**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 PLAINTIFFS AND MOVING PARTIES


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## TABLE OF CONTENTS

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Statement of the Case . . . . . 1

1. The Certified Questions . . . . . 1

2. Procedural History . . . . . 3

3. Statement of Facts . . . . . 5

A. Plaintiffs' Exercise of Religion . . . . . 5

B. The Theological Experts . . . . . 7

C. The Challenged Regulations . . . . . 12

Summary of Argument . . . . . 14

Argument . . . . . 15

I. Florida RFRA Protects Conduct "Substantially Motivated by a Religious Belief." . . . . . 15

A. The Statutory Text Unambiguously Protects Conduct "Substantially Motivated by a Religious Belief." . . . . . 15

B. The Proposed Four-Part Text Is Inconsistent with Statutory Text. . . . . 19

C. The Substantial Motivation Standard Is Reinforced By All the Secondary Indicators of Statutory Meaning. . . . . 25

1. The Mischief to Be Remedied. . . . . 25

2. The Derivation from Free Exercise Law. . . . . 28

3. Legislative History. . . . . 29

4. Avoidance of Constitutional Difficulties. . . . . 30

II. The Florida Free Exercise Clause Requires the State to Justify Substantial Burdens on Religious Exercise. . . . . 32

A. The Florida Constitution Protects the Religious Practices of Each Individual. . . . . 35

B. The Florida Constitution Protects Against All State Action. . . . . 37

C. The Florida Constitution Requires That Burdens on Religious Exercise Be Justified by a Compelling Interest in Public Morals, Peace, or Safety. . . . . 44

Conclusion . . . . . 49

## TABLE OF AUTHORITIES

### Cases

Attorney Gen'l v. Desilets, 636 N.E.2d 233 (Mass. 1994) . . . . . 39

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) . . . . . 38-39

City of Boerne v. Flores, 521 U.S. 507 (1997) . . . . . 26-27

Donato v. Am. Tel. & Tel. Co., 767 So.2d 1146 (Fla. 2000) . . . . . 16

EEOC v. Catholic University, 83 F.3d 455 (D.C. Cir. 1996) . . . . . 26

Employment Div. v. Smith, 494 U.S. 872 (1990) . . . . . 5, 26, 38, 40-42

First Covenant Church v. City of Seattle,
840 P.2d 174 (Wash. 1992) . . . . . 42-43, 46

Fla. Dept. of Revenue v. Fla. Mun. Power Agency,
789 So.2d 320 (Fla. 2001) . . . . . 16

Fraternal Order of Police v. City of Newark,
170 F.3d 359 (3d Cir. 1999) . . . . . 39

Frazee v. Illinois, 489 U.S. 829 (1989) . . . . . 28-29

Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000) . . . . . 39, 43

Hunt v. Hunt, 648 A.2d 843 (Vt. 1994) . . . . . 39

In re Brown, 478 So.2d 1033 (Miss. 1985) . . . . . 40, 46

In re Young, 141 F.3d 854 (8th Cir. 1998) . . . . . 26

Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D. Md. 1996) . . . . . 39

Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill,
589 S.W.2d 877 (Ky. 1979) . . . . . 40

Larson v. Valente, 456 U.S. 228, 244 (1982) . . . . . 31

Mack v. O'Leary, 80 F.3d 1175(7th Cir. 1996) . . . . . 27

Matter of Dubreuil, 629 So.2d 819 (Fla. 1993) . . . . . 15, 34-36, 40-41, 45, 47-49

McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998) . . . . . 39

Munns v. Martin, 930 P.2d 318 (Wash. 1997) . . . . . 39

People v. Phillips, (N.Y. County Ct. of Gen'l Sessions 1813) . . . . . 47-48

People v. Woody, 394 P.2d 813 (Cal. 1964) . . . . . 35, 37

Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989) . . . . . 34-36, 41, 45, 47-49

Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996) . . . . . 39

Rupert v. City of Portland, 605 A.2d 63 (Me. 1992) . . . . . 40

Sherbert v. Verner, 374 U.S. 398 (1963) . . . . . 26

State v. Evans, 796 P.2d 178 (Kan. App. 1990) . . . . . 40

State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) . . . . . 39, 42-43, 46-49

State v. Miller, 549 N.W.2d 235 (Wis. 1996) . . . . . 39, 42-43

State v. Rife, 789 So.2d 288 (Fla. 2001) . . . . . 16-17

State ex rel. Fla. Jai Alai, Inc. v. State Racing Comm'n,
112 So.2d 825 (Fla. 1959) . . . . . 17, 20

State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) . . . . . 40

Swanner v. Anchorage Equal Rights Comm'n,
874 P.2d 274 (Alaska 1994) . . . . . 39

Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) . . . 39

Thomas v. Indiana, 450 U.S. 707 (1981) . . . . . 29-30

Town v. State ex rel. Reno, 377 So.2d 648 (Fla. 1979) . . . . . 35-37, 41

Traylor v. State, 596 So.2d 957 (Fla. 1992) . . . . . 33, 43, 45

Warner v. City of Boca Raton, 2001 WL 1153220 (11th Cir. 2001) . . . . . 1-2, 32

Warner v. City of Boca Raton,
64 F. Supp. 2d 1272 (S.D. Fla. 1999) . . . . . 4-6, 8, 14, 16, 19-25, 27, 32

Wisconsin v. Yoder, 406 U.S. 205 (1972) . . . . . 26

Wons v. Public Health Trust, 500 So.2d 679 (Fla. 3d DCA 1987) . . . . . 36

**Constitutional Provisions**

Federal

U.S. Const. amend. I

(Establishment Clause) . . . . . 31, 37

(Free Exercise Clause) . . . . . 5, 26, 35, 37-38, 42-43, 49

Florida

art. I, §3, Fla. Const. (1968) (Free Exercise Clause) 1, 3, 5, 15, 26, 32-35, 37, 41, 43-46, 49

art. I, §5, Fla. Const. (1885) (Free Exercise Clause) . . . . . 45-46

art. I, §3, Fla. Const. (1868) (Free Exercise Clause) . . . . . 46

art. I, §3, Fla. Const. (1865) (Free Exercise Clause) . . . . . 46

art. I, §3, Fla. Const. (1861) (Free Exercise Clause) . . . . . 46

art. I, §3, Fla. Const. (1838) (Free Exercise Clause) . . . . . 46

Other States

Ala. Const. amend. 622 (Religious Freedom Restoration) . . . . . 40

Minn. Const. art. I, §16 (Free Exercise Clause) . . . . . 46-47

Miss. Const. art. 3, §18 (Free Exercise Clause) . . . . . 46-47

N.Y. Const. art. XXXVIII (1777) (Free Exercise Clause) . . . . . 45-48

Wash. Const. art. I, §11 (Free Exercise Clause) . . . . . 46-47

**Statutes**

Federal

42 U.S.C. §2000bb *et seq.* (1994 & U.S.C.A. Supp. 2001)
(Religious Freedom Restoration Act) . . . . . 26-27, 30, 40

42 U.S.C.A. §2000cc *et seq.* (Supp. 2001)
(Religious Land Use and Institutionalized Persons Act) 27-28, 40

Florida

§30.30(5), Fla. Stat. (2001) . . . . . 17

§39.01(64)(a), Fla. Stat. (2001) . . . . . 18, 21

§39.395, Fla. Stat. (2001) . . . . . 18, 20

§65.081(2), Fla. Stat. (2001) . . . . . 18

§68.084(4), Fla. Stat. (2001) . . . . . 18

§73.071(3)(c), Fla. Stat. (2001) . . . . . 18

§90.204(2), Fla. Stat. (2001) . . . . . 18

§100.361(9), Fla. Stat. (2001) . . . . . 18

§102.031(3)(a)(7), Fla. Stat. (2001) . . . . . 18

§761.01 et seq., Fla. Stat. (2001)
(Florida Religious Freedom Restoration Act)

generally 1-2, 4, 6, 8, 14-16, 18-19, 24-26, 30, 32, 37, 40, 49

§761.02(3), Fla. Stat. (2001) . . . . . 4, 14-16, 27-28

§761.03(1) Fla. Stat. (2001) . . . . . 15, 18-19

Other States (all Religious Freedom Restoration Acts)

