guarantee of free exercise of religion. In fact, it undercuts that freedom.

The first amendment states that Congress shall make no law prohibiting the free exercise of religion. By this explicit language, the framers meant what they said; namely, that any law that burdened the free exercise of religion was absolutely forbidden. This absolute barrier to government intrusion into the realm of religion was first recognized and affirmed in article 1, section 16, of the 1776 Virginia Constitution, which reads in pertinent part as follows: "The religion, or the duty which we owe to our creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence. Therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience."

This provision of the Virginia Constitution allowed for no exceptions even if a specific practice of religion disturbed the public peace. Other State constitutions permitted such exceptions, but James Madison led Virginia away from the English legacy of religious toleration to a new principle of freedom of religion.

For nearly 200 years the Virginia legacy of absolute protection of the free exercise of religion was endorsed by Americans who cherished religious freedom. In the early 1960's, however, former Supreme Court Justice William J. Brennan transformed that absolute guarantee into one subject to regulation if the Government could demonstrate a compelling interest to do so.

This regime of religious toleration lasted less than 30 years when it came to an end in *Employment Division, Department of Human Resources* v. *Smith*. In that case, the Supreme Court, in an opinion by Justice Antonin Scalia, reaffirmed the free exercise clause as an absolute protection for belief and profession of belief and the performance of or abstention from certain physical acts, such as proselytizing, when those acts are, by nature, subject solely to one's conscience unencumbered by the threat of civil sanction.

Scalia's critics have, without exception, overlooked this portion of the *Smith II* opinion. In doing so, they have overlooked the fact that Scalia not only endorsed a free exercise jurisprudence that imposes a real constitutional barrier to government intrusion upon religion but restored a jurisprudential principle that predated by nearly 100 years the one endorsed by the compelling State interest test.

The Supreme Court introduced the compelling State interest test in 1962, as I have pointed out. Prior to that date, it had not applied such a test. Rather, it had applied a jurisdictional analysis to determine whether the duty commanded by the State was one owed to the State or one owed exclusively to the Creator. Under such a test, the Court upheld the laws prohibiting polygamy but protected the right of the church to govern its own doctrinal affairs free from interference by the State. The spheres of civil and ecclesiastical authority were constitutionally separate. The State could not intrude upon the church's domain, no matter what the State's interest and no matter how compelling.

This jurisdictional approach to the free exercise clause continued even after 1962 in two cases, *Turcaso and Watkins* and *McDaniel and Patey*. The Court upheld free exercise claims but did not rest their holdings upon the compelling State interest test, nor could they have and remained true to that test. In *Turcaso,* the Court struck down a Maryland law imposing a religious test upon a candidate for political office. In *McDaniel,* the Court ruled against a Tennessee law prohibiting a minister of the gospel from holding public office. In neither case could the claimant have demonstrated that he was commanded by his religious faith to run for political office. Hence, neither statute intruded upon either claimant's religious conscience.

Under the compelling State interest test, neither claimant had a free exercise claim, but under a jurisdictional test both did. In *Turcaso,* the State could not enforce its limit without testing the claimant's beliefs; whether he believed or did not believe belonged exclusively to his Creator. As a duty to the Creator, he had a right against the State. In *McDaniel,* the right of a minister to run for political office belonged to the church, not the State. It was a question of church government and discipline wholly outside the cognizance of the State.

The point here is that the Court had developed a free exercise jurisprudence well before Brennan had led the Court to apply the compelling State interest test, and that jurisprudence was never abandoned. It was to that jurisprudential tradition that Justice Scalia returned when he refused in *Smith II* to apply the compelling State interest test, and let me remind this distinguished panel that Justice Scalia affirmed that the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one believes and also affirmed that there were certain acts that were totally outside the jurisdiction of the State, notwithstanding any claim of compelling State interest.

Now let me illustrate by a couple of examples of how the jurisdictional test would work. You could have a statute prohibiting discrimination whether it is based upon race, sex, or sexual preference, for example. It would be general applicability, but would it

apply to the organizational and structural definition of a religious organization?

Under the Scalia approach in the *Smith* test, there would be no compelling State interest that could possibly allow the State to intrude in the organizational structure of the religious organization. If this bill were passed, it would affirm that if a State had a compelling State interest it could dictate to churches and other religious bodies how they ought to organize their churches. This is inconsistent with the majority opinion *Smith II.* It would be reintroduced under the compelling State interest test of the *Sherbert* case which this particular statute endorses.

