Richard Warner v. City of Boca Raton

CHIEF JUSTICE: WELL, GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THIS WEEK AT THE FLORIDA SUPREME COURT, AND WE ARE CERTAINLY PLEASED TO HAVE SO MANY WHO ARE HERE IN ATTENDANTS TODAY. WE ESPECIALLY WELCOME THE STUDENTS FROM THE FLORIDA STATE SUMMER PRELAW PROGRAM. THEY ARE ESCORTED BY SECOND-YR LAW STUDENT MISS SHAREKA HARRIS, AND WE WILL BE MEETING WITHU, I BELIEVE, LATER THIS AFTERNOON AND, ALSO, OF COURSE, WE ARE VERY PLEASED TO WELCOME BACK, FOR ANOTHER SEMINAR HERE, AT THE COURT, TE LAWYERS FROM THE GOVERNMELAW SIONF THE FLORIDA BAR, WHO ARE HERE IN CONNECTION WITH THE ALL-DAY SEMINAR, PRACTICING BEFORE THE SUPREME COURT OF FLORIDA. SO WE ARE PARTICULARLY PLEASED TO HAVE YOU HERE, AND IN YOUR INTEREST, IN THS COURT, SO WE L MONOWNTO OUR ORAL ARGUMENT THIS MORNING, AND THE FIRST CASE THAT WE HAVE ON THE CALENDAR IS WARNER VERSUS CITY OF BOCA RATON. MR. LAYCOCK.

THANK YOU, YOUR HONOR. A FEW THINGS ARE MORE -- FEW THINGS ARE MORE CENTRAL TO RELIGION THAN THOSE THAT POINT TO DEATH, THE JESUS GRAVE COVERINGS AND STARS OF DAVID, ALL TRADITIONAL RELIGIOUS PRACTICES AND, UNDER THE CITY'S TEST, ALL EXCLUDED FROM THE STATUTE. THE CITY'S DEFINITION OF EXERCISE OF RELIGION DEFIES THE STATUTORY TEXT AND NULLFIES IT. THEY SAY SOME KIND OF MARKING ON A GRAVE IS AN EXERCISE OF RELIGION BUT NO PARTR FOM UNISAL RNDAY, SO NO TICULAR FORM IS PROTECTED. THESAY THAT T ANY RIOUA. EVERY RGIOUSACTICE GROWS AND EVOLVESR TIMEND ARSN DRENT FOR, AND NO PARTICULAR FORM WOULD BE PROTECTED.

WHAT KIND OF TEST ARE WE TO APPLY, IN ARRIVING AT WHETHER IT IS OR IS NOT A PRACTICE?

WELL, THE LEGISLATURE GAVE S THE PRINCIPLE TEST. AN EXERCISE OF RELIGION IS CONDUCT THAT IS SUBSTANTIALLY MOTIVATED BY RELIGIOUS BELIEF, NOT POLITICAL, NOT ECONOMIC, NOT IDEOLOGICAL. IT HAS TO BE RELIGIOUS. NOT A LITTLE BIT OF RELIGION MIXED WITH SOMETHING ELSE. IT HAS TO BE SUBSTANTIALLY RELIGIOUS AS THE MOTIVATION. IT HAS TO BE SINCERE. THE FEDERAL COURTS HAVE DEALT WITH THE STANDARD FOR 40 YEARS, AND THE SORT OF PARADE OF HORRIBLES THAT THE CITY'S BRIEF TALKS ABOUT, SIMPLY HASN'T HAPPENED.

SO HOW DO WE KNOW, WHEN IT IS A PRACTICE THAT IS BASED ON A RELIGIOUS BELIEF? YOU KNOW, IF YOU WANTED TO, WE KNOW THAT, IN MOST RELIGIONS, YOU BRING AN URN OF FLOWERS TO A GRAVE AND THATMSOE PRETTY MUCH A RELIGIOUS BELIEF, BUT IF SOMEONE WANTED TO, SAY, BRING SOME KIND OF ANIMAL TO THE GRAVE SITE, HOW DO WE DETERMINE IF THAT IS A RELIGIOUS BELIEF? WELL,I AM GOING TO ANSWER YOUR QUESTION, BUT LET ME FIRST SAY THE GREAT BULK OF REPORTED CASES UNDER THESE SORTS OF STATUTES AND UNDER THE FREE EXERCISE CLAUSE, THIS IS NO DOUBT THAT IT IS A RELIGIOUS BELIEF. IT IS A RECOGNIE PRACTICE OUT OF A RECOGNIZED RELIGION, AND IT IS A COURSE OF EVENTS. THAT DOESN'T MEAN THERE WON'T BE HARD CASES, AND THERE ARE HARD CASES, AND WHEN YOU GET THAT SORT OF HARD CASE, YOU LISTEN TO THE POINT OF TESTIMONY AND YOU BRING TO BEAR ALL OF THE TOOLS THAT THE LAW HAS FOR A STATUTORY TEST OF MOTIVATION, AND RELIGION IN ITS NATURE, AT LEAST IN MODERN TIMES, IS AN INDIVIDUAL EXPERIENCE. MOST PEOPLE'S RELIGION GROWS DIRECTLY OUT OF A LARGER FAITH TRADITION. WHEN YOU GET THE TRADITIONAL ODD CASE, IT IS A FACT FINDING MEASURE. THOSE CASES ARE HARD TO PROVE. SOMETIMES THEY WIN AND SOMETIMES THEY LOSE.

HOW DO YOU GET BY, IF WE ACCEPT AND THE TRIAL COURT, HERE ACCEPTED THAT THESE WERE SINCERE RELIGIOUS BELIEFS, THE PART OF THE STATUTE, THE FLORIDA STATUTE THAT TALKS ABOUT THAT THERE HAS GOT TO BE AAL BURDEN, AND WHAT IS THE TEST, GOING BACK TO WHAT JUSTICE HARDING HAS ASKED US, THE TEST THAT IS ENUNCIATEED GO NOT ONLY TO THE NATURE OF THE BELIEF BUT, ALSO, TO THE NATURE OF THE RESTRICTION AND I DON'T SEE ANY REFERENCE IN TERMS OF THE BRIEFS THAT WERE FILED IN YOUR BEHALF, TO HOW THAT SUBSTANTIAL BURDEN PART OF THE STATUTE IS TO BE FACTORED IN.

WELL, THE CHECKSAND BALANCES IN THE STATUTEBEGIN WITH SUBSTANTIALLY BURDENING AND CONTINUOUS COMPELLING INTERESTS, AND WE HAVE NEVER GOTTEN THAT R,CAUSE THE CITY HAS CUT OFF THE CASE AT THE THRESHOLD STAGE OF DEFINITION.

BUT THE JUDGE FOUND THAT IT WAS A SUBSTANTIAL B. PERSONAL PNCES. WE GO BACK TO THAT THEY SEEM TO BE INTERTWINED.

