TESTIMONY OF
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DIRECTOR OF LEGISLATIVE AFFAIRS

SEVENTH-DAY ADVENTIST CHURCH
WORLD HEADQUARTERS

SUBMITTED PURSUANT TO THE REQUEST OF THE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR & PENSIONS

UNITED STATES HOUSE OF REPRESENTATIVES

On

THE WORKPLACE RELIGIOUS FREEDOM ACT (H.R. 1431)

February 12th, 2008

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TESTIMONY IN SUPPORT OF
THE WORKPLACE RELIGIOUS FREEDOM ACT (WRFA)

James D. Standish, JD, MBA[1]

Introduction

Chairman Andrews, Ranking Member Kline and Subcommittee Members, I am grateful for the opportunity to testify in support of the Workplace Religious Freedom Act, H.R. 1431 (WRFA), on behalf of the Seventh-day Adventist Church.

- The Seventh-day Adventist Church has 15 million members worldwide.
- Adventists operate 165 hospitals, 432 clinics and dispensaries, 123 nursing homes and retirement centers, and 34 orphanages worldwide. In addition, Adventists operate three medical schools, three dental schools, 50 schools of nursing and six schools of public health.
- There are 62 Adventist hospitals located in the United States.
- Adventists operate 6,709 schools, 99 colleges and universities, 39 training institutes, with a total enrollment of 1,254,179 students worldwide.
- There are 1,020 Adventist schools in the United States.

I am particularly proud that Seventh-day Adventist healthcare provides critical treatment in some of the world's most impoverished regions. For example, Adventist hospitals and clinics provide care for over 800,000 HIV/AIDS sufferers in sub-Saharan Africa each year.[2] Further, in many areas of the world, Adventist schools provide the only accessible education for children from disadvantaged families.

This practical ministry of healing and teaching is the outworking of our faith commitment that has at its core a trust in the saving grace of our Lord, Jesus Christ. As part of this commitment, Seventh-day Adventist Christians aspire to keep the Ten Commandments under the grace of Christ. This includes resting from secular work on the seventh day of the week as required by God in the Ten Commandments.[3]

While there is debate within the Christian community regarding which day of the week to keep holy, and further if or how to keep the Sabbath holy, there is no debate that throughout church history some Christians have continued to keep the Sabbath day holy

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[2] There are 29 Seventh-day Adventist hospitals in sub-Saharan Africa, and these hospitals are complemented by a number of Adventist clinics and dispensaries. In total, these facilities accounted for 62,912 inpatient admissions, and 1,601,950 outpatient visits in 2004. More than 50% of the patients served in these facilities are HIV positive.

[3] Exodus 20:8 – 11 (NKJV): "Remember the Sabbath day, to keep it holy. Six days you shall labor and do all your work, but the seventh day *is* the Sabbath of the LORD your God. *In it* you shall do no work: you, nor your son, nor your daughter, nor your male servant, nor your female servant, nor your cattle, nor your stranger who *is* within your gates. For *in* six days the LORD made the heavens and the earth, the sea, and all that *is* in them, and rested the seventh day. Therefore the LORD blessed the Sabbath day and hallowed it."

on the seventh day of the week (Saturday). Further, there is no debate that the Seventh-day Adventist commitment to setting aside the Sabbath to worship God is based on a sincerely held religious belief.

Today there is significant discussion over if and how the Ten Commandments should be displayed in government buildings. As important as these debates may be, a much more important question is how people are treated when they actually keep the Ten Commandments.

Sadly, the experience of Seventh-day Adventist Christians in recent years indicates an increased hostility to accommodating Sabbath observance. Indeed, the rise in hostility to accommodating the sincerely held religious beliefs of American workers is not limited to Seventh-day Adventist Christians, but rather falls across the faith spectrum. We know this both from reporting done by the various faith communities, and from statistics kept by the United States Equal Employment Opportunity Commission (EEOC) that will be discussed in the next section of this testimony.

I co-chair a coalition of 49 national religious organizations who have come together in support of WRFA. A full list of the coalition members is provided as Exhibit A to this testimony. It is rare that entities with such diverse theological views and public policy priorities agree on any given piece of legislation. Indeed, at this time there may well be no other issue that shares such deep and broad multi-faith support. The increase in hostility to religion in the American workplace has brought this disparate group together to support a vital improvement in the law to protect the religious freedom of America's workers.

Deficiency in the Current Legal Standard

Title VII of the U.S. Civil Rights Act of 1964 as amended in 1972 requires employers to "reasonably" accommodate the religious practices of their employees unless, by so doing, the employer would incur an "undue hardship on the conduct of the employer's business."[4] The Act itself does not define the terms "reasonably accommodate" and "undue hardship," and thus it was the role of the courts to provide clarification.