Let me also turn attention to the fact that in the area of proselytizing we see across the country tort suits brought under general applicability provisions of emotional distress and so forth. Under the *Smith II,* such tort suits would not be allowed, but under the compelling State interest tests such tort lawsuits have been allowed in case after case across the country, intruding upon the free exercise of religion in the proselytizing area.

H.R. 2797 explicitly rejects the jurisdictional principle endorsed in the *Smith* case in favor of a toleration test of former Justice Brennan. If enacted, it would permit and, by permitting, encourage governments to burden a person's exercise of religion if that burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

No government interest, no matter how compelling it may be, is sufficient to justify a burden upon a person's free exercise of religion. One's duties to God are defined by the Creator, not by the State, and, if enforceable, only by reason or conviction as prescribed by the Creator, and such duties are unalienable rights toward men. If they are to remain unalienable, they must be completely and absolutely free from any government regulation, no matter how compelling the interest or necessary the regulation.

H.R. 2797 should be rejected then because it endorses a philosophy of free exercise of religion but does not enhance but actually undermines the absolute guarantee of free exercise of religion as provided by the first amendment.

I would also like to remind the subcommittee that it would probably be found unconstitutional as an exercise of congressional power according to footnote 10 of Justice William Brennan's opinion in *Katzenbach* and *Morgan.*

Thank you very much.

Mr. EDWARDS. Thank you, Mr. Titus.

[The prepared statement of Mr. Titus follows:]

PREPARED STATEMENT OF HERBERT W. TITUS, DEAN, REGENT UNIVERSITY SCHOOL OF LAW, VIRGINIA BEACH, VA

My name is Herbert W. Titus. I am Dean of the College of Law and Government, Regent University, Virginia Beach, Virginia. I am a graduate of the Harvard Law School and have taught constitutional law for twenty-five years. I appear today not on behalf of Regent University or its close affiliate, the Christian Broadcasting Network, but as a constitutional lawyer, as a Christian, and as a citizen committed to the free exercise of religion in American society.

While I have limited my statement to H.R. 2797, I wish to go on record as also opposing H.R. 4040. While H.R. 4040 provides for some laudable exceptions to the general standard contained in H.R. 2797, those exceptions do not satisfy the objections that I have to H.R. 2797.

I. H.R. 2797 Debases the Free Exercise of Religion as an Unalienable Right.

H.R. 2797 purports to provide greater security for the protection of the constitutional guarantee of the free exercise of religion; in fact, it undercuts that freedom.

The First Amendment states that "Congress shall make no law...prohibiting the free exercise" of religion. By this explicit language, the framers meant what they said, namely,

that any law that burdened the free exercise of religion was absolutely forbidden.

This absolute barrier to government intrusion into the realm of religion was first recognized and affirmed in Article I, Section 16 of the 1776 Virginia Constitution which reads, in pertinent part, as follows:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience...

This provision of the Virginia Constitution allowed for no exceptions even if a specific practice of religion "disturbed the public peace." While other state constitutions permitted such exceptions, James Madison led Virginia away from the English legacy of "religious toleration" to a new principle of freedom of religion.

For nearly 200 years, the Virginia legacy of absolute protection of the free exercise of religion was endorsed by Americans who cherished religious freedom. In the early 1960's, however, former Supreme Court Justice William J. Brennan transformed that absolute guarantee into one subject to regulation if the government could demonstrate "a compelling interest" to do so. Sherbert v. Verner, 374 U.S. 398 (1963).

This regime of religious toleration lasted less than thirty years when it came to an end in Employment Division,

Department of Human Resources v. Smith, ____U.S. ____, 110 S. Ct. 1595 (1990). In that case, the Supreme Court, in an opinion by Justice Antonin Scalia, reaffirmed that the free exercise clause absolutely protected "belief and profession" of belief and "the performance of (or abstention from) [certain] physical acts" (such as proselytizing) when those acts are, by nature, subject solely to one's conscience unencumbered by the threat of civil sanction. Id. at 1599.

H.R. 2797 explicitly rejects this jurisdictional principle endorsed in the Smith case in favor of the toleration test of former Justice Brennan. If enacted, it would permit and, by permitting, encourage governments to "burden a person's exercise of religion" if that burden "is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."

