Office of Public Affairs

NATIONAL ASSOCIATION of EVANGELICALS

Dr. Robert P. Dugan, Jr., *Director*
Office of Public Affairs
1023 15th Street NW, Suite 500
Washington, DC 20005
Phone: 202-789-1011
FAX: 202-842-0392

National Office
450 Gundersen Drive
Carol Stream, IL 60188
Phone: 708-665-0500
FAX: 708-665-8575

Dr. Billy A. Melvin
Executive Director

STATEMENT OF FOREST D. MONTGOMERY

Counsel, Office of Public Affairs

NATIONAL ASSOCIATION OF EVANGELICALS

on

S. 2969, THE RELIGIOUS FREEDOM RESTORATION ACT

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

September 18, 1992

Mr. Chairman and Members of the Committee:

On behalf of the National Association of Evangelicals (NAE) I want to express our deep appreciation for the opportunity to testify before this distinguished Committee on the pressing need for enactment of S. 2969, the Religious Freedom Restoration Act (RFRA). Quite simply, this is the most important bill relating to religious liberty ever considered by Congress.

NAE includes some 45,000 churches from 74 denominations. Through its commissions and affiliates, such as the National Religious Broadcasters and World Relief, NAE serves an evangelical constituency of approximately 15 million people. At its 1991 convention, NAE passed a resolution urging Congress "to pass bipartisan remedial legislation, such as the 'Religious Freedom Restoration Act,' which will restore the traditional 'compelling interest' test and thus protect the free exercise of religion."

We have frequently appeared before congressional committees to give testimony on religious issues. NAE has also been involved as amicus curiae in many religious liberty cases considered by the Supreme Court. But our previous involvements pale by comparison to the present hour. We are here today to speak about the need to legislatively overrule the Supreme Court's dreadful decision in Employment Division v. Smith (April 1990). In Smith, five Justices of the Supreme Court gutted the Free Exercise Clause of the First Amendment. In the post-

Smith world, government no longer needs to demonstrate a compelling governmental interest to justify an erosion of religious freedom. Now all that is needed to restrict religious exercise is a neutral law of general applicability. Our ability to put our faith into action is at the mercy of majoritarian rule.

The issue in Smith was whether the sacramental use of peyote by members of the Native American Church was protected under the Free Exercise Clause. Reversing the state supreme court, the U.S. Supreme Court ruled that Oregon could deny unemployment benefits to persons discharged from their jobs for sacramental peyote use. If that is all the Court had done, we would not be here today. But the Court, on its own volition, and without benefit of briefing or argument, discarded decades of precedent and announced a sea change in First Amendment law.

This was the rule of law before Smith: Laws of general applicability could constitutionally burden religious practice only if the government demonstrated a compelling governmental interest and used the least restrictive means to further that interest. This test involved balancing the government's interest against the individual's religious liberty interest in the context of each particular case.

This is the new rule of law: If prohibiting the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." With all due respect to Jusice Scalia, the author of Smith, this new

rule of law does offend the First Amendment. Indeed, in subjugating our First Liberty to the will of legislative majorities, the Supreme Court has abdicated its role as guardian of those rights declared unalienable in the Declaration of Independence and heretofore secured in the Bill of Rights.

Smith was thought to present a narrow question of constitutional law: Whether the State of Oregon had a compelling interest in regulating illegal drugs that overrode free exercise rights in the sacramental use of peyote. That was the issue briefed; that was the issue argued. This was thought to be a routine Free Exercise case which would no doubt be decided within the parameters of well-established precedent.

Thus we were stunned when the Court used this seemingly innocuous case to announce a complete overhaul of established First Amendment law. No liberty is more precious in the American experience than religious liberty -- our First Freedom. Yet the Supreme Court, the very guardian of our liberties, metamorphosed the Free Exercise Clause from fundamental right to hollow promise.

Justice O'Connor is right on target when she says the Court's holding "not only misreads settled First Amendment precedents," but also "appears to be unnecessary to this case."

To add insult to injury, the majority opinion callously characterizes the compelling governmental interest test as a "luxury" which

we as a people can ill afford. But what we can ill afford is a Court that considers religious freedom, our legacy, a luxury. Abundant scholarship on the origins and historical understanding of the Free Exercise Clause indicates that religious liberty was to be a preferred freedom, a fundamental right not to be submitted to rule by legislative majorities.

As matters stand now, the free exercise of religion cannot be used as an effective defense against unwarranted governmental action. The Court apparently does not want to be bothered with balancing government's interest against the religious liberty interests of individuals. No religious Americans need apply.