With scant legislative history to build upon, the Supreme Court found that undue hardship means anything above a *de minimis* cost or inconvenience.[5] By so doing, the Court greatly reduced the impact of the accommodation requirement.[6]

Further, there is a split among federal courts on the definition of "reasonable" accommodation. Some Circuits have held that in order to be considered a reasonable accommodation for the purposes of Title VII, the accommodation must eliminate the conflict between the religious practice in question and the employer's requirement. The

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[4] 42 U.S.C. § 2000e(j). (Employers have a duty to accommodate an employee's religious practices as long as they can "reasonably accommodate" the practices and the accommodation does not cause "undue hardship" on the employer's business.)

[5] *Trans World Airlines, Inc v. Hardison*, 432 U.S. 63, 84 (1977). (Accommodation of religious beliefs requiring more than a *de minimis* cost to the employer normally results in "undue hardship" and therefore is not required by current law.)

[6] For more on the history of the accommodation provision of Title VII, please see Exhibit B at the conclusion of this testimony.

8th Circuit, on the other hand, recently held that an employer may "reasonably accommodate" by an offer to only partially accommodate the religious practices of employees.[7]

Thus, under the current legal standard, an employee in some jurisdictions faces two prohibitive barriers to successfully bringing a Title VII accommodation claim: First, if an employer offers a partial accommodation the court may hold the offer is a "reasonable" accommodation. In this case, the employee loses, whether or not the employer could have offered an accommodation that removed the conflict entirely. But employers also get a second bite of the apple. Even when a court finds an offer of partial accommodation does not meet the Title VII threshold, an employer wins if he can show that accommodating an employee's sincerely held religious beliefs would result in anything above the most minimal inconvenience.

For employers unwilling to respect the religious diversity of the American workforce, the weakness of the current standard provides a two-pronged gift of legal impunity.

The weakness in the current law created a growing problem of religious discrimination in the American workplace. The U.S. Equal Employment Opportunity Commission reports that claims involving religious discrimination in the workplace increased 83% between 1993 and 2006.[8] In contrast, racial discrimination claims declined by 8% during the same period, and other major categories of claims have held roughly steady or declined.[9]

Thus, the rise in religious discrimination claims is not an artifact of an increasingly litigious society. Rather, the rise in religious discrimination claims while other major classes of discrimination have remained level or falling, indicates a substantive growth in intolerance of religion in the American workplace. This is particularly perplexing as the rise comes at a time when many American employers have implemented programs and policies to advance the acceptance of diversity in the workplace.

Four primary reasons have been advanced to explain the increase in religious discrimination.

- First, the economy increasingly operates on a 24-hour, 7-day-a-week schedule. This schedule necessarily conflicts with people of faith who celebrate particular holy days, whether it be a weekly Sabbath or annual holy days.
- Second, due largely to changes in immigration patterns, we are an increasingly religiously diverse society, and our religious diversity now exists in parts of the nation that were largely religiously homogenous up until

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[7] *Sturgill v. UPS*, 2008 WL 123945 (8th Cir. Jan. 15, 2008) ("What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict." Slip Opinion at 6.).

[8] Exhibit C at the conclusion of this testimony contains a year-by-year analysis of religious and race based discrimination receipts received by the U.S. EEO.

[9] See Exhibit C.

relatively recent times. In the case of religious practice, unfamiliarity may breed contempt or at least intolerance. Intolerance towards non-Western religions may be exacerbated by the overlap between religious practice and race, ethnicity and national origin.

- Third, the number of religious discrimination claims saw their largest increase after 9/11 when Muslim and Sikh Americans reported a sharp spike in demands to remove any garb or grooming that would indicate their faith affiliation. Unfortunately, the level of claims reached after 9/11 has not subsided in the years subsequent.[10]
- Fourth, America may be becoming an increasingly materialistic society, in which our family life, our environment, and even our spirituality are becoming subordinated to our mercantile drive.

Whatever the factors behind the meteoric rise in religious discrimination claims, the impact on individuals cannot be overstated. To lose a job does not merely mean losing an income. As one worker put it: "I have been through a divorce, I've buried both my parents, but nothing has been as painful as losing my job, because without work, I've lost my independence." Another stated: "when I lost my job, I didn't just lose an income, I lost my self esteem, I lost my health insurance, I lost my ability to support my children, and I lost my dreams."

WRFA Addresses the Loopholes in the Current Law

The serious increase in religious discrimination claims, with the accompanying personal hardship caused, requires us to close the current loopholes in the law that permit employers to arbitrarily fire American workers in retaliation for them following their faith commitment. WRFA is a simple piece of legislation that has two central provisions:

The first provision defines the meaning of "undue hardship" in Title VII as an accommodation that would require *significant* difficulty or expense.[11] By clarifying the meaning of "undue hardship," WRFA increases the protection from the current *de minimis* standard that provides virtually no protection to American workers, to a legal standard that provides moderate incentive to work out an accommodation.

