IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2206

RICHARD AND MIRIAM WARNER, *et al.*,

Appellants,

vs.

CITY OF BOCA RATON,

Appellee.

On Certified Questions from the United States Court of Appeals for the Eleventh Circuit

---

APPELLEE'S ANSWER BRIEF

BRUCE ROGOW
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Boulevard
Fort Lauderdale, Florida 33394
(954) 767-8909

Counsel for the City of Boca Raton

NAMED PARTIES NOT APPEARING ON COVER PAGE

(All are Appellants)

ELEANOR DANCIU

EMIL DANCIU

JOANNE DAVIS

SOUHAIL KARRAM

CARIDAD MONIER

BOBBIE PAYNE

IAN PAYNE

LOUISE RICCOBONO

MARIE RICCOBONO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CITATIONS

CASES **Page**

TABLE OF CITATIONS (continued)

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF CITATIONS (continued)

Page

OTHER

STATEMENT OF THE CASE

In August 1999, United States District Judge Kenneth L. Ryskamp ruled that the Boca Raton Cemetery's prohibition against vertical grave monuments and decorations on cemetery plots does not violate federal or state constitutional guarantees, and that those regulations do not violate the Florida Religious Freedom Restoration Act, Chapter 761, Florida Statutes. *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999) (Appendix A).[1]

---

[1] The Act provides in relevant part:

> **761.02 Definitions.** – As used in this act:
>
> (1) "Government" or "state includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.
>
> * * *
>
> (3) "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.
>
> **761.03 Free exercise of religion protected. –**
>
> (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the

In 1982, the City enacted a Regulation that provided for graves to be marked by horizontal markers that do "not extend vertically above the ground and [are] constructed of approved metal or stone containing names, dates, or other engraved lettering used in identification of one or more persons and placed at the head of a lot or plot." 64 F. Supp. 2d at 1276, n. 2.

The Appellants are Boca Raton residents who purchased plots between 1984 and 1996 and "decorated the graves of family members and loved ones with standing statues, crosses, Stars of David, ground covers and borders in violation of the regulations." *Id.* at 1277. As Judge Ryskamp wrote, "[i]t is undisputed that the plaintiffs placed vertical decorations on their Cemetery plots in observance of sincerely held religious beliefs." *Id.*

The City repeatedly asked that the non-complying plot owners remove their vertical decorations, but as Judge Ryskamp's opinion details, "a minority of Plot Owners failed to comply with the City's request," leading to the City Council's July 1997 adoption of two staff recommendations: that the Cemetery Rules "should be

---

person:

> (a) Is in furtherance of a compelling governmental interest; and
>
> (b) Is the least restrictive means of furthering that compelling governmental interest.

implemented and enforced uniformly" and that "[a]ll cemetery plot decorations should be brought into compliance . . . within 90 days." *Id.* at 1279.

The Appellants sued in state court, claiming violations of federal and state constitutional rights, and the City removed the case to federal court. There, the Appellants filed an Amended Complaint alleging, *inter alia*, that the City's prohibition on vertical grave decorations "substantially burdens the plaintiffs' exercise of religion in violation of the recently enacted Florida Religious Freedom Restoration Act of 1998 (the Florida RFRA), Fla. Stat. 761.01 *et seq.*" *Id.*

That claim became the focus of the case and the ensuing trial. Judge Ryskamp recognized the novel and historical aspects of the Florida RFRA claim:

> There are no reported decisions construing the Florida RFRA. However, the Court does not write on a blank slate, because this statute is merely the latest attempt in a long struggle to define the scope of protection that should be afforded to religious practices burdened by neutral laws of general applicability.

Id. at 1279-1280. Judge Ryskamp acknowledged the strong emotions" and "host of complicated legal issues" presented, but concluded that:

> In the end, however, the case presents a simple question: Does any federal or Florida law relieve an individual from the obligation to comply with Regulations which uniformly prohibit vertical grave decorations in the Boca

> Raton Municipal Cemetery? In this Court's view, the answer is no.

Id.

With regard to the Florida RFRA, Judge Ryskamp wrote:

> The Court finds that while marking graves and decorating them with religious symbols constitute customs or practices of the plaintiffs' religious traditions, the particular manner in which such markers and religious symbols are displayed--vertically or horizontally--amounts to ***a matter of purely personal preference which is not protected under the Florida RFRA.***

Id. at 1285 (emphasis supplied).

> The Court finds that the prohibition [on vertical grave decorations] ***does not substantially burden the plaintiffs' religious practices.***
>
> * * *
>
> The City's Regulations do not prohibit the plaintiffs from marking graves and decorating them with religious symbols. Rather, the Regulations permit only horizontal grave markers. ***These markers may be engraved with any type of religious symbol.***
>
> * * *
>
> The Court finds that these restrictions on the manner in which religious decorations may be

> displayed merely inconvenience the plaintiffs' practices of marking graves and decorating them with religious symbols. Accordingly, the Court finds that the prohibition on vertical grave decorations ***does not substantially burden the plaintiffs' exercise of religion within the meaning of the Florida RFRA***.

Id. at 1287 (footnote omitted) (emphasis supplied).

The plot owners appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the Florida RFRA (§ 761.02(3)) protects "an act or refusal to act that is substantially motivated by a religious belief," and that since the plaintiffs vertically decorated "the graves in observance of sincere religious beliefs[,] [t]hat is the end of the religious exercise issue" under the Florida RFRA. *See* Appellants' Initial Brief in the United States Court of Appeals, pp. 29-30. Judge Ryskamp had rejected that construct:

> In the context of the Cemetery's Regulations, the plaintiffs' proposed construction of the Florida RFRA would lead to cemetery anarchy. For example, reasonable size and height limitations on grave decorations would have to yield to sincerely held religious beliefs that grave decorations should be larger than the prescribed limitations. Moreover, the Cemetery's operating hours would have to yield to sincerely held religious beliefs that grave sites should be visited outside the Cemetery's operating hours. The Court does not believe that the Florida legislature intended

such a result.

64 F. Supp. 2d at 1283.

In the United States Court of Appeals, recognizing that the Florida RFRA had not been interpreted by this Court, the City suggested the possibility of certification to this Court pursuant to Rule 9.150(a), Fla.R.App.P. ("a United States court of appeals may certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida"). *See* City of Boca Raton's Answer Brief in the United States Court of Appeals, p. 20, n. 7.

On October 1, 2001, the United States Court of Appeals certified two questions to this Court as a "guide":

> As the circumstances of this case demonstrate, the breadth of protection afforded by the state of Florida under state law can determine the outcome of this case as well as have wide ranging and profound implications in Florida. We therefore certify to the Florida Supreme Court these controlling questions for review:
>
> 1. Does the Florida Religious Freedom Restoration Act broaden, and to what extent does it broaden, the definition of what constitutes religiously motivated conduct protected by law beyond the conduct considered protected by the

> decisions of the United States Supreme Court?
>
> 2. If the Act does broaden the parameters of protected religiously motivated conduct, will a city's neutral, generally-applicable ordinance be subjected to strict scrutiny by the courts when the ordinance prevents persons from acting in conformity with their sincerely held religious beliefs, but the acts the persons wish to take are not 1) asserted or implied in relatively unambiguous terms by an authoritative sacred text, or 2) clearly and consistently affirmed in classic formulations of doctrine and practice, or 3) observed continuously, or nearly so, throughout the history of the religion, or 4) consistently observed in the tradition in recent times?