I THINK THE CITY'S POSITION HAS INTERTWINED THEM. I THINK, STATUTORILY, THEY ARE NOT INTERTWINED. THE JUDGE FOUND THIS WAS CONDUCT SUBSTY MED BY RUS BELIEF. THAT SHOULD HAVE MADE ITRE ERCTHNQUESTIONS S IT BN SUBSTALLY BURDENED, HAS THE EXERE OF RELIGION BEEN SUBSTANTIAY DD? IS THIS EXERCISE IMPORTANT TO THE RELIGIOUS EXPERIENCE OF THESE PLAINTIFFS, NOT IS IT IMPORTANT TO OTHER CHRISTIANS AND JEWS SOMEPLACE ELSE IN THE WORLD. HAS IT SIMPLY BEEN SUBJECT TO A REASON ABLE SIZE RESTRAINT OR HAS IT BEEN TOTALLY PROHIBITED? HERE IT HAS BEEN TOTALLY PROHIBITED. IS THERE A SUBSTANTIAL CHARGE, DOCUMENTED FOR THE COST OF MAINTENANCE? IF THERE IS A SUBSTANTIAL COST, THAT MIGHT NOT BE A SUBSDANTION -- A SUBSTANTIAL BURDEN.

THIS ISN'T A TOTAL PROHIBITION, IS IT? BECAUSE THE STATUTE ACTUALLY ALLOWS THE PLAINTIFFS TO DO VERTICAL MARKINGS ON THE GRAVES, CORRECT? THEY JUST CANNOT DO WHO ARE SONTAL ONES. OR HORIZONTAL ONES. THEY JUST CANNOT DO VERTICAL ONES, SO WE ARE NOT TALKING ABOUT A PROHIBITION HERE.

WE ARE TALKING ABOUT A PROHIBITION OF THE CATHOLIC STATUTES. YOU CANNOT HAVE A PROHIBITION STATUTE. WE ARE TALKING ABOUT A PROHIBITION OF RELIGIOUS GRAVE MARKINGS. YOU CANNOT HAVE A SUBSTANTIAL PLOT MARKING, EVEN IF IT IS FLAT WITH THE GROUND.

THESE ARE CITY CEMETERIES. ALL OF THESE ARE NOT CITY CEMETERIES, ARE THEY?

I DON'T THINK THE RECORD SHOWS. THE CITY HAS MOVED IN AND TAKEN OVER A LARGE PORTION OF IT, BUT I DON'T THINK THE OTHERS AND THE EFFECT, WHAT THEY WERE AND HOW FAR THEY WERE, I DON'T KNOW.

I GUESS MAYBE THIS IS ALONG THE LINES OF JUSTICE QUINCE'S ASKING. I CAN'T GET BY THE FACT THAT, IN THIS CASE WE ARE REALLY DEALING WH THE GOVERNMENT'S RIGHT TO USE, IT IS GOVERNMENT LAND, AND THEY ARE ALLOWING, UNDER CONDITIONS, INDIVIDUALS TO USE THAT LAND, AND IF WE WERE TO SAY THAT RIFRA DOES NOT, IS NOT, DOES NOT ALLOW THE GOVERNMENT TO USE ITS LAND THE WAY IT SEES FIT DOESN'T THAT END UP ESTABLISHING REALLY, A PREFERENCE FOR RELIGION? IN OTHER WORDS SO THAT IF SOMEBODY SAID I WANT TO PUT UP A STATUTE OF -- A STAY OF ABRAHAM LINCOLN ON MY GRAVE SITE, THAT THEY WOULDN'T BE ABLE TO DO THAT -- STAT EW OF -- A STATUE OF ABRAHAM LINCOLN ON MY GRAVE SITE BUT IN THE MULTIPLE RELIGIONS OF THE WORLD, THAT THAT WOULD BE ALLOWED. SO IT IS HARD TO GET AWAY FROM THE CONTEXT OF THIS CASE, WHEN WE TALK ABOUT THE BROAD ISSUE OF WHAT IS THE EXERCISE OF RELIGION SO HOW DO YOU RESPOND TO THAT?

WELL, THE PERSON WHO WANTS TO PUT UP A STATUE OF ABRAHAM LINCOLN MAY HAVE A FREE

SPEECH CLAIM. WE HAVE A FREE SPEECH CLAIM IN THE PLEADINGS. AS A PRACTICAL MATTER, NEARLY ALL OF THE SPEECH IN THE CEMETERY IS RELIGIOUS SPEECH. IF RELIGIOUS SPEECH IS PROTECTED UNDER THE STATUTE, I THINK THE CITY IS LIKELY TO BEHAVE MORE REASONABLY, WITH RESPECT TO ANY SECULAR SPEECH THAT SOMEONE WANTS TO PUT ON THEIR GRAVE STONE. OUTSIDE THE CONTEXT OF SPEECH, FREE EXERCISE OF RELIGION HAS ALWAYS, FROM THE SPECTER OF THE CONSTITUTIONAL FOUNDATION, HAS EXISTED AND IT DOES NOT RAISE A FREE SPEECH CLAUSE, AND WE GET BACK TO WHERE WE WERE. ESTABLISHMENT OF A BURDEN IS NEUTRAL, AND THE STATUTES NOT CLAIMING RELIGION AS ANYTHING OTHER THAN A FREE BASE IN OUR SOCIETY.

HOW DOES THE ORDINANCE PLAY INTO THE CITY'S HE CAN QATION?

THAT THE CITY'S ORDINANCE DOESN'T MENTION RELIGION? THERE IS A DISPUTE ABOUT HOW NEUTRAL THIS ORDINANCE IS, BUT IF IS NETRAL AND AND LICKABLE, THAT MEANS -- AND IS NEUTRAL AND APPLICABLE, THAT MEANS, AS A REPORT TO A MATTER OF STATUTORY LAW, THE TEST THAT PREVAILS UNDER THE ORDINANCE, THE FREE EXERCISE CLAUSE, SO THE TEST IS NOT WHETHER IT IS NEUTRAL BUT WHETHER IT SUBSTANTIALLY BURDENS A PERSON'S EXERCISE OF FREE RELIGION, SO THAT GOES BACK TO YOU TO DECIDE.

ARE YOU SAYING THAT WHAT CONSTITUTES A SUBSTANTIAL BURDEN THAT WE ARE ONLY LOOKING AT, ONE WHETHER THIS WAS A FREE EXERCISE ISSUE, OR HOW DO YOU SEPARATE ONE FROM THE OTHER?

WELL, WE ARE IN THIS AWKWARD SITUATION, WHERE ONLY THE DEFINITIONAL QUESTION HAS BEEN CERTIFIED. THE SUBSTANTIAL, THE SUBSTANTIAL BURDEN QUESTION ASKS WHAT IS THE IMPACT ON THESE PLAINTIFFS' RELIGIOUS EXPERIENCE OF THIS REGULATION? AND YOU KNOW, WE HAVE BRIEFED THAT. THERE IS TEST MOPE ABOUT THAT.

BUT YOU ARE SAY -- THERE IS TESTIMONY ABOUT THAT.

BUT YOU ARE SAYING THAT WOULD BE A SUBJECTIVE THING, THAT THE COURT COULDN'T INQUIRE OR HAVE A SUBJECTIVE TEST AS TO WHETHER IT DOES OR DOESN'T SUBSTANTIALLY BURDEN. I MEAN, THE PLAINTIFF COULD HAVE DECIDED TO GO TO A CEMETERY. THEY KNEW THE REGULATIONS EXISTED. TO GO TO A CEMETERY THAT ALLOWED THEM TO ERECT --

NO, MA'AM. THEY DID NOT KNOW THE REGULATIONS EXISTED. E TESTIMONY IS OVERWHELMING ON THAT. IN FACT, THE REGULATIONS DID NOT EXIST. THEY WERE AMENDED IN 1996, TO COVER CROSSES AND STAUS AND STATUOUS FOR THE FIRST TIME.

