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

———————————

REPLY BRIEF OF PLAINTIFFS AND MOVING PARTIES

Douglas Laycock
727 E. Dean Keeton St.
Austin, TX 78705
512-232-1341
Texas Bar No. 12065300

James K. Green
James K. Green, P.A.
222 Lakeview Ave., Suite 1630
West Palm Beach, FL 33401
561-659-2029
Florida Bar No. 229466

Lynn G. Waxman
Lynn G. Waxman, P.A.
501 South Flagler Drive
Suite 505
West Palm Beach, FL 33401
561-659-2036
Florida Bar No. 795010

Charlotte H. Danciu
Charlotte H. Danciu, P.A.
370 W. Camino Gardens Blvd.
Suite 210
Boca Raton, FL 33432
561-392-5445
Florida Bar No. 307084

Cooperating Attorneys for the

American Civil Liberties Union Foundation of Florida, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Secondary Authorities

ARGUMENT

A religious liberty claim has several independent elements. First, claimants must show that their conduct is religious exercise. Second, they must show that this religious exercise has been substantially burdened. Third, under the federal Free Exercise Clause (but *not* under Florida RFRA), they must show that the burdensome law is not generally applicable. Fourth, government may justify substantial burdens by showing a compelling interest.

These issues are now irretrievably divided between two court systems. Plaintiffs filed this case in state court. The city first removed it to federal court, and then invoked the certification procedure to bring a small part of it back to this Court. Some of the legal issues have been certified to this Court; other legal issues, and all the factual issues, remain in federal court. This procedural posture is awkward for everybody, but plaintiffs have attempted to work within it.

The city and its amici have conflated the distinct elements of religious liberty claims; they have briefed both law and facts, and commingled religious exercise with substantial burden, general applicability, and asserted justifications for the city's rules. The brief of the Florida League of Cities, which the city endorses, City Br. 26 n.6, is

simply a policy argument about why the statute should never have been enacted. Their claim that government rarely interferes with religious exercise is not the legislature's view. In describing a case of a synagogue excluded from a community, they say it is an "extreme notion" even to give the synagogue standing to present its claims. League of Cities Br. at 10. *Perhaps* that synagogue has not been substantially burdened; *perhaps* there is a compelling reason to exclude it. But to say that the synagogue is not an exercise of religion is absurd. The city and its amici simply refuse to credit this act of the legislature. They ask the Court to hold at the threshold that almost nothing is religious exercise.

Law very much like the Florida RFRA is in effect in nearly half the states. Pl. Br. 27, 39-40. It was federal constitutional law from 1963 to 1990, and it is statutory law today with respect to federal laws and agencies. 42 U.S.C. §2000bb *et seq.* (1994 & U.S.C.A. Supp. 2001). The predicted horrible consequences have not materialized. The governor -- the chief executive and administrative officer of Florida, charged with taking care that the laws be faithfully executed, art. IV, §1, Fla. Const. -- rejects the exaggerated fears of the city and its amici, supporting plaintiffs' straightforward interpretation of the statute. Amicus Br. of Jeb Bush.[1]

---

[1] The additional issues now raised by the city were fully briefed in the Eleventh Circuit. On retroactive enactment and enforcement of the cemetery regulations, see Br.

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

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

The city does not deny that the primary source of statutory meaning is the text, or that the statute contains a complete definition: "`Exercise of religion' means an act or refusal to act that is substantially motivated by a religious belief." §761.02(3), Fla. Stat. (2001). The city now says that if the legislature meant substantial religious motivation to be the test, it could have said "*any* act or refusal to act." City Br. 23, 32. That might have added emphasis, but both common sense and the dictionary show that its absence does not help the city. "A" or "an" *means* "any" or "each" when "used with a following restrictive modifier" (e.g., "substantially motivated by a religious belief"). *Webster's Third New Int'l Dictionary Unabridged* 1 (1961, 1981). Certainly the difference between "an" and "any" cannot be the pretext for writing the city's four-part test into the statute.