The second central provision of WRFA states that an accommodation of religious practice is not a "reasonable accommodation" unless it removes the conflict between the religious practice and the work requirements.[12]

It is vital to understand how these two provisions work together. For an accommodation to be considered reasonable, post-WRFA, it must eliminate the conflict between the employer's requirements and the employee's religious practice. Thus, for example, an accommodation that would offer a Seventh-day Adventist Christian employee two Saturdays off every month, would not qualify as a reasonable

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[10] See Exhibit C.

[11] Workplace Religious Freedom Act, Section 2 ("…the term `undue hardship' means an accommodation requiring significant difficulty or expense.").

[12] Workplace Religious Freedom Act, Section 2 ("…for an accommodation to be considered to be reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.").

accommodation as it would not remove the conflict. This does not mean, however, that the Adventist employee would prevail in her claim.

Rather, once the accommodation options available to remove the conflict are determined, the court will then analyze whether the employer can implement the reasonable accommodation without incurring a significant difficulty or expense. If the employer can show that removing the conflict cannot be done without incurring a significant difficulty or expense, the employer wins.

In practice, the vast majority of accommodation issues are handled informally in the workplace. The new WRFA standard provides an incentive for reticent employers to seriously explore whether they can accommodate the needs of America's religiously diverse workforce. In the overwhelming majority of cases, accommodations can be worked out with little fuss if there is a willingness – and incentive – on both sides to do so. The employee always has an incentive, as her job is on the line. WRFA provides the necessary incentive to recalcitrant employers to search for an accommodation in good faith.

Objections to WRFA

There are two principle objections to providing protection for people of faith in the workplace.

- First, there are concerns that protection for people of faith will increase litigation, and particularly litigation involving sham religious claims.
- Second, there is concern that protecting American workers will burden third parties.

WRFA Will Reduce, Not Increase, Litigation

WRFA will reduce litigation for three reasons. First, it eliminates the current incentive for recalcitrant employers to refuse to explore accommodation options. Second, it does not change the current financial disincentive for attorneys from the private bar to represent victims. Third, it does not eliminate the legal and financial disincentive to bring sham claims. The experience in New York State bears out the fact that religious discrimination claims drop after the implementation of the WRFA standard.

<u>WRFA Eliminates Incentive to Arbitrarily Refuse Accommodation</u>

Experts in the area of employment law agree that one of the contributing factors to the dramatic rise in religious discrimination claims at the federal level is the weakness of the accommodation provisions as currently understood. Mitch Tyner, who managed more than 200 Sabbath accommodation cases[13] during his career in the general counsel's office at the headquarters of the Seventh-day Adventist Church, states "a contributing factor to the dramatic rise in religious discrimination claims at the federal level in recent years is the weakness of current federal law." Todd McFarland, associate general counsel at the headquarters of the Seventh-day Adventist Church states: "Most of the claims can easily be resolved when there is a will on both sides. The weakness in federal law,

[13] A majority of cases did not go to litigation.

however, provides an incentive for recalcitrant employers to hold out rather than working constructively to find a solution. They know that in the remote chance a claim is litigated, the employer holds all the cards."

While there is relatively little incentive for a recalcitrant employer to accommodate the religious beliefs of their employees under current law, this does not deter people of faith in the workplace asserting their rights. This is because people of strong religious conviction are committed to following their conscience. In the words of the Apostles, they believe "we must obey God rather than men."[14] As a result, the remote chance of prevailing under current law does not reduce the number of claims asserted. Rather, the law encourages recalcitrant employers to refuse accommodation, while having little impact on the willingness of the faithful to follow their convictions. These two forces combine to increase the number of claims under the current weak legal standard.

WRFA provides an incentive to both employers and employees to work out an accommodation if it is possible. Although the rise is religious discrimination claims is alarming, religious intolerance in the workplace remains the experience of a minority of employees indicating that the majority of America's employers value the religious diversity of their workforce and already work out accommodation. WRFA will provide an added incentive to recalcitrant employers to do the right thing before a case results in litigation. WRFA is written to provide additional clarity and thereby reduce misunderstandings. In addition, as discussed below, the economics of bringing religious accommodation cases discourage litigation and virtually eliminates sham religious claims.