According to Justice Scalia, applying the compelling interest test to all actions thought to be religiously commanded would be "courting anarchy." Yet the societal disarray Justice Scalia darkly envisions has failed to materialize in 200 years under the Bill of Rights.

Justice Scalia concedes that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." He shrugs off this concession with the comment that this result is the "unavoidable consequence of democratic government." But the Bill of Rights was designed precisely to secure fundamental human rights from what would otherwise be the "unavoidable consequence of democratic government."

Contrast Justice Scalia's aberrant view with that of the Supreme Court in an earlier and more enlightened day: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

This familiar quotation is from West Virginia State Board of Education v. Barnette, the famous flag salute case decided on Flag Day, 1943. The Court held that school children could not be forced, against their religious beliefs, to salute the flag. Besides ignoring the teaching of Barnette, Justice Scalia unaccountably relies on the Gobitis case which was expressly overruled in Barnette. Incredibly, in citing and relying on Gobitis, the majority opinion did not even note that it had been expressly overruled.

In his able dissenting opinion, Justice Blackmun pointedly observes that the majority opinion "effectuates a wholesale overturning of settled law" concerning the Free Exercise Clause, and expresses the hope that the majority is "aware of the consequences." Let's look at some of those consequences.

Must autopsies be performed which violate religious faith?

Can students who believe the flag is a graven image be forced to salute it?

Must a church get permission from a landmarks commission before it can relocate its altar?

Can orthodox Jewish basketball players be excluded from inter-scholastic competition because their religious belief requires them to wear yarmulkes?

Can the Roman Catholic Church be forced to ordain female priests?

Are public school students going to be required to attend sex education classes that teach views antithetical to their religious beliefs and practices?

Are young women to be forced to comply with gym uniform requirements contrary to their religious tenets of modesty?

Are the Amish to be forced to display an orange triangle on their horse-drawn buggies when silver reflective tape would suffice?

These are but a few of the consequences which Smith would apparently visit on the religious community. The worst, of course, is that government officials who were formerly under obligation to be reasonable and attempt, if possible, to accommodate religious practice, are

now free to impose laws without any regard for the religious sensibilities of minorities.

Justice Scalia, we have to believe, does not realize the full import of his ruling. We are speaking today about religious practice. For high-demand religions, there are practices that are immutable.

When it comes down to obeying God or Caesar, the devout have no choice. Which is to say that Employment Division v. Smith -- unless rectified -- will inevitably lead to civil disobedience. While we concede that free exercise is not an absolute, and that it must yield to compelling governmental interest, we cannot but remonstrate against the present rule which requires virtually no justification whatsoever for the abridgement of religious freedom.

Religious liberty remains a God-given right, as the Declaration of Independence states, but it is no longer secured by the Constitution as interpreted by the 5-4 majority. It is now to be bestowed by a beneficent majority if it so chooses, or denied by an unsympathetic majority unpersuaded by the pleas of a religious minority. The free exercise of religion, that fundamental human right, is no longer a matter of God's grace, but legislative grace. As evangelicals, as Americans, we cannot, we will not, rest until Smith's egregious affront to the Bill of Rights is corrected.

A word about the abortion "issue." Some have argued that RFRA

could be used successfully to support a right to abortion. That contention was farfetched before the Supreme Court's recent decision in Planned Parenthood v. Casey; after Casey it is untenable. Casey reaffirmed the core holding of Roe v. Wade -- that a woman has a constitutional right to abortion. Thus there is no need to assert a religiously based right to abortion.

Nor can RFRA be considered as creating a statutory right to abortion if Casey and Roe v. Wade are ever overturned. It is unthinkable that the Supreme Court would reject a woman's right to abortion, under one constitutional argument (the right to privacy), only to recreate that right on the basis of religion. This explains why many pro-life organizations support RFRA. Among them are the National Association of Evangelicals, the Christian Life Commission of the Southern Baptist Convention (representing some 15.2 million Baptists nationwide) Agudath Israel, Church of Jesus Christ of Latter-Day Saints, Coalitions for America, Christian Action Council, Traditional Values Coalition, Concerned Women for America, Christian Legal Society and the Home School Legal Defense Association. These groups would not support RFRA if abortion interests would be advanced by it.

In closing, we are pleased to note that Gov. Bill Clinton, in a September 9 address to B'Nai B'Rith, indicated his support of the Religious Freedom Restoration Act. We would also welcome a show of support from President Bush for this bi-partisan bill. Needless to say, evangelicals consider religious faith a preeminent family value.

We applaud the bipartisan bill introduced by Senators Edward Kennedy and Orin Hatch. The Religious Freedom Restoration Act would simply restore the balancing process which formerly prevented government from running roughshod over religious freedom.

The First Liberty of the American people is in your hands.