Ariz. Rev. Stat. §41-1493.01 *et seq.* (Supp. 2000) . . . . . 27, 40

Conn. Gen. Stat. Ann. §52-571b (Supp. 2001) . . . . . 40

Idaho Code §73-401 *et seq.* (Supp. 2001) . . . . . 27, 40

775 Ill. Comp. Stat. 35/1 *et seq.* (2001) . . . . . 27, 40

N.M. Stat. Ann. §28-22 (Supp. 2000) . . . . . 27, 40

Okla. Stat. §51-251 *et. seq.* (Supp. 2001) . . . . . 27, 40

R.I. Gen. Laws §42-80.1 (1999) . . . . . 40

S.C. Stat. 1-32-10 *et seq.* (Supp. 2000) . . . . . 40

Tex. Civ. Prac. & Rem. Code §110.001 *et seq.* (Supp. 2001) . . . . . 27, 40

**Ordinances**

Rules and Regulations of The Boca Raton Municipal Cemetery and Mausoleum

1982 Version . . . . . 13

1988 Version . . . . . 13

1996 Version . . . . . 13

**Legislative History**

Florida House Committee on Governmental Operations,
Statement on House Bill 3201 (1998) . . . . . 29-30

**Secondary Authority**

Abbott, Walter M., *The Documents of Vatican II* (1966) . . . . . 31

Gordon, James D., III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91 (1991) . . . . . 40

Laycock, Douglas, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1 40

McConnell, Michael W., *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990) . . . . . 40

McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) . . . . . 44

*People v. Phillips*, 1 Western L.J. 109 (1843) . . . . . 47

*Privileged Communications to Clergymen*, 1 Catholic Lawyer 199 (1955) . . . . . 47-48

*Random House Unabridged Dictionary* 662 (1987) . . . . . 24

Sampson, William, *The Catholic question in America: whether a Roman Catholic clergyman be in any case compellable to disclose the secrets of auricular confession / decided at the Court of General Sessions, in the city of New-York* (1813) . . . . . 47

*Webster's Third New International Dictionary Unabridged* (1961, 1981) 43

## STATEMENT OF THE CASE

### 1. The Certified Questions

This case presents questions of Florida law, certified by the United States Court of Appeals for the Eleventh Circuit. The underlying federal case is a suit to enjoin enforcement of certain cemetery regulations of the City of Boca Raton. Pursuant to these regulations, the city has threatened to remove crosses, statues of saints, Stars of David, and religious grave coverings maintained by Christian and Jewish families who have buried loved ones in the cemetery.

Plaintiffs have presented two claims under Florida law: that enforcement of the city's regulations as now interpreted would violate first the Florida Religious Freedom Restoration Act, §761.01 *et seq.*, Fla. Stat. (2001) (Florida RFRA), and second, the Florida Free Exercise Clause, Art. I, §3, Fla. Const. The Eleventh Circuit has certified a threshold question of statutory interpretation under Florida RFRA, and it has invited comment on the Florida Constitution.

The questions as certified by the Eleventh Circuit (to which we shall suggest some modifications) are as follows:

> 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 con-sidered 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?*

2001 WL 1153220 at *4 (emphasis added).

Plaintiffs respectfully suggest that the essence of the two certified questions is the italicized portion of Question 2. State-law questions have been certified because only this Court is authoritative on state law. It would neither be authori-tative, nor necessary to either Court's decision, for this Court to identify what religiously motivated conduct is protected by federal law. It is not necessary to define state law by comparison to that standard; we believe that this Court should define state law directly. In any event, the differences between Florida RFRA and federal free exercise law do not lie in the definition of religious exercise, but in the range of governmental actions against which religious exercise is protected.

The Eleventh Circuit did not formally certify a question of state constitutional law. But it said that its phrasing of the questions is not meant to restrict this Court's "response to the questions or its analysis of the state law questions, *including state constitutional questions,* posed by this case. " *Id.* (emphasis added). We would

formulate the state constitutional questions as follows:

What are the standards of judicial review under the Florida Free Exercise Clause? In particular:

1) What religious practices are protected? Is it conduct motivated by sincere religious belief, or should the proposed four-part test be read into the Constitution?

2) What are the forms of state action against which religious exercise is protected? Does the Free Exercise Clause apply to any law, or only to laws that are not "neutral and generally applicable"?

3) What are the possible justifications for laws that prohibit or penalize the free exercise of religion? Is it any compelling governmental interest, or only compelling interests in "public morals, peace, and safety," or any interest in "public morals, peace, and safety," without regard to its importance?

**2. Procedural History**

Plaintiffs filed this case in a Florida state court, and the city removed to federal court. R-1.[1] The case was certified as a class action, R-37, and tried to the court. The federal district court entered judgment for the city. R-97. That court found that

[1] The record is cited R-Document-Page, except that regulations are cited to section number instead of page number, and exhibits are cited by exhibit number. Thus, R-1-3 would mean Record, Document 1, Page 3.

plaintiffs placed religious symbols on graves in observance of sincerely held religious beliefs, 64 F. Supp. 2d 1272, 1277 (S.D. Fla. 1999) (R-96-6), but it held that this religiously motivated conduct is not religious exercise within the meaning of Florida RFRA, *id*. at 1286-87 (R-96 at 29-30).

The principal legal issue, at trial and on appeal, was the interpretation of the Florida RFRA, and in particular, of that Act's definition of "exercise of religion":

> "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.

§761.02(3), Fla. Stat. (2001). The federal district court held that "substantially motivated" is "too broad," and that the whether-or-not clause adds to the definition the four-part test set out in the second certified question. 64 F. Supp. 2d at 1281 (R-96-16). This test was proposed by the city's expert witness, and adopted by the court. Plaintiffs were required to prove not only that their conduct was substantially motivated by religious belief--that is undisputed--but also that their conduct has been unambiguously affirmed in a sacred text or classic statements of the faith, or that it has been universally practiced by adherents of the faith through time or space. The court held that plaintiffs had not satisfied this four-part test.

Plaintiffs appealed. The primary question briefed was the meaning of Florida RFRA's definition of "exercise of religion," and the evidence tending to show that the

competing interpretations of that definition were or were not satisfied.

The federal district court also held that the regulations do not violate the Florida Free Exercise Clause. It reached this conclusion by first holding that the regulations do not violate the federal Free Exercise Clause, 64 F. Supp. 2d at 1288 (R-96-33); it then summarily rejected all Florida constitutional claims on the ground that Florida constitutional law has "generally" followed federal constitutional law. *Id*. at 1295 (R-96-48). The court rejected the federal claim on the ground that, under the federal law of free exercise, even the most severe restrictions on religious exercise require no justification if they are imposed by a neutral and generally applicable law. *Employment Div. v. Smith*, 494 U.S. 872 (1990). 64 F. Supp. 2d at 1288 (R-96-33). As noted, the court then assumed that this Court would adopt the same narrow interpretation of the Florida Constitution.

## 3. Statement of Facts

### A. Plaintiffs' Exercise of Religion

At various times from 1984 to 1996, plaintiffs purchased plots in the city's cemetery and buried one or more close relatives there. *Id*. at 1277 (R-96-6). On the graves, each family placed religious symbols that rise above the level of the ground or grave coverings that extend beyond the head of the plot. *Id*.

It is undisputed that plaintiffs placed these religious symbols and grave coverings

in observance of sincerely held religious beliefs. *Id.* The Jewish plaintiffs covered the graves "in observance of a Jewish tradition that grave sites are to be protected and never walked upon." *Id.* The Catholic plaintiffs placed statues of Jesus or the saints, and for a deceased infant, a cross and a statue of two children playing. *Id.* (R-96-7). Plaintiff Karram, a Protestant of Greek Orthodox extraction, placed a standing cross. *Id.* (R-96 at 6-7). Some of the Christian plaintiffs covered the graves, believing that graves are sacred and not to be walked on. *Id.* (R-96-7). These findings are amply supported; plaintiffs testified to the religious significance of the symbols they had placed, and to the intensity of their religious experiences. Plaintiffs and their experts testified to the origins of these beliefs and practices in their respective religious traditions, and the city's experts confirmed much of that testimony. This factual testimony is carefully reviewed in the briefs in the Eleventh Circuit. Br. of Appellants 32-49; Reply Br. 9-16.

The city has not disputed that plaintiffs' conduct is substantially motivated by religious belief. Nor has the city disputed that plaintiffs' conduct grows out of their respective religious traditions. Rather, the city has argued that these religious beliefs are personal to the plaintiffs, not required by Christianity or Judaism and not universal among Christians or Jews, and that such "personal" religious beliefs are not protected. This disagreement frames the question certified by the Eleventh Circuit: is it enough

to trigger inquiry under Florida's RFRA that plaintiffs' conduct was substantially motivated by religious belief, or must their conduct also satisfy the four-part test proposed by the city's expert witness?

**B. The Theological Experts**

The city's argument forced each side to offer expert testimony on religious burial practices; half the trial was devoted to competing interpretations of Christian and Jewish teaching and practice on human burial from ancient times to the present. Plaintiffs' experts testified that plaintiffs were following longstanding religious traditions of their respective faiths. Pl. Ex. 38, 44, 46. The city's experts reluctantly conceded that most of these traditions exist. But they said that these traditions were not sufficiently required, essential, or integral to deserve legal protection. Def. Ex. 51, 52.