WRFA Doesn't Eliminate Financial Disincentive for Bringing Claims

There are significant financial disincentives to bringing religious accommodation cases and these will not change after WRFA is enacted. Damages in accommodation cases tend to consist of lost wages, which are frequently modest because the workers involved are typically on the low end of the wage scale. As a result, finding attorneys willing to bring these cases can be difficult, and it is highly unlikely an attorney would be willing to invest the time and effort to bring a case involving a sham claim. In addition, while courts do not examine the validity of religious beliefs themselves, they do examine the sincerity of the individual's claim.[15]

To date, critics of WRFA have not been able to identify a single sham religion claim that has succeeded under Title VII or its state equivalents during the 35 years the religious accommodation requirement has been in place. The lack of financial incentive to bring a sham claim, combined with the court's power to investigate whether a claimed religious belief is indeed sincerely held, likely explains the dearth of examples. Sham claims are not a factor in accommodation claims to date, and there is nothing in WRFA that would change this reality.

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[14] Acts 5:29 (NIV).
[15] See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965).

An example helps to illustrate the financial disincentives of brining workplace accommodation cases. If an employee earns $20,000 per annum, and is fired by an employer who refuses to accommodate her religious convictions, and if that employee is out of work for an entire quarter, the damages involved in the case are only $5,000. The expense of going through the administrative process and then litigation seldom justifies the damages involved. It is not surprising that many Title VII accommodation cases brought today are brought by religious entities attempting to vindicate a principle, rather than by attorneys in the private bar. The financial disincentive involved in bringing these cases will not change post WRFA.

Accommodation Claims in New York Dropped Dramatically Post WRFA

If there were any doubts at all about the impact of WRFA, the experience of New York State addresses them. Since adopting the WRFA standard, religious discrimination claims have been lower in four out of five years.[16]

There is no reason to believe the passage of WRFA will increase the number of religious discrimination claims or encourage sham claims. Rather, WRFA will reduce the number of claims as it provides an incentive to work out commonsense accommodations. This is the experience in New York State and it will be the experience nationwide.

WRFA Will Advance Civil Rights, Not Harm Them

It is important to remember when discussing the civil rights impact of WRFA that religious liberty is our first civil right. The Pilgrims fled from Britain to the Netherlands, and from the Netherlands to America in order to experience religious freedom. Roger Williams left Massachusetts to found Rhode Island in order to experience religious freedom. The first provisions in the First Amendment to our Constitution are designed to protect religious freedom. And many Americans can trace our roots back to a family member who fled to the United States to escape religious intolerance. Ensuring that American workers are not arbitrarily forced to choose between their livelihood and their faith is a vital step forward to advancing our core civil right of religious freedom.

Critics of WRFA have raised emotive objections but lack evidence to support them. Specifically, they claim WRFA will privilege harassment and the denial of reproductive healthcare services. On March 20th, 2007, the ACLU circulated a letter opposing WRFA. In the letter, the ACLU referred to a miniscule minority of cases brought under Title VII in the last three decades that involved emotive claims. In every case, the plaintiff lost. There is no rational basis to believe the outcome would be any different post-WRFA. Despite this, the ACLU urges Congress to oppose WRFA because "Congress has no assurance that courts will continue to reject claims that could cause important harm." The ACLU is wrong. Congress has every reason to believe that claims that would harm third parties will not succeed under WRFA. WRFA will not privilege the denial of products or services to customers. We know this for two reasons.

[16] New York State Division of Human Rights

First, the bill's modest accommodation requirement is insufficient to require employers to turn away customers, let alone compromise patients' healthcare or public safety. Further, there is no rational basis for concluding the bill will privilege the harassment of employees. If there was, the minority faiths currently supporting the bill would be the first to oppose it since our members are vulnerable to religious based harassment in the workplace.

Second, New York State law that tracks the WRFA standard can be observed. Critics of WRFA have not been unable to point to a single incidence in which the NY State law has been interpreted to privilege employees denying customers/patients services or products in a timely manner. Nor have they found a single case in New York where WRFA was interpreted to privilege harassment. It is incumbent on those making remarkable claims to back those claims up with solid evidence. Critics of WRFA have been unable to do so. As such, while the emotive scenarios presented by critics of WRFA may elicit fear, it is an irrational fear.

Opponents of virtually every piece of legislation presented in Congress create a parade of horribles to discourage its passage. Rather than succumb to irrational fear, we must keep in mind the reality of WRFA's modest accommodation standard and the experience at the state level. In the case of WRFA, we have a serious, growing, well documented violation of civil rights occurring. Against this reality, critics parade the most speculative negative outcomes of its passage without a single case to back up their conclusion that WRFA will result in their outcomes. Between the facts presented by the supporters of WRFA, and the emotive fiction of its adversaries, the choice is clear.