I THOUGHT SINCE 1982, ONLY HORIZONTAL MARKERS WERE ALLOWED IN THE CEMETERY. ANOTHER CITY CLAIMS THAT, BUT IF YOU READ THE REGULATIONS, THE STATUOUS, CROSSES AND EMBLEMS ARE IN A SEPARATE SECTION. THEY SAID SIMPLY WE ARE NOT RESPONSIBLE IF THEY GET DAMAGED. THEY HAD TO AMEND IT IN 1996, TO SAY WHAT THEY ARE NOW TRYING TO ENFORCE, BUT UNDER SUBSTANTIAL BURDEN, IT IS NOT PURELY SUBJECTIVE. OBVIOUSLY SUBSTANTIALITY CON NOTES SOME QUESTION OF -- COME NOTES SOME QUESTION OF DEGREE -- CONNOTES SOME QUESTION OF DEGREE AND REASONABLENESS, AND IT HAS TO BE SUBSTANTIAL BURDEN ON RELIGION, NOT A SUBSTANTIAL BURDEN ON THE COMMUNITY AS A WHOLE.

WHAT SUBSTANTIAL BURDEN DID THE TRIAL COURT APPLY, TO DETERMINE IF THE REGULATION HAD A SUBSTANTIAL BURDEN?

I DON'T THINK YOU CAN, AT LEAST IN THIS STAGE OF THE STATUTE'S DEVELOPMENT, I DON'T THINK YOU CAN ANNOUNCE A SINGLE TEST THAT WILL DID YOU EVER ALL -- THAT WILL COVER ALL THE GREAT RANGE OF CASES, BUT ANYTHING, TOTAL PROHIBITION THAT WOULD BE VISIBLE ENOUGH TO PRESERVE THE STATUOUS AND CROSSES THAT ARE PRESERVING, I DON'T THINK IT

WOULD ELIMINATE THEM.

YOU SAID THE PURPOSE FOR WHICH THEY ARE ERECTED. WHAT IS THAT PURPOSE?

THAT PURPOSE ACTUALLY VARIED AMONG THE PLAINTIFFS, TO MR. CAROM, THE PROTESTANT PLAINTIFF, IT IS VERY IMPORTANT THAT THE CROSS BE VISIBLE FROM A DISTANCE. TO THE --

S OPPOSED? -- BECAUSE? VISIBLE FROM A DISTANCECE OF?

BECAUSE OF THE MESSAGE IT CONVEYS AND BECAUSE IT DRAWS PEOPLE TO THE GRAVE SITE, WHO WILL THEN READ THE IN SFRN THAT IS OTHERWISE -- THE INSCRIPTION THAT IS OTHERWISE HORIZONTAL.

CHIEF JUSTICE: JUSTICE SHAW HAD A QUESTION.

IF YOU HAVE A PARTICULAR TEST TO BE APPLIED, HOW IS IT TO BE REVIEWED BY AN APPELLATE COURT?

I CAN ARTICULATE A TEST FOR THIS CASE. WHAT I CAN'T DO IN THE STATUTES DEVELOPMENT IS ARTICULATE A TEST GENERALLY. A TOTAL PROHIBITION OF A TRADITIONAL RELIGIOUS PRACTICE THAT GROWS RIGHT OUT OF THE CENTER OF A FAITH TRADITION IS A SUBSTANTIAL BURDEN. I THINK IT IS AN EASY CASE, AND I THINK THAT IS AN EASY TEST. YOU KNOW, WHAT I CAN'T GIVE YOU IS A UNIVERSAL TEST.

YOUR TEST FOR THIS CASE IS WHAT?

IS A TOTAL PROHIBITION OF A FAMILIAR PRACTICE THAT GROWS OUT OF THE CENTER OF A RECOGNIZED FAITH TRADITION IS A SUBSTANTIAL BURDEN. I DON'T THINK THAT PART OF THE TEST SHOULD BE CONTROVERSIAL, AND I THINK THAT IS ENOUGH TO DECIDE THIS CASE.

CHIEF JUSTICE: JUSTICE ANSTEAD.

I AM HAVING SOME DIFFICULTY WITH YOUR ARGUMENT NOT ADVOCATING A SUBJECTIVE TEST HERE, AND YOU WERE USING THE EXAMPLE OF ONE OF THE PLAINTIFFS HERE THAT YOU SAY THAT IT WAS VERY IMPORTANT THAT THE MONUMENT BE VISIBLE. NOW, WHAT KIND OF A TEST ARE WE GOING TO APPLY TO THAT? VISIBLE FROM WHAT DISTANCE? ARE WE GOING TO HAVE TO, NOW, IF IT IS IMPORTANT TO THAT PERSON THAT IT BE VISIBLE FROM A QUARTER OF A MILE, OR A CERTAIN DISTANCE, THAT THERE FOR THERE CAN BE NO HEIGHT RESTRICTION ON THE MONUMENTS? AND THEN IF THE NEXT PERSON, IT IS A MATTER OF THE WIDTH OF THE MONUMENT THAT IS IMPOT, SO THAT THERE BE A SORT OF A SYMBOL OF POWER OR STRENGTH. IM HAVING DIFFICULTY WITH RECONCILING THESE CONSIDERATIONS TO DE FACTO WHAT WE END UP WITH, THEN, IS A VERY SUBJECTIVE TEST.

YOU END UP WITH A VERY INDIVIDUAL TEST. THE STATUTE IS ENTIRELY WRITTEN IN TERMS OF THE INDIVIDUAL PERSON AND HIS RELIGIOUS BELIEF.

WHAT IS THE DIFFERENCE BETWEEN INDIVIDUAL AND SUBJECTIVE?

WELL, SUBSTANTIALITY IS A MATTER OF DEGREE. WE HAVE NEVER DISPUTED THERE CAN BE REASONABLE SIZE LIMITATIONS, AND IN FACT, THE ITEMS THAT THESE PLAINTIFFS HAVE OUT THERE ARE QUITE MODEST. YOU CAN ASSESS THE CREDIBILITY OF WHAT THE PLAINTIFF IS CLAIMING ABOUT HIS RELIGION. YOU CAN ASSESS THE REASONABLENESS OF THE LIMITATION. YOU CAN UPHOLD RESTRICTIONS IN DEGREE THAT ARE NOT PROHIBITIONS IN KIND. WE THINK WHAT WE HAVE HERE, PARTICULARLY WITH RESPECT TO THE STATUOUS AND THE GRAVE COVERINGS -- STAT EWS AND THE GRAVE COVERINGS, IS A PROHIBITION IN KIND. IT IS ILLEGAL IN

BOCA RATON, DESPITE A VERY LONG STANDING TRADITION BY THE JEWISH TRADITION THAT THE GRAVE NOT BE WALKED ON AND THAT THE GRAVE BE COVERED, AND THE MEANS TO ACHIEVE THAT IN A SECULAR SOCIETY.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL.