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

---

of Appellants 5-12, Reply Br. 17-21. On the substantial burden on plaintiffs' religious exercise, see Br. of Appellants 32-49, Reply Br. 9-16. On the city's asserted compelling interests, see Br. of Appellants 53-54, Reply Br. 22-25. We did not address these issues in any detail in our initial brief in this Court, because they were not certified to this Court.

The city claims that "most" of the symbols at issue have "absolutely no religious significance," City Br. 27, and that its four-part test "would protect all but personal preference." *Id.* at 42. Each of these claims is inconsistent with the record and with the judgment the city is defending. The federal judgment authorized the city to remove crosses, Stars of David, and statues of Jesus and the saints from the graves of the dead. It is absurd to say that these items have no religious significance. The city quotes Dr. Pals' testimony on cross-examination, when he claimed that he used "essential" and "integral" only to set up an opposite pole to "tangential" and "marginal." City Br. 40-41. These disclaimers cannot change what the federal district court did with his test or what the city asked it to do. Even long established religious practices have been excluded from the statute.

All five Catholic plaintiffs erected statues. Plaintiffs' expert Dr. McGuckin said that these statues are "archetypal of a Catholic religious piety." R-107-613. Olan Young, the city's employee, said that "the Catholic people are the ones who put those statues up," and "It is of great significance to them and to their religious beliefs." Pl. Ex. 36 at 51-52. The city's expert Dr. Katz agreed that "Catholic markers often portray images of Mary or Christ or local patron saints." Def. Ex. 52 at 7. The city's expert Dr. Pals said that images and statues are "fairly near to the core of the [Catholic] tradition." R-108-743. But putting such a statue on a grave was unprotected in his view, because

putting it there "isn't necessary, it isn't essential." *Id.* at 744. This is a test of religious compulsion. These symbols do indeed "reflect[] some tenet, practice, or custom" of plaintiffs' larger religious traditions. It is only Dr. Pals' far more restrictive test that is unsatisfied.

The city cites testimony that plants and wood chips have no religious significance, City Br. 27, and proceeds as though this case were about plants and wood chips. The real dispute in this part of the case is about covering graves. The city forbids grave coverings of any kind, not just plants and wood chips. And for plaintiffs, covering the grave is the point of religious significance. What the quoted witness said, from her first mention of the topic, is that "we don't walk on the grave site of the deceased. It's out of love and respect and our belief that it would be sacrilegious for us to do that." R-105-20. She consistently said that the items had no religious significance in themselves, but that they were there "to make sure that the grave is protected," *id.* at 27, "so people won't walk over it," *id.* at 30.

Even Dr. Pals said that "clearly there is a tradition among some Jews of covering a grave." R-108-783. Dr. McGuckin and the Christian plaintiffs testified that the grave is a sacred space, and that not walking on the grave is deeply rooted in Catholic and Orthodox traditions. Pl. Ex. 44 at 7; R-107-630 (McGuckin); R-105-20, 101, 206 (plaintiffs). In traditionally religious communities, that belief was generally observed,

and grave coverings were not needed. In an increasingly secular society, in which many people casually walk on graves and city managers are surprised to learn that anyone objects, R-105-69 (Driscoll), covering the grave to prevent people from casually walking on it becomes an important means to protect the traditional religious practice. Pl. Ex. 44 at 7; R-107-630 (McGuckin).

Beyond the detail about individual items, there is this fundamental generalization, confirmed (with different emphasis) by experts from both sides. The city's rules "represent a distinctly secularised . . . view of death," in which the body is "a spent commodity," not "a sacred thing" destined to rise again. Pl. Ex. 44 at 2-3 (McGuckin). Plaintiffs repeatedly testified about their religious sense of the continued presence of the dead; it is that sense that the city's "landscaped cemetery by design is meant to suppress." Def. Ex. 52 at 8 (Katz). The city says that some church-affilated cemeteries use memorial gardens. City Br. 14. But witnesses for both sides agreed that in such cemeteries, there would be a large central cross or other religious symbol standing over all the graves. R-107 at 551-53 (Sloane (city's expert)); *id*. at 635-37 (McGuckin); R-108-778 (Pals).