Indeed, it is not only the diverse coalition supporting WRFA that rejects the critics' parade of horribles. Governor Eliot Spitzer wrote the following critique of the ACLU's efforts to defeat WRFA when he was New York Attorney General:

> "I have the utmost respect for the ACLU, but on this issue they are simply wrong. New York's law has not resulted in the infringement of the rights of others, or in the additional litigation the ACLU predicts will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA."[17]

Despite the lack of evidence for the critics' objections to WRFA, the coalition supporting WRFA is not opposed to inserting language into the bill that specifically indicates the WRFA standard is not to be interpreted to require accommodations that

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[17] Eliot Spitzer, "Defend the Civil Right to Freedom of Religion for America's Workers," *The Forward*, June 25, 1990, at 1, 7. http://www.forward.com/main/article.php?ref=spitzer200406241125

would cause harm to third parties – whether they be coworkers or customers. The ACLU has rejected this offer to date, preferring to insist on creating a legal standard that would provide a higher level of protection to selected religious practices they find innocuous and a lower level of protection for all other practices. We believe this approach to be both unjust on its face, and possibly unconstitutional.

Restricted Bill is Unjust & Creates Constitutional Questions

The ACLU's proposed a restricted bill would provide the WRFA standard to a limited set of religious practices which the ACLU selects, while leaving all other religious practices unprotected by WRFA. The restricted approach strikes at the heart of indivisible freedoms because it aims to provide one set of religious practices preferential treatment under the law vis-à-vis all other religious practices.

Specifically, the ACLU proposes to provide WRFA protection to requests to accommodate religious holy day, garb and grooming requirements. This limited bill would exclude all other religious practices from coverage. Among the wide range of religious practices that would be excluded under the ACLU restricted bill are:[18]

- A Jehovah's Witness employee who requests to opt out of raising the flag and pledging allegiance at work;
- A Methodist attorney who requests accommodation not to represent tobacco interests;
- A Quaker (Society of Friends) employee who requests to be transferred to non-military related accounts;
- An Orthodox Jewish woman who requests permission not to shake the hands of male customers;
- A Hindu employee who requests permission not to greet guests with the phrase "Merry Christmas;"
- A Christian employee who requests to be assigned to work that does not involve embryonic research;
- A Muslim hospital employee who requests to be exempted from duty in which she would be present when a member of the opposite sex is unclothed;
- A Christian webpage developer who asks to be reassigned from a pornographic website development project;
- A Muslim truck driver who requests to be assigned to routes that do not involve delivering alcoholic beverages.

[18] List compiled by the Coalition for Freedom of Religion in the Workplace.

These are just a few of the uncovered religious claims, and do not include claims that arise from indigenous faiths, many major Eastern religions and the wide variety of claims arising from the diverse branches of Christianity. To understand the weakness of the restricted approach, it is worth considering sample claims post-passage of the ACLU's restricted WRFA:

Post-passage of a restricted WRFA, if an Evangelical Christian delivery driver requests her employer to accommodate her sincerely held religious conviction to attend church on Sunday, her claim would be analyzed under the WRFA significant difficulty or expense standard. If a Muslim delivery driver working for the same company asked the same employer to accommodate her sincerely held religious conviction that requires her not to delivery alcoholic beverages, her claim would be analyzed under the existing *de minimis* difficulty or expense standard. As such, the Muslim employee would be much more likely to lose even if the two accommodation requests presented precisely the same challenge to accommodate. It is difficult to understand how anyone could believe such disparate treatment is a just outcome.

Further, it is unclear whether such disparate treatment could withstand constitutional scrutiny under either the Equal Protection or the Establishment Clauses.

In defense of their restricted proposal, critics note that the religious practices covered constitute the majority of claims made in reported Title VII cases over the past three decades. This defense is faulted in two ways.

First, a bill that protects the majority of claims is hardly justification for disfavoring minority religious practices.

Second, it assumes that future accommodation claims will mirror the past. This is a deeply faulted assumption. America's religious demographics are changing dramatically. As immigrants from Asia, Africa, the Pacific and other areas of the world come to the United States, they bring their religious practices with them. It is very likely that prospectively, we will see far more claims from these faith communities as they become established in America. We cannot afford to exclude religious practices from protection simply because they were not prevalent in the U.S. during the 70s and 80s. Indeed, as we go forward, newer faith communities are likely to need the protection of WRFA at least as much - if not more than - established communities.

Disparate treatment is something the ACLU has stood against in the past on issues ranging from free speech to religious liberty. Sadly, they have abandoned their core values and in the process are acting in a manner counter productive to the liberties they claim to protect. Criticism of WRFA is unjustified by the facts, and the proposed "solution" is deeply unjust and likely unconstitutional.

Conclusion

Losing employment is not an insignificant event. Loss of a job can have the most dire impact on a family emotionally, financially, and in their relationships. In recognition of this, our laws have been crafted carefully to protect the disabled, for example, from dismissal without efforts being made to accommodate their needs. And this Congress passed the Employment Non-Discrimination Act to protect gay, lesbian and bisexual

employees. It is not too much to ask from a nation founded on the principles of religious freedom for people of faith to be accorded the same respect.

