NO. SC01-2206

In The
SUPREME COURT OF FLORIDA

RICHARD WARNER, et al.

Plaintiffs and Moving Parties

Vs.

CITY OF BOCA RATON,

Defendant and Responding Party

On Certification from the
United States Court of Appeals for the Eleventh Circuit

INITIAL BRIEF OF AMICUS CURIAE, JEB BUSH, GOVERNOR OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Governor Bush adopts and relies on the statement of the case and of the facts set forth in the Initial Brief of Plaintiffs and Moving Parties.

SUMMARY OF ARGUMENT

The Florida Legislature adopted the Florida Religious Freedom Restoration Act (Florida "RFRA") in the wake of United States Supreme Court decisions removing protection for religiously-motivated conduct against governmentally imposed burdens under neutral laws of general applicability. The Legislature's purpose in adopting the Florida RFRA was to prevent any contraction of the religious liberty enjoyed by the people of Florida.

The Florida RFRA defines the "exercise of religion" which is subject to its protection as conduct "that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." §761.02(3), Fla. Stat. Contrary to the interpretation advanced by the District Court, this statutory provision does not imply that conduct will not fall within the

scope of the "exercise of religion" unless it is based in some larger system of religious belief and reflects some tenet, practice, or custom of a larger system of religious belief.

Such a reading of the concluding phrase of the statutory definition – the "whether or not compulsory or central" clause – is not a reasonable and obvious implication of the statute. Indeed, it is at odds with the manifest purpose of the Legislature in adopting the concluding phrase of the definition. That purpose was to guard against a restrictive interpretation of the scope of religious exercise by the Florida Courts similar to the restrictive interpretation imposed by some federal courts on the Federal Religious Freedom Restoration Act ("Federal RFRA").

The four-part test adopted by the District Court for determining whether religiously motivated conduct is sufficiently "orthodox" to be considered an "exercise of religion" is a standard that has no basis in the text or history of the Florida RFRA, and a standard that would eviscerate the protection the Legislature intended to establish by the statute.

The inappropriateness of the District Court's four-part test is further demonstrated by the test's inconsistency with the understanding of the scope of the exercise of religion in federal First Amendment cases. Those cases show the peril in

establishing a dichotomy between religious beliefs that meet some standard of orthodoxy and those that do not.

There is no basis for concluding that Florida follows the restrictive interpretation of free exercise established by the U. S. Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990). Florida's free exercise jurisprudence requires that that governmental action that intrudes on free exercise – even under a neutral law of general applicability – be justified by a compelling governmental interest.

ARGUMENT

In 1990, the U.S. Supreme Court in Smith, held that governmental actions under neutral laws of general applicability – that is, laws which do not "target" religion for adverse treatment – are not ordinarily subject to challenge under the free exercise clause even if they result in substantial burdens on religious practice. In doing so, the Court abandoned the strict scrutiny legal standard for governmental actions that have the effect of substantially burdening the free exercise of religion. Prior to the Smith decision the Court had for many years recognized, as the Court said in Wisconsin v. Yoder, 406 U.S. 205, 220 (1972), that "[a] regulation neutral on its face may, in its

application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."

In response to widespread public concern regarding the impact of the Smith decision, the Congress in 1993 passed the Religious Freedom Restoration Act (the Federal RFRA) which sought to restore the strict scrutiny legal standard for governmental actions that substantially burdened religious exercise. RFRA was based in part on the power of Congress under Section 5 of the 14th Amendment to "enforce, by appropriate legislation, the provisions" of the 14th Amendment with respect to the States. The Supreme Court in 1997 in the City of Boerne v. Flores, 521 U.S. 507 (1997) held, however, that Congress had gone beyond its proper powers under Section 5 of the 14th Amendment in enacting the Federal RFRA.

In the wake of the Boerne decision, during the 1998 Regular Session the Florida Legislature adopted the "Religious Freedom Restoration Act of 1998." It is the interpretation of this statute which is the primary focus of the questions certified to this Court by the 11th Circuit Court of Appeals.

I. THE "EXERCISE OF RELIGION" UNDER THE FLORIDA RFRA INCLUDES ALL CONDUCT THAT IS "SUBSTANTIALLY MOTIVATED BY A RELIGIOUS BELIEF."

