

The Religious Liberty Protection Act of 1998

( S. 2148 )

STATEMENT BEFORE  
THE SENATE COMMITTEE  
ON THE JUDICIARY

June 23, 1998 | Introduction by Senator Orrin G. Hatch

Our first witness will be Elder Dallin H. Oaks. Since 1984 Elder Oaks has been a member of the Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints. In addition to his church service, Elder Oaks had an extensive legal career. He served as a law clerk to Chief Justice Earl Warren, practiced law with the Chicago firm of Kirkland and Ellis, was a law professor at the University of Chicago, was executive director of the American Bar Foundation, and served as an associate justice on the Utah Supreme Court. He also served for nine years as president of Brigham Young University, the nation's largest private university. He is the author of nine books and over one hundred articles on the subjects of religion and law.

Mr. Chairman

I am privileged to appear before you to testify in support of Congressional enactment of s. 2148, the Religious Liberty Protection Act of 1998. I am here as a representative of The Church of Jesus Christ of Latter-day Saints to present the official position of that church. As the Chairman has noted in that biographical summary, I speak from considerable experience with the law of church and state. HISTORY The history of The Church of Jesus Christ of Latter-day Saints (sometimes called Mormon or LDS) illustrates why government should have a compelling interest before it can pass valid laws to interfere with the free exercise of religion. No other major religious group in America has endured anything comparable to the officially sanctioned persecution imposed upon members of my church in the 19th century by federal, state, and local governments. Mormons were driven from state to state, sometimes by direct government action, and finally expelled from the existing

ELDER DALLIN H. OAKS | ILLUSTRATED BY PAUL ZOWLAK

borders of the United States, only to be persecuted anew when those borders expanded to include the territory of Utah.

This is not academic history to me. My third great-grandmother, Catherine Richard Oaks, lost most of her possessions when a Missouri state militia drove the Mormons out of that state in 1838. Seven years later, when state authorities stood by while a lawless element evicted the Mormons from Illinois, she lost her life from exposure on the plains of Iowa. My wife's second great-grandparents, Cyril and Sally Call, hid in a cornfield as a mob burned their home in Illinois. My great-grandfather, Charles Harris, was sent to prison in the Utah Territory in 1893 for his practice of plural marriage. His oldest daughter, my great aunt, Belle Harris, was the first woman to be imprisoned during federal prosecution of Mormons in the 1880s.

#### THE "COMPELLING GOVERNMENTAL INTEREST" TEST MUST BE RESTORED

The conflict between religious-based conduct and government regulation of religious practices remains today. The free exercise of religion, enshrined in our Constitution, is in jeopardy and cries out for protection. There is nothing more sacred than a devout person's worship of God—nothing more precious than that person's practice of his or her religion.

With the abandonment of the "compelling governmental interest" test in the case of *Employment Division v. Smith*, the Supreme Court has permitted any level of government to enact laws that interfere with an individual's religious worship or practice so long as those laws are of general applicability, not overtly targeting a specific religion. This greatly increased latitude to restrict the free exercise of religion must be curtailed by restoring the "compelling governmental interest" test.

#### RELIGIOUS BURDENS UNDER SMITH

The testimony of other witnesses will show that in the half decade since the *Smith* case numerous religious practices

have already fallen victim to the increased government power it unleashed.

In addition, I wish to put into the record of this Committee the entire testimony given at a recent hearing of the House Judiciary Subcommittee on the Constitution by Professor W. Cole Durham of Brigham Young University. His testimony provides compelling evidence that the *Smith* test is burdening religious freedoms in many areas.

For example, he reported a land-use study he conducted with attorneys of the prestigious Chicago law firm of Mayer, Brown & Platt. This study examined reported cases involving free-exercise challenges to land-use regulation. It started from the basic proposition that if land-use laws and decisions are really being generally and neutrally applied, land-use decisions and policies should impact all religions (and other land-use applicants as well) in a consistent way.

The joint study not only failed to find consistency in the application of land-use laws to different religious associations; it found a huge disparity.

Professor Durham testified: "Minority religions representing less than 9 percent of the population were involved in over 49 percent of the cases regarding the right to locate religious buildings at a particular site." Thus, the proportion of land-use challenges to minority religions disclosed in this study is more than *five times* the number we would expect if minority religions experienced such challenges in the same proportion as their proportion of the total population.

Professor Durham testified: "There may, of course, be other factors that explain some of the disparity, but the differences are so staggering that it is virtually impossible to imagine that religious discrimination is not playing a significant role."

#### THE RELIGIOUS LIBERTY PROTECTION ACT OF 1998

Mr. Chairman, when I last testified before a Congressional Committee, it was to support enactment of the Religious Freedom Restoration Act (RFRA). Now that the Supreme Court has held RFRA unconstitu-

tional, you and many of your colleagues have worked hard to develop alternative legislation, using Congress' well-tested commerce and spending clause authorities to reinstate the "compelling governmental interest" test throughout the nation. We applaud this approach. The Religious Liberty Protection Act of 1998 is a very sophisticated piece of legislation. We strongly endorse its enactment.

#### CONCLUSION

The Bill of Rights protects principles, not constituencies. The worshipers who need its protection are the beleaguered minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that reality. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members, including many of my own ancestors, repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special reason to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless clearly required by a "compelling governmental interest."

It is nothing short of outrageous that the Supreme Court currently extends extraordinary constitutional protection to words that cannot be found within the Constitution, such as the "right to privacy," while abandoning the vital "compelling governmental interest" requirement that is needed to ensure the effectiveness of the express Bill of Rights language guaranteeing the free exercise of religion. The fact that the Constitution has two express provisions on religions suggests that religious freedom was meant to have a preferred position, but the Supreme Court's *Smith* decision has now consigned it to an inferior one.

Religious organizations and religious worship and practices have been forced out of their constitutional sanctuary and into the public square, to be treated like every other organization and activity without unique constitutional guarantees. We appeal to Congress to use its legislative power to restore religion to its rightful sanctuary.

Thank you, Mr. Chairman.