All the experts agreed that religious practice and tradition is diverse and that it exists at multiple levels. These levels were variously referred to as high tradition and low tradition, high tradition and little tradition, law and custom, center and periphery, requirements and preferences. Thus the city's expert Dr. Nathan Katz confined himself to identifying "the requirements" of Catholicism, Protestantism, Judaism, and Islam. Def. Ex. 52 at 1. He testified that the minimum requirements of each faith could be satisfied by grave markers flush with the ground. *Id*. at 1-6. Dr. Katz defended his focus on "requirements" by elaborating the distinction between "high traditions" and

"little traditions":

> By "high tradition" is meant the textual-legal side of a religion, usually male dominated and church or synagogue-centered. By "little tradition" is meant the folkways and home-centered observances, usually orally rather than textually transmitted, often the domain of women in a traditional culture.
>
> Another way of making this distinction would be by using the concepts of "by law" and "by custom."

*Id.* at 6-7. In Dr. Katz's view, the law should protect only the male-dominated high tradition, the "textual-legal side of a religion." *See id.*

The city's other expert was Dr. Daniel Pals. He testified that Florida's RFRA protects only those religious practices that are "essential and integral" to a religious tradition. Def. Ex. 51 at 1-5. He then proposed his four-part test for identifying which practices are essential and integral. *Id.* at 5. His factual testimony addressed his four-part test. He testified that "vertical" grave monuments are not required by Christian or Jewish scripture or classic texts, that neither Christians nor Jews have consistently erected such monuments throughout history, and that neither Christians nor Jews consistently erect such monuments throughout the world today. *Id.* at 5-18. The federal district court adopted Dr. Pals' four-part test verbatim, 64 F. Supp. 2d at 1285 (R-96 at 24-25), and adopted the conclusions of his factual testimony, *id.* at 1286-87 (R-96 at 27-30).

Asked about Dr. Katz's distinction between high and low religious traditions, Dr.

Pals said he preferred the language of "center and periphery," but that he did not disagree with anyone who expressed the point in terms of high and low tradition. R-108-768. He conceded that religious scholars generally view the high and low religious traditions as equally important:

> Q. (by Mr. Green) Is it not the case that in American religious studies popular religious practice is regarded as having the same value and importance as high church based religion?
> A. Yes. If you are asking does it have the same value, yes.

R-108-775.

Plaintiffs' witnesses confirmed that the "low" religious tradition is an important or even dominant part of religious practice. Dr. Winifred Fallers Sullivan, plaintiffs' expert on American religious practice, said "religion scholars would largely agree" that:

> [A]uthentic religious practices include both those founded in textually based doctrine taught by institutionalized hierarchies as well as in folk traditions and customs passed down through families and communities.

Pl. Ex. 46 at 1. She said that the grave-marking practices here "may all be considered important religious practices in the context of a particular individual's religious life." *Id.* at 3. "This is what American religion scholars would under-stand as right at the center of American religious practice." R-108 at 820-21.

Rabbi Michael Broyde, plaintiffs' expert on Jewish practice, testified that both law and custom are essential to Judaism, and that burial practices have been largely left

to custom. Pl. Ex. 38 at 1.

> To examine Judaism in a way that is limited to its legal traditions and only protect those faith-grounded rituals and rites that the Jewish faith labels "law", rather than "tradition", would be a vast misunderstanding of the Jewish faith, and improper.

*Id.* He testified to a Jewish custom of covering graves with one or more stones, *id.* at 3-4, and to Jewish law that prohibits the removal or reduction in size of a tombstone once placed, *id.* at 5.

Dr. John McGuckin, plaintiffs' expert on Christian practice, repeatedly rejected the distinction between high and low tradition as "inappropriate," "invalid," and one that "verges on the offensive". R-107 at 614-15, 622, 628.

> I tend to think there is only popular religious practice and, therefore--although these, for example, these statues are not high art or intellectual theological statements, I think they are very profound representations of Christian practice, and to deny it touches, I think, rights of religious expression.

R-107-628.

Dr. McGuckin placed plaintiffs' crosses and statues in a long Christian tradition of marking graves with standing crosses and standing tombstones. Pl. Ex. 44 at 4-5. He explained the custom of covering graves or marking the edges of graves as derived from the Christian view that a grave is a sacred space and should not be walked on. He viewed grave coverings as a religious response to the fear that in an increasingly

secularized culture, the historic Christian respect for the grave would be violated. *Id.* at 7; R-107-630.

There was one other striking point of agreement between the experts--that the city's cemetery regulations substitute a highly secularized symbolism of death for the traditional Christian symbolism of death. Dr. McGuckin stated:

> The rules and regulations of Boca Raton cemetery, forbidding anything but a flat memorial stone, seem to me to represent a distinctly secularised and hyper-individualised consciousness that appears to presume a view of death, and the dead body, as spent commodity, and of the grave as a place where only temporary remembrance of immediate family members needs to be preserved.

Pl. Ex. 44 at 2. In contrast, the Christian tradition treats "the dead body as a sacred thing," and "the gravesite as a hallowed place." *Id.* at 3. The grave becomes "a place of prayer to teach the living how to prepare for their own deaths, as well as a place where they can pray for their dead." *Id.* at 4. "The Resurrection of the Body is a fundamental tenet of Christianity," *id.*, and the buried body therefore "rests in anticipation of the resurrection." *Id.* at 5.

Dr. Katz, the city's expert, testified that the city's rules symbolically negate these Christian traditions. Describing the symbolic significance of the shift from "traditional monuments" to "the in-ground plaque or marker," he said:

> [T]hese markers represent a changing attitude among Americans towards death. The new ideal is "reconciliation with the natural environment."

> Traditional monuments, on the other hand, stressed the individuality of the deceased and tended to "elicit the very sense of the continued presence of the dead that the landscaped cemetery *by design is meant to suppress*." As death is relegated to the further reaches of American consciousness, the individuality of monuments is being discouraged.

Def. Ex. 52 at 7-8 (emphasis added) (citations omitted). In Dr. McGuckin's account of the Christian view, the dead are present and awaiting the resurrection; in Dr. Katz's account of the city's cemetery rules, expression of that view is to be deliberately suppressed. The dead are not to rise again, but are to be "reconciled" with the natural environment. In the Christian view, the grave is a focal point for prayer, and for reflection on one's own inevitable death; in Dr. Katz's account of the city's cemetery rules, death is to be put out of public view.

Both Christian and Jewish plaintiffs gave moving testimony of their personal experience of their religious views of burial. These plaintiffs pray at the grave sites, speak to their deceased loved ones at the grave sites, teach their children about the resurrection at the grave sites. Even the city's experts acknowledged that these religious symbols are religiously important *to the plaintiffs*. This testimony is reviewed in Br. of Appellants 50-53.

### C. The Challenged Regulations

Considerable time at trial and on appeal was devoted to the question of retroactive enforcement of the city's regulations. This goes principally to the severity

of the burden on plaintiffs' religious practices, not to interpreting the definition of religious exercise. It can therefore be briefly summarized.

The provisions principally at issue are Articles IX(2) and XIV(2) of the cemetery regulations, and their supporting provisions and definitions. The 1982 and 1988 versions of these regulations are R-78; the 1996 version is R-69. The changes over time are closely analyzed in Br. of Appellants 5-8. These regulations depend on technical and changing definitions, of distinctions among "objects," "ornaments," "articles," "markers," "memorials," and "monuments." The 1996 version prohibits any article, R-69-§IX(2), including crosses and statues, *id.* §I(1), with exceptions for approved flower vases, *id.* §IX(1), and for any small articles for a week at a time around any of fourteen holidays, *id.* §IX(2). The rules also prohibit any monument or memorial that rises above the ground, *id.* §XIV(2), and any flat marker that extends beyond the head of a plot, *see id.* §I(13).

Plaintiffs argue that important parts of these rules, including the prohibition on crosses and statues, were introduced by substantive amendment in 1996. Br. of Appellants 5-8; Reply Br. 17-21. The city argues that the repeated amendments had little effect and that the rules always meant substantially what they now say. Br. of Appellees 6-10. It is undisputed that the city did not enforce its current interpretation of the rules for many years. In 1998, the city acknowledged that "For some years the

City has not enforced its regulations." R-107-518. Evidence of general non-enforcement is reviewed in Br. of Appellants 9-12; Reply Br. 17.

## SUMMARY OF ARGUMENT

Florida's RFRA defines the religious exercise that it protects:

> "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.

§761.02(3), Fla. Stat. (2001). In the teeth of this definition, the federal district court held that "substantially motivated" is too broad, and that the whether-or-not clause adds a second element to the definition. 64 F. Supp. 2d at 1281 (R-96-16). That second element is the proposed four-part test, under which plaintiffs must show that their religious practice is specifically directed by an authoritative text or universally practiced in Christianity or Judaism. This test paraphrases the compulsory-or-central rule that the statute expressly negates.