Rather than succumb to the irrational objections of WRFA critics. It is vital that Congress address this very real, well documented problem. Americans from all religious faiths need protection. WRFA provides a modest level of protection to ensure that American workers are no longer arbitrarily forced to choose between their faith and their livelihood.

Today, on behalf of the Seventh-day Adventist Church and on behalf of the religious community writ large, I urge each member of the subcommittee to support WRFA's passage through the House of Representatives and into law. Enough American workers have been humiliated and marginalized for no crime other than remaining faithful to their understanding of God's requirements. Our national values and our common humanity dictate that we provide the modest, commonsense protection encapsulated in WRFA - and that we delay no longer.

EXHIBIT A

ORGANIZATIONS SUPPORTING THE WORKPLACE RELIGIOUS FREEDOM ACT

Agudath Israel of America
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
American Islamic Congress
American Values
Anti-Defamation League
Baptist Joint Committee on Public Affairs
Bible Sabbath Association
B'nai B'rith International
Center for Islamic Pluralism
Central Conference of American Rabbis
Christian Legal Society
Church of Scientology International
Concerned Women for America
Council on Religious Freedom
Family Research Council
General Board of Church and Society, The United Methodist Church
General Conference of Seventh-day Adventists
Guru Gobind Singh Foundation
Hadassah - WZOA
Institute on Religion and Public Policy
Interfaith Alliance
International Association of Jewish Lawyers and Jurists
International Commission on Freedom of Conscience
International Fellowship of Christians and Jews
Islamic Supreme Council of America
Jewish Council for Public Affairs
Jewish Policy Center
NA'AMAT USA
National Association of Evangelicals
National Council of the Churches of Christ in the U.S.A.
National Jewish Democratic Council
National Sikh Center
North American Council for Muslim Women
North American Religious Liberty Association
Presbyterian Church (USA)
Rabbinical Council of America
Religious Action Center of Reform Judaism
Republican Jewish Coalition
Sikh American Legal Defense Education Fund
Sikh Council on Religion and Education
Southern Baptist Convention, Ethics and Religious Liberty Commission
Traditional Values Coalition
Union of Orthodox Jewish Congregations
Union for Reform Judaism
United Church of Christ Office for Church in Society
United Synagogue of Conservative Judaism
U.S. Conference of Catholic Bishops

EXHIBIT B

Excerpt From the American Bar Association's Human Rights Magazine

"Reconciling Faith and Livelihood: **Religion in the Workplace and Title VII"**

By Richard T. Foltin and James D. Standish

The Civil Rights Act of 1964

In a 1963 message to Congress, President John F. Kennedy vowed to protect Americans from workplace discrimination on the basis of "race, creed or ancestry." A year later, President Lyndon Johnson signed the omnibus Civil Rights Act (Act), in part as a legacy to his assassinated predecessor. The milestone legislation included Title VII, which prohibited discrimination in the workplace on the basis of race, color, religion, sex, or national origin.

It was clear that the prohibition on religious discrimination and the application of nondiscrimination principles to religious entities presented special issues. As originally drafted, the Act afforded a sweeping exemption for religious entities. By the time Congress completed its work on Title VII, however, that exemption was significantly narrower. Pursuant to section 702, religious entities were exempted from the provisions prohibiting hiring based on religion. In addition, section 703(e)(2) provided an exemption that allowed religious educational institutions to hire and employ employees of a particular religion. Yet like all other employers, they were subject to Title VII's prohibition on discrimination on the basis of race, color, sex, and national origin. The exemption was limited, moreover, to employee positions "connected with the carrying on . . . of [the entities'] religious activities."

While dealing at least to some extent with the special concerns of religious organizations, the Civil Rights Act did not directly address the question of whether an employer has an obligation to accommodate employees' religious practices or beliefs. The problems presented by this lacuna were evident almost from the start. An employer need not hang a sign in his window stating "no Jews need apply"; he merely needed to require work on Saturday to accomplish the same end.

The newly created Equal Employment Opportunity Commission (EEOC) was quick to issue regulations, in 1966, providing that employers must afford accommodation unless it would cause "a serious inconvenience to the conduct of business." In 1967 the EEOC refined the regulations to require accommodation unless it would incur "undue hardship on the conduct of the employer's business." Lawsuits quickly challenged the EEOC's authority to take this action. One such case—an appeal from a Sixth Circuit decision finding that the prohibition on religious discrimination should not be read to require accommodation—reached the U.S. Supreme Court, but it was split down the middle, resulting in an affirmance without national precedential authority. *Dewey v. Reynolds*

Metals Co., 402 U.S. 689 (1971), *affirming by an equally divided Court* 429 F.2d 324 (6th Cir. 1970).