No government interest, no matter how compelling it may be, is sufficient to justify a burden upon a person's free exercise of religion. One's duties to God are defined by the Creator, not by the State, and if enforceable only by reason or conviction as prescribed by the Creator, then such duties are unalienable rights towards men. If they are to remain unalienable, they must be completely and absolutely free from any governmental regulation no matter how compelling the interest or necessary the regulation.

H.R. 2797 should be rejected, then, because it endorses a philosophy of free exercise of religion that does not

enhance, but actually undermines, the absolute guarantee of free exercise of religion provided by the First Amendment.

II. H.R. 2797 Debases the Role of Congress and of the State Legislatures.

Throughout America's 216-year history, Congress and the state legislatures have provided exceptions to specific laws of general applicability in order to accommodate the claims of conscience asserted by a wide variety of religious groups. Most notably, Congress has consistently excepted certain religious conscientious objectors from mandatory military service. See, e.g., United States v. Seeger, 380 U.S. 163 (1965). And as Justice Scalia pointed out in the Smith opinion, a number of states have made an exception in their drug laws for the sacramental use of peyote. Employment Division, Oregon Department of Human Services v. Smith, supra, 110 S.Ct. at 1606.

H.R. 2797 would prevent Congress and the state legislatures from continuing this practice because it would impose a requirement of "compelling government interest" and "least restrictive means" in every situation. Even the United States Supreme Court did not apply the "compelling state interest" test in such a monolithic fashion. For example, the Court required evidence that the matter of conscience was a central tenet of a bona fide religious faith before it applied the compelling state interest test. See Wisconsin v. Yoder, 406 U.S. 205 (1972). Moreover, the

Court refused to apply the compelling interest test in those cases where the conscientious objector had failed to demonstrate a sufficiently serious threat to religious conscience. See, e.g., Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

H.R. 2797 allows for neither of these careful assessments. Any "exercise of religion," no matter how peripheral to a person's faith, triggers the statutory requirements of compelling interest and necessity of means. Any burden, no matter how slight, will bring upon the government the strict statutory requirements.

H.R. 2792 should, therefore, be rejected because its wholesale treatment of all religious conscience issues impugns the integrity of the traditional legislative process that treats each religious claim in the context of a specific legislative proposal. H.R. 2797 should also be rejected because it treats all religious conscience claims as equally meritorious deserving in every case the high standards of compelling interest and necessity of means. Such indiscriminate treatment of all appeals to religious conscience belittles those claims that have been proved genuine in the crucible of time and tradition.

III. H.R. 2797 Debases the Role of the States and of the State Constitutions in the Federal System.

The standard of religious freedom embodied in H.R. 2797 is imposed not only upon the government of the United

States, but upon the States and its political subdivisions. Yet, there is no finding that the states have failed to provide the kind of protection for religious conscience as H.R. 2797 demands. To the contrary, there is evidence that such protection is available under state constitutional guarantees of religious toleration.

For example, following the Smith ruling, the Supreme Court of Minnesota, applying a compelling state interest test, struck down a Minnesota statute requiring the display of an orange safety triangle as applied to an Amish man operating his horse-drawn buggy. Minnesota v. Hershberger, 462 N.W. 2d 393 (1990) This ruling was based upon the Minnesota state constitution. As an independent state ground, unreviewable by the United States Supreme Court, this ruling is not threatened in anyway by the Smith precedent.

After Smith, litigants seeking protection for "religious conscientious objectors" have sought and will continue to seek state constitutional protection. In a federal system that alternative should be encouraged and allowed to run its course, not nipped in the bud as H.R. 2797 would do.

H.R. 2797, therefore, should be rejected as a premature and unwise intrusion upon the states and the role of state constitutions in the American federal system.

Mr. EDWARDS. The other gentleman does not have testimony. Is that correct?

Mr. PECK. No.

Mr. EDWARDS. Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Professor Titus then, if I follow your reasoning, do you believe in absolute freedom of religion?

Mr. TITUS. Yes, I do.

Mr. WASHINGTON. So you disagree with all the cases that have been decided on the question.

Mr. TITUS. I disagree with all the cases that have utilized the compelling State interest test since *Sherbert* and *Verner,* which was only 30 years ago.

Ms. STROSSEN. Could I comment on that, Congressman Washington?