The statutory text is the primary source of statutory meaning in Florida. Florida RFRA's affirmative definition of protected religious exercise--conduct "substantially motivated by a religious belief"--is complete and unambiguous. The whether-or-not clause is a proviso, warning courts off a possible misinterpretation. The plain meaning of the definition is supported by the legislative history, by the mischief to be remedied, by the legal background of the statute, and by strong constitutional and policy

considerations. The certified question asks whether the proper interpretation is to follow the affirmative definition, or to adopt a test remarkably similar to the misinterpretation negated in the whether-or-not clause.

Florida's Free Exercise Clause, Art. I, §3, Fla. Const., also requires that restrictions on religious exercise serve a compelling interest by the least restrictive means. *Matter of Dubreuil*, 629 So.2d 819, 822 (Fla. 1993). This protection should not be narrowed to only some exercises of religion, or to only some forms of state action. This Court should not follow recent decisions shrinking the federal right to free exercise, so that it protects only against laws that are not "neutral" or not "generally applicable." Those federal decisions have no basis in Florida law.

## ARGUMENT

### I. FLORIDA RFRA PROTECTS CONDUCT "SUBSTANTIALLY MOTIVATED BY A RELIGIOUS BELIEF."

#### A. The Statutory Text Unambiguously Protects Conduct "Substantially Motivated by a Religious Belief."

Florida RFRA provides that "government shall not substantially burden a person's exercise of religion" unless "application of the burden to the person" serves a compelling interest by the least restrictive means. §761.03(1), Fla. Stat. (2001). Florida RFRA expressly defines the protected exercise of religion:

*"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.

§761.02(3), Fla. Stat. (2001) (emphasis added).

The italicized portion is a complete definition that answers the certified question. The whether-or-not clause negates a possible alternative definition. Florida RFRA applies the compelling interest test to government action that substantially burdens conduct that is "substantially motivated by a religious belief." Nothing like the alternative four-part test appears in the statutory definition; indeed, that test requires inquiries that the whether-or-not clause prohibits.

This clear statutory definition is binding on the courts. This Court has repeatedly emphasized the primacy of statutory text. "Legislative intent must be derived primarily from the words expressed in the statute." *Fla. Dept. of Revenue v. Fla. Mun. Power Agency*, 789 So.2d 320, 323 (Fla. 2001). "Legislative intent is determined primarily from the language of a statute." *State v. Rife*, 789 So.2d 288, 292 (Fla. 2001). "The primary source for determining legislative intent is the language chosen by the Legislature to express its intent." *Donato v. Am. Tel. & Tel. Co.*, 767 So.2d 1146, 1150 (Fla. 2000).

The federal district court rejected the statutory definition as "overly broad." 64 F. Supp. 2d at 1281 (R-96-16). With respect, the federal district court disagreed with

the statute and refused to enforce it. But no court has that power. "The courts of this state are `without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.'" *Rife*, 789 So.2d at 292, quoting earlier cases. Nor does the whether-or-not clause change the meaning of the affirmative definition. The whether-or-not clause is a proviso; the purpose of a proviso "is either to except something from the enacting clause or to qualify or restrain its generality, *or to exclude some possible ground of misinterpretation.*" *State ex rel. Fla. Jai Alai, Inc. v. State Racing Comm'n*, 112 So.2d 825, 828 (Fla. 1959) (emphasis added). A proviso in the form of a whether-or-not clause always performs this last function--"to exclude some possible ground of misinterpretation." Conduct substantially motivated by religious belief is protected "whether or not" it is compulsory or central to Christianity or Judaism. If it is compulsory or central it is protected, and if it is not compulsory and not central, it is still protected.

"Whether-or-not" provisos are common in statutory drafting, and their universal function is to negate a possible statutory element--to exclude from consideration alleged facts that parties or judges might think are relevant, but which the legislature wishes to make irrelevant. The phrase appears hundreds of times in Florida statutes, in two recurring uses. When a fact matters, the phrase appears in the description of

what is to be adjudicated: courts and agencies are directed to find or state "whether or not" the fact is true.[2] When a fact does not matter, the phrase appears in a proviso; the statute is stated to control, "whether or not" the fact is true. Listing all the examples would fill this brief and leave no pages for argument. Florida law authorizes medical providers in child abuse cases to detain a child in specified circumstances, "whether or not additional medical treatment is required." §39.395, Fla. Stat. (2001). The same statute defines "sexual abuse of a child" to include "any penetration, however slight," "whether or not there is the emission of semen." §39.01(64)(a), Fla. Stat. (2001). The obvious point of such clauses is that the medical provider need not prove that additional medical treatment is required, and the state need not prove the emission of semen. A whether-or-not proviso is used to make something irrelevant.[3]

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[2] *See, e.g.*, §30.30(5), Fla. Stat. (2001), directing the court to "determine whether or not such property is subject to levy under the writ."

[3] Additional examples include §65.081(2), Fla. Stat. (2001) (action to quiet title may be maintained "whether or not plaintiff is in possession"); §68.084(4), Fla. Stat. (2001) ("Whether or not the department proceeds with the action," court may stay discovery); §73.071(3)(c), Fla. Stat. (2001) (where taking of property requires relocation of mobile home, compensation includes cost of relocation, "whether or not the owner of the mobile home is an owner or lessee of the property involved"); §90.204(2), Fla. Stat. (2001) (court may take judicial notice of any "reliable information, whether or not furnished by a party"); §100.361(9), Fla. Stat. (2001) ("this act shall apply to cities and charter counties whether or not they have adopted recall provisions"); §102.031(3)(a)(7), Fla. Stat. (2001) ("A person, whether or not a registered voter," is permitted in polling place for certain purposes).

The plain meaning of the definition is textually reinforced by the main substantive provision of Florida RFRA. It is "*a person's* exercise of religion" that presumptively may not be substantially burdened, and "*a person's* exercise of religion" that may be burdened if "application of the burden *to the person*" serves a compelling interest. §761.03(1), Fla. Stat. (2001). The statutory focus is on each individual and his or her exercise of religion--in the substantive statement of what is protected, in the substantive statement of the government's defense, and in the definition of religious exercise. There is simply nothing in statutory text to support the four-part test proposed in the certified question.

**B. The Proposed Four-Part Test Is Inconsistent with Statutory Text.**

This Court is hearing this case to answer certified questions, not to directly review the judgment of the federal district court. But the principal certified question asks whether Florida RFRA requires claimants to satisfy the four-part test applied by the federal district court and proposed by the city's expert witness. It is essential to review that court's opinion, and that witness's testimony, to understand what the proposed four-part test is intended to mean and how the federal courts would interpret an answer endorsing that test.

The federal district court turned the whether-or-not clause entirely on its head. This transformation proceeded in two remarkable steps. First, the court implausibly

said that the whether-or-not clause adds a second element to the definition of religious exercise.

> [T]he fact that the Florida RFRA explicitly states that a practice need not be "compulsory or central to a larger system of religious beliefs" in order to be subject to the protection of the statute, suggests that the practice must have some basis in a larger system of religious beliefs.

64 F. Supp. 2d at 1282 (R-96-19). Otherwise, the whether-or-not clause would be "mere surplusage and of no effect." *Id.* at 1283 (R-96-19).

This reasoning is fallacious. Whether-or-not provisos have the well-recognized purpose "to exclude some possible ground of misinterpretation." *State ex rel. Fla. Jai Alai, Inc. v. State Racing Comm'n*, 112 So.2d 825, 828 (Fla. 1959). The federal district court had already identified the need for that function in this statute; the point of the whether-or-not clause was "to correct what appears to have been a manifest error in the federal courts' interpretation of the federal [RFRA] statute." 64 F. Supp. 2d at 1283 (R-96-17). If the whether-or-not clause achieves that correction, it is not "mere surplusage"; it has had the important effect of negating a possible statutory element that might have been erroneously implied.

By the district court's reasoning, the power to detain a possibly abused child "whether or not additional medical treatment is required," §39.395, Fla. Stat. (2001), means that medical providers can detain the child only when there is "some basis" for

further medical treatment. It would only be where there is some basis for medical treatment that there would be any meaning to the qualification that medical treatment is not required. *Compare* R-96-20 ("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.") If the need for further medical treatment is completely irrelevant, then under the district court's reasoning, to say that it is irrelevant is "mere surplusage." Similarly, the statute defining sexual abuse without regard to the emission of semen, §39.01(64)(a), Fla. Stat. (2001), would require the state to prove that there was nearly emission, or partial emission. This is absurd. Clauses such as these do not mean that medical treatment or emission must have something to do with it or they would not have been mentioned. Rather, their very purpose is to emphasize that medical treatment and emission have nothing to do with it.