THANK YOU, YOUR HONOR. SAME WITH THE STATUOUS. STAT EWS OF JESUS AND THE SAINTS ARE USED IN RELIGIOUS PRACTICE. SOME ARE USED SYMBOLICALLY IN TERMS OF PRAYER, THE PLAINTIFFS TESTIFIED. A STAT EW IS TOTALLY PROHIBITED. YOU CANNOT HAVE A STAT EW IN BOCA RATON IN THE CEMETERY. WE THINK THESE ARE PROHIBITIONS IN KIND. WE THINK LIMITATIONS OF DEGREE WILL BE UNREASONABLE AND WILLE SUBSTANTIAL BURDENS, BUT IN ANY EVENT, EVEN IF THERE ARE HARD CASES DOWN THE ROAD ON SOME OF THOSE ISSUES, YOU CANNOT CUT OFF ALL OF THOSE CASES AT THE THRESHOLD, BY ANNOUNCING A DEFINITION OF EXERCISE OF RELIGION THAT NULLFIES THE STATUTE. THIS ONE, THIS DEFINITION, NULLFIES THE STATUTE. WE TOLD YOU IN THE BRIEFS IT WOULDN'T EVEN PROTECT COMCOMMUNION WINE -- COMMUNE I DON'T EVEN WINE. THEY MADE FUN OF IT. AND THE TESTED SAID THAT UNIN WRET PTED BE SOMERES DO IT AND OTHERS DON'T. IF IT PLEASE THE COURT, ILL RESERVE THE REST OF MY TIME. THANK YOU.

MAY IT PLEASE THE COURT. THE PLAINTIFFS CONSTRUCT OF THIS STATUTE IS, AS JUDGE REINKAMP FOUND,, ONE CAN IMAGINE ARLINGTON CEMETERY, WITH THE KIND OF RULES THAT ARLINGTON HAS AS TO UNIFORMITY, ACCORDING TO THE PLAINTIFFS, IF THE STATUTE WAS APPLIED IN THAT SITUATION, ONE COULD PUT UP WHATEVER ONE THOUGHT THAT IS NECESSARY, IN VIEW OF THEIRSELF-PROCLAIMED RELIGIOUS BELIEFS.

WOULD IT MATTER THAT THE, WHETHER -- THEIR SELF-PROCLAIMED RELIGIOUS BELIEFS.

WOULDT MATTER WHETHER IT WAS CENL TIR BELIEF? SAY IT CAME OUT THAT IT T WAS CENTRAL TO THE CATHOLIC RELIGIOUS THAUN ACROSS BE UP RIGHT BUT TO THE JEWISH RELIGION IT WAS NOT QUITE AS CENTRAL, BUT FOR THEEWISH RELIGION IT WAS THAT THE GRAVEE COVERED. WOULD WE BE GETTING INTO A SITUATION, IN THE TEST THAT THE FEDERAL DISTRICT COURT ANNUNCIATED, ABOUT TRYING TO DECIDE HOW CENTRAL IT IS, IN TERMS OF LOOKING AT WHETHE REGUONASONABLE OR NOT?

NO, JUSTICE PARIENTE. WE ARE NOT LOOKING AT THE ORTHODOXY OF THE PRACTICE. THE QUESTION IS --

BUT THAT SEEMS TO BE THE CONCERN, THAT IF WE TAKE THAT FOUR-PART TEST AND SAY THAT IS THE THRESHOLD, THE VERY FIRST QUESTION, YOU ARE NOT GOING TO GET TO A FREE EXERCISE, UNDER FLORIDA'S RIFRA, UNLESS IT IS, IT MEETS ONE OF THOSE FOUR TENETS, AND THAT, I AM HAVING A LITTLE TROUBLE WITH THAT AS BEING THE, WHAT OUR LEGISLATURE INTENDED TO AT LEAST INITIALLY, PROTECT. ON THE OTHER HAND, I THINK THE SUBSTANTIAL BURDEN RAISES A DIFFERENT QUESTION, BUT YOU SEE WHAT I AM SAYING? I AM CONCERNED THAT THAT TEST MAY BE, REALLY, TOO NARROW FOR WHAT OUR LEGISLATURE INTENDED TO PROTECT, AS LONG AS THE REGULATION WAS, DEPENDING ON WHAT WAS AT ISSUE.

I THINK THE REASON WHY THE STAT YOUTH TALKS ABOUT NOT -- THE STATUTE TALKS ABOUT NOT CENTRAL OR CORE, IS BECAUSE IT WAS TRYING TO MOVE AWAY FROM THE FREE EXERCISE CASES, FROM SHERBERT VERSUS VERNER, WHICH IS KIND OF THE WHOLE WELL SPRING OF THIS WHOLE RUN OF EXERCISE LAW, SO WE HAVE SAID THAT OBVIOUSLY THE FLORIDA STATUTE SEEKS TO EXPAND WHAT IS INCLUDED WITHIN THE FREE EXERCISE OF RELIGION. THE QUESTION, THEN, IS, IS EXPAND HOW FAR? EXPAND TO SOME SELF-PROCLAIMED, PERSONAL PREFERENCE OF RELIGION, AND OUR SUBMISSION IS, OF COURSE THE STATUTE DOESN'T GO THAT FAR, AND SO THE TEST THAT JUDGE REISKAMP USED WAS SIMPLY SOMETHING TO LOOK FOR THE SOURCE SO THAT YOU CAN DISCERN THE DIFFERENCE BETWEEN PERSONAL PREFERENCE AND SOMETHING THAT

HAS A SOURCE, AND THE ONLY ISSUE WE ARE TALKING ABOUT HERE IS VERTICALITY. I MEAN, THERE IS NO QUESTION THAT ON THESE MARBLING -- MARKERS, YOU CAN PUT WHATEVER RELIGIOUS SYMBOL YOU WANT. THEIR APPROACH IS YOU CAN'T ASK THE QUESTION. YOU CAN'T ASK WHETHER OR NOT THERE IS A SOURCE FOR THI, BECAUSE AS LONG AS WE SAY WE BELIEVE, THEN THATEND OF THE INQUIRE IS OVER!

BUT WOULDN'T THERE BE MANY SITUATIONS WHERE THAT WOULD BE REASONABLE? IN OTHER WORDS A PERSON'S FREE EXERCISE, IF YOU HAD SOMETHING WHERE IT WAS THE USE OF A PUBLIC FACILITY AFTER HOURS, AND THEY SAID WE WERE GOING TO ALLOW RELIGIOUS GROUPS TO USE IT. DO WE REALLY CARE IN THAT SITUATION, WHETHER IT IS A, YOU KNOW, IS IT REALLY A RELIGIOUS, IS IT A RELIGIOUS GROUP OR A GINAL RELIGIOUS GROUP OF WE ARE GOING TO LET THEM USE OUR FACIL, BECAUSE THERE IS REALLY NO OTHER, THERE IS NOTHING ELSE THAT IS INVOLVED. I MEAN, AGAIN, GOING BACK TO THE FACT THAT THIS IS A PUBLIC LAND AND THAT THERE FOR THE, THAT THE GOVERNMENT HAD THE RIGHT TO PUT INTO EFFECT REGULATIONS THAT WOULD BE TO THE BENEFIT OF ALL OF THE USERS OF THIS LAND, SEEMS TO ME TO BE, REALLY, THE MORE CRITICAL INQUIRY, BUT YET THAT IS NOT REALLY BEFORE US.