If the only point of the city's proposed test were to eliminate idiosyncratic personal beliefs with no real religious significance, it would not take the lengthy testimony of a rabbi, a theologian, and three religion professors to apply the test. The

city's experts testified that plaintiffs' religious practices are not required or universal in Judaism or Christianity, and on that basis, these practices were denied protection. If it wishes, the city can argue in federal court that particular items are not protected by the statute as this Court interprets it. But it cannot mislead this Court into believing that this case is about items of marginal religious significance.

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

1. The Mischief to Be Remedied.

The definition of "exercise of religion," in Florida and elsewhere, was a response to hostile interpretations of federal RFRA that denied protection to many religious practices, often on the ground that they were personal to plaintiffs. The city's principal response is that it disagrees with the legislature.

2. The Derivation from Free Exercise Law.

The statutory definition is derived from free exercise law, and especially from *Frazee v. Illinois*, 489 U.S. 829 (1989), and *Thomas v. Indiana*, 450 U.S. 707 (1981). Pl. Br. 28-29. The city claims that these cases did not address "religiously neutral government regulation of conduct." City Br. 39. This is both irrelevant and false. It is irrelevant because the neutrality of regulation goes to the state action at issue, not to the religious exercise at issue.

It is false because the regulations in *Frazee* and *Thomas* were more generally applicable than the regulations here. The regulations there provided (with very narrow exceptions) that employees were ineligible for benefits if they would not satisfy the employer's requirements for the job. The requirements at issue were coming to work when scheduled and doing the work assigned. Those rules did not mention religion, and the great bulk of applications were to the secular behavior of unreliable or insubordinate employees. Whatever the city means by "religiously neutral," the rules in *Frazee* and *Thomas* qualify.

The city gets no help from *Heffron v. ISKCON*, 452 U.S. 640 (1981), City Br. 24. *Heffron* did *not* suggest that the practice at issue there was not the exercise of religion. The Court held that the religious practice was constitutionally protected, but that it was principally speech and that the government's rule was merely a time, place, and manner regulation that left open substantial channels of communication and was justified by a substantial government interest. *Id.* at 647.

3. Legislative History.

The city, and especially its amici, repeat the arguments that were made and rejected in the legislative history. Pl. Br. 32. The city has no response to that legislative history; it should not be heard to reargue what the legislature rejected.

4. Avoidance of Constitutional Difficulties.

The city's interpretation required an elaborate theological trial, culminating in a judicial holding that plaintiffs' sincere religious practices are not really necessary to their respective faiths. The city's only response is to quote the federal court's conclusory denial of the problem. City Br. 38. That court's inquiry was *not* "extremely limited and purely factual;" it was intrusive, scriptural, and theological. *See, e.g.*, 64 F. Supp. 2d at 1285-86 (rejecting Dr. McGuckin's theological opinion as lacking an "objective basis;" *id.* at 1286 (relying on Dr. Pals' "compre-hensive and systematic review" of religious practices); *id.* (relying on Dr. Pals' review of the Torah, Talmud, Bible, and "writings of Christian theologians").

Nearly all religious practices appear in multiple variations; we explained why even Holy Communion would not be protected under the City's test. Pl. Br. 31-32. The city never quite denies the point. The city says a regulation of communion "would not be a neutral law of general applicability." City Br. 37. That response, if true, would mean that there would be protection under the federal Free Exercise Clause; it does not mean that there would be protection under Florida RFRA. And a law prohibiting the consumption of alcohol, or prohibiting the consumption of alcohol by minors, might well be generally applicable. The city also says that such a law is "unimaginable." We hope so. But a generation ago, a city desecrating graves would have been unimaginable.

What the city conspicuously does not say is that if some churches use wine and some use grape juice, and if some individuals receive the wine and some do not, all these variations are protected under Florida RFRA. That concession would fatally undermine its central argument that plaintiffs here are unprotected because some Christians and Jews mark graves differently. Later, in its discussion of the Florida Constitution, the city says Communion would be protected under Florida RFRA because it is a "central religious ritual." City Br. 46. We agreed that some generic right to Communion would be protected. Pl. Br. 32. The city never quite denies that under its test, all variations in form would be unprotected.