As I understand the testimony—and I haven't had the benefit of reading the written version—but from the oral remarks, I gather that Dean Titus supports absolute freedom for a very narrow definition of religious activity—namely, belief—but when it gets to practice, he believes in the not complete, nonprotection that the Supreme Court has mandated in the Scalia opinion in the *Smith* case, and I think to talk about religious freedom as only the right to believe but not the right to practice your beliefs, among other things, is squarely inconsistent with the plain language of the religion clause which refers to free exercise of religion.

Mr. WASHINGTON. I don't think we need to reach that point. I mean I agree with you, but I——

Mr. TITUS. Do I have a privilege as a witness to correct her remarks?

Mr. WASHINGTON. Excuse me?

Mr. TITUS. Do I have a privilege as a witness to correct her remarks? She mischaracterized my position.

Mr. WASHINGTON. OK. Well, I will accept your assertion that she mischaracterized it, because I don't think it is necessary to the point where I'm taking you.

Mr. TITUS. Well, it is absolutely crucial, because I did not say that religion was confined to merely belief.

Mr. WASHINGTON. OK. I agree with you. If I get another round of time——

Mr. TITUS. And I think it is unfair to the witness to mischaracterize my remarks in response to a question that you directed to me.

Mr. WASHINGTON. I apologize for her mischaracterizing your remarks.

Let me get back to where I was trying to take you, because in my judgment I think that that will be sufficient to show the difference between where you are and where most other people are on the question, I think. So, therefore, the conclusion—if you don't agree on the premise, the conclusion doesn't matter, and I think that you and I—I have a problem with the premise that you have laid for us, and I think perhaps most other people, regardless of where they stand on the issue, do too.

But anyway, let me see if I can understand you, in fairness to you, Dean.

Mr. TITUS. Thank you.

Mr. WASHINGTON. So under the absolute freedom, then you would take literally the words that Congress shall make no law.

Mr. TITUS. That is what it says.

Mr. WASHINGTON. OK. And so what do we do when Congress does make a law and the Supreme Court does not rule that unconstitutional under that provision, "Congress shall make no law?"

Mr. TITUS. Well, I would hope, first of all, that Congress would not pass such a law. As a Congressman, you have a duty to uphold the Constitution. You certainly don't want to defer to the Supreme Court as to your constitutional duty.

Mr. WASHINGTON. OK. I think we are going to have to speak real world here, though, now, Dean.

Mr. TITUS. I am speaking the real world, I believe.

Mr. WASHINGTON. Well, you are not because you read Justice Scalia's——

Mr. TITUS. Do Members of Congress not pay attention to the Constitution?

Mr. WASHINGTON. Excuse me?

Mr. TITUS. Do Members of Congress not pay attention to the Constitution?

Mr. WASHINGTON. Well, let's save that argument for another day.

I'm troubled by—let's take what you have said to the logical conclusion, if there is one. Now then, you have read into *Employment Division* v. *Smith* something that, as far as I have been able to read—and I confess that I have not read widely on the subject, although I did practice constitutional law, I never taught it before I came to the Congress—you have read something into *Smith* that I didn't find.

I didn't find the decision to turn on Justice Scalia's opinion, that the State of Oregon had no right to—I mean let's start with the beginning. What brought the Court's attention to this was the fact situation and had to do with individuals who were members of an ethnic group that were here long before Columbus, and so this society, as we call it, came and imposed its will, if you will, on people who apparently were practicing their religion, as they define it—and I think that is what religion is, and I think you would agree with that—which included—you don't agree?

Mr. TITUS. No, I do not agree with that.

Mr. WASHINGTON. You don't agree that people have the right to define their religion for themselves?

Mr. TITUS. No, that is not the American tradition.

Mr. WASHINGTON. Wait 1 minute. Who defines the American tradition then, sir? You?

Mr. TITUS. No. I quoted to you from the Constitution of Virginia, and I think every legal scholar will indicate to you——

Mr. WASHINGTON. I beg to differ with you because——

Mr. TITUS [continuing]. That the first amendment rests upon the Virginia legacy.

Mr. WASHINGTON. Excuse me. Let me ask the questions.

I beg to differ with you. If that is where you are coming from, then maybe I will use my time on something else, because that is not what all legal scholars believe, and the expert is one more than 50 miles from home, and Virginia Beach is more than 50 miles

from here, but that doesn't make you an expert; that doesn't make you a constitutional scholar.