I THINK IT IS, BECAUSE THE QUESTION BEFORE YOU IS, DOES THE FLORIDA RIFRA PROTECT ANY SELF-PROCLAIMED PERSONAL PREFERENCE, WITH REGARD TO RELIGION?

BUT MAYBE IT WOULD, IN ANOTHER CONTEXT. THAT IS WHAT I GUESS, YOU KNOW, IF YOU MAKE THE BAR TOO HIGH, MAYBE YOU HAVE FRUSTRATED THE LEGISLATIVE INTENT, BUT IT IS HARD TO BELIEVE THE LEGISLATURE REALLY WANTED TO SORT OF DESTROY THE CONCEPT OF MEMORIAL GARDENS IN THIS STATE.

OR DESTROY THE CONCEPT OF NEUTRAL LAWS OF GENERAL APPLICABILITY THAT WOULD, IF VIOLATED, BECAUSE SOMEONE EXPRESSES A PERSONAL RELIGIOUS PREFERENCE, THEN HAVE AN IMPACT UPON THE RIGHTS OF OTHERS. I THINK WHAT IS INTERESTING ABOUT THIS CASE --

IF YOU ACCEPT THE PROPOSITION THAT THIS STATUTE EXPANDS WHAT WOULD BE THE PRONOUNCEMENT OF THE U.S. SUPREME COURT, THEN WHY ISN'TR OPPONENT CORRECT THAT YOU CAN, THAT WE CAN NOT ENUNCIATE A RULE HERE THAT FITS EVERY INSTANCE, AND THAT WHAT WE ARE DEALING WITH HERE IS SOMETHING THAT WE OUGHT TO ANNOUNCE THAT THIS IS A SITUATION BY THIS CITY, THAT IS IN VIOLATION OF THIS RATHER NARROW RANGE WHICH YOUR OPPONENT SAYS OF ORGANIZED RELIGIOUS BELIEFS?

WELL, JUSTICE WELLS. FIRST, THE RULE THAT WE ARE TALKING ABOUT IS, REALLY, A RULE THAT JUST CREATES SOME FRAMEWORK WITHIN WHICH ONE CAN APPLY THE FLORIDA RIFRA. I MEAN, I THINK THAT IS IMPORTANT. THE FIRST AMENDMENT SAYS CONGRESS SHALL MAKE NO LAW. THAT IS VERY SPECIFIC, AND YET WE HAVE A WHOLE VARIETY OF RULES THAT TEST THAT. THE CENTRAL HUDSON TEST FOR COMMERCIAL SPEECH. LEMON VERSUS KURTZMAN FOR PLACING THE MATTER IN FREE SPEECH, SO THERE IS REALLY NOTHING WRONG WITH THE FRAMEWORK OF PLACING THE APPLICATION OF THE STATUTE. IF THERE IS NO FRAMEWORK FOR IT, THEN IT CREATES A MORE CHAOTIC FOR IT, WHERE EACH OF THESE CONDITIONS WILL HAVE NO DEFINITION OF WHETHER AND HOW TO APPROACH WHETHER OR NOT YOU HAVE GOT A SUBSTANTIAL BURDEN ON THE FREE EXERCISE OF RELIGION, BUT I THINK THE BEGINNING POINT TASK HAS TO BE IS, IS THIS SOMETHING THAT QUALIFIES AS THE FREE EXERCISE OF RELIGION? THEIR POSITION IS AS LONG AS WE SAY IT IS, THEN THAT TRUMPS NEUTRAL LAWS OF GENERAL PLIKABLES. IF WE SEE IT -- IF WE -- GENERAL PLIK ABILITY. IF WE SAY IT -- OF A PLIK ABILITY. IF WE SAY THAT, IN THE CONCEPT OF WHAT EVERYONE HAS TO FOLLOW, IF THEY SAY IT IS IN OUR INTEREST, THEN THAT IS A COMPELLING INTEREST. ALL THE BOCA RATON CEMETERY SAYS IS HORIZONTAL MARKERS ARE HOW YOU MARK THE GRAVE SITES HERE. YOU CAN PUT WHATEVRU N THAT MARKER. THAT IS A NEUTRAL RAW LAU OF GENERAL APPLICABILITY. IT HAS NOTHING DO WITH PERSONAL RELIGION. THESE PEOPLE COME AND THEY BUILD THEIR OWN PERSONAL

SHRINES, AND THERE IS NO --

MR. ROGOW, LET'S GET BACK TO THE SUBSTANTIAL BURDEN PORTION OF THE STATUTE. WHAT WOULD BE YOUR TEST FOR A SUBSTANTIAL BURDEN?

A SUBSTANTIAL BURDEN WOULD BE WHETHER OR NOT THE BURDENEN THAT IS PLACED ON THE PRACTICE THAT IS BEING ESPOUSED, SO INTERFERES WITH SOMETHING MORE THAN A PERSONAL PREFERENCE OF THEIR RELIGIOUS BELIEFS, THAT THERE FOR IT BECOMES A SUBSTANTIAL BURDEN AND CANNOT BE --

HOW WOULD YOU REACT TO THE PETITIONERS INDICATE THAT IT WOULD BE A TO GET DEPRIVATION WOULD BE A SUBSTANTIAL BURDEN. WOULD YOU AGREE WITH THAT?

THE TOTAL DEPRIVATION IS A VERTICAL MONUMENT. THERE IS NO QUESTION ABOUT THAT. A TOTAL DEPRIVATION. BUT THEN THE QUESTION IS WHERE IS IT SO IMPORTANT? WHERE IS IT SHOWN, WHAT IS THE SOURCE THAT IT IS SO IMPORTANT OF A VERTICAL REPRESENTATION? THEY CAN HAVE CROSSES AND STARS AND WHATEVER YOU LIKE, BUT THEY HAVE TRIVIALIZED THE FREE EXERCISE CLAUSE. THEY ARE TALKING ABOUT ETCHING STONES, WOOD CHIPS, MARBLE, CROTON TREES. THEY HAVE DONE ALL OF THESE THINGS IN, QUOTE, THEIR EXERCISE OF FREE RELIGION, SO WHAT THEY HAVE DONE IS CREATE A CHAOTIC SCENE THAT IS CONTRARY TO THE RULES OF THE ZMTORY. -- OF THE CEMETERY. BY THE WAY, JUDGE REISKAMP RULED IN 1982 THAT VERTICAL RICINGS WILL BE BANNED BUT THAT IS NOT THE QUEOF THIS COURT. THE QUESTION OF THIS COURT IS, IS IT BROAD OR DOES IT PERMIT AN INQUIRY INTO THE SUBSTANTIAL BURDEN, AN INQUIRE IRINTO THE SOURCE OF THE PARTICULAR -- AN INQUIRY INTO THE SOURCE OF THE PARTICULAR RELIGIOUS BELIEF. NOT A SOURCE BUT A REASON FOR IT.