Warner v. City of Boca Raton, 267 F.3d 1223, 1227 (11th Cir. 2001) (Appendix B).

STATEMENT OF THE FACTS

The Appellants' statement of facts provides little information about the Boca Raton Municipal Cemetery, preferring to focus on the expert testimony. Judge Ryskamp's decision contains extensive finds of historical fact, findings which have not been disputed by the Appellants. *Warner v. City of Boca Raton*, 64 F. Supp. at 1275-1279. We supplement those findings and the Appellants' statement with certain factual details from the testimony in order to provide the Court with context and a complete picture of the cemetery.[2]

The Boca Raton Municipal Cemetery is public property, on which Appellants have limited "ownership" interests. The City owns the property. They purchased only "the exclusive right of burial of the human dead in that certain parcel of land." R69-TAB#18 (Certificate of Ownership) (purchaser of grave sites agrees that "the burial right herein granted will be used only in conformity with the Cemetery Rules and Regulations as they may be from time to time adopted or amended" [and] "the

---

[2] Although the parties stipulated and the court found that the cemetery is 21.5 acres in size, that area includes the Mausoleum grounds. The cemetery itself 15.8 acres. Of the approximately 10,000 plots, 6,500 are sold and 4,500 are occupied. R7-669-670. Section A, an older section containing remains and monuments that were moved from a prior location, is completely sold out, but not all occupied. R7-671; R3-110-Expansion Folder #4, Pl. Exh. 36, p. 55 (Olan Young deposition). The Record References here and throughout are to the record on appeal in the Court of Appeals, which has been provided to this Court.

property herein described shall forever remain under the exclusive control of the [City] for the purposes of care and maintenance").

The Boca Raton Municipal Cemetery is secular. However, approximately 90% of the grave markers contain some religious emblem. R8-695. Any sort of emblem, religious or not, may be engraved on a horizontal stone or bronze marker; some reflect the deceased's social organizations, jobs, and favorite activities. Designs are available through catalogs, or people may design their own emblem for the engraver to use. *Id.* at 694-695.

The record reflects that a small minority of the 4,500 occupied plots in the Boca Raton Municipal Cemetery have a history of non-compliance with the Cemetery's no-vertical-display Rules, prompting complaints by other plot owners. R5-317, 323-324 ("19 or 20" vertical decorations in 1990, "447" in 1995); R3-110-Expansion Folder #4, Def. Exhs. 58-60 . The City sent letters to plot owners in 1991, with a copy of the Rules attached, noting the fact of rule violations generally and asking all plot owners to "take steps to correct the violation in the next thirty (30) days from the date of this letter. If the violations are not corrected, you will be notified of the city's intent to remove all objects and items that are in violation." R2-78-Expansion Folder #3, Exh. G; R3-110, Expansion Folder #4, Def. Exh. 58-60. Where the problems were not resolved, due to the sensitivity of the issue the Assistant City Manager advised City

staff in August 1992 not to remove items from grave sites, as "staff will be re-evaluating the existing ordinance to determine if any modifications should be made." R3-110-Expansion Folder #4, Def. Exh. 57.

The Rules were amended in 1996. The substantive change of the greatest import is the accommodation the City made for those persons who wished to display personal items on grave sites. Section IX(2), as amended in 1996, reads as follows:

> (2) Certain Articles ~~Ornaments~~ Prohibited – The placing of ~~boxes, shells toys, metal ornaments, chairs, settees, glass, wood or iron cases, and similar~~ any articles of any kind upon plots or upon or in front of crypts and niches that are not specifically authorized under these rules and regulations shall not be permitted. ~~And if so placed~~ The Cemetery Manager ~~Sexton~~ reserves the right to remove same. The placing of small articles on a headstone memorial after a sixty (60) day period from the date of burial shall be prohibited. The placing of small articles on a headstone memorial on the deceased's birthday, Mother's Day, Father's Day, the anniversary date of the deceased's death, and on national holidays may be permitted. The small articles may be permitted for a period commencing one (1) day before and ending five (5) days after such birthday, anniversary or holiday. The Cemetery Manager ~~Sexton~~ reserves the right to remove all articles ~~ornaments~~ which interfere with the maintenance of the Cemetery or Mausoleum, or interfere with the accessibility to another plot, crypt or niche in the preparation of an interment, disinterment, entombment or disentombment.

RE-Doc 69, p. 14; R1-2-Exh. p-14.[3]

In 1997, the City commissioned researchers at Florida Atlantic University to conduct a survey of plot owners concerning the Cemetery Regulations. The district court quoted the survey's conclusions:

> "The results of this survey have revealed that the majority of the plot owners, regardless of the time length of plot ownership, location (east or west) of plot, or frequency of visitation, believe that the July 23, 1996 Rules and Regulations should be followed by all plot owners as required by the City of Boca Raton. They believe that contributions to a Tree Legacy landscape beautification program is a much higher priority than allowing plot owners to decorate plots with no limitations. They believe that the regulations should apply to all current owners and to future owners."

64 F. Supp. 2d at 1278; R3-96-9 (quoting from R2-78, Expansion Folder #3, Exh. H, 5) (the complete survey results).

Thus, the City's efforts met the expectations of those who had purchased plots since 1982 – that all sections except the relocated graves with upright monuments in "Section A" would be a memorial garden style cemetery – and met the wishes of the

---

[3] We note that the Cemetery does permit approved floral containers that are an integral part of the horizontal marker design. R1-2-Exh. 11(p. 9, 1996 Rules, Section IX(1)). Those special vases are designed to be unscrewed, inverted, and placed below ground level when not in use or when necessary for cemetery maintenance and access to adjoining grave sites. R8-794-795.

majority of those responding to the survey. But violations of the Rules plagued the City, which was trying to respond to the concerns of plot owners who supported the Rules as well as those who objected to the Rules. Eventually, in 1998, the City announced its intention to remove items that were in violation of the Rules. That announcement prompted this litigation.

It was stipulated by all parties that "[t]he City had a written prohibition against vertical above-ground decorations, monuments and memorials at the time the named plaintiffs placed their decorations on the grave sites." R3-83-6, ¶ H (Pretrial Stipulation). The district court found that Appellants' decorations were placed on the graves "in violation of the Regulations." R3-96-6; *see also* 1996 Regulations, Section VIII (Control of Work by City) (R1-2-Exh. p. 10).

The testimony was that Cemetery management was repeatedly surprised to find certain large structures installed without any warning. Former sexton (cemetery manager) Olan Young testified that he encountered the father of Appellant Joanne Davis "with a crew of workers" at the cemetery, and they had, without permission, installed two bronze statues on the plots the Davis' had purchased for the burial of their loved ones. R3-110, Expansion Folder # 4, Pl. Exh. 26, pp. 40-42. When Olan Young arrived, "the job had been finished." *Id*. He told Mr. Davis the statues

violated the rules, but Mr. Davis did not remove them.