Mr. TITUS. I'm just telling you what the Virginia Constitution says.

Mr. WASHINGTON. If you are suggesting that the Virginia Constitution takes precedence over the U.S. Constitution, then I understand exactly where you are coming from.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. You see, Dean, if you don't give the answers that we want, why, we just dismiss you; we just roll over you, you see.

Mr. WASHINGTON. Would the gentleman yield?

Mr. HYDE. How did I know that I would be asked that question? Of course I yield to my friend from Texas.

Mr. WASHINGTON. You see, Dean, what my friend from Illinois fails to explain to you is that under the Constitution, at least as I think he and I both agree, in us is reposed the ultimate decision of voting. It doesn't matter whether you and I agree or not. It matters how I vote. No one has the right to take this vote from me; 500,000 people elected me to hold this office, and I will surrender to no one. It doesn't matter whether you and I agree. You are here; the burden of proof is out there to convince me on something that I exclusively have the right to vote on, and I will cast it, and if you assert matters and I'm trying to find a common ground with you and we can't, then you lose the battle and I vote the way I wish to vote.

I thank the gentleman for yielding.

Mr. HYDE. Not at all, and I wish to parenthetically comment that the gentleman said 500,000 elected him. He got a bigger count than I did.

Mr. WASHINGTON. I count them all.

Mr. HYDE. That's good, and they are all good Democrats.

Ms. Strossen, welcome here, and I look forward to you testifying in the future on other legislation having to do with political correctness where I know you are a great expert, and I look forward to that happy day.

Ms. STROSSEN. So do I, Mr. Congressman.

Mr. HYDE. Was he listening? I wasn't looking.

I read your statement yesterday, and I find it very interesting, very comprehensive—you and Mr. Peck.

So I just have a few peripheral questions to ask you, perhaps more in self-indulgence than in the search for truth here, but nonetheless, on your page 2 you say the American Civil Liberties Union is a nationwide, nonpartisan organization, nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and most particularly in the Bill of Rights. I like that.

And I wonder if you agree that our rights as enumerated so dramatically and resoundingly in the Declaration of Independence, do you support those rights as well?

Ms. STROSSEN. Absolutely. The ACLU has a philosophy, which I believe is the U.S. constitutional philosophy, that our rights were not granted to us by any document. The rights were preexisting. That is the whole philosophy that is stated so eloquently, as you indicated, in the Declaration of Independence. Therefore we did not

need a Bill of Rights to enumerate those rights, and therefore there are certain rights that we defend that are not enumerated in the Bill of Rights.

Mr. HYDE. Well, I am more than pleased to hear you say that because I think the statement in our Declaration that the source of our rights is the Creator—it is an endowment, not an achievement. And they are inalienable. And the purpose of government is to secure these rights, and we get our just powers from the consent of the governed. That encapsulates all the wisdom and philosophy of the ages, in my opinion, insofar as they pertain to our rights and governance.

Now, with that in mind I notice that you quote from William Penn. You have, "The latter's very first article proclaimed religious freedom '[b]ecause no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences," et cetera. And then you say that this was the only portion of the charter that could not be amended, and you cite a source. It is the source that interests me: "Reprinted in 'Sources of Our Liberties.'"

I have not read "Sources of Our Liberties," but does that purport to say that it is this charter and these other parchments that are the sources of our liberties, or does the author of that agree with you and me that the sources of our liberties preceded the composition of these human documents?

Ms. STROSSEN. I will let Mr. Peck speak to the author.

Mr. PECK. "Sources of Our Liberties" is a book published by the American Bar Foundation, which does not purport to say that these are sources, so to speak, as much as part of our heritage in understanding our liberties. So it reprints the original documents from things that figured importantly in the history of what we now regard as constitutional liberty, including all the original constitutions of the States and the important acts of the colonies that they took in this regard, as well as the Constitution itself.

Mr. HYDE. Well, I understand that. I just assumed that when you say the "Sources of Our Liberties," this was not a theological book. This was a book about documents and constitutions.

I just think it overstates the case to say our liberties are sourced in these documents.

Mr. PECK. True. But it was not my position to dispute the title given by the book.