In 1972, Congress reentered the fray, amending Title VII to add a new section 701(j), which required employers to "reasonably" accommodate the religious practices of their employees unless, by so doing, the employer would incur an "undue hardship on the conduct of the employer's business." The scant legislative history associated with this amendment gave little indication of precisely what Congress considered reasonable accommodation and what constituted undue hardship. This was left up to the courts. But, as Justice Thurgood Marshall would later observe in his dissent in *Trans World Airlines v. Hardison*, 432 U.S. 63, 89 (1977), the record demonstrated, at least, that section 701(j) was introduced by Senator Jennings Randolph (D-WV) explicitly "to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.'" Citing 118 CONG. REC. 705 (1972).

At the same time, Congress amended section 702 to conform with section 703(e)(2) to broaden the religious discrimination exemption, allowing religious organizations to make hiring decisions on the basis of religion with respect to all employee positions, not just with respect to work connected with "religious activities." As Professor Melissa Rogers has shown in her recent examination of the legislative history leading up to enactment of this latter amendment, the sponsoring senators—Sam Ervin (D-NC) and James Allen (D-AL)—"considered an institution-wide exemption for religious organizations from Title VII to be crucial to religious autonomy and freedom."

The premise on which sections 702 and 703 (e)(2) were based—that protecting the autonomy of religious institutions is a necessary corollary of the Constitution's protection of the free exercise of religion—has not been subject to serious debate. Indeed, the courts have read a constitutionally mandated "ministerial exception" into Title VII pursuant to which religious institutions may discriminate *on any basis*, not just with respect to religion, when it comes to employment decisions involving clergy. Rather, debate has focused on the extent to which exemptions for religious organizations should be carved out so as to protect the groups' autonomy. Thus cases questioned the constitutionality of the 1972 expansion of the section 702 exemption. The Supreme Court upheld the exemption in 1987. Other cases, with varying results but generally protective of religious institutions, have examined the question of just how "religious" a religious institution has to be to qualify for a section 702 or section 703(e)(2) exemption, as well as whether given employment decisions were made on the basis of sex or pregnancy, as opposed to religion—and would therefore, at least with respect to nonministerial employees, not fall under the exemption.

Most recently, as a result of the push for "charitable choice" and faith-based initiatives, there has been extensive debate as to whether the exemptions afforded under sections 702 and 703(e)(2) apply to social services programs provided by religious institutions when federal funds are involved. Some have argued that the exemption applies nevertheless; others have argued that Congress never intended the exemption to cover other than

privately funded positions or projects—and that, in any event, to practice such discrimination with public funds is constitutionally problematic.

Others have noted that there is nothing in the text of the statute to suggest that it was Congress's intent to limit the exemption to entities that do not receive federal funding.

Hardison and Its Aftermath

If the meaning of sections 702 and 703(e)(2) remains unsettled, the courts have been more clear in their reading of section 701(j). Unfortunately, the decisions have not always viewed religious accommodation in the workplace as a serious civil rights issue.

The seminal Supreme Court case in this area is *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). Larry Hardison was a member of the Worldwide Church of God and believed it was his religious duty to rest from secular work on Saturdays (his Sabbath). Trans World Airlines discharged Hardison because he refused to work on Saturdays in a position as a clerk that required staffing twenty-four hours per day, 365 days per year. In ruling for TWA, the Court determined—in a 7-2 decision—that anything more than a de minimis cost to an employer constituted an "undue hardship" for purposes of section 701(j), and found that accommodations proposed by Hardison would have imposed such a cost because they "involved costs to TWA, either in the form of lost efficiency in other jobs or higher wages." The Court also found that TWA had made reasonable efforts at accommodation.

In a dissent joined by Justice William Brennan, Justice Thurgood Marshall argued that the Court's reading of section 701(j) reflected the belief that Congress, in drafting the 1964 Civil Rights Act to require employers to make reasonable accommodations for religious practice, did "not really mean what it [said]." Marshall and Brennan also argued that the Court's reading of section 701(j), in particular the de minimis interpretation of "undue burden," so vitiated the obligation to reasonably accommodate as to result in "effectively nullifying it."

The history of religious accommodation litigation since 1977 bears out Justice Marshall's concerns. It would be an overstatement to say that employees seeking a reasonable accommodation of their religious practices never prevail in court. Many cases never reach litigation because employees and employers work out an accommodation amicably. But for the most part, to borrow the title of one law review article on the subject, the courts have concluded that "heaven can wait."

Turning to the specifics of section 701(j), one might expect a "reasonable accommodation" to remove the conflict with religious practice, with employers then required to show an "undue hardship" before being relieved of the obligation to provide such an accommodation. But this is often not the case. Perhaps most remarkably, some courts have suggested—beginning with *Hardison*—that employees' rights under collective bargaining agreements are, in of themselves, reasonable accommodations even

when those agreements make absolutely no provision for employee religious practices that may come into conflict with the requirements of the workplace.