YOU HAVE COME BACK TO YOUR NEUTRAL LAW OF GENERAL APPLICABILITY. NOW, WOULD YOU AGREE THAT THE ENACTMENT OF THESE LAWS AROUND THE COUNTRY, AND BY FLORIDA, REALLY, WERE IN REACTION TO A CASE OUT OF THE U.S. SUPREME COURT THAT, REALLY, RESTED ON, INDEED ON THAT PRINCIPLE. AND DISCUSSED WHETHER OR NOT ONE OF THE PURPOSES OF THE ACT, REALLY, WAS TO THE EXTENT THAT THEY COULD DO IT, TO NOT ABIDE BY THAT PRINCIPLE OF JUST HAVING IF YOU COULD IDENTIFY IT AS A NEUTRAL LAW, GENERAL APPLICABILITY, THEN YOU COULD REGULATE ANY RELIGIOUS PRACTICE YOU WANTED TO. YOU UNDERSTAND MY QUESTION?

YES. YOU KNOW, THAT, WE BEGIN, REALLY WITH SMITH, WHICH SAYS NEUTRAL LAWS OF GENERAL PLIK ABILITY, EVEN IF IT TOUCHES UPON THE EXERCISE OF RELIGION, THE NEUTRAL LAW SHOWS THAT THERE IS NO BIAS AGAINST RELIGION, SO THAT IS OKAY, AND THEN THE FEDERAL RIFRA IS PASSED, WHICH SAYS, WELL, YOU HAVE GOT TO SHOW A COMPELLING GOVERNMENTAL INTEREST, GOING BACK TO THE SHERBERT VERSUS VERNER TEST, THEN THE FEDERAL LAW IS STRUCK DOWN BECAUSE IT IMPINGEES ON THE STATE'S RIGHTS, EVEN THOUGH IT HAS APPLICATION ON THE STATE SIDE, SO WHEN THE FEDERAL LAW IS STRUCK DOWN, THEN THE LOCAL LAWS COME INTO PLAY. THEY ARE NOW CONCERNED THAT THEY WANT TO HAVE THE GREATEST EXPANSION OF THE FREE EXERCISE CLAUSE TO USE IT MORE THAN A SHIELD, TO USE IT AS MORE THAN A SHIELD BUT AS WEAPON, SO THEY INCLUDE LANGUAGE, BUT IT DOESN'T HAVE TO BE CORE OR CENTRAL, BECAUSE THAT IS WHERE WE HAD STARUT, SO, NOW, YOU GET INTO ANY EXERCISE OF RELIGION, AND THAT IS WHERE THEY HAVE TAKEN THIS, UNDER THE FLORIDA RA. HS THEIR SUBMISSION. ANY EXERCISE OF RELIGION. SELF-PROCLAIMED, NO SOURCE, I BELIEVE, IT QUALIFIES TO TRIGGER THE COMPELLING GOVERNMENTAL INTEREST.

BUT THEY SEEM TO, ALSO, GGEST THAT THE TEST APPLIED BY THE DISTRICT JUDGE HERE CERTAINLY GOES RIGHT BACK INTO THAT CENTRAL OR CORE CONCEPT. THAT SEEMS TO BE, REALLY, AS I READ, THE PRIMARY ARGUMENT AND THRUST THAT THEY ARE MAKING. IS THEY HAVE TURNED THE STATUTE ON ITS HEAD.

THAT IS WHAT THEY SAY, JUSTICE LEWIS, BUT THEY ARE ABSOLUTELY WRONG. JUDGE REISKAMP WAS VERY CAREFUL AND VERY KAURB US ABOUT THAT. HE CERTAINLY RECOGNIZED THE LIMITATIONS. HE CERTAINLY RECOGNIZED THAT CORE AND CENTRAL WAS NOT THE KEY WORD ANYMORE, AND SO ALL HE WAS LOOKING FOR WAS, WHAT IS THE SOURCE? OR CAN IT BE, WHICH IS THEIR SUBMISSION, YOU DON'T HAVE TO HAVE A SOURCE. IT IS A FREE EXERCISE OF RELIGION BECAUSE I SAY IT IS, AND HE THOUGHT THAT THAT WENT TOO FAR, THAT THAT EXPANDED THIS NOTION OF FREE EXERCISE, WHICH IS, I MEAN, WE RESPECT THE FREE EXERCISE OF RELIGION. IT IS A SHIELD AGAINST GOVERNMENT INTERFERENCE WITH RELIGION, BUT THAT DOESN'T MEAN THAT YOU CAN USE IT AS A WEAPON TO INTERFERE WITH THE RIGHTS OF OTHERS, WHICH IS EXACTLY WHERE THEY TAKE THIS STATUTE, AS THEY WANT TO USE IT. NONE OF THESE OTHER CASES, BY THE WAY, INVOLVE INFRINGING THE RIGHTS OF OTHERS. IF ONE WANTS TO NOT WORK ON A SATURDAY AND STILL GET UNEMPLOYMENT BENEFITS, WELL, THAT IS YOUR RIGHT TO FREE EXERCISE, AND YOU GET YOUR BENEFIT, BUT THIS IMPINGES UPON EVERYBODY IN THE COMMUNITY.

WHERE DOES THAT COME INTO, THOUGH, THE INQUIRY? THAT IS GOING BACK TO THIS STATUTE DOES SEEM TO INTERFERE IN THE AND INDICATION OF THE -- IN THE APPLICATION OF THE PLAINTIFF'S -- OF THE PLAINTIFFS' POSITION, WOULD INFRINGE UPON ALL OF THOSE THAT PICKED A NONSECTARIAN CEMETERY, WHERE THERE WOULD BE HORIZONTAL GRAVE MARKERS, AND SO, BUT WHETHER DOES THAT FIT INTO THE FIRST ISSUE AS TO WHETHER, IF THIS HAD ENDED UP BEING SOMEBODY'S CORE BELIEF THAT, IT WAS PART OF THE CATHOLIC RELIGION, IT STILL WOULD, IF YOU ALLOWED THIS TO HAPPEN IN A PUBLIC CEMETERY, YOU WOULD STILL BE INFRINGING UPON THOSE THAT WANTED TO HAVE HORIZONTAL GRAVE MARKERS, SO I GUESS I AM STILL HAVING TROUBLE WITH WHERE WE WOULD FIT IN, THE QUESTION THAT THIS, THE PLAINTIFF' POSITION INFRINGES ON THE RIGHT SIDE OF OTHERS, IN TERMS OF -- ON THE RIGHTS OF OTHERS, IN TERMS OF THE CERTIFIED QUESTION FROM THE ELEVENTH CIRCUIT?