Similarly here, the express statement that plaintiffs' religious practice need not be compulsory does not imply that it must be nearly compulsory, or strongly recommended, or encouraged by an authoritative text, or universal or nearly so. The express statement that their religious practice need not be central to a larger system of religious belief does not imply that it must be nearly central, or somewhat central, or at the center.

Instead, plaintiffs must show that religious belief substantially motivates their conduct. How that belief relates to a larger tradition may cast light on whether the belief is really religious. Certainly the belief must be sincere, and it must be religious as opposed to political, economic, or based in secular ideology. But the proposed four-part test seeks to distinguish personal *religious* beliefs from a high-tradition religious beliefs, denying protection to the former. This is in defiance of the statute, which protects plaintiffs if their motivating belief is religious.

The federal district court's requirement that plaintiffs' conduct "have *some basis* in a larger system of religious beliefs," 64 F. Supp. 2d at 1283 (R-96-20), is plainly satisfied in this case and in most cases.[4] Elsewhere in its opinion, the district court said that a plaintiff's practice is protected only if it "reflects some tenet, practice or custom of a larger system of religious beliefs." *Id.* (R-96-21). This is still further removed from the statutory text, but this standard too is easily met in this case. The disputed religious symbols all reflect practices and customs of plaintiffs' respective faith traditions, but this was not enough. The city said it is not enough that plaintiffs

[4] "Some basis in a larger system of religious beliefs" will be the most common means of proving the substantial religious motivation that the statute actually requires. This common means of proof should not be elevated into a separate statutory requirement; to do that artificially inflates its importance and may invite the battle of theological experts that the city initiated in this case.

conduct "grows out of their respective religious traditions," or that the statues "are archetypical of a Catholic religious piety." Appellees Answer Br. 32. The four-part test is intended to exclude such claims, and to require something far more restrictive.

The federal district court's second step was to address its question about "practice or custom" indirectly, through Dr. Pals' four-part test. The four-part test created yet another standard--very different from the statutory standard of substantial motivation, and also very different from "some basis in" or a "practice or custom of" a larger system of religious beliefs.

Applying Dr. Pals' test, the court asked whether plaintiffs' religious practice:

1) is asserted or implied in relatively unambiguous terms by an authoritative sacred text;
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.

64 F. Supp. 2d at 1285 (R-96 at 24-25); Def. Ex. 51 at 5. The federal district court said it would be enough if one of these four standards were satisfied. 64 F. Supp. 2d at 1285 (R-96-25). The court then adopted Dr. Pals' testimony that none of the four standards was satisfied. *Id.* at 1286-87 (R-96 at 27-30).

The first two elements of this test protect only those religious practices that are required or directed by authoritative texts in a religion's high tradition. The third and

fourth elements protect only those religious practices that are universal, or nearly so, through the entire history of the religion or the entire world today.

Dr. Pals and the district court ensured that the tests of universality in time or space can never be satisfied. They lumped together all branches of Christianity as a single faith tradition, *id*. at 1286 (R-96 at 28-29), and all branches of Judaism as another single faith tradition, *id*. (R-96 at 27-28). Yet Dr. Pals testified that these religions "are notoriously large and complicated entities, which change through history and are known at given moments to exhibit remarkable diversity." Def. Ex. 51 at 5. Plaintiffs' expert Dr. Sullivan agreed. Pl. Ex. 46 at 2. The universality elements of the four-part test are thus illusory; the test reduces to a search for a mandate or directive in an authoritative religious text--the very question that Florida's legislature told courts not to ask.

Dr. Pals unabashedly offered his test "as a standard for interpreting Florida's Religious Freedom Restoration Act." R-108-754. His "guiding principle" was "the degree that a given practice or custom is *integral and essential* to a tradition." *Id.* (emphasis added). So for "compulsory or central," Dr. Pals substituted the near synonyms "essential and integral." "Essential" means "absolutely necessary; indispensable." *Random House Unabridged Dictionary* 662 (1987).

Dr. Pals repeatedly invoked a third term that even more closely negates the

statutory text. He described religious practices as arranged in a circle, with protected practices near the center and unprotected practices at the periphery. R-108 at 739-40. "And the things that are in the center of that map seem to me the things that are essential and integral." R-108-745; *see also* R-108-768. So the statute says a practice need not be compulsory, but Dr. Pals said it has to be essential; the statute says it need not be central, but Dr. Pals said it has to be integral and at the center. Dr. Pals announced his four-part test as a means to implement these standards: to "determine what is--and what is not--integral and essential to a religious tradition." Def. Ex. 51 at 5.

The federal district court adopted Dr. Pals' four-part test verbatim, without mentioning the intermediate steps on which the test was based. The judge avoided the language of "essential and integral" and "at the center." He adopted only Dr. Pals' conclusions, but those conclusions cannot be understood apart from the reasoning that produced them. The judge offered no reasons of his own; he simply relied on Dr. Pals. 64 F. Supp. 2d at 1285 (R-96-24). The whole point of Dr. Pals' test is to determine whether religious practices are essential, integral, and at the center. The four-part test that is one option in the certified question 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.

### C. The Substantial Motivation Standard Is Reinforced By All the Secondary Indicators of Statutory Meaning.

#### 1. The Mischief to Be Remedied.

Florida RFRA is one of several state RFRAs enacted in response to important developments in federal law. The United States Supreme Court had long held that when government burdens a person's exercise of religion, government must show that the burden serves a compelling interest by the least restrictive means. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). In 1990, the Court restricted the scope of that protection. *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Smith* holds that burdens imposed by neutral and generally applicable laws require no justification. On its facts, *Smith* held that criminal prohibition of a worship service required no justification.

Congress responded with the federal Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994 and U.S.C.A. Supp. 2001), which requires justification of substantial burdens on religious exercise. But in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court invalidated federal RFRA as applied to states, making clear that each state must decide for itself the extent to which it will protect religious

liberty.[5]

Florida was one of several states to enact RFRAs in response to *Boerne.* These state RFRAs were drafted to avoid misinterpretations that had plagued the federal RFRA. Some lower federal courts had protected only religious practices that were compulsory or in some sense "central." Examples are collected in *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). The district court in this case correctly recognized that this "`compulsory or central' requirement was completely at odds with Congressional intent." 64 F. Supp. 2d at 1282 (R-96-17). To avoid such misinterpretations, Congress amended federal RFRA to negate any requirement of compulsion or centrality. 42 U.S.C.A. §2000bb-2(4), 42 U.S.C.A. 2000cc-5(7)(A) (Supp. 2001). Similarly in the state RFRAs, seven states

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[5] *Boerne* was a holding about federalism: federal RFRA was invalid as applied to the states because regulating the states in this way was not within any of Congress's enumerated powers. As against the states, Congress claimed to be enforcing the federal Free Exercise Clause, and its power was limited to judicial interpretation of that Clause. RFRA remains valid as applied to federal law, because Congress has general power to limit the reach of federal law. *In re Young*, 141 F.3d 854, 859-61 (8th Cir. 1998); *EEOC v. Catholic University*, 83 F.3d 455, 470 (D.C. Cir. 1996). State RFRAs are similarly valid as applied to state and local law, because each legislature has general legislative power within its own state. Power to enact Florida RFRA does not depend on the state or federal Free Exercise Clause; it depends on the legislature's general power to make policy for the state.

expressly protected conduct substantially motivated by religious belief;[6] five of these, including Florida, also expressly negated any requirement of compulsion or centrality.[7]

First Florida provided an affirmative definition: "The exercise of religion means an act or refusal to act that is substantially motivated by religious belief." §761.02(3), Fla. Stat. (2001). Then it reinforced that standard by expressly negating the alternatives that had appeared in the federal cases. A religiously motivated act is within the statute "whether or not the religious exercise is compulsory or central to a larger system of religious belief." §761.02(3). The four-part test would do exactly what the legislature tried to prevent, reading this language not to protect the substantial-motivation standard, but to negate it.

**2. The Derivation from Free Exercise Law.**

The United States Supreme Court has dramatically restricted the range of state action against which religious exercise is protected, thus triggering the recent wave of religious liberty legislation. But that Court has not changed its definition of religious exercise, and Florida's statutory definition of "exercise of religion" is derived from

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[6] N.M. Stat. Ann. §28-22-2(A) (Supp. 2000); Okla. Stat. §51-252(7) (Supp. 2001); *see also* statutes cited in note 7.

[7] Ariz. Rev. Stat. §41-1493(2) (Supp. 2000); §761.02(3), Fla. Stat. (2001); Idaho Code §73-401(2) (Supp. 2001); 775 Ill. Comp. Stat. §35/5 (2001); Tex. Civ. Prac. & Rem. Code §110.001(a)(1) (Supp. 2001).

federal free exercise law. The United States Supreme Court has repeatedly rejected arguments similar to the proposed four-part test.