In adopting the Religious Freedom Restoration Act of 1998 ("Florida RFRA"), Chapter 761, Florida Statutes, the Florida Legislature sought to provide broad protection for the free exercise of religion against the undue encroachment of governmental power. Under Section 761.03, Florida Statutes, the government is prohibited from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability… ." The only exception from this prohibition is for circumstances in which the government "demonstrates that application of the [governmental] burden" to the person's exercise of religion is both " in furtherance of a compelling governmental interest," and "the least restrictive means of furthering that compelling governmental interest."

Section 761.02(3), Florida Statutes, specifically defines the "exercise of religion" which falls within the scope of protection afforded by the Florida RFRA:

> "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." (emphasis supplied)

The fundamental question now before this Court can and should be answered on the basis of the plain meaning of this statutory provision.

The heart of the statutory definition of "exercise of religion" is found in the phrase "substantially motivated by a religious belief." That phrase establishes the scope of the religious exercise which the Legislature intended to protect. This language is on its face designed to ensure that the protection against overreaching governmental power afforded by the Florida RFRA extends to all conduct that is "substantially motivated by a religious belief." What the language excludes are claims that are not in fact substantially motivated by – i.e., genuinely and sincerely based in – a religious belief, and claims that are motivated by a secular belief or philosophy, as opposed to a religious belief.

In the proceedings before the District Court, the plaintiffs argued that "any act substantially motivated by a sincerely held religious belief constitutes the exercise of religion under this definition." Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1281 (S.D. Fla. 1999). The District Court held, however, that the understanding of the statute urged by the plaintiffs was "overly broad." Id. The District Court based this conclusion on the import it attached to the concluding clause of Section 761.02(3), Florida Statutes: "whether or not the religious exercise is compulsory or central to a larger system of religious belief."

The District Court inferred from the Legislature's inclusion of this "whether or not compulsory or central" clause an intent to constrict the scope of the statutory definition and exclude from protection conduct that otherwise would enjoy protection as conduct "substantially motivated by a religious belief." The District Court reasoned that the inclusion of the "whether or not compulsory or central" clause "suggests" that protected conduct must "have some basis in a larger system of religious beliefs." 64 F.Supp.2d at 282. From requiring simply "some basis" in such a larger system the District Court moved to require that the conduct reflect "some tenet, practice, or custom or a larger system of religious beliefs." Id. at 1283. Thus, the District Court held:

> …[T]he Florida legislature intended to limit the statute's coverage to conduct that, while not necessarily compulsory or central to a larger system of religious beliefs, nevertheless reflects some tenet, practice, or custom of a larger system of religious beliefs. Conduct that amounts to a matter of purely personal preference regarding religious exercise does not fall within the ambit of the Florida RFRA.

Warner at 1281

After setting up this dichotomy between protected conduct that "reflects some tenet, practice, or custom of a larger system of religious belief" and unprotected conduct that "amounts to a matter of purely personal preferences," the District Court

went on to adopt a four-part test for determining what type of conduct is protected under the Florida RFRA as the "exercise of religion." The test adopted by the District Court was based on testimony presented by Defendant's expert witness, Dr. Daniel L. Pals, a professor and former Chair of the Department of religious Studies at the University of Miami, who, according to the District Court, "developed a workable framework for determining the place of a particular practice within a religious tradition." Id. at 1285.

The framework - consisting of four criteria - developed by Dr. Pals was adopted *in toto* by the District Court. The District Court thus held that to determine whether a religious practice falls within the scope of the "exercise of religion" protected by the Florida RFRA

> …a court should consider whether the practice: (1) is asserted or implied in relatively unambiguous terms by an authoritative sacred test; (2) is clearly and consistently affirmed in classic formulations of doctrine and practice; (3) has been observed continuously, or nearly so, throughout the history of the tradition; and (4) is consistently observed in the tradition as we meet it in recent times.

Id. at 1285.

In order to be considered "a tenet, custom or practice" of a particular religious tradition, and thus entitled to protection as an "exercise of religion," a practice must

satisfy at least one of the four enumerated criteria. Otherwise, it is placed in the category of unprotected conduct as "a matter of purely personal preference regarding religious exercise." Id. Applying the four-part test to the claims of the Plaintiffs, the District Court found that the conduct in which the Plaintiffs sought to engage was not "substantially motivated by a religious belief," but was instead "a matter of purely personal preference," and thus not within the scope of the conduct protected by the Florida RFRA. Id.