I AM POINTING THAT OUT TO SHOW HOW IMPORTANT IT IS. I DON'T THINK YOUR QUESTION ADDRESSES THAT. I AM POINTING TO SOME SOURCE. SHOULD THERE BE A MECHANISM TO DETERMINE IF AN EXERCISE OF RELIGION IS PURELY PERSONAL, AND I THINK THIS GOES TO A SUBSTANTIAL BURDEN. YOU KNOW, IF THE STATUTE HAD SAID ANY BURDEN ON FREE EXERCISE OF RELIGION TRIGGERS A COMPELLING GOVERNMENTAL INTEREST TEST, THAT WOULD HAVE BEEN THE WIDEST, BROADEST EXPANSION, ANY BURDEN ON ANY FREE EXERCISE. THAT IS NOT WHAT THE STATUTE SAYS, AND SO THE STATUTE TALKS ABOUT A SUBSTANTIAL BURDEN. WELL, TO MEASURE WHETHER OR NOT IT IS SUBSTANTIAL, ONE HAS TO MAKE SOME DETERMINATION OF WHAT THIS EXERCISE IS, AND THAT IS EXACTLY WHAT JUDGE RYSKAMP WAS DOING HERE, IN USING IN FOUR-PART TEST. WHAT IS THE CHOICE OF THIS FREE EXERCISE, AND IF WE ARE TALKING ABOUT WHETHER YOU ARE GOING TO IMPINGE UPON THE RIGHTS OF OTHERS, YOU ARE IDENTIFYING THE PROBLEM BETWEEN AN ABRAHAM LINCOLN STATUTE AND THE STATUTE -- LINCOLN STAT EWAN THE STAT -- STAUE AND THE STAUE OF THE MOTHER MARRY, THAT IS A QUESTION FOR ANOTHER DAY. ALL WE ALGOUTE IS THAT IT BE CONSTRUCTED IN THE EXERCISE OF FREE RELIGION.

IF WE INTERPRETED THAT WOULD ALLOW SOMEONE'S RELIGIOUS BELIEFS SAID THAT SHE SHOULD HAVE A VERTICAL MARKER AND SOMEONE ELSE'S WAS NOT RELIGIOUS BUT THEY WANTED TO HAVE SOMETHING. WOULDN'T THAT GET THE GOVERNMENT AND THIS IS A GOVERNMENT CEMETERY, IN THE BUSINESS OF ESTABLISHING A PREFERENCE FOR RELIGION OVER NONRELIGION?

YES, AND WE HAVE ARGUED THAT AS A POSITION THAT WOULD HAVE TO BE TAKEN, IF THIS COURT SAYS THAT THE STATUTE SAYS WHAT THE PLAINTIFFS SAY IT IS. NOW, ON THE CERTIFIED QUESTION, THAT FEDERAL QUESTION WOULD, THEN, BE BACK IN THE ELEVENTH CIRCUIT, BUT THAT CERTAINLY CREATES A SHADOW OVER THIS, AND I THINK, HELPS FORM THE ANSWER, THE PROPER ANSWER TO THE QUESTION. ONE DOESN'T --

WHAT IS THAT ANSWER TO THE FIRST QUESTION? YOU WOULD AGREE THAT THIS IS BROADER THAN THOSE, THAN THE UNITED STATES CONSTITUTIONAL CASES ON THIS ISSUE.

IT, AND THE QUESTION IS, IS IT SO BROAD, IS IT SO, SO PLAINTIFF FREE TO EXERCISE ANYTHING THAT THEY WANT, THAT IT BECOMES AN ESTABLISHMENT OF RELIGION PROBLEM, AND I THINK THE ANSWER WOULD BE YES, IF WE GET TO THAT POINT, BUT OUR CONSTRUCT --

WHAT ABOUT THE SECOND CERTIFIED QUESTION FROM THE ELEVENTH CIRCUIT? HOW WOULD YOU SUGGEST THAT THE COURT ANSWER THAT QUESTION?

THAT THE ANSWER IS, IS THAT, THE ANSWER SHOULD BE NO, AS WE HAVE SAID IN OUR BRIEF, THAT IF THE PRACTICE, THAT THE PERSON IS ESPOUSEING, HAS NO SOURCE, THEN IT IS NOT COVERED BY THE FEDERAL RIFRA, AND THAT IS ALL THAT JUDGE RYSKAMP SAID. I MEAN, HE HAD THIS FOUR-PART TEST THAT HE USED, AND HE SAID IF IT MEETS ANY ONE OF THOSE ARTS, AND ONESEVEN IFT IS SOMETHING RECENT THAT HAS SOME SOURCE,E FOR IT IS NOT PURELY A SELF-PROCLAIMED PERSONAL PREFERENCE AND THEREFORE IT WOULD FALL WITHIN THE FLORIDA ARRIVERA.

SO -- THE FLORIDA RIFRA.

SO THAT SECOND CERTIFIED QUESTION GOES TO THE QUESTION OF WHETHER OR NOT THAT CONDUCT IS SUBSTANTIALLY MOTIVATED BY RELIGIOUS BELIEF?

I THINK, JUSTICE QUINCE, IT GOES AS TO WHETHER OR NOT THERE CAN BE AN INQUIRY INTO WHETHER OR NOT THE CONDUCT IS SUBSTANTIALLY MOTIVATED BY RELIGIOUS BELIEF, AND THAT IS WHAT HE WAS DOING, AND THEN, OF COURSE, WE WOULD GET, IF THE ANSWER TO THAT QUESTION IS, IS THAT THIS TEST, THIS ATTEMPT TO FORMULATE SOMETHING OTHER THAN WHAT YOU HAVE HEARD THE PLAINTIFF SAY IS THERE IS NO TEST. WE SAY IT AND WE DON'T HAVE A TEST TO GIVE TO YOU. THIS WAS AN OBJECTIVE TEST THAT HE WAS USING THAT ONLY LOOKED FOR A SOURCE. THAT IS ALL. THE NEXT QUESTION WOULD BE, WELL IF THEY DO MEET THE SOURCE TEST AND THEN INTERFERE WITH THE RIGHTS OF OTHERS, DO WE GET TO THE ESTABLISHMENT CLAUSE PROBLEM BUT THAT IS ANOTHER CASE, AS I HAVE SAID, FOR ANOTHER DAY ON THISORD, ON THIS CASE, I THINK -- ON THIS RECORD, ON THIS CASE, I THINK THE ANSWER WOULD BE SIMPLE THAT THIS NEUTRAL LAW OF GENERAL APPLICABILITY ALLOWING THE MARKINGS ON THE HORIZONTAL MARKERS, WOULD NOT VIOLATE THE FLORIDA RIFRA AND OBVIOUSLY DOESN'T VIOLATE THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE BUT THAT IS THE INQUIRY HERE. THE INQUIRY IS SHOULD THERE BE A MECHANISM TO DETERMINE IF THE EXERCISE OF RELIGION IS PURELY A PERSONAL PREFERENCE, AND SHOULD THERE BE A MECHANISM TO DETERMINE IF THE BURDEN IS SUBSTANTIAL, AND THEY, INTERESTINGLY ENOUGH, HAVE A CONCESSION THAT I DON'T THINK THEY REALIZE THE SIGNIFICANCE OF AND THAT IS, WELL, THERE COULD BE AN INQUIRY, MR. LAYCOCK SAID, ABOUT WHETHER, ABOUT THE SIZE, FOR EXAMPLE. WOULD THAT BE A SUBSTANTIAL BURDEN? IF THEY WANTED TO BUILD A 100-FOOT MONUMENT INSTEAD OF A TEN-FOOT MONUMENT, ONCE THEY HAVE CONCEDED THERE CAN BE THAT INQUIRY, THEN WHAT THEY ARE SAYING IS THAT THIS CAN BE THIS KIND OF ATTEMPT TO FIND OUT WHAT THE SOURCE IS OFE RELIGIOUS PREFERENCE, AND THAT IS ALL THAT HAPPENED IN THIS CASE.

CHIEF JUSTICE: JE SHAW.