Mr. HYDE. Oh, no. No. You are stuck with the title, as we all are. I understand that. I just wanted to try and make the point that our liberties precede documents. I think Hamilton said it very well: The sacred rights of mankind are not to be found rummaging among parchments and books written in the heart by the finger of divinity, et cetera I should commit that to memory.

All right. I am concerned about whether or not we have the power, the authority, the competence to establish a standard of review for the Supreme Court whether by statute. What we are telling the Court is you may no longer look at these cases by any standard other than a strict scrutiny, and whether we have the competence to do that.

Now, you have said at the outset of your testimony that Congress always has the power to enhance rights. And I just wonder if we

can do that even though it is contrary to an interpretation made by the competent interpreter of the Constitution; to wit, the Court.

Ms. STROSSEN. Congressman Hyde, your previous questions demonstrate precisely why Congress has not only that power but, in my view, that responsibility under our charter of government to protect our liberties, which is what is being done here, when the Court has failed to do so.

To use a metaphor that I often use when I teach my constitutional law students, we tend to be so fixated in recent years on the U.S. Supreme Court's interpretation of the Constitution that too often we assume that our liberties are completely coextensive with the Court's interpretation of the U.S. Constitution. For reasons you yourself have just described, that is contrary to our philosophy of government. All that the U.S. Supreme Court can do, and here is my metaphor, is to set a floor on our liberties. It tells other units of government this is the level below which you may not sink in protecting rights. It does not and it cannot set a ceiling. Congress is free to protect rights more than the Supreme Court does, and I would say in this instance Congress has a constitutional responsibility to do because it would simply restore the plain language and long accepted meaning of the first amendment of the Constitution.

Mr. HYDE. Of course, one person's enhancement is another person's diminishment—diminution. The notion that abortion rights, the right to an abortion is enhanced from my end of the kaleidoscope is a diminishment of the sacred right to life which is enshrined in our Declaration and in our 14th amendment and in our 5th amendment.

But I am not totally satisfied with the adequacy. I accept what you say, but I am not totally satisfied that we in Congress have the right to tell the Court what standard of review it shall use on first amendment cases or any other. And I just need to—we are going to hear more about that tomorrow.

Ms. STROSSEN. Congress, of course, does that all the time. When it passes statutes which are to be enforced by the courts, it is always imposing, indeed in many situations, much more detailed standards for judicial enforcement. Here the general compelling State interest test is simply constitutional law shorthand for telling the Court you have got to treat religious freedom as a fundamental right. What that translates into in actual adjudication is that any abridgment on such a right is subject to strict scrutiny. So, in fact, it is a rather modest specification of the judicial review approach.

And going to the abortion issue, Congressman Hyde, of course this legislation is completely neutral on the abortion issue. All it does is restore religious liberty, freedom of conscience, and I think that is a liberty that can enhance the rights and in many situations will enhance the rights of those who conscientiously and religiously are opposed to abortion.

As the law currently stands, Congress or State legislatures or municipal governments could compel doctors, nurses and others who have religious objections to abortion, could nonetheless be compelled as part of general legislation to perform those abortions. This law would give them a defense based on religious freedom.

Mr. HYDE. I quite agree with that part of your statement. I am unpersuaded, and I would like to be persuaded to your point of view, that a right to an abortion, which your very organization asserts as a religious right, would not be assertable under this statute which requires the only way to diffuse that or divest that of legal force is to find a compelling governmental interest in opposition to it. But there may be no compelling governmental interest in protecting unborn life. The courts may just go around that and dispose of *Roe* v. *Wade* as a liberty interest. And so this becomes awfully strong, awfully powerful, and a weapon that you recognize the force of it because you utilize it, your organization utilizes it. So that gives me pause.

Ms. STROSSEN. Congressman Hyde, this law, of course, would simply restore the law to where it was before 1990, and in no case before——

Mr. HYDE. Can I jump in there?

Ms. STROSSEN. Yes.

Mr. HYDE. Don't you recognize—or do you recognize that the compelling State interest wasn't all that compelling in many religious cases before *Smith*.

Ms. STROSSEN. But that actually cuts against the argument that you are making, because my next point was, even though we did where it was appropriate assert free exercise as a basis for having an abortion when there was in fact a religious belief that mandated abortion in a particular circumstance, that claim never prevailed even under the compelling State interest standard.

Mr. HYDE. Except once.

Ms. STROSSEN. I stand corrected.

Mr. HYDE. Well, I think in the *Harris* v. *McRae* case.