The four-part test adopted by the District Court is without any basis in the text of the Florida RFRA. It is inconsistent with the plain meaning of the statutory language which sets forth the definition of "exercise of religion." Moreover, the District Court's test is alien to the manifest purpose of the Legislature in adopting the Florida RFRA, and would substantially defeat that legislative purpose. In sum, the test adopted by the District Court is a fabrication of the judicial imagination. It should be rejected by this Court in favor of the unambiguous standard set forth in the text of the statute itself.

The District Court's misinterpretation of the statute is grounded in its misunderstanding of the purpose and effect of the concluding clause of the definition of the "exercise of religion" in Section 761.02(3), Florida Statutes. The District

Court's inference from this clause of an intent to restrict the scope of the protected "exercise of religion" is an unnatural contrivance that turns the legislative intent topsy-turvy. Contrary to the District Court's misinterpretation, the plain import of that concluding clause is not to restrict the scope of the definitional language that precedes it, but to guard against a restrictive understanding of that language.

The District Court itself recognized the origin of the contested language – "whether or not the religious exercise is compulsory or central to a larger system of religious belief" – in the "manifest error of the federal courts' interpretation" of the Federal RFRA as restricting the scope of protected religious exercise to practices that are "compulsory or central to a larger system of religious belief." Warner at 1282. See, e.g., Mack v. O'Leary, 80 F. 3d 1175, 1178 (7th Cir. 1996) (collecting cases).

This is, indeed, a correct understanding of the origin of the language in question. And this origin is sufficient to explain the purpose and effect of that language, namely, to negate the erroneous interpretation of the Federal RFRA that had been previously adopted by some federal courts, and thus to ensure that the Florida courts would not adopt a similar interpretation of the Florida RFRA.

The District Court recognized this obvious and undeniable purpose of the Florida Legislature, but inexplicably determined that this legislative purpose was not

sufficient to explain the Legislature's intent, and embarked on a search for some additional meaning implicit in the statutory provision. This search for some additional meaning was, in fact, predicated by the District Court on the view that without such additional meaning the "whether or not compulsory or central" portion of the text would be "mere surplusage and of no effect." Warner at 1283. But, of course, that view cannot be squared with the clear and direct purpose of the "compulsory or central" clause to preclude the acceptance and adoption by the Florida courts in interpreting the Florida RFRA of the erroneous, restrictive interpretation of the scope of the protected exercise of religion adopted by some federal courts under the Federal RFRA.

The District Court cites the case of Cassady v. Sholtz, 169 So. 487, 490 (Fla. 1936) for the proposition that the "implications and intendments of the statute are as effective as the express provisions" and in support of its implication of a restrictive reading of the "exercise of religion." The District Court reasons that the "whether or not compulsory or central" clause "suggests" that for a religious practice to be protected it "must have some basis in a larger system of religious beliefs." Warner at 1282. The District Court describes the "implied" or "suggested" restriction on the scope of the "exercise of religion" as a requirement that the protected conduct

"reflects some tenet, practice or custom of a larger system of religious beliefs." Id. at 1283.

The District Court overlooks the fundamental principle that when a court goes beyond the express language of a statute it should limit its interpretation to implications that are "reasonable and obvious." See State v. Rife, 789 So. 2d 288, 292 (Fla. 2001). In the instant case, the standard imposed on the statute by implication is neither reasonable nor obvious. On the contrary, the restriction implied by the District Court involves a rewriting of the workable and clear standard articulated by the Legislature in the plain language of the statute.

The District Court reasoned that "[i]f the Florida legislature had meant to protect any act motivated by a sincerely held religious belief, it could have easily and more clearly said so." Warner at 1282. This reasoning is based on the faulty premise that there is something unclear about the intent of the legislature. But, there is nothing at all unclear about the legislative definition of "exercise of religion" as conduct "substantially motivated by a religions belief." And there is nothing at all unclear about the purpose of the "whether or not compulsory or central" clause.

The proper rejoinder to the District Court's reasoning on this point is that if the Legislature had meant to limit the protection for the "exercise of religion" in the manner

suggested by the District Court, "it could have easily and more clearly said so." It indeed would have been a simple matter for the Legislature to define "exercise of religion" as conduct "substantially motivated by a religious belief based in a larger system of religious belief, whether or not the religious exercise is compulsory or central to the large system of religious belief." But the Legislature did not employ this simple and obvious language to restrict the scope of the "exercise of religion" under the Florida RFRA.