Former Cemetery Manager Kevin Jordan testified that Appellant Souhail Karram installed a large standing wooden cross without permission (R8-791-793); that Ian Payne installed a permanently affixed upright Star of David over the weekend when no cemetery staff were present (*id.* at 793-795); and that the Warners installed a rock garden that impeded equipment that was needed for cemetery operations, and also installed graveside cement bench (*id.* at 796), all in violation of the Rules.

The City presented testimony from Lawrence Sloan, a national consultant to the cemetery industry (R7-490-495), recognized by the Appellants' counsel as "one of the foremost cemetery experts, if not the foremost cemetery expert in the country" (R7-543), and found by the district court to be an expert in cemetery management. *See* R3-110-Expansion Folder #4, Def. Exh. 53A (Sloan Curriculum Vitae). Mr. Sloan explained that the City's "memorial park" style of cemetery – horizontal ground-level metal markers, as opposed to traditional upright tombstones – is a design concept originating in the 1920's, intending to create a park-like atmosphere, where there can be no competition for the largest monument, and where the cemetery can maximize the use of the real property by placing plots within inches of one another. R7-495-497, 502. (In the Boca Raton Municipal Cemetery, plots are six inches apart. R7-678). Mr. Sloane testified that many religious cemeteries utilize the

memorial park / horizontal marker cemetery style, including the Chicago archdiocese (Catholic), the Miami archdiocese (two cemeteries), the Palm Beach diocese, protestant religious cemeteries, and Jewish cemeteries. R7-498-501. Notably, approximately 150 plots in the Boca Raton Municipal Cemetery are owned by Temple Beth El, a Jewish congregation, and all of those plots comply with the Cemetery Rules and Regulations prohibiting vertical monuments and decorations. R5-321-322, 444; R7-556.

The Superintendent of Arlington National Cemetery in Washington, D.C. confirmed the importance of adherence to cemetery rules. Since 1962, Arlington National Cemetery has allowed only Government-issued above-ground markers to be used: "The standard marker for Government-issued headstones are 42 inches in height, with approximately half of that exposed, so around 24 inches exposed out of the ground." The older part of the Arlington National Cemetery has "numerous private markers, rang[ing] in height from, maybe a foot to over a 70 feet in height . . . . the typical older style of cemetery from the 1950's and that venue." R5-374, 390-392; R3-110, Expansion Folder # 4, Pl. Exh. 37, pp. 9, 38. Arlington's rules would not permit cement block ridging, plastic floral coverings, wooden borders, benches and religious statues, with maintenance being the critical concern: "We do all of our mowing, trimming of headstones or other activity that would cause us to travel across the entire

cemetery, fertilizing, insecticide control, and so on at one time, and to stop and start for individual graves, where they had borders that would prevent us from going across them, that would not be the best efficiencies of trying to do this type of operation." *Id.* at 31-34.[4]

The Boca Raton Cemetery Manager, Curtis Harris, explained how the Appellants' *ad hoc* decorations interfere with the City's maintenance and access to grave sites, which is necessary to open graves for interment and disinterment, and for grave-side burial services. The grave-opening procedure usually requires four workers and begins with the removal of sod from a 10' x 3 ½´ plot. Then, using a tractor-like piece of equipment known as a backhoe, workers place a large (8 ½' x 5') heavy metal box open on the top and bottom, called a cofferdam, over the excavated area. A dump truck is also brought to the site, to remove the soil from the area after the grave is opened using the backhoe for digging. During the process the cofferdam lowers itself, providing a secure frame and preventing a cave-in when workers go into the

---

[4] Although traditional upright headstones are used in Arlington National Cemetery, that government-operated cemetery regulates speech and religious free exercise at that location. For example, Arlington National Cemetery prohibits any form of political or partisan speech (R3-110-Expansion Folder #4, Pl. Exh. 37, p. 43), allows only *silent* prayer at the John F. Kennedy grave site (*id.* at 42-43), permits no solicitation or vendors (*id.* at 49), and permits only pre-approved religious symbols on government issued headstones. *Id.* at 50.

space to shovel and flatten out the bottom of the grave. R7-671-674. The concrete or metal burial vault, which will hold the casket, is then delivered by truck and lowered into the grave, using the backhoe. *Id.*

Most people prefer and request grave-side services prior to a burial. R7-676. Cemetery staff prepare the area surrounding the grave site to accommodate the mourners. Plywood is placed on the ground surrounding the opened grave, and the area is draped with green carpeting. A lowering device is placed on the grave site, and an approximately 14' x 14' tent is set up over the site. Twelve to twenty-four chairs are placed near the opened grave, on the carpeted plywood. The services usually include 25-30 people, who stand in close proximity to the site, although as many as 1,000 have been in attendance. R7-674-677. Approximately 150 burials take place each year. R5-308.

After the services and the lowering of the casket, the equipment is removed and a 4" concrete top is placed on the vault, the cofferdam is removed, and the grave is filled with sand. *Id.* The procedure for disinterments, which occur eight or nine times per year, is essentially the same, requiring several workers and heavy equipment, but not the cofferdam. *Id.* at 677-678.

That factual background, and the undisputed fact that the Boca Raton Municipal Cemetery permits any religious symbol to be placed on the authorized horizontal

memorials, sets the stage for addressing the certified questions.[5]

[5] The United States Court of Appeals for the Eleventh Circuit will ultimately decide this case utilizing the answers provided by this Court to the Certified Questions. Depending upon this Court's decision, the Court of Appeals may affirm Judge Ryskamp's decision, or, if this Court concludes that the Florida RFRA exempts all religiously motivated conduct from neutral laws of general applicability, absent a compelling governmental interest, the Court of Appeals will have to address whether the City has a compelling governmental interest or if, by creating such a broad preference for religious conduct, the Florida RFRA violates the Establishment Clause of the First Amendment. *See Warner v. City of Boca Raton*, 64 F. Supp. 2d at 1287, n. 11, quoting Justice Stevens' concurrence in *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997): "`In my opinion, the [federal RFRA] is a `law respecting an establishment of religion' that violates the First Amendment to the Constitution.'"

SUMMARY OF ARGUMENT

This Certified Question case from the United States Court of Appeals requires the Court to construe the language of the Florida Religious Freedom Restoration Act, §§ 761.01, *et seq.* (Florida RFRA), in the context of a challenge to various Rules and Regulations of the 10,000-plot Boca Raton Municipal Cemetery. The City Cemetery Rules and Regulations, in effect since 1982, prohibit vertical monuments or decorations on grave sites, instead requiring horizontal grave markers in the "memorial park"-style secular cemetery. (Certain days of remembrance are set aside in the Regulations, and temporary vertical decorations are permitted on those days). "Memorial park" cemeteries are common, and are maintained by Catholic and Jewish organizations as well as in private and municipal cemeteries.

