

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 Contents | i |
| Table of Authorities | ii |
| Argument | 1 |
| I. Florida RFRA Protects Conduct "Substantially Motivated by a Religious Belief." | 3 |
| A. The Statutory Text Unambiguously Protects Conduct "Substantially Motivated by a Religious Belief." | 3 |
| B. The Proposed Four-Part Text Is Inconsistent with Statutory Text. | 3 |
| C. The Substantial Motivation Standard Is Reinforced By All the Secondary Indicators of Statutory Meaning. | 7 |
| 1. The Mischief to Be Remedied. | 7 |
| 2. The Derivation from Free Exercise Law. | 7 |
| 3. Legislative History. | 8 |
| 4. Avoidance of Constitutional Difficulties. | 8 |
| II. Substantial Burden and Compelling Interest Are Separate Issues. ... | 10 |
| A. Substantial Burden | 10 |
| B. Compelling Interest. | 12 |
| III. The Florida Free Exercise Clause Requires the State to Justify Substantial Burdens on Religious Exercise. | 14 |

Conclusion 15

TABLE OF AUTHORITIES

Cases

Board of Educ. v. Grumet, 512 U.S. 687 (1994) 10

City of Boerne v. Flores, 521 U.S. 507 (1997) 10

Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) 10

Employment Div. v. Smith, 494 U.S. 872 (1990) 10

EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) 10

Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) 10

Frazee v. Illinois, 489 U.S. 829 (1989) 7-8

Heffron v. ISKCON, 452 U.S. 640 (1981) 8

Henderson v. Kennedy, 265 F.3d 1072 (D.C. Cir. 2001) 11

In re Young, 141 F.3d 854 (8th Cir. 1998) 10

Matter of Dubreuil, 629 So.2d 819 (Fla. 1993) 14-15

Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989) 14-15

Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996) 10-11

Sullivan v. Sasnett, 521 U.S. 1114 (1997) 10-11

Thomas v. Indiana, 450 U.S. 707 (1981) 7-8

Town v. State ex rel. Reno, 377 So.2d 648 (Fla. 1979) 15

Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999) 8-9

Warner v. City of Boca Raton, 267 F.3d 1223 (11th Cir. 2001) 14

Constitutional Provisions

Federal

U.S. Const. amend. I

Establishment Clause 10

Free Exercise Clause 1, 9

Florida

art. I, §3, Fla. Const. (1968) (Free Exercise Clause) 10, 14-15

art. IV, §1, Fla. Const. (1968) (Governor Clause) 2

Statutes

Federal

42 U.S.C. §§2000bb et seq. (1994 & U.S.C.A. Supp. 2001)
(Religious Freedom Restoration Act) 2, 7, 10-11

Florida

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

generally 1-2, 9-10, 14-15

§761.02(3), Fla. Stat. (2001) 3, 7

Secondary Authorities

Webster's Third New Int'l Dictionary Unabridged (1961, 1981) 3

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.

invoked the certification procedure to bring a small part of it back to this Court.

of the legal issues have been certified to this Court;

factual issues

but plaintiffs have attempted to work within it.

The city and its amici have conflated the distinct elements of religious liberty claims

substantial burden,

The brief of the Florida League of Cities

a policy argument about why the statute should never have been enacted.

that government rarely interferes with religious exercise is not the legislature's view.

In describing a case of a synagogue excluded from a community,

notion "even to give the synagogue standing to present its claims

10 Perhaps that synagogue has not been substantially burdened; perhaps there

is a compelling reason to exclude it.

religion is absurd. The city and its amici simply refuse to credit this act of the

legislature

religious exercise.

Law very much like the Florida RRA is in effect in nearly half the states

40

respect to federal laws and agencies 42U

predicted horrible consequences have not materialized.

executive and administrative officer of Florida

be faithfully executed,

and its amici,

Amicus Br. of Jeb Bush.¹

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, that the statute contains a completed definition:

refusal to act that is substantially motivated by a religious belief.

The city now says that if the legislature meant substantial religious motivation to be the test, added emphasis not help the city.

restrictive modifier" (e.g. "substantially motivated by a religious belief") Webster's Third New Int'l Dictionary Unabridged 1 (1961, 1981). Certainly

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. 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 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.

The city claims that "most" of the symbols at issue have "absolutely no religious significance preference judgment the city is defending crosses is absurd to say that these items have no religious significance testimony on cross examination, only to set up an opposite pole to "tangential" and "marginal." City Br. 404! These disclaimers cannot change what the federal district court did with history or what the city asked it to do the statute.

All five Catholic plaintiffs erected statues these statues are "archetypal of a Catholic religious piety.

city employee

It is of great significance to them and to their religious beliefs

city expert Dr.

Christ or local patron saints

statues are fairly near to the core of the [Catholic] tradition.

such as a statue on a grave was unprotected in his view,

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

The city cites testimony that plants and wood chips have no religious significance

City B:

dispute in this part of the case is about covering graves

of any kind,

point of religious significance

the topic,

respect and our belief that it would be sacrilegious for us to do that.

consistently said that the items had no religious significance in themselves

they were there to make sure that the grave is protected,
walk over it," id. at 30.