Equally protecting all variations of religious practice would *not* violate the Establishment Clause. The Supreme Court has unanimously upheld such exemptions against Establishment Clause attack. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-39 (1987). It affirmatively invited such exemptions in *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). It reaffirmed these principles in *Board of Educ. v. Grumet*, 512 U.S. 687, 705 (1994). The net effect of a regulatory burden plus exemption is neutral; government leaves religion where it found it. Government does not establish religion by leaving it alone. This is why courts rejected Establishment

Clause challenges to the federal RFRA.[2]

II. Substantial Burden and Compelling Interest Are Separate Issues.

A. Substantial Burden.

One way to assess the substantiality of a burden is by the degree of interference. Regulation that permits a religious practice but makes the practice somewhat more difficult might be an insubstantial burden. A reasonable size limit might be an insubstantial burden; "substantially" is inherently a word of degree. But the tiny two-dimensional line drawings that the city permits are not just smaller versions of three-dimensional statues, and do nothing to deter walking on graves; the differences are in kind and not of degree. *See Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997), holding, under federal RFRA, that Wisconsin imposed a substantial burden when it prohibited prisoners from wearing crosses and other religious symbols.

In *Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001), relied on at City Br. 33-35, the court did not dispute that plaintiffs were engaged in religious exercise. It found no substantial burden because the regulation was "at most a restriction of one

---

[2] *In re Young*, 141 F.3d 854, 861-63 (8th Cir. 1998); *EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds*, 521 U.S. 507 (1997).

of a multitude of means" by which plaintiffs could spread the Gospel. The rule was a locational restriction on selling; the location had no religious significance, and ample other locations were available. Here, each grave is a unique location with profound religious significance.

The substantiality of a burden may also be assessed by its impact on the plaintiff. In *Henderson*, the court properly "examined the importance of selling t-shirts on the Mall *to the plaintiffs*," 265 F.3d at 1074 (emphasis added), not to Christianity's high tradition. Plaintiffs here explained the great importance of these symbols and grave coverings in their religious practice. See pages cited *supra* note 1. Even the city's experts agreed. Dr. Katz said that "Very often, sincerely and passionately held religious beliefs turn out to be held only on an individual basis, with no source in the religious high tradition itself." Def. Ex. 52 at 7; *accord*, R-106-438. Dr. Pals said the Jewish tradition of covering graves "would be strong in the sense that for those people who do it they find it to be very important." R-108-783. He professed sensitivity to "the emotional wrenching" caused by removing religious symbols from graves. *Id.* at 782. The burden on *plaintiffs*' religious exercise is substantial; the city argues only that there would be no burden on *other* Christians and Jews, with beliefs rather different from those of plaintiffs.

Retroactive enforcement of the city's regulations greatly aggravates the burden.

Here, the graves had been selected and the dead had been buried before the city announced or enforced its rules, and before the rules mostly at issue were even enacted. There was no prohibition on grave coverings until 1988, and no prohibition on statues and crosses until 1996. See pages cited *supra* note 1.

B. Compelling Interest.

Much of the city's brief asserts its reasons for banning plaintiffs' religious symbols. The brief of the International Cemetery and Funeral Association, tendered but not yet accepted for filing,[3] is entirely addressed to these matters. If the city were right about its reasons, it would prevail at the compelling interest stage of the case. But asserted compelling interests in cemetery cases have nothing to do with the definition of religious exercise, which will apply in all cases.

In any event, there is little to the city's claims of compelling interest. Its hyperbolic rhetoric about cemetery anarchy is belied by its own photographs, showing neat and modest gravesites. The city has long operated the cemetery without enforcing the regulations, yet its witnesses could not identify a single operational problem that had not been promptly solved. The city's expert on cemetery management, Mr.

[3] Plaintiffs objected to the brief on the ground of relevance. Plaintiffs asked either that the brief be refused, or that if the issues were expanded to include those addressed, that the Court accept a similar brief from other industry interests. Both sides' motions are still pending as this brief is finalized.