The Appellants, all of whom purchased plots while the horizontal-marker rule has been in effect, have installed and constructed vertical grave site decorations that violate the Cemetery Regulations (*see* photographs in Appendix C to this Brief). Appellants contend that, under the Florida RFRA, because the decorations express sincerely held religious beliefs, the Regulations must give way to Appellants' personal preferences for vertical grave decorations, including statuary, benches, plants, rocks, ropes, and edging stones. The United States Court of Appeals recognized that the scope of the Florida RFRA has "wide ranging and profound implications in Florida."

267 F.3d at 1227. The City asserts that Florida law does not, as the Appellants contend, give any and all claims of religious free exercise preference over neutral laws of general application, and that the City's horizontal marker Regulation, which permits religious emblems, does not impose a substantial burden on Appellants' free exercise of religion.

The Florida RFRA broadens the definition of what constitutes religiously motivated conduct, expanding federal decisions that have required religiously motivated conduct to be "compulsory or central" to a larger system of religious belief in order to warrant constitutional protection. The Florida RFRA does not limit its protection to conduct that is "compulsory or central" to a larger system of religious belief. However, the statute does not, by its terms, protect any and all religiously motivated conduct, and does not require strict scrutiny unless governmental action substantially burdens the exercise of religion. *See* § 761.02(2), Fla. Stat. Any other construction of the statute would generally disable government from enforcing neutral laws of general application *vis á vis* any idiosyncratic claims of religious free exercise, if those claims were based upon a sincerely held belief. This Court should either adopt the four-part test utilized by the United States District Court in determining whether the Regulations were a "substantial burden" on the exercise of religion, or fashion some other test to measure the substantiality of the burden. Since the statute

only requires strict scrutiny of regulations that impose a substantial burden on religious free exercise, courts must have some framework for measuring that burden. Otherwise, if the Florida RFRA is construed to provide a preference for any and all religiously motivated conduct, the statute would run afoul of the Establishment Clause of the First Amendment. (Any potential Establishment Clause issues are not before this Court, but would be presented to the United States Court of Appeals for the Eleventh Circuit after remand, if necessary).

Appellants have also asked the Court to consider whether Article I, Section 3 of the Florida Constitution demands strict scrutiny of all laws affecting claimed religiously motivated conduct. The City suggests that the Court should decline to address the Florida Constitutional issue, which is not squarely presented by the Certified Questions, or, because there is no precedent supporting the claim that the Florida Constitution provides any greater protection for religious free exercise than does the Florida RFRA, the Court should reject Appellants' Florida Free Exercise argument. Both the United States District Court and the Court of Appeals for the Eleventh Circuit correctly rejected the notion that the Regulations are invalid under the Florida Constitution's Free Exercise Clause.

ARGUMENT

I.

THE FLORIDA RFRA'S REQUIREMENT THAT ACTS "SUBSTANTIALLY MOTIVATED BY A RELIGIOUS BELIEF" MAY NOT BE "SUBSTANTIALLY BURDEN[ED]," ABSENT A COMPELLING GOVERNMENTAL INTEREST, DOES NOT MEAN THAT ALL PERSONAL METHODS OF RELIGIOUS EXPRESSION ARE EXEMPT FROM NEUTRAL LAWS OF GENERAL APPLICABILITY

A. THE CERTIFIED QUESTIONS AND THE CITY'S PROPOSED ANSWERS TO THE CERTIFIED QUESTIONS

1. Question One

The United States Court of Appeals for the Eleventh Circuit has certified two questions to this Court. The first question is:

> Does the Florida Religious Freedom Restoration Act broaden, and to what extent does it broaden, the definition of what constitutes religiously motivated conduct protected by law beyond the conduct considered protected by the decisions of the United States Supreme Court?

The answer to the first certified question is "yes," the Florida Religious Freedom Restoration Act broadens the definition of what constitutes religiously motivated conduct protected by law beyond the conduct considered protected by the decisions of the United States Supreme Court. Indeed, it was the purpose of the Florida RFRA to do so when it defined the exercise of religion as "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." § 761.02(3), Fla. Stat.

Supreme Court free exercise decisions have looked to the religious importance of the acts or refusals to act. *See e.g., Wisconsin v. Yoder,* 406 U.S. 205, 218, 92 S. Ct. 1526, 1534, 32 L.Ed.2d 15 (1972) (compulsory school attendance until age 16 required the Amish "to perform acts undeniably at odds with fundamental tenets of their religious beliefs."). Later, the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.C. 1595, 108 L.Ed.2d 876 (1990), held that the First Amendment's Free Exercise Clause did not exempt individuals from complying with "neutral, generally applicable" laws, even if the laws incidental effect substantially burdened religious exercise. 494 U.S. at 881. That decision led to the legislative initiatives resulting in the passage of the federal RFRA (42 U.S.C. § 2000bb *et seq.*), which was declared unconstitutional as applied to the states (*City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997)), which in turn led to the Florida legislature's enactment of the Florida RFRA.

The extent to which the Florida RFRA broadens the free exercise definition is

this: it goes beyond the *Employment Division v. Smith* decision and subjects neutral laws of general applicability to a statutory free exercise analysis, and the religiously motivated act or refusal to act need not be compulsory or central to the religion, as required by pre-*Smith* federal precedents. However, the Florida RFRA, while rejecting the need to show centrality or compulsoriness, ***does not protect any and all*** religiously motivated conduct, because it does not say that "any" religious act or refusal to act triggers strict scrutiny.

2. Question Two

The second question is:

> If the Act does broaden the parameters of protected religiously motivated conduct, will a city's neutral, generally-applicable ordinance be subjected to strict scrutiny by the courts when the ordinance prevents persons from acting in conformity with their sincerely held religious beliefs, but the acts the persons wish to take are not 1) asserted or implied in relatively unambiguous terms by an authoritative sacred text, or 2) clearly and consistently affirmed in classic formulations of doctrine and practice, or 3) observed continuously, or nearly so, throughout the history of the religion, or 4) consistently observed in the tradition in recent times?

The answer to the second certified question is "no." A city's neutral, generally

applicable law will not be subjected to strict scrutiny when the law prevents persons from acting in conformity with their sincerely held religious beliefs if the acts the person takes are purely personal preferences, and not (1) asserted or implied in relatively unambiguous terms by an authoritative sacred text, or (2) clearly and consistently affirmed in classic formulations of doctrine and practice, or (3) observed continuously, or nearly so, throughout the history of the religion, or (4) consistently observed in the tradition in recent times.

Whether the stated four factors are used, or some other standards, the important point is that under the Florida RFRA there must be some way to separate out religiously motivated personal preferences from acts which, if precluded, would constitute a substantial burden on religious free exercise. If there were not such a mechanism, the Florida RFRA would allow neutral laws of general applicability to be trumped (absent a compelling governmental interest) by anyone merely asserting that their acts were "substantially motivated by a religious belief."