Even Dr.

grave

sacred space

Orthodox traditions Pl. Ex 44 at 7; R-107-630 (McGuckin); R-105-20, 101, 206 (plaintiffs) In

traditionally religious communities

coverings were not needed.

casual walk on graves and city managers surprised to learn that anyone objects

10569 (Driscoll)

becomes an important means to protect the traditional religious practice

R-107-630 (McGuckin).

Beyond the detail about individual items

confirmed (with different emphasis) by experts from both sides

as distinctly secularised.

"a sacred thing" destined to rise again.

testified about their religious sense of the continued presence of the dead;

sense that the city's landscaped cemetery by design is meant to suppress

(Katz)

14

central cross or other religious symbol standing over all the graves

(Sloane (city's expert)); id. at 635-37 (McGuckin); R-108-778 (Pa

If the only point of the city's proposed test were to eliminate idiosyncratic
personal beliefs with no real religious significance,

testimony of a rabbi,

city expert testified that plaintiffs' religious practices are not required or universal

in Judaism or Christianity,

it wishes

the statute as this Court interprets it.

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,"

hostile interpretations of federal RRA that denied protection to many religious practices

response is that it disagrees with the legislature.

2. The Derivation from Free Exercise Law.

The statutory definition is derived from free exercise law,

Frazee v. Illinois, 489 U.S. 829 (1989), and *Thomas v. Indiana*, 450 U.S. 707 (1981)

government regulation of conduct.

irrelevant because the neutrality of regulation goes to the state action at issue, the religious exercise at issue.

It is false because the regulations in *Frazee* and *Thomas* were more generally applicable than the regulations here (very narrow exceptions) that employees were ineligible for benefits if they would not satisfy the employer's requirements for the job work when scheduled and doing the work assigned, religion, or insubordinate employees

in *Frazee* and *Thomas* qualify.

The city gets no help from *Heffron v. ISKCON*, 452 US 640 (1981), City Br. 24. *Heffron* did not suggest that the practice at issue there was not the exercise of religion.

but that it was principally speech and that the government's rule was made in a public place

and was justified by a substantial government interest. I

3. Legislative History.

The city's interpretation required an elaborate theological trial, in the legislative history.

it should not be heard to reargue what the legislature

4. Avoidance of Constitutional Difficulties.

The city's interpretation required an elaborate theological trial, a judicial holding that plaintiffs' sincere religious practices are not really necessary to their respective faiths

conclusory denial of the problem

limited and purely factual," it was intrusive

F

basis

practices)

Christian theologians").

Nearly all religious practices appear in multiple variations

Holy Communion would not be protected under the City's test.

quite deniesthe point.

law of general applicability.

would be protection under the federal Free Exercise Clause

would be protection under Florida RFA

alcohol,

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

What the city conspicuously does not say is that if some churches use wine and some

use grape juice

variations are protected under Florida RFA

its central argument that plaintiffs here are unprotected because some Christians and

Jews mark graves differently

says Communion would be protected under Florida RFA because it is a "central religious ritual.

R.

unprotected.

Equally protecting all variations of religious practice would not violate the Establishment Clause

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;

found it

rejected Establishment Clause challenges to the federal

II. Substantial Burden and Compelling Interest Are

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).

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; dimensional line drawings that the city permits are not just smaller versions of three-dimensional statues; 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 RRA, wearing crosses and other religious symbols.

In *Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001), relied on at City Br., found no substantial burden because the regulation was "at most a restriction of one of a multitude of means" by which plaintiffs could spread the Gospel. locational restriction on selling

other locations were available

religious significance.

The substantiality of a burden may also be assessed by its impact on the plaintiff. Henderson, the Mall to the plaintiffs," 265 F.3d at 1074 (emphasis added), not to Christianity's high tradition, symbols and grave coverings in their religious practice. Even the city's experts agreed. had religious beliefs that would be burdened only on an individual basis, the religious high tradition itself." Def. Ex. 5 at 7, accord, R. 106-438 Dr. Pal 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, emotional wrenching" caused by removing religious symbols from graves. 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

announced or enforced its rules

There was no prohibition on grave coverings until 1988

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,

accepted for filing

its reasons

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

net and modest gravesites

the regulations

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.

had not been promptly solved.

testified that,

generally on a national basis,

to address the problems asserted by the city.

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

did neither.

suppress religious exercise that is profoundly important.

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

If this case were entirely in one court,

exercised claim

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,

issues that consumed many pages in the Eleventh Circuit briefs.

brief the free exercise issue more fully.

history now elaborately briefed,

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' 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*, 54 So.

Br.

dependent children. It asserts that the rules in *Dubreuil* and *Wons* were not neutral and generally applicable to a patient similarly situated.

special burden a few.

whether it applies generally to others. *Dubreuil* and *Wons* are far more difficult facts than are presented here.

applicable rules that burdened an unusual religious belief.

CONCLUSION

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

The Court should answer that Florida's First Amendment protects conduct that is substantially motivated by religious belief, that the Florida Constitution protects religiously motivated conduct against generally applicable laws compelling interest in public morals, peace, or safety.

Respectfully submitted,

| | |
|----------------|---------------------|
| James K. Green | Douglas Laycock |
| Lynn G. Waxman | 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 11, 2011.

Bruce Rogow
Beverly A. Pohl
Broward Financial Center
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
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 32310
Counsel to the Governor

Matthew D. Staver
Erik W. Stanley
Joe G. Ostrom
Liberty Counsel
1010 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 Part
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 Part
Admitted pro hac vice