In *Frazee v. Illinois*, 489 U.S. 829 (1989), Frazee refused to work on Sunday because of his Christian beliefs, but he did not say that he was a member of a church. The Illinois court held that his personal religious belief was not enough unless it "resulted from a tenet, belief or teaching of an established religious body." *Id.* at 831. The Supreme Court unanimously reversed. "Frazee's refusal was based on a sincerely held religious belief." *Id.* at 833. Lack of any directive from a larger religious body did not mean that "his belief, however sincere, must be deemed a purely personal preference rather than a religious belief." *Id.* at 832.

*Frazee* relied on *Thomas v. Indiana*, 450 U.S. 707 (1981). Thomas was a Jehovah's Witness who refused, on religious grounds, to fabricate turrets for military tanks. *Id.* at 710-11. Another member of Thomas's church was willing to fabricate the tank turrets. *Id.* at 711. The Indiana court rejected Thomas's claim as a "personal philosophical choice rather than a religious choice." *Id.* at 714. It relied heavily on the disagreement between the two members of the same church, just as the four-part test here would rely heavily on the fact that not all Christians and Jews mark graves the same way plaintiffs do. But the Supreme Court rejected that argument, noting that "intrafaith differences of that kind are not uncommon," *id.* at 715, and that "it is not

within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Id.* at 716. Thomas had a personal religious belief, and that was enough.[8]

**3. Legislative History.**

The Florida legislature deliberately codified this understanding of religious exercise. The House Committee Report noted that "the United States Supreme Court gave a great degree of deference to a person's subjective assertion of religious deprivation." Florida House Comm. on Governmental Operations, Statement on House Bill 3201 at 1 (1998).[9] The Report quoted *Thomas*: "[The petitioner] drew a line, and it is not for us to say that the line he drew was an unreasonable one." House Report at 3 n.6 (quoting *Thomas*, 450 U.S. at 715). The Report twice noted that critics thought that federal RFRA had given even "greater deference to the subjective claims of individuals," House Report at 1, 8, and that Florida RFRA was "substantially similar," *id.* at 8, or could have "parallel" effect, *id.* at 1. Thus warned, the legislature passed the bill. The Report's focus on the "subjective claims of individuals" is

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[8] These cases provide the answer to the implicit question about federal law in the first certified question. United States Supreme Court cases protect conduct that is substantially motivated by religious belief, without regard to anything like the proposed four-part test.

[9] The Report is available at: <http://www.leg.state.fl.us/data/session/1998/House/bills/analysis/pdf/HB3201S1.GO/pdf>.

precisely what the four-part test is designed to reject, but it is fully consistent with the statutory definition of "religious exercise."

**4. Avoidance of Constitutional Difficulties.**

The federal trial in this case documents another serious objection to the four-part test: It entangles church and state by requiring trials on conflicting claims of theological experts, and it prefers some religious beliefs over others. The four-part test would protect compliance with formal doctrine, the "textual-legal side" of religion, but not the lived religious experience of millions of Floridians. At best it would protect the religious practices of those who closely adhere to some authoritative teaching recognized by courts, yet deny protection to the heart-felt religious practices of Floridians who supplement those teachings. A narrow religious orthodoxy would be established and protected from government interference; religious innovation would be unprotected and subject to prohibition. John Calvin, Martin Luther, and Brigham Young--even Moses, Jesus, and Mohammed--would all be unprotected, because their beliefs and practices were not compulsory or universal in any pre-existing religious tradition. Such discrimination among religious beliefs would violate "the clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The four-part test as applied by the federal district court would interfere with even the most fundamental religious practices, because variations in those practices

would be unprotected. Consider the Christian sacrament of Holy Communion. Some churches use wine; some use grape juice. In the Roman Catholic church, whether lay people receive the wine is a matter of local and individual option, an option rarely exercised before the Second Vatican Council. *See General Principles for the Restoration and Promotion of the Sacred Liturgy* ¶55, in Walter M. Abbott, *The Documents of Vatican II* 156 (1966). Some churches receive Communion weekly or even daily, some only at long intervals. These and other variations in time and space would mean, according to the federal district court, that none of the variations are protected by Florida RFRA. Some generic right to Communion would survive, but any city council in Florida could regulate all the details, confining all Christians to a single form. Compare the court's finding that marking graves with religious symbols is a Christian and Jewish practice, but that "the particular manner in which such markers and religious symbols are displayed" is a "purely personal preference." 64 F. Supp. 2d at 1285 (R-96-25). By the same reasoning, Communion is a Christian practice, but "the particular manner" of receiving Communion may be a "purely personal preference."

The proposed four-part test is terrible policy, and unconstitutional if applied generally. It is inconsistent with the statutory text, the background of the statute, and the legislative history. This Court should answer that the statute means what it says:

that the "exercise of religion" protected by Florida RFRA is conduct substantially motivated by religious belief.

## II. THE FLORIDA FREE EXERCISE CLAUSE REQUIRES THE STATE TO JUSTIFY SUBSTANTIAL BURDENS ON RELIGIOUS EXERCISE.

Plaintiffs claim that the city's cemetery regulations also violate the Florida Free Exercise Clause, Art. I, §3, Fla. Const. It is this claim that presents the "state constitutional questions, posed by this case," on which the Eleventh Circuit invited comment. 2001 WL 1153220 at *4.

This Court has vigorously asserted the primacy of state constitutional law. *Traylor v. State*, 596 So.2d 957, 961-63 (Fla. 1992). Noting prudential concerns that constrain interpretations of federal constitutional rights, this Court viewed state bills of rights as "express[ing] the ultimate breadth of the common yearnings for freedom of each insular state population." *Id.* at 961. The Court therefore announced general principles of state constitutional interpretation:

> Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

*Id.* at 962-63.

The Court has applied this approach to the Florida Free Exercise Clause, which

provides as follows:

> 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.

Art. I, §3, Fla. Const. This Clause presents three basic interpretive questions: What religious practices are protected? What are the forms of state action against which religious exercise is protected? What are the possible justifications for laws that prohibit or penalize the free exercise of religion?

Each of these questions can be answered in a way that largely negates constitutional protections. If the Free Exercise Clause protects too narrow a conception of religious exercise, or it protects against too narrow a range of state action, or if it can be overridden by too broad a range of state interests, then most of the diverse religious practices of Florida's people will be subject to the whims of local political majorities. Instead, each of these questions must be answered under *Traylor*'s primary interpretive principle--construing "each provision freely in order to achieve the primary goal of individual freedom and autonomy." 596 So.2d at 963. Such answers would be consistent with this Court's cases interpreting the Florida Free Exercise Clause. Before considering each of the three questions in turn, it will be helpful to summarize those cases.

In *Matter of Dubreuil*, 629 So.2d 819 (Fla. 1993), and in *Public Health Trust*

*v. Wons*, 541 So.2d 96 (Fla. 1989), this Court refused to order Jehovah's Witness mothers to accept blood transfusions believed necessary to save their lives. On those difficult facts, the dissenters found a compelling interest and the majority did not, but there was no disagreement on the standard. The majority said the test is whether the state's interest "was compelling enough to override her constitutional rights of privacy and religious freedom, by the least intrusive means available." *Dubreuil*, 629 So.2d at 822. The dissenters expressly agreed. *Id.* at 829 ("compelling interest great enough to override this strong constitutional right") (McDonald, J.); *id.* ("I fully agree") (Overton, J.).

This Court also applied the compelling interest test in *Town v. State ex rel. Reno*, 377 So.2d 648 (Fla. 1979). The Court rejected a claim that the federal right to free exercise protects the distribution of marijuana to anyone who presents himself at a church and asks for it. *Id.* at 651. But the court carefully distinguished *People v. Woody*, 394 P.2d 813 (Cal. 1964), which held that free exercise *does* protect the peyote service of the Native American Church. *Id.* This Court in *Town* endorsed the importance of religious liberty in terms of American history, not expressly tied to either the state or federal guarantee of the right:

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self expression, however unique, of the

individual and the group becomes ever more important.

*Id.* at 651, quoting *Woody*, 394 P.2d at 821. This Court's understanding of religious liberty as set out in *Town* is fully consistent with *Dubreuil* and *Wons.* Especially now that the federal courts have shrunk the scope of federal protection, we believe that *Town* is relevant to interpreting the Florida Constitution.