In the context of this municipal cemetery case, for example, any religiously motivated person could erect a fifty-foot vertical cross at a grave site on public property, and the City's neutral, generally applicable regulation limiting grave markings in the municipal cemetery to horizontal markers would not be enforceable. By way of comparison, since the federal RFRA now contains free exercise language like the

Florida RFRA's (*see* discussion, *infra* at p. 33), under the Appellants' construct the neutral, generally applicable height restrictions at Arlington National Cemetery (which allows vertical symbols of limited height) (R3-110, Expansion Folder # 4, Pl. Exh. 37, pp. 9, 38), could be ignored by a religiously motivated veteran's family that wanted a fifty-foot cross or Star of David.

The Appellants' RFRA statutory construct would lead to those absurd and anarchic results.[6] Since that cannot be the law, the four-factor test applied by the United States District Court, or something similar, must be part of the application of the Florida RFRA. Contrary to the Appellants' view that no free exercise inquiry can be made once a person establishes that his or her act or refusal to act is substantially motivated by religious beliefs, courts have the duty to fashion mechanisms in order to determine how laws are to be applied. The First Amendment simply states that "Congress shall make no law . . . ," but there are a variety of tests that are used to apply that directive. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 100 S. Ct. 2343, 65 L.Ed 2d 341 (1980)

---

[6] The potential for religious tyranny over duly enacted neutral laws of general application is, of course, not limited to the cemetery context. ***All*** state, county, city, and other governmental laws and regulations in Florida would be unenforceable against any idiosyncratic claim of religiously motivated conduct, if the Appellants' construct of RFRA were to be accepted. *See Amicus Curiae* Brief of the Florida League of Cities, filed in support of Appellee.

(four-part test for commercial speech); *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) (three-part test for obscenity); *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989) (reasonable time, place, and manner test for restrictions on speech in a public forum); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971) (criteria for determining violation of the Establishment Clause). Similarly, fashioning a test to aid in the application of the Florida RFRA is appropriate and necessary and not inconsistent with decisional law.

We turn to the reasons that the answers proposed by the City are the proper answers to the Certified Questions.

B. CEMETERY ANARCHY

The Appellants and their *amici* contend that once a person establishes that his or her act or refusal to act is "substantially motivated by a religious belief," the Florida RFRA free exercise inquiry ends: any such act or refusal to act then cannot be prohibited absent a compelling governmental interest. The Appellants contend that prohibiting vertical grave decorations is a "substantial burden" on their exercise of religion because it completely precludes the vertical decorative grave embellishments the Appellants desire.

The Appellants are seeking Florida RFRA protection for a variety of vertical lawn decorations (edging stones, gardenia bushes, crotons, trees, statues, posts with ropes, cement planters) in addition to Christian crosses and Stars of David. Appendix C to this Brief contains illustrative photographs of grave sites not in compliance with the Cemetery Rules and Regulations. There is absolutely no religious significance to most of the vertical decorations, even though the Appellants have attempted to clothe their decorations with personal religious significance.

Appellant Carrie Monier admitted that the cement planters, crotons, gardenias, wood chips, and posts with ropes on her brother's grave have no religious significance to her (R4-27-30), but later amended her testimony to say that she enclosed the "grave site to protect it from people walking over it, and machinery and things like that. Because of respect, my beliefs, my religion, my practice." *Id.* at 31-32.

A Catholic plaintiff, asked if there was religious significance to the edging stones and other stones on her father's grave, said, "No, there isn't," and as to the planted flowers placed on the grave, she said they symbolized "life going on and the life that my father made and the grandchildren and everything." R4-190.

A Plaintiff's expert, a professor of early church history at Union Theological Seminary, was asked whether plantings on a grave site have independent religious

significance. He responded:

> A. [JOHN McGUCKIN]: It doesn't have ancient Christian significance but it obviously has some resonance with their spiritual experience of bereavement.
>
> And as far as I have thought about this and spoken with the bereaved families . . . the planting of things is some kind of comfort and a symbol of life. So I suppose it is a religious symbol on the wider parameters of religious symbolism.

R7-648. He saw no religious significance in cement planters (*id.* at 651), and as to the edging stone perimeter grave markers, which served to make grave sites visible, he agreed that "verticality is not necessary to provide visibility." [7] Asked about the "religious significance" of plastic windmills and toys placed on grave sites, he responded:

---

[7] Another Plaintiffs' expert, Rabbi Broyde, acknowledged that there is no independent significance to vertical marking of Jewish graves. Although Jews have a tradition of marking graves to deter people from walking on the graves, horizontal markers suffice:

> Q [MR. ROGOW]: Let me see if I have it right. If a municipality that is opening a cemetery has a rule that says only horizontal markers shall be placed at a grave site that would not burden any Jewish religion tradition or law?
>
> A. Yes, I think that's correct. (R4-143).

A. I wouldn't like to say anything at all about windmills because I just wondered what they meant. I've never seen that before, I must confess. In terms of the child's toys it struck me as a very clear and typical example of the special grieving processes of mothers deprived of small children.

If you were to ask me is that a religious thing, the child's toy is there, rubber ducks and frogs as far as I remember – I would agree that it certainly isn't in the classical Canon of Christian symbols this any way at all. But I start getting a little bit edgy in trying to make a clear line between the deep felt grief of that mother and how she wants to express it.

Id. at 653.

Professor McGuckin confronted the issue in this case in this colloquy:

Q. [MR. ROGOW]: Is it your position that whatever one says is woven together with one's religious beliefs therefore is entitled to

be placed or put on a grave site at the Boca Raton cemetery?

A. No, certainly not.

Q. Where do you draw the line?

A. I don't know. I've never considered the issue. I've come at it primarily from the viewpoint of a Christian theological looking at historical precedent and so on.

Id. at 656.

Another Plaintiffs' expert, Professor Winifred Sullivan, recognized that "In order to determine whether something is a religious practice you need to look at the larger context" (R8-840), and struggled with the dilemma created by the Plaintiffs' construct of the Florida RFRA in the context of a Catholic wishing to replicate a Pope's Sarcophagus on a loved one's grave:[8]

> Q. And what I'm suggesting is that, would there be any question that placing a Sarcophagus that resembles a Sarcophagi used for the Pope, that that would be a religious practice, a religious commitment, that would be tied to religion? Is there any doubt about that?
>
> A. No, given the particular context. There could be people who are totally secular who would like to have a Sarcophagus like the Pope because they thought it was pretty or it made them important. It didn't have anything to do with their religious life.
>
> Q. And they would have no claim under RFRA, correct?
>
> A. Right.
>
> Q. But if you can tie to it religion then do you have a claim under RFRA?

---

[8] "Sarcophagus" is defined as "a stone coffin [above ground], often inscribed or decorated with sculpture." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION (2000).

A. As I understand it.

Q. And so then we come back to my question. What do you do with the hypothetical that I've given you. Assume somebody committed, a practicing Catholic, the Sarcophagi, a perfect replica of one of the Sarcophagi of the Popes, and the person says I need to put this there. And this city says you can't do it. Does it violate the rules?

A. I think it's a problem. I don't have an answer. I think that's the whole problem. That's a problem that's created by the Florida legislature.

R8-841-842.