Ms. STROSSEN. No. With all due respect——

Mr. HYDE. On the district level, not the appellate.

Ms. STROSSEN. So the Supreme Court has never validated that approach. And, with respect to every assertion of religious freedom both before *Smith* and——

Mr. HYDE. Why do you keep asserting it then?

Ms. STROSSEN. We have to in order to——

Mr. HYDE. Sure.

Ms. STROSSEN [continuing]. Preserve the claim. Precisely because the Supreme Court has never definitively ruled on it.

But, as I was going to say, as with every claim of religious liberty, it is not necessarily appropriate in every abortion case. Only in those situations where under those particular facts and given a particular religious belief there is a belief, a specific good faith, sincere belief that would be violated absent an abortion. And that is not the case under every religion, and it is not the case with respect to every possible abortion.

Mr. HYDE. Well, I want to save those little babies too, even where someone claims a religious right to. But I hear you.

Dean Titus, what about LSD—the League for Spiritual Development? Timothy Leary—Bishop Timothy Leary or whatever he was. Didn't you think, or do you agree that there was a compelling State interest in prosecuting him for the proliferation of a hallucinogenic drug under the guise of religion?

Mr. TITUS. Well, I think that the issue is not so much whether the State has a compelling State interest as whether or not the State has authority to deal with drug abuse or drug use. I think that traditionally in America the assumption is that that is a matter for the civil ruler, and therefore if someone comes along with some subjective religious conscience claim it is really at the discretion of the legislature whether to accommodate that claim.

Mr. HYDE. Supposing it is objective rather than subjective? Supposing it has all the trappings of a temple and robes and the whole 9 yards—organs, the works, but claims the use of—as in *Smith*, as in *Smith*—the use of LSD is a spiritual development, religious thing?

Mr. TITUS. I don't think it makes a bit of difference whether it has all of the "trappings" of a religious order. As a matter of fact, there are many people who have claimed to take the lives of babies or taken the lives of young children or taken the lives of adults in the name of religion.

Mr. HYDE. Human sacrifice.

Mr. TITUS. Precisely. And that, of course, again, is not religion within the meaning of the first amendment, nor is it within the meaning of the great American tradition. But that is a matter that is subject to the jurisdiction of the civil authorities, and the civil authorities don't have to demonstrate in every case that they have a compelling State interest with regard to protecting innocent human life.

Ms. STROSSEN. Congressman Hyde, could I ask a question along that line?

Mr. HYDE. Sure.

Ms. STROSSEN. Would you have said, then, Dean Titus, that during prohibition that the Catholics were not entitled to a religiously based exemption for using wine?

Mr. TITUS. I did not say that.

Ms. STROSSEN. Well, isn't there civil authority to impose the prohibition laws?

Mr. TITUS. Yes, there is civil authority with regard to that.

Mr. WASHINGTON. The point is well taken.

Mr. HYDE. Never volunteer any information. Just answer the question.

Mr. TITUS. Well, what is important is to recognize the question of whether or not that is a duty owed to your Creator enforceable only by reason and conviction as contrasted to force or violence, or whether that is a matter of subjective religious conscience. The American tradition constitutionally has been to protect those objective duties that are owed to the Creator by reason and conviction. That is the constitutional tradition.

Mr. HYDE. But doesn't someone get to decide what is a truly conscientious religious belief, and can't there be differences of opinion on that?

Mr. TITUS. Of course, there can be differences of opinion about that. But the great American tradition——

Mr. HYDE. Polygamy was illegal.

Mr. TITUS [continuing]. Has been to accommodate some religious objections but not all of them. This is the second point that I make in my testimony. The danger with this bill is it is a monolithic so-

lution to what really ought to be addressed case by case, situation by situation. I think it is important for this subcommittee to know that after the *Smith* case came down the State or Oregon, its legislature, passed an exemption to those who were using peyote as is consistent with the tradition in America to accommodate certain subjective religious conscientious objections in particular cases, but not as a general wholesale view or a general wholesale act as this statute would do.

Mr. EDWARDS. Well, we are going to hear from the gentleman from Oregon now. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman. I think the gentleman from Illinois has done a great job today in questioning and in some of his statements. I think he is very politically correct today.

Mr. HYDE. I move that be stricken from the record, and the gentleman repudiate it.

[Laughter.]