The District Court's starting point for its restrictive reading of the definition of the "exercise of religion" is wholly unjustified. Its conclusion that the statute affords protection to religiously motivated conduct only if it is based in a larger system of religious beliefs goes beyond what the statute says, and implies a limitation that is neither reasonable nor obvious.

If the District Court had stopped at that point, violence would have been done to the language of the statute, but the practical consequences of the misinterpretation would have been limited. In the case of the instant claim, as in the case of the great majority of other claims that might be brought under the Florida RFRA, the claimants can, without difficulty, establish that their religiously-motivated conduct has some basis in a larger system of religious beliefs. Similarly, the requirement that a religious

practice "reflect some tenet, practice or custom of a larger system of religious beliefs" – although totally unjustified as a matter of statutory interpretation - would not bar most claims that might be asserted under the Florida RFRA.

But the District Court went further. By adopting its four-part test, it moved beyond the "mere" imposition of an implication that is without a reasonable and obvious basis to the prescription of a convoluted standard that has not even the most tenuous connection with either the text or the purpose of the statutory provision. It is indeed ironic that, in its purported effort to explicate the "implications" of the "whether or not compulsory or central" clause, the District Court adopted a standard that is virtually indistinguishable from the requirement that any protected religious exercise be compulsory or central to a larger system of religious belief.

It is difficult to discern a meaningful difference between the "compulsory or central" requirement which is expressly and unequivocally rejected in the statute and the four-part test of religious orthodoxy adopted by the District Court. For the most part, practices that satisfy the four-part test will be practices that would likely be deemed central to some religious tradition.

The District Court's wholesale adoption of the four-part framework developed by Dr. Pals for evaluating the nature of religious practice is a remarkable departure

from a reasoned effort to determine the actual intent of the Florida Legislature. What legislator could have imagined that the passage of the Florida RFRA would set the courts off on a mission, as the District Court would have it, "to determine the place of…particular practice[s] within a religious tradition"? Id. at 1285. What legislator could have imagined that the Florida RFRA would extend its protection only to those individuals who could establish to the satisfaction of a court that their religious beliefs and practices were sufficiently based in "an authoritative sacred text," or in "classic formulations of doctrine and practice," or that their religious beliefs and practices had been nearly continuously "observed in the history of a particular tradition" or "consistently observed in the tradition as we meet it in recent times." Id. at 1285. What legislator could have imagined that the courts would impose such tests of religious orthodoxy in their interpretation of a statute designed to protect the religious liberty of individuals whose consciences were being trampled by the insensitive exercise of governmental power?

The implausibility of the standard established by the District Court is further demonstrated by a consideration of the scope of the "exercise of religion" under federal constitutional law. Although Smith fundamentally altered – i.e., diminished – the protection available to persons asserting a free exercise of religion claim, the Supreme

Court has not altered its understanding of what constitutes religious exercise. The applicable law is illustrated by two cases that pre-date the Supreme Court's abandonment in Smith of the compelling interest/least restrictive means test for free exercise cases involving neutral laws of general application.

In Thomas v. Indiana, 450 U.S. 707 (1981), the Supreme Court dealt with the claim for unemployment benefits of Thomas, a Jehovah's Witness who had left his job because he was unwilling to work in the production of turrets for military tanks. The record showed that another Jehovah's Witness was willing to do the same work, and that Thomas himself would not object to participating in the production of the steel necessary for the manufacture of the tanks. Id. at 715. The Supreme Court rejected the conclusion of the Indiana Supreme Court that these circumstances indicated that "Thomas had made a merely 'personal philosophical choice rather than a religious choice.'" Id at 714.

In resolving the issue of whether Thomas' conduct was within the scope of religious exercise, the Supreme Court began by noting that the resolution of the "question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or

comprehensible to others in order to merit First Amendment protection." Id. at 714.

Concluding that Thomas was entitled to unemployment compensation because he had indeed "terminated his employment for religious reasons," the Court held:

> …[T]he guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands to their common faith. Courts are not arbiters of scriptural interpretation. (emphasis supplied)

Id. at 715-16.