The Appellants do not acknowledge any dilemma. They have no problem with the statute; to them it means that personal religious motivation trumps all else: the City would have to permit the replication of a Pope's Sarcophagus, or any other religiously motivated vertical grave decorations. That, Judge Ryskamp concluded, was a recipe for "cemetery anarchy." *Warner v. City of Boca Raton*, 64 F. Supp. 2d at 1283.

C. THE FLORIDA RFRA DOES NOT PRECLUDE AN INQUIRY INTO A SUBSTANTIAL BURDEN

The Florida RFRA "`exercise of religion' . . . act or refusal to act" need not be an act that is ***compulsory*** or ***central*** to a larger system of religious belief. But that

does not mean that ***any*** act substantially motivated by a religious belief is within the statute. Had the statute said "***Any*** act or refusal to act that is substantially motivated by a religious belief constitutes the free exercise of religion," the Appellants' approach might have more force. But the Act does not say that, and while the "whether or not . . . compulsory or central" language sought to avoid a cramped view of the exercise of religion, it does not say that ***any*** religiously motivated conduct trumps neutral laws of general applicability. Judge Ryskamp explained:

> If any act motivated by a sincerely held religious belief were protected under the Florida RFRA, then it adds nothing to the meaning of the statute to say that the act need not be compulsory or central to a larger system of religious beliefs. It is only where the act is presumed to have some basis in a larger system of religious beliefs that the qualification that the act need not be compulsory or central to such a system has any meaning. In short, in order to give effect to all the statutory language, the "exercise of religion" must mean 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.

Warner, 64 F. Supp. 2d at 1283.

That conclusion and the concomitant need to inquire into where the act or

refusal to act can be placed within the tenets, practices or customs of religious beliefs does not offend the Florida RFRA. *Compare Henderson v. Kennedy,* 265 F.3d 1072 (D.C. Cir. 2001), *on rehearing from* 253 F.3d 12 (D.C. Cir. 2001). There, the Court of Appeals held that amendments to the original federal RFRA, which extended RFRA's protections to "***any*** exercise of religion, whether or not compelled by, or central to, a system of religious belief" (emphasis supplied), did not, in the court's view, "alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists." [9]

Henderson involved plaintiffs who wanted to sell t-shirts bearing a religious message on the National Mall in Washington, D.C. A National Park Service regulation prohibited such sales. The regulation was neutral and did not discriminate among viewpoints. The evangelical Christian plaintiffs asserted that "they hold the sincere religious belief that [they] are obligated by the Great Commission to preach the good news, the gospel of salvation through Jesus Christ to the whole world . . . by all available means . . . [and in] obedience to their vocation, [they] have distributed at a

---

[9] The federal RFRA amendments, contained in the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, 806 (2000), by using the words "any exercise of religion," could be read as going beyond the Florida RFRA. If that is so, and it is still proper to inquire into the importance of the religious practice, the Florida Statute certainly permits the inquiry.

price publications and t-shirts . . . for an amount that covers the cost to create them and to enable [them] to carry out [their] vocation." *Henderson (II)*, 253 F.3d at 15.

The initial opinion in *Henderson* addressed the federal RFRA claim under the original RFRA language: free exercise under First Amendment principles. That, the court said, meant "`a substantial burden on the observation of a central religious belief or practice. . . .'" 253 F. 3d at 17 (citations omitted). The court wrote:

> One can conceive of many activities that are not central or even important to a religion, but nevertheless might be religiously motivated. In fact it is hard to think of any conduct that could not potentially qualify as religiously motivated by someone's lights. To make religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement.

253 F.3d at 17.

Referring to a Seventh Circuit federal RFRA case, *Mack v. O'Leary*, 80 F.3d 1175, 1179-80 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), the *Henderson* court noted approvingly its view that courts must "`separate center from periphery in religious observances. . . .'" 253 F.3d at 17 (internal citation omitted).

Congress's amended definition of the free exercise of religion ("whether or not compelled by, or central to, a system of religious belief") did not change the result in

Henderson:

> Our [first] opinion assumed that plaintiffs Henderson and Phillips wanted to sell t-shirts on the Mall because of their religious beliefs. Our focus was on whether the Park Service regulation imposed a "substantial burden" on their exercise of religion. *See Henderson*, 253 F.3d at 16-17. In reaching our judgment we examined the importance of selling t-shirts on the Mall to the plaintiffs. Our conclusion was this: "Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means [by which petitioners may engage in their vocation to spread the gospel], it is not a substantial burden on their vocation. Plaintiffs can still distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall." *Id*. at
> 17. That conclusion is unaffected by the amendments of RFRA.

Henderson (II), 265 F.3d at 1074.

Appellants will argue that there are no alternatives open to them – that only vertical grave decorations can meet their religiously motivated needs. That argument ignores the fact that religious symbols of any sort can be placed on the horizontal markers (R8-694-695) and ignores the inquiry that courts have always made when addressing substantial burdens on free exercise claims: where the exercise lies within the religious tradition that motivates the act. *See First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d 1114 (Fla. 3d DCA 2000) ("Application of the

County's zoning ordinances to preclude expansion of First Baptist Church of Perrine's school does not prevent or seriously inhibit the Church's ability to provide a religious education"); *Cf. Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 769 U.S. 827, 105 S. Ct. 108 (1984) (City's zoning ordinance banning public religious services in a residential area did not substantially burden rabbi's free exercise of religion).

In this case, that means determining whether vertical grave decorations are so much on the peripheries of the Appellants' religions that they are really matters of personal preference, and thus, the City has not placed a "substantial burden" upon them. Nothing in the Florida RFRA precludes that inquiry. Indeed, the Appellants' most vigorous advocate expert witness, Professor Sullivan (who assisted in their motion for summary judgment and prepared "maybe half" of the questions posed to her on her direct testimony (R8-841-842)), on cross-examination recognized the need for such an inquiry with regard to grave markings and coverings:

> Q. [MR. ROGOW]: And so we have to learn what the individual believes and how he or she has come to those beliefs, and then do we have to look at the conduct of the individual at the grave site, do we have to make a connection between the individual's beliefs and upbringing and tradition and the conduct at the grave site?

> A. [PROFESSOR SULLIVAN]: Yes. It would vary depending on the religious community what the importance of the conduct was.

R8-843.

Such an inquiry must be made in order to give meaning to the words "substantial burden," *Henderson v. Kennedy (II), supra*, 265 F.3d at 1074, and the inquiry does not offend any legal principles.

D. THE FREE EXERCISE FLORIDA RFRA DETERMINATION DOES NOT VIOLATE ANY LEGAL PRINCIPLES

The Appellants' exaggerated arguments are exemplified by their assertion that the test used by Judge Ryskamp would mean that "any city council could regulate all the details [of `even the most fundamental religious practices'], confining all Christians to a single form [of `communion']." Appellants' Brief, pp. 31-32.

The argument is specious because such (unimaginable) regulation would not be a neutral law of general applicability. That the manner of marking graves in a municipal cemetery and the obligation to conform to pre-existing rules poses no threat to any religious practice is evidenced by the undisputed fact that cemeteries operated by religious institutions throughout the country utilize horizontal marker memorial gardens, including 150 Temple Beth El plots in the Boca Raton Municipal Cemetery that

comply with the City's Rules and Regulations, including the horizontal marker rule. R5-498-501; 321-322, 444, R7-556.