Mr. KOPETSKI. I know that scares you, Henry.

I really think this has been a good hearing, very instructive for everybody involved here, and I appreciate the work of the ACLU. We don't always agree, but I think it is important that we have an organization such as yours whose first priority is our cherished rights. I appreciate your being here and involved in these issues.

Ms. STROSSEN. Thank you.

Mr. KOPETSKI. I want to get at this notion, though, where we have this language "Congress shall make no law prohibiting the free exercise of religion." But the reality is it is set in force under our system of government that we are going to have these collisions between religion and government. Do you agree with that, Ms. Strossen?

Ms. STROSSEN. Yes. In fact, that absolutist language in the first amendment also pertains to freedom of speech and freedom of the press. And, in fact, no Supreme Court Justice and no ACLU member has ever interpreted literally as being an absolute protection for religious freedom. That goes hand in hand with a relatively broad notion of the exercise of religion.

If one has a very narrow definition of religion, which was how I understood Dean Titus's testimony, but putting him aside, one could say, "Well, we will define religion as only the right to a belief"—and at one point in our history that is the narrow view the Supreme Court took—then you could protect it absolutely. But once you get into the sphere of actual practices, obviously one does have to have limits in an orderly society in which other people's rights are also valued.

Mr. KOPETSKI. So what we are sort of doing here in our Constitution is drawing a line in the dirt and saying, you know, don't cross this line, or if you are going to cross this line you better have a compelling reason to do so?

Ms. STROSSEN. You have a heavy burden of proof.

Mr. KOPETSKI. OK. Now do you think this is a real problem out here? I mean we have heard about the altar case, we heard about the scapulars and the rosaries for prisoners. I mean are city councils, are State legislatures not mindful of people's religious exercises? Is this a continuing problem or are we just here debating for the sake of debate?

Ms. STROSSEN. No. It is a continuing problem all over the country, and I am very grateful, I might say, with a great deal of participation by the ACLU in Oregon that Oregon's Legislature did pass an exemption. But that is the sort of protection that one cannot count on. And it is precisely the most unpopular religions practiced by the most marginalized and vulnerable people in our society where we cannot expect the legislative process to be attentive to their beliefs.

I might add to the examples that you have already mentioned prisoners, Muslim prisoners have been forced to eat pork or are being denied the option of a diet that would be consistent with their religious beliefs. Amish in Minnesota have been subject to certain traffic regulations that violate their religious beliefs.

I think it is not a coincidence that the Supreme Court decisions that have been unprotective of free exercise of religion three of them in the recent past have involved native Americans, and that is the history of our society. It is the minority religions, the unpopular religions, the new religions that are going to be discriminated against. In that sense I think Dean Titus's testimony is eloquent support for the necessity of this legislation. Because as I understand him, he invokes the American tradition that does protect Catholicism but doesn't protect native Americans, that does protect the use of wine but not the use of LSD. And I don't understand any distinction among those in principle. It is just a matter of the mainstream, the powerful versus the minority and the oppressed. And, of course, the whole purpose of the Bill of Rights, including the freedom of religion clause, is precisely to protect minority groups from the tyranny of the majority.

Mr. KOPETSKI. I want to explore finally this notion therefore that if you think, and you folks monitor events and government actions throughout the country and all different levels, from school boards on up to State legislatures, and even us, the Congress—that if this is going on, and it is not organized but it is insidious, and we have this piece of legislation that we are really trying to have as neutral in terms of the abortion issue, that this should be the compelling reason why not, because where you have the question of abortion versus the reality of erosions of religious rights in this country.

Would you comment on that—what we, the Congress, ought to do in those kinds of choices? Because I have got to convince an abortion legislator to vote for this legislation. What do I say to him or her?

Ms. STROSSEN. I think it is really a myopia, if I may say so, the fixation on the abortion issue and overlooking the overarching issue of religious freedom, which as even Congressman Hyde admitted in many situations is actually going to come to the aid of those who have conscientious or religiously grounded objections to abortion. I think it is tragic that in this obsession and the polarization over the abortion issue we are losing sight of such fundamental freedoms in this society.

If I might say so, even under the Supreme Court's decision in *Smith*, I think that the free exercise argument on behalf of certain abortions would still prevail even absent—or could still prevail even absent this statute, because the Court in *Smith* did say if you have hybrid constitutional rights, not just free exercise of religion,