### A. The Florida Constitution Protects the Religious Practices of Each Individual.

In each of its free exercise cases, this Court's focus was on the religious beliefs of the individual claimant. None of these opinions suggests any requirement that the religious practice be compulsory or central in some broad religious tradition, and none of them describes a trial of theological experts like that conducted by the federal district court in this case. In *Dubreuil* and *Wons*, the Court protected the unique practices of Jehovah's Witnesses without inquiring, as the federal district court did in this case, whether those beliefs were compulsory or universal among all Christians. The Court did not even mention that the belief in refusing blood transfusions is taught in authoritative Jehovah's Witness texts. What mattered was the beliefs of the individual patients:

> Running through all of these decisions, however, is the courts' deeply imbedded belief, rooted in our constitutional traditions, that *an individual* has a fundamental right to be left alone so that he is free to lead his private life *according to his own beliefs* free from unreasonable govern-mental

> interference. Surely nothing, in the last analysis, is more private or more sacred than *one's religion or view of life,* and here the courts, quite properly, have given great deference to *the individual's right* to make decisions vitally affecting his private life *according to his own conscience*. It is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded.

*Wons*, 541 So.2d at 98, quoting *Wons v. Public Health Trust*, 500 So.2d 679, 687 (Fla. 3d DCA 1987) (emphasis added). Similarly in *Dubreuil*, it was "the rights of the *individual*" that were protected both by the compelling interest test and the least restrictive means test. 629 So.2d at 822 (emphasis added). The controlling fact was not that other Jehovah's Witnesses believed a religious teaching against blood transfusions, but that the individual claimants believed it.

Similarly in *Town v. State*, this Court indicated that individual believers get as much protection as religious groups: "the protection of a self expression, *however unique, of the individual and the group* becomes ever more important." 377 So.2d at 651, quoting *People v. Woody*, 394 P.2d at 821 (emphasis added).

There is simply no basis in Florida law to read the proposed four-part test into the Florida Constitution. It is inconsistent with precedent and without support in constitutional text. And for the reasons discussed in connection with Florida RFRA, it would be terrible policy. It would set up civil courts as arbiters of religious orthodoxy; it would prefer demonstrably orthodox religious practice to any kind of

religious innovation; it would authorize government to interfere with any religious practices that vary among believers; and it would violate the Estab-lishment Clause. *See supra* at 30-32. This Court should reject such an inquiry.

### B. The Florida Constitution Protects Against All State Action.

The Florida Constitution provides that there shall be "no law . . . prohibiting or penalizing the free exercise" of religion. Art. I, §3, Fla. Const. By its terms, this protection applies to all law; it is not confined to certain subsets of laws. The federal Free Exercise Clause has been interpreted to apply only to certain subsets of laws, and the city would apparently read that restriction into Florida law as well. It is therefore necessary to review recent changes in federal law, and the legislative and judicial response to those changes.

In 1990, a five-four decision of the United States Supreme Court introduced to federal free exercise analysis a new threshold question--whether a law that burdens religion is neutral and generally applicable. If not, then the burden on religion must be justified by a compelling government interest. But if yes, then government need not justify the burden in any way. *Employment Div. v. Smith*, 494 U.S. 872 (1990). A generally applicable law is valid, however frivolous the government's interest, and however great the interference with religious liberty. For example, if a law against consumption of alcohol by minors is neutral and generally applicable, then the state

can deprive minors of the sacrament of Holy Communion in Catholic, Episcopal, and other churches that use real wine for communion, and a fortiori the state can suppress First Communion, traditionally celebrated at about age seven. A dry county or precinct could entirely exclude the central religious ritual of these churches.

A law is not generally applicable if it applies to religious conduct but not to similar secular conduct, or if it has secular exceptions but not religious exceptions, or if the state permits secular activity that undermines the same interests as the forbidden religious activity.[10] Whether a law is neutral and generally applicable under these standards often requires a difficult and complex inquiry into arguably analogous secular behavior.[11]

This new requirement in federal cases has been rejected by Congress and nearly half the states. Eight state courts have expressly rejected it as an interp-retation of their

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[10] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537, 543 (1993); *see also* cases cited in note 11. For application of that standard to this case, see Br. of Appellants 57-63 (in the Eleventh Circuit); Reply Br. 28-29.

[11] *See Lukumi*, 508 U.S. at 531-46 (comparing challenged ordinances to full range of state and local law on activities affecting animals and to regulation of restaurants and garbage disposal); *see also Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999); *Rader v. Johnston*, 924 F. Supp. 1540, 1546-56 (D. Neb. 1996); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 884-86 (D. Md. 1996).

own constitutions;[12] six other state courts, including Florida, have rendered decisions inconsistent with it.[13] Congress passed first the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994 and U.S.C.A. Supp. 2001), and more recently the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §2000cc *et seq.*

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[12] *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-82 (Alaska 1994) ("substantial threat to public safety, peace or order or where there are competing state interests of the highest order"); *Attorney Gen'l v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994) (state "interest sufficiently compelling to justify" burden on religious exercise); *State v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990) (compelling interest and least restrictive means); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (compelling interest and least restrictive means); *Hunt v. Hunt*, 648 A.2d 843, 852-53 (Vt. 1994) ("Vermont Constitution protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts governmental interference with free exercise"); *Munns v. Martin*, 930 P.2d 318, 321-22 (Wash. 1997) (compelling interest and least restrictive means); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996) (compelling interest and least restrictive alternative); *see also McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998) (compelling interest), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999). The first *McCready* opinion found a compelling interest. The religious claimant sought rehearing on the basis of new authority elsewhere holding that a similar state interest was not compelling. *See id.* at 546 (Cavanagh, J., dissenting) (describing the petition's reliance on *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 714-17 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. en banc 2000), *cert. denied*, 121 S.Ct. 1078 (2001).

[13] *Matter of Dubreuil*, 629 So.2d 819 (Fla. 1993) (ignoring *Smith* and applying pre-*Smith* law); *State v. Evans*, 796 P.2d 178 (Kan. App. 1990) (same); *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979) (pre-*Smith*, expressly interpreting state constitution); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (applying pre-*Smith* law but reserving issue of whether to change in light of *Smith*); *In re Brown*, 478 So.2d 1033, 1037-39 & n.5 (Miss. 1985) (pre-*Smith*, expressly interpreting state constitution); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107, 111 (Tenn. 1975) (same).

(Supp. 2001). Ten state legislatures, including Florida's, passed state Religious Freedom Restoration Acts,[14] and the voters of Alabama rejected *Smith* by constitutional amendment, Ala. Const. amend. 622. The *Smith* opinion has also been subjected to intense scholarly criticism.[15]

The new federal rule has been so widely rejected because it does not serve the American tradition of religious liberty. It does not serve the purposes either of the constitutional guarantee or of the state's occasional need to override the constitutional guarantee, because it disregards the relative importance of each interest. It has no basis in the Florida cases, and this Court should not read this new federal rule into the Florida Constitution.

There is no hint of the new federal rule in this Court's three free exercise cases. Each appears to have involved a generally applicable law, each applied the compelling interest test, and thus each is inconsistent with the new federal rule. In *Dubreuil* and

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[14] Ariz. Rev. Stat. Ann. §41-1493 *et seq.* (Supp. 2000); Conn. Gen. Stat. Ann. §52-571b (Supp. 2001); §761.01 *et seq.*, Fla. Stat. (2001); Idaho Code §73-401 *et seq.* (Supp. 2001); 775 Ill. Comp. Stat. Ann., Act 35 (2001); N.M. Stat. Ann. art. 28-22 (Supp. 2000); Okla. Stat. §51-251 *et seq.* (Supp. 2001); R.I. Gen. Laws ch. 42-80.1 (1999); S.C. Stat. ch. 1-32 (Supp. 2000); Tex. Civ. Prac. & Rem. Code ch. 110 (Supp. 2001).

[15] *See* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990).

*Wons*, the hospital rules did not discriminate against religious motivations, and there is no mention of the rules containing any exceptions. The hospitals' position was that all patients, or at least all patients with dependents, must accept life-saving treatment. These generally applicable rules were struck down under the Florida Free Exercise Clause. Similarly in *Town v. State*, the law against consuming marijuana was generally applicable, yet the Court applied the compelling interest test. 377 So.2d at 650-51.

*Wons* was decided before *Smith*; *Dubreuil* adhered to *Wons* after *Smith*. Unless five Justice of the United States Supreme Court are authorized to amend the Florida Constitution, *Wons* and *Dubreuil* are still the law today. The Florida Constitution requires justification of generally applicable rules, and the federal *Smith* test is no part of Florida law.

Some state supreme courts rejected *Smith* summarily; some gave extensive reasons. Most of those reasons apply in Florida. The Supreme Court of Washington criticized the consequences of the new federal rule:

> The majority's analysis in *Smith* II . . . places free exercise in a subordinate, instead of preferred, position. . . . *Smith* II accepts the fact that its rule places minority religions at a disadvantage. Our court, conversely, has rejected the idea that a political majority may control a minority's right of free exercise through the political process.

*First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992).