Nor did the federal trial, and the test applied, "entangle church and state . . . and prefer some religious beliefs over others." Appellants' Brief, p. 30. Judge Ryskamp recognized the Supreme Court's admonitions against courts questioning the "`validity of particular litigants' interpretations of those creeds.'" *Warner*, 64 F. Supp. 2d at 1284 (citations omitted), and carefully complied:

> Under the Court's construction of the Florida RFRA, however, courts are not required to interpret and weigh religious doctrine to determine the centrality of a particular practice to a religious tradition. Nor are courts required to determine whether a particular practice is compulsory or prohibited by a religious tradition. Rather, a court's inquiry is extremely limited and purely factual: Does the practice in question reflect some tenet, custom or practice of a larger system of religious beliefs? Accordingly, the risk of courts taking sides in religious controversies is minimized.

Id.

Finally, neither *Frazee v. Illinois*, 489 U.S. 829, 109 S. Ct. 1514, 103 L.Ed.2d 914 (1989), nor *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S. Ct. 1425, 67 L.Ed.2d 624 (1981), precludes the inquiry made by

Judge Ryskamp. *See* Appellants' Brief, pp. 28-29. Neither *Frazee* nor *Thomas* addressed religiously neutral government regulation of conduct. *Frazee* and *Thomas* involved state denial of unemployment compensation benefits to persons whose religious beliefs caused them not to work on Sunday (*Frazee*) or not to work on military tanks (*Thomas*). Their sincerely held religious beliefs protected them from being denied benefits, but the cases do not stand for the proposition that sincerity alone requires the government to accommodate ***any and all conduct*** engaged in by a person in the name of his or her religion, or that a court is precluded from any inquiry in order to determine "substantial burden." *See*, for example, *Hefron v. International Society of Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L.Ed.2d 298 (1981), rejecting a religious group's attempt to roam throughout a state fair to dispense religious literature and solicit donations contrary to neutral rules that allowed such activities only at licensed booths. Under the Appellants' theory, the Florida RFRA would invalidate a similar rule applied to Krishnas at a Florida state fair absent a compelling governmental interest; a construct that inevitably would lead to personal religious conduct vanquishing nearly all secular, generally applicable rules.

The Appellants' experts recognized the relevance of inquiries into the sources of religious burial practices and testified about those sources. But the City's expert, Dr. Daniel Pals, the former Chair of the Department of Religious Studies at the

University of Miami, did more. He provided a workable framework for the Florida RFRA inquiry, a framework designed to determine "the place of a particular practice within a religious tradition." *Warner*, 64 F. Supp. 2d at 1285. The Appellants' representation to this Court that Dr. Pals tied his test to "essential and integral" religious practices, contrary to the Florida RFRA's "whether or not the religious exercise is compulsory or central" (Appellants' Brief, pp. 24-25), distorts Dr. Pals' testimony, ignores his actual words, and undermines their argument against Judge Ryskamp's use of the Pals framework. This cross-examination colloquy with Appellants' counsel reveals the disingenuousness of Appellants' submission:

> Q. [MR. GREEN]: Are you aware that the Florida RFRA goes beyond the Federal RFRA in defining exercise of religion as "an act or refusal to act that is substantially motivated by religious belief regardless of whether a particular practice is essential or integral to a religious tradition"?
>
> A. [DR. PALS]: Yes, I am aware of that.
>
> Q. So you premised your report on a standard, namely essential and integral, which is inconsistent with the Florida RFRA standard, correct?
>
> A. I think that would not be correct. I think it's, it is certainly consistent with the Florida Statute.

Q. Well, sir, you mentioned on a number of occasions in your report the criteria essential and integral. My understanding is that you mention it on page two of your report, and you certainly mention it in the conclusions of your report, correct?

A. Certainly, that's correct.

* * *

A. That's true. It is important to understand that those words are always paired in my discussion with two others. The terms I've used are marginal and tangential.

The purpose of that, I think it is fairly clear from the report, is to set up a theoretical structure where you have one pole where you have the strongest set of practices that are protected, and another pole where you have the weakest, the set of practices that one has the most difficulty protecting.

So I do think you would find that I've tried to work with that parallel set of concepts on each end of the spectrum.

R8-755-756. That testimony, and Judge Ryskamp's explanation of the utility of the Pals framework, absolutely belies the Appellants' statement that the "four part test . . . is designed and intended to turn the statutory definition on its head – to protect only conduct that is essential, integral, and at the center of a vast religious tradition." Appellants' Brief, p. 25.

Unless one accepts the Appellants' view that ***any*** religiously motivated conduct can only be circumscribed by a compelling governmental interest, there must be a principled basis for determining what constitutes a "substantial burden." The test used by Judge Ryskamp, which would protect all but personal preference (although sincere) religious conduct, is consistent with the Florida RFRA, with common sense, and with the Establishment Clause of the First Amendment and federal RFRA decisions from which the Florida RFRA is derived.

II.

THE CITY'S NEUTRAL, GENERALLY APPLICABLE HORIZONTAL MARKER CEMETERY REGULATION DOES NOT VIOLATE THE FLORIDA CONSTITUTION

The Appellants claim that the Florida Free Exercise Clause, Article I, § 3, Fla. Const., invalidates the Boca Raton Municipal Cemetery Rules and Regulations. Judge Ryskamp held there was no Florida constitutional violation. *Warner*, 64 F. Supp. 2d at 1295. The United States Court of Appeals thought that the Appellants' Article I, Section 3 argument was devoid of merit: "We doubt this view is correct. We can find no support in Florida law for this contention. Also, the very text of the Florida Constitution suggests that it affords less absolute protection than that provided by the United States Constitution." *Warner v. City of Boca Raton*, 267 F.3d 1223, 1226, n. 3 (11th Cir. 2001).

Before addressing the Appellants' substantive argument, we note that although the United States Court of Appeals said its phrasing of the certified questions was not meant to restrict this Court's analysis, the questions, and the litigation, have centered on the Florida RFRA. Thus, this Court should limit its exercise of certified question jurisdiction to that statute. *Compare Hawkins v. Ford Motor Company*, 748 So. 2d 993, 996, n. 5 (Fla. 1999) (declining to address issues, raised by the litigants, that were

outside the scope of the certified question and had been "squarely addressed" by the United States Court of Appeals).

The Appellants' Brief in the United States Court of Appeals devoted but three pages to a Florida Free Exercise argument (pp. 54-57), and in the district court that claim was barely addressed by the Plaintiffs.[10] However, should the Court decide to address the Florida Free Exercise Clause, the conclusion must be that the Appellants are not entitled to relief under that Clause.

Article I, § 3 of the Florida Constitution provides:

> 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 public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or
>
> religious denomination or in aid of any sectarian institution.