HOW WOULD THAT SOURCE TEST WORK AS A PRACTICAL R? BECAUSE IT SEEMS TO BE A RATHER LOW HURDLE TO ESTABLISH SOME TYPE OF SOURCE. NOT VERY IMAGETIVE OR CREATIVE, NOT TO BE ABLE TO COUP WITH SOME TYPE OF SOURCE, SO HOW, AS A PRACTICAL MATTER, HOW SUBSTANTIAL WOULD THAT HAVE TO BE?

EITHER, JUSTICE SHAW, I THINK YOU ARE RIGHT IT IS A VERY LOW TEST, AND THE FACT THAT IT IS A VERY LOW FLESH HOLD, REALLY -- THRESHOLD, REALLY, SHOULD BE SATISFACTORY TO THEM, BECAUSE IT ALLOWS THEM TO CROSS THE BAR INTO THE FLORIDA RIFRA WITHOUT HAVING TO SHOW VERY MUCH, BUT WHAT IT UNDERSCORES IS, IF YOU CAN'T MEET THAT TEST, THEN THE FLORIDA RIFRA DOESN'T PROTECT YOU. THEY DON'T WANT IT THAT WAY. THEY WANT THE FLORIDA RIFRA TO PROTECT EVERYTHING. NOW, UNDER THE FREE EXERCISE CLAUSE CASES, IT IS MUCH HIGHER TEST. ITS CORE IS CENTRAL, SO THERE IS NO QUESTION THAT WE AGREE THAT THE FLORIDA STATUTE EXPANDS THE RIGHT. THE QUESTION IS HOW FAR DOES IT EXPAND IT? IT DOES FOR THE EXPAND IT TO THE ENDS OF THE EARTH AND THE ENDS OF HORSIZE ONE AND ONE'S IMAGINATION IN THE THE FORM OF FREE EXERCISE.

CHIEFSTICE: KIEF MR. LAYCOCK. MR. CHIEF JUSTICE

MR. LAYCOCK CAN THERE BE AN INQUIRY INTO THE SOURCE?

THERE CAN BE AN INQUIRY, BUT LET ME SAY THAT THE TRIAL CONDUCTED IN THIS CASE BORE ABSOLUTELY NO RESEMBLANCE TO WHAT MR. ROGOW JUST DESCRIBED.

WHAT IS WRONG WITH THE CRITERIA THAT JUDGE RYSKAMP SET OUT, AS TO THE FACT THAT THERE --

THE CRITERIA ON THEIR FACE, REQUIRE EITHER THAT THE PRACTICE BE UNIVERSAL THROUGHOUT A WORLD RELIGION OR THAT IT BE DIRECTED IN SACRED TEXT, AND AS APPLIED BY THE DISTRICT COURT, IT WASN'T ENOUGH THAT THE GENERAL CONCEPT BE EDIN SACRED TEXT. THE DETAILS OF IMPLEMENTATION HAD TO BE DIRECTED IN SACRED TEXT. S TEST, AS APPLIED, AS AN EOF DESTRUCTION, NOTHING WILL EVER QUALIFY FOR PROTECTION UNDER THIS STATUTE, NOT EVEN COMMUNION WINE AND NOT EVEN THE STAY OF THE SAKE -- THE STAUE OF THE SACRED HEART ON A GRAVE SITE. THIS WOULD NOT HAVE TAKEN THEE LODGE AND AND HISTORY PROFESSORS TO -- THE THEOLOGIAN PROFESSORS AND HISTORY PROFESSORS TO WORK THROUGHOUT THE LENGTH AND TERM OF ORGANIZED RELIGIONS, TO SATISFY THIS TEST.

HOW FAR CAN ONE GO IN ANALYZING THE SOURCE? THAT IS WHAT WE HAVE BEEN REACHING FOR ALL MORNING.

I THINK IN MOST OF THESE CASES, THE EASIEST WAY FOR THE PLAINTIFF TO EXPLAIN HIS PERSONAL RELIGIOUS BELIEF IS TO EXPLAIN WHERE IT COMES FROM OUT OF HIS LARGER RELIGIOUS TRADITION. YOU GET THAT KIND OF TESTIMONY IN THESE CASES. THE PLAINTIFF OFFERED IT IN HIS CASE, BEFORE THE THEOLOGIAN --

BUT IS THAT CRUCIAL --

IF THAT TESTIMONY IS CREDIBLE. IF HE IS NOT CHANGING HIS STORY. IF HE HAS LIVED HIS RELIGIOUS LIFE CONSISTENTLY WITH THAT TESTIMONY, THEN HE HAS EXERCISED RELIGION. THEN WE CAN INQUIRE ABOUT THE SUBSTACKS YACHT -- SUBSTANTIALITY OF THAT BURDEN AND HOW FAR IS THE GOVERNMENTAL ALLOWED TO INTRUDE, AND IF HE IS HARMING OTHERS, THERE IS PROBABLY A COMPELLING INTEREST IN PREVENTING HIM FROM HARMING OTHERS F THE CITY WANT PRESIDENTS TO MAINTAIN -- IF THE CITY WANTS TO MAINTAIN MEMORIAL GARDENS, THEY NEED TO CLEARLY STATE THAT UP FRONT AND TELL THE PEOPLE BEFORE THEY BUY THEIR LOTS.

SO THE QUESTION THAT I HAD WAS, HOW DO YOU ANALYZE THIS TEST, IN TERMS OF THIS STATUTE T FREE EXERCISE IN THE CIRCUMSTANCE, INFRINGING ON THE RIGHTF OTHERS, AND WHAT YOU NOW ARE GETTING INTO, YOU ARE SAYING IT DOESN'T, IT WOULD FIT INTO THE COMPELLING STATE INTEREST PART OF IT? IS THAT --

YES.

NOT INTO THE FIRST PRONG.

NO. WHETHER IT AFFECTS THE RICE OF OTHERS DOESN'T HELP YOU FIGURE OUT WHETHER IT IS RELIGION FOR THE PLAINTIFF, BUT IF IT IS IMPOSING ON THE RIGHTS OF OTHERS THAT IS CERTAINLY REASON FOR REGULATION THAT MAY WELL SATISFY THE --

YOU SAY THAT JUDGE RYSKAMP APPLIED THE TESTS AS HE ENUNCIATED, BUT THE ISSUE OF HOW HE APPLIED THE TEST IS NOT SOMETHING THAT IS BEFORE US.

IF YOU SAY YES TO THIS CERTIFIED QUESTION AND SEND IT BACK TO THE FEDERAL COURTS, THEY ARE GOING TO INTERPRET YOUR ANSWER CONSISTENTLY WITH HOW THEY APPLIED THE TEST, AND THE TEST, BECAUSE IT REALLY IS DIRECTLY WHAT THE LEGISLATURE SAID NOT TO DO. IS IT DIRECTED IN A SACRED TEXT, YES OR NO? IS IT UNIVERSAL THROUGHOUT THE WORLD? YES OR NO? THE LEGISLATURE MADE POLICY. THE STATUTE IS VERY CLEAR, AND IF IT TURNS OUT TO BE UNWORKABLE I AM SURE THEY WILL AMEND IT, BUT RIGHT NOW YOU SHOULD FOLLOW THE STATUTE.

CHIEF JUSTICE: THANK YOU, MR. LAYCOCK. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.