A similar result based on similar reasoning was reached in the subsequent case of Frazee v. Illinois, 489 U.S. 829 (1989). There, the Illinois Court had rejected Frazee's unemployment claim because his refusal to work on Sunday, although based on a sincere religious conviction, was not "based upon some tenets or dogma…of some church, sect, or denomination," but was instead "based solely on [Frazee's] personal belief… ." Id. at 830. A unanimous Supreme Court, relying on Thomas, rejected the view of the Illinois court and held:

> …[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal [to work on Sunday] was based on a

> sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

Id. at 834.

Both Thomas and Frazee point to the perils of establishing a dichotomy between sincerely held religious beliefs that satisfy some standard of correctness or authoritativeness and those sincerely held religious beliefs that do not satisfy such a standard. There is no reason to believe that in its effort to protect religious liberty in the wake of the Smith and Boerne decisions the Florida Legislature would have adopted a definition of religious exercise which would create the very sort of peril which the U. S. Supreme Court rejected in Thomas and Frazee.

II. THE FREE EXERCISE CLAUSE OF THE FLORIDA CONSTITUTION REQUIRES THAT ANY GOVERNMENTAL ACTION INTRUDING ON THE FREE EXERCISE OF RELIGION BE JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

Article I, Section 3, Florida Constitution, which sets forth provisions relating to religious freedom, provides, in pertinent part:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with the public morals, peace or safety.

These provisions have been interpreted by this Court in line with the principle set forth in Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992), that the Florida courts are "bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy."

The District Court ignored this guiding principle of Florida law and summarily rejected the plaintiffs' claims under the Florida Constitution. The District Court in essence assumed that the Florida courts would necessarily and without reflection adopt as state constitutional law the same truncated protections for religious liberty that were adopted in Smith as federal constitutional law.

There is, however, nothing in the Florida case law to support that conclusion. Nothing in Florida's free exercise jurisprudence supports the conclusion that the Smith approach has been adopted as Florida constitutional law. The Smith approach is inconsistent with the guiding principle articulated in Traylor. And the cases in which this Court has dealt with free exercise claims raised under the Florida Constitution have required that even neutral laws of general applicability be justified by a compelling governmental interest if they result in an intrusion on the free exercise of religion. See

In re Dubreuil, 629 So. 2d 819 (Fla. 1994); Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); Town v. State, 377 So. 2d 648 (Fla. 1979).

The text of Article I, Section 3, Florida Constitution, as consistently interpreted by this Court, prohibits the government from penalizing, burdening, or intruding on the free exercise of religion unless the government can show that its action is justified by a compelling governmental interest and is accomplished through the least restrictive means.

None of the cases suggest that religious exercise is to be understood in any way other than as conduct which is religiously motivated. Indeed, the Traylor interpretive principle requiring that each provision of the Declaration of rights be interpreted "freely in order to achieve the primary goal individual freedom and autonomy," 596 So. 2d at 963, militates strongly against any restrictive reading of the scope of the free exercise of religion that is protected under the Florida Constitution.

CONCLUSION

This Court should respond to the questions certified by the 11th Circuit by rejecting the four-part test adopted by the District Court and holding that under the Florida RFRA all conduct that is substantially motivated by a religious belief falls within the scope of the "exercise of religion" subject to the protection of the statute.

The Court should also hold that the Florida Constitution protects against all governmental action encroaching on the exercise of religion unless the action is based on a compelling governmental interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via Regular U. S. Mail this day of November , 2001, to: DOUGLAS LAYCOCK, 727 East Dean Keeton Street, Austin, Texas, 78750; JAMES K. GREEN, 222 Lakeview Avenue, Suite 1630, West Palm Beach, Florida, 33401; LYNN G. WAXMAN, 501 South Flagler Drive, Suite 505, West Palm Beach, Florida, 33401; CHARLOTTE H. DANCIU, 370 West Camino Gardens Boulevard, Suite 210, Boca Raton, Florida, 33432; BEVERLY POHL, BRUCE ROGOW, Broward Financial Centre, 500 East Broward Boulevard, Suite 1930, Fort Lauderdale, Florida, 33394-3092; and DIANA G. FRIESER, City of Boca Raton, 201 West Palmetto Park Road, Boca Raton, Florida, 33432-3730.

CHARLES T. CANADY

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

CHARLES T. CANADY