It is the *Hardison* Court's interpretation and application of "undue hardship" that has most often affected religiously observant employees. Frequently, even in the absence of substantial economic cost, the courts have found that the provision of a reasonable accommodation amounts to an undue hardship. Sometimes the "hardship" is no more than the administrative task of adjusting schedules.

Beginning with *Hardison* itself, the existence of a seniority provision in a collective bargaining agreement has been invoked as a basis for undue hardship because, for instance, to allow an employee his Sabbath off would violate the seniority rights of another employee. To be sure, section 703(h) of Title VII expressly provides that "the routine application of a bona fide seniority system [i.e., without intention to discriminate because of race, color, religion, sex, or national origin]" is not unlawful. But all too often, this conclusion is reached without further inquiry as to whether the bargaining representative might have been enlisted in a search for voluntary swaps or whether an exemption might be sought to technical violations of the collective bargaining agreement that stand in the way of an amicable arrangement.

These constrictive readings of section 701(j) are inconsistent with the principle that religious discrimination should be treated as seriously as any other form of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination. Since these constrictive readings turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress. Legislation now pending in Congress would do exactly that.

EXHIBIT C
Change in Religious Discrimination Receipts Filed at the U.S. Equal Employment Opportunity Commission vis-à-vis Racial Discrimination Receipts Filed

Percentage Annual Change in Charge Receipts Filed at the U.S. EEOC

Source: http://www.eeoc.gov/stats/religion.html & http://www.eeoc.gov/stats/race.html

Religious Discrimination	**FY 1992**	**FY 1993**	**FY 1994**	**FY 1995**	**FY 1996**	**FY 1997**	**FY 1998**	**FY 1999**	**FY 2000**	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**	**FY 2005**	**FY 2006**
Charge Receipts Filed	1,388	1,449	1,546	1,581	1,564	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541
% Annual Increase		4.4%	6.7%	2.3%	-1.1%	9.3%	4.5%	1.4%	7.1%	9.7%	21%	-1.6%	-2.6%	-5.1%	8.6%
% Increase Over Period	**83%**														

Racial Discrimination	**FY 1992**	**FY 1993**	**FY 1994**	**FY 1995**	**FY 1996**	**FY 1997**	**FY 1998**	**FY 1999**	**FY 2000**	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**	**FY 2005**	**FY 2006**
Charge Receipts Filed	29,548	31,695	31,656	29,986	26,287	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238
% Annual Increase		7.3%	-0.1%	-5.3%	-12%	11.1%	-1.3%	0.0%	0.44%	-0.1%	3.5%	-4.6%	-2.9%	-3.4%	1.9%
% Increase Over Period	**-8%**														

Religious Discrimination Charge Receipts as a % of Racial Discrimination Charge Receipts	**FY 1992**	**FY 1993**	**FY 1994**	**FY 1995**	**FY 1996**	**FY 1997**	**FY 1998**	**FY 1999**	**FY 2000**	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**	**FY 2005**	**FY 2006**
	4.70%	4.57%	4.88%	5.27%	5.95%	5.85%	6.20%	6.28%	6.70%	7.36%	8.60%	8.88%	8.90%	8.75%	9.33%

Notes on the EEOC data:

1) First, religious discrimination claims may be filed at the state or federal level, and in some cases, the local level. The EEOC numbers do not include the state and local claims. Thus the EEOC statistics likely exclude a large number of claims, this is particularly true as in some states, e.g. California and New York, it is preferable to bring these cases under state law in state courts than under federal law in federal court.

2) Many religious discrimination claims never make it to the complaint stage. There are a number of reasons for this, including:

    a. In our experience, most of the people impacted by a refusal to accommodate are at the lower end of the socio-economic spectrum, and a disproportionate percentage are recent immigrants. They are often very fearful of authority figures and thus unwilling to file a claim. In addition, many have limited access to legal assistance and limited understanding of their rights under U.S. law.
    b. People of sincere faith are sometimes unwilling to assert their rights in court because they believe to do so would violate their faith, e.g. it is "un-Christian" to sue an employer.
    c. Many people when facing dismissal or discrimination in the workplace use their limited time and energy to find another job, and once they have found one, move on with their lives without filing complaint about the discrimination they suffered.
    d. Often damages in religious discrimination cases, which are generally limited to lost wages, are low because the low wages of those involved. Thus there is little financial return on the time and effort needed to successfully bring a claim through to conclusion either for the potential plaintiff or for the lawyers who might bring the cases.

3) The EEOC data does not breakout the number of religious discrimination claims that focus on facial religious discrimination in hiring, and the number that involve a failure to accommodate a religious practice.