The Minnesota court said that the compelling interest test would "strike a balance

under the Minnesota constitution between freedom of conscience and the state's public safety interest." *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990). The Wisconsin court adopted this reasoning as its own. *State v. Miller*, 549 N.W.2d 235, 240 (Wis. 1996). By contrast, the new federal test does not "strike a balance" between constitutional and regulatory interests, because the test of general applicability has little relationship to the weight of either interest.

Several state courts contrasted the wording of their state constitutions with the wording of the federal Free Exercise Clause. The federal clause says only that there shall be no law "prohibiting" the free exercise of religion, which might be read to cover only direct or absolute prohibitions and not mere regulatory burdens. The Minnesota court held that its constitution offers broader protection, because it says the right of conscience shall not be "infringed" or subjected to "interference." *Hershberger*, 462 N.W.2d at 397. The Ohio court similarly relied on textual protection against "interference." *Humphrey v. Lane*, 729 N.E.2d 1039, 1044 (Ohio 2000). The Washington court relied on language that protects against being "disturbed" on account of religion. *First Covenant*, 840 P.2d at 186.

Florida's Free Exercise Clause says that there shall be no law "prohibiting or penalizing the free exercise" of religion. "Penalizing" may not be quite so capacious as "interference" or "disturbed," but like those words, it necessarily negates any

narrow and exclusive interpretation of "prohibiting." Florida courts must "give independent legal import to every phrase and clause contained" in the state Constitution. *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992). "Penalize" can mean to "put at a serious disadvantage," *Webster's Third New International Dictionary Unabridged* 1668 (1961, 1981), which is another way of saying "to substantially burden". As in Minnesota, Wisconsin, and Washington, the language of the state Constitution is broader than the federal language, and this is one more reason to reject the narrow federal scope of constitutional protection.

The Florida language is stronger in another way as well. Consider again the two sentences of the Florida Free Exercise Clause:

> 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.

Art. I, §3, Fla. Const. The second sentence is more fully explored in the next subsection. For now, note the logical relationship between the two sentences. The second sentence limits the right stated in the first sentence. The existence of the second sentence necessarily implies that if it were omitted, religious freedom *would* justify practices inconsistent with public morals, peace, or safety. The implication is that the first sentence exempts religious behavior even from laws that are generally applicable and very important. The second sentence confines that sweeping right to

manageable proportions. If the new federal rule were read into the first sentence, so that free exercise never requires an exemption from generally applicable law, the second sentence would become unnecessary and of little or no effect. The new federal rule is thus inconsistent with the text of the Florida Constitution. This implication of peace and safety and similar provisos is explored in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461-66 (1990).

### C. The Florida Constitution Requires That Burdens on Religious Exercise Be Justified by a Compelling Interest in Public Morals, Peace, or Safety.

Government may justify necessary restrictions on the exercise of religion, and the grounds of justification are stated in the Florida Constitution: "Religious freedom shall not justify practices inconsistent with public morals, peace or safety." This Court has properly required that such an interest be compelling. Individual rights are protected "unless the state has a compelling interest great enough to override this constitutional right." *Matter of Dubreuil,* 629 So.2d 819, 822 (Fla. 1993). Moreover, "the means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." *Id.* This Court has sometimes listed specific state interests, but these "are intended merely as factors to be considered while reaching the difficult decision of when a compelling state

interest may override the basic constitutional rights of privacy and religious freedom." *Public Health Trust v. Wons*, 541 So.2d 96, 97 (Fla. 1989).

This interpretation is supported by Florida precedent and by the constitutional commitment to "the primary goal of individual freedom and autonomy." *Traylor v. State*, 596 So.2d 957, 963 (Fla. 1992). It is further supported by precedent in other states with similar provisos in their free exercise clauses. The public morals, peace, and safety provision of the Florida Free Exercise Clause is derived from the New York Constitution of 1777. This is apparent in the following comparison:

> "Religious freedom shall not justify practices inconsistent with public morals, peace or safety." Art. I, §3, Fla. Const. (1968).
>
> "[B]ut the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the State or society." Art. I, §5, Fla. Const. (1885).
>
> "*Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. Const. art. XXXVIII (1777).

The 1885 Florida language closely tracks the New York proviso. The 1968 Florida Constitution retained the substance of the three specified state interests, but simplified and modernized the language, substituting "public morals" for "licentiousness," and deleting "subversive of" as an arguably weaker alternative to

"inconsistent with."[16]

The same New York proviso also appears in the Minnesota, Mississippi, and Washington constitutions. Minn. Const. art. I, §16; Miss. Const. art. 3, §18; Wash. Const. art. I, §11. Each of those states has also construed this morals-peace-and-safety proviso to require a compelling state interest. *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990); *In re Brown*, 478 So.2d 1033 (Miss. 1985); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992).

> Rather than a blanket denial of a religious exemption whenever public safety is involved, only religious practices found to be *inconsistent* with public safety are denied an exemption. By juxtaposing individual rights of conscience with the interest of the state in public safety, this provision invites the court to balance competing values in a manner that the compelling state interest test . . . ably articulates: once a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.

*Hershberger*, 462 N.W.2d at 398.

This interpretation of the substantially similar Minnesota, Mississippi, and

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[16] The New York language first appeared in Art. I, §3, Fla. Const. (1868), which differed only slightly from the 1885 provision. The part of the clause before the proviso, affirmatively guaranteeing free exercise, also closely tracked the New York language, but this was rephrased in the Florida Constitution of 1968. The Florida Constitutions of 1838, 1861, and 1865 used a different model: "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience."

Washington language is collateral support for this Court's interpretation in *Dubreuil* and *Wons.* But this interpretation has a much older pedigree. Its substance may be traced to the earliest interpretation of the New York proviso from which the Florida, Minnesota, Mississippi, and Washington provisions were derived. *People v. Phillips*, (N.Y. County Ct. of Gen'l Sessions 1813).[17] In that celebrated case, DeWitt Clinton, later governor of New York, held that the New York constitution protected a Catholic priest who refused to testify to what he had learned from the defendant's confession. The state argued that the case was covered by the proviso, that refusing to testify was "inconsistent with the peace and safety of the state." 1 Cath. Law. at 207-08. The court rejected this argument at length. It said the proviso "has reference to something actually, not negatively, injurious. To acts committed, not to acts omitted -- offenses of a deep dye, and of an extensively injurious nature." *Id.* at 208. To read the proviso as subordinating religious exercise to any claim of public peace or safety would "render the liberty of conscience a mere illusion. It would be to destroy the enacting

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[17] The opinion was fully reported in William Sampson, *The Catholic question in America: whether a Roman Catholic clergyman be in any case compellable to disclose the secrets of auricular confession / decided at the Court of General Sessions, in the city of New-York* (1813). Substantial excerpts were reprinted in *People v. Phillips*, 1 Western L.J. 109 (1843). More substantial excerpts were reprinted in *Privileged Communications to Clergymen*, 1 Catholic Lawyer 199 (1955). All three versions are available in the Florida State University library. All citations in text are to the most recent and most convenient of the three printings.

clause of the proviso--and to render the exception broader than the rule." *Id.*

> [U]ntil men under pretence of religion, act counter to the fundamental principles of morality, and endanger the well being of the state, they are to be protected in the free exercise of their religion.

*Id.* at 209. This is the stringent standard of justification now crystallized as the compelling interest test, in the first reported interpretation of the language from which Florida derived its standard for justifying burdens on religious exercise. It is powerful historic evidence in support of this Court's interpretation in *Dubreuil* and *Wons,* that infringements on the free exercise of religion must be justified by a compelling government interest.

The Minnesota court has held that the morals-peace-and-safety proviso is in some ways even stronger than the compelling interest test, because it is narrower:

> Only the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution. Conversely, the free exercise clause of the first amendment has been interpreted to allow varied governmental interests to justify such an imposition.

*Hershberger*, 462 N.W.2d at 397. The Florida language also specifies the set of government interests that may be strong enough to justify burdens on religious liberty. Perhaps on appropriate facts the Court will imply additional compelling interests based on necessity. But the specification of three classes of interests is strong reason to be cautious in implying others, and to insist that any additional reasons for restricting

religious liberty be of indubitable necessity and of the same magnitude as compelling interests in public morals, peace, and safety.[18]

## CONCLUSION

The Court should answer that Florida RFRA protects conduct that is substantially motivated by religious belief, and that the four-part test proposed in the certified question is no part of Florida law. The Court should further answer that the Florida Constitution protects religiously motivated conduct against generally applicable laws, and that burdens on religious exercise must be justified by a compelling interest in public morals, peace, or safety.

[18] The city has never claimed such an interest. Its asserted compelling interests are in convenience in maintenance and gravedigging. The evidence is reviewed in Br. of Appellants 53-54; Reply Br. 22-24.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellants has been mailed to counsel for the city, Beverly Pohl, Bruce Rogow, and Diana G. Frieser, this 13th day of November, 2001.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210.

_____

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