Sloane, testified that, "There has been a return to more upright monumentation in the industry generally on a national basis," R-107-540, and that routine procedures are commonly used to address the problems asserted by the city. *Id.* at 538, 542. Cities can maintain memorial garden sections in their cemeteries if they make adequate space available in the monument section of their cemetery and clearly explain the rules in advance; Boca Raton did neither. There is no compelling reason to emotionally brutalize these families and suppress religious exercise that is profoundly important to them.

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

If this case were entirely in one court, a ruling on Florida RFRA might moot the free exercise claim. But no one knows what the federal court will do with this Court's answers. That court has invited comment on the state constitutional claim, *Warner v. City of Boca Raton*, 267 F.3d 1223, 1227 (11th Cir. 2001), and it has clearly signaled that it will not seriously entertain that claim without guidance from this Court, *id.* at 1226 n.3. Because the certified legal questions excluded the factual issues that consumed many pages in the Eleventh Circuit briefs, it was possible here to brief the free exercise issue more fully. With the Florida Free Exercise Clause and its history now elaborately briefed, this Court should reaffirm state constitutional protection for

religious exercise.

The city does not dispute plaintiffs' analysis of the text and history of the Clause. Nor does it dispute the broad trend in other states, rejecting the unprotective federal rule. It offers only flawed distinctions of this Court's decisions in *Matter of Dubreuil*, 629 So.2d 819 (Fla. 1993), and *Public Health Trust v. Wons,* 541 So.2d 96 (Fla. 1989). The city says those cases "had no impact on the rights of others," City Br. 46, even though the issue that divided the Court was precisely the impact on dependent children. It asserts that the rules in *Dubreuil* and *Wons* were not neutral and generally applicable, but it does not deny that those rules applied to every patient similarly situated. All these cases involve rules that apply to many and that specially burden a few. That a rule uniquely burdens plaintiffs says nothing about whether it applies generally to others. *Dubreuil* and *Wons,* on far more difficult facts than are presented here, applied the compelling interest test to generally applicable rules that burdened an unusual religious belief.

CONCLUSION

This Court has warned that "a mass society . . . presses at every point toward conformity." *Town v. State ex rel. Reno,* 377 So.2d 648, 651 (Fla. 1979). Few cases better illustrate that warning than the city's insistence that deep religious faith submit to its desire for graves that are identical in appearance.

The Court should answer that Florida RFRA protects conduct that is substantially motivated by religious belief, that the proposed four-part test is no part of Florida law, 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.

Respectfully submitted,

_____

James K. Green
Lynn G. Waxman

Douglas Laycock
Charlotte H. Danciu

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief has been mailed to counsel for the city and for all amici on January 29, 2002, as follows:

Bruce Rogow
Beverly A. Pohl
Broward Financial Centre
Suite 1930
500 E. Broward Blvd.
Fort Lauderdale, FL 33394
Counsel for the City

Rebecca A. O'Hara
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, FL 32302
Counsel for Amicus Florida League of Cities

Diana Grub Freiser
City Attorney
City of Boca Raton
201 W. Palmetto Park Road
Boca Raton, FL 33432-3795
Counsel for the City

Douglas Lee Stowell
P.O. Box 11059
Tallahassee, FL 32302-3059
Counsel for potential amicus
International Cemetery & Funeral Association

Charles T. Canady
General Counsel
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399-1050
Counsel to the Governor

Matthew D. Staver
Erik W. Stanley
Joel L. Oster
Liberty Counsel
210 E. Palmetto Ave.
Longwood, FL 32750
Counsel to amicus Liberty Counsel

_____

Douglas Laycock
727 E. Dean Keeton St.
Austin, TX 78735
Counsel for Plaintiffs and Moving Parties
Admitted pro hac vice

CERTIFICATE OF COMPLIANCE

I certify that this brief is in Times New Roman 14-point type and that it complies with the font requirements of Rule 9.210.

_____

Douglas Laycock
727 E. Dean Keeton St.
Austin, TX 78735
Counsel for Plaintiffs and Moving Parties
Admitted pro hac vice