The *Traylor v. State*, 596 So. 2d 957, 961-63 (Fla. 1992), admonition that "Florida's state courts are bound under federalist principles to give primacy to our

---

[10] For example, Appellants only devoted one perfunctory paragraph to the their Florida constitutional claims in their motion for summary judgment (DE# 70-16-17).

state Constitution. . . ." (*id.* at 962), does not support the conclusion that the Boca Raton Cemetery Regulations have penalized the free exercise of religion. Nor does *Matter of Dubreuil*, 629 So. 2d 819 (Fla. 1993) (upholding a Jehovah's Witness refusal to accept blood transfusions) or any other case offered by the Appellants, support the notion that the City's neutral law of general applicability is invalid under Article I, § 3.

The crux of the Appellants' argument is that the *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), First Amendment standard – that a neutral, generally applicable law need not be justified by a compelling governmental interest – should not be the Florida Free Exercise standard. Florida, the Appellants argue, should protect any and all individual exercises of religion and even neutral, generally applicable laws must give way to any individual religious conduct unless the religious conduct actually harms the public morals, peace or safety. Appellants' Brief, pp. 32-49.

Of course, the Florida RFRA already provides more protection to religiously motivated conduct than does the *Smith* standard, rendering unnecessary an extraordinary constitutional expansion, and relieving the Appellants from their claimed fear that without such an expansion, a neutral law against consumption of alcohol by minors would allow the state to "suppress First Communion." Appellants' Brief, p.

38. The test used by Judge Ryskamp, applying the Florida RFRA, would protect Communion since it is not a mere personal preference; it is, as the Appellants describe it, "the central religious ritual of these churches." *Id.*

The Appellants' use of *Dubreuil, supra*, and *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989), to support their expansive view of the Florida Free Exercise Clause, is as unpersuasive as their prediction of the risks to Communion. They posit that those cases, which involved religiously motivated refusal of blood transfusions, "involved a generally applicable law [and] applied the compelling interest test. . . ." Appellants' Brief, p. 41. Aside from the fact that neither case actually involved a law, the important distinction is that the right to refuse blood transfusions had no impact upon the rights of others who were subject to neutral, generally applicable regulations.

Forbidding the state from imposing its will to override an individual's religious preference against blood transfusions is not analogous to exempting an individual from a neutral, generally applicable law that governs all who are within its ambit. Therefore, the Appellants' reliance on *Dubreuil* and *Wons* for their conclusion that "the Florida Constitution requires justification of generally applicable rules" (Appellants' Brief, p. 41) is wrong. Indeed, *Wons'* respect for "the individual's right to make ***decisions vitally affecting his private life*** according to his own conscience" (541 So. 2d at 98) (emphasis supplied) confirms that when the public's life and interests are implicated,

the primacy of the individual does not carry the weight assigned to it by the Appellants.[11]

The Appellants and their *amici* (one of whom takes credit for the Florida RFRA: "Mathew D. Staver represents to this court that he was the author and drafter of the Florida Religious Freedom Restoration Act") (*Amicus* Brief of Liberty Counsel in Support of Plaintiffs - Appellants, p. 2) have been successful in legislatively expanding protection for the exercise of religiously motivated conduct. The Florida constitutional expansion they seek is not supported by Florida case law. Moreover, if the Court were to accept the Appellants' proposition that the Florida Constitution requires that ***any and all*** religiously motivated conduct is exempt from neutral, generally applicable laws absent a compelling governmental interest, then Florida's Free Exercise Clause would be subject to challenge in the United States Court of Appeals under the First Amendment Establishment Clause. To avoid that conflict, and because this Court's cases do not support the creation of that conflict, the Appellants'

---

[11] Although this Court's decision concerning the Florida RFRA has implications beyond the facts of this case, this case well illustrates that the interests of others may be as substantial as those of the religious plaintiffs. Here, the vast majority of families with loved ones buried in the Boca Raton Municipal Cemetery support the enforcement of the Regulations, which promised them a certain ambiance in their loved ones' final resting place. (R2-78, Expansion Folder #3, Exh. H) (FAU Survey of Plot Owners). Appellants' personal decorations indisputably destroy that ambiance. *See* Exhibits to this Brief.

Florida Constitution Free Exercise argument should be rejected, if the Court decides to address it.

CONCLUSION

For the foregoing reasons, the first Certified Question should be answered in the affirmative, because the Florida RFRA provides more protection to religiously motivated conduct than does the First Amendment as construed by the Supreme Court of the United States. The second Certified Question should be answered in the negative, because under the Florida RFRA no substantial burden occurs when purely personal and potentially idiosyncratic religiously motivated conduct is regulated by a neutral law of general application. This Court should adopt the Pals test, as did the United States District Court, or fashion a similarly workable standard for the application of the statute to the myriad factual circumstances to which it might apply. In addition, the Florida Constitution provides no greater protection to religious free exercise than does the Florida RFRA.

Respectfully submitted,

BRUCE ROGOW
Florida Bar No. 067999
BEVERLY A. POHL
Florida Bar No. 907250
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Boulevard
Fort Lauderdale, Florida 33394
Ph: (954) 767-8909
Fax: (954) 764-1530

By: _____

BRUCE ROGOW

By: _____

BEVERLY A. POHL

Counsel for the City of Boca Raton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel by FedEx to Mr. Laycock and Mr. Green, and by U.S. Mail to other counsel this 9th day of January 2001:

DOUGLAS LAYCOCK
727 E. Dean Keeton St.
Austin, TX 78705
Counsel for Appellants

JAMES K. GREEN
JAMES K. GREEN, P.A.
250 AUSTRALIAN AVE., STE. 1503
WEST PALM BEACH, FL 33401
Counsel for Appellants

LYNN G. WAXMAN
LYNN G. WAXMAN, P.A.
501 S. FLAGLER DRIVE, SUITE 505
WEST PALM BEACH, FL 33401
Counsel for Appellants

CHARLOTTE H. DANCIU
CHARLOTTE H. DANCIU, P.A.
370 WEST CAMINO GARDENS BLVD., STE. 210
BOCA RATON, FL 33432
Counsel for Appellants

DIANA GRUB FRIESER
CITY ATTORNEY
City of Boca Raton
201 West Palmetto Park Road
Boca Raton, FL 33432-3795
Counsel for the City of Boca Raton

ERIK W. STANLEY
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
Counsel for *Amicus Curiae* Liberty Counsel

SIMONE MARSTILLER
EXECUTIVE OFFICE OF THE GOVERNOR
209 The Capitol
Tallahassee, FL 32399-6507
Counsel for *Amicus Curiae*

DOUGLAS STOWELL
STOWELL, ANTON & KRAMER
211 East Call Street
PO Box 11059
Tallahassee, FL 32302
Counsel for *Amicus Curiae* International Cemetery and Funeral Association

ROBERT FELLS
INTERNATIONAL CEMETERY
AND FUNERAL ASSOCIATION
1895 Preston White Drive, Suite 220
Reston, VA 20191
Counsel for *Amicus Curiae*
International Cemetery and Funeral
Association

REBECCA O'HARE
FLORIDA LEAGUE OF CITIES
301 S. Bronough St.
P.O. Box 1757
Tallahassee, FL 32302
Amicus Curiae

BRUCE ROGOW

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font, and is in compliance with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

BRUCE ROGOW

APPENDIX