No. 91-948

IN THE

Supreme Court of the United States

October Term, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC.,

—and—

ERNESTO PICHARDO,

Petitioners,

—against—

CITY OF HIALEAH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS, CITIZENS FOR ANIMALS, FARM ANIMAL REFORM MOVEMENT, IN DEFENSE OF ANIMALS, PERFORMING ANIMAL WELFARE SOCIETY, and STUDENT ACTION CORPS FOR ANIMALS, IN SUPPORT OF RESPONDENT CITY OF HIALEAH, FLORIDA

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July 31, 1992

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae constitute a broad-based consortium of secular organizations dedicated to the humane treatment of animals. Though they come to this case holding diverse views and goals, the *amici curiae* agree that — as articulated in the 1641 Massachusetts Bay Colony "*Body of Liberties*" — "[n]o man [may] exercise any Tirranny or Crueltie towards any bruite Creature . . . ."[2]

International Society for Animal Rights, founded in 1959 in the District of Columbia,[3] now has some 25,000 members and supporters worldwide. Its chartered purposes include promoting "protection for animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause [and seeking] to prevent nationwide causes of cruelty to and suffering in animals [and publishing materials] dealing with the individual aspects of animal welfare [and conducting] mass humane education . . . to foster mercy, compassion and respect for animals . . . ." International Society for Animal Rights is often requested by other animal rights organizations to furnish memoranda and *amicus curiae* briefs in animal rights cases throughout the United States.

Citizens for Animals, organized two decades ago, is a grassroots national organization devoted to the promotion of animal rights. Like International Society for Animal Rights, and in furtherance of its constituents' values, Citizens for Animals is committed to making its position known to the courts through the submission of *amicus curiae* briefs.

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[1] *Amici* file this brief with permission of respondent; we understand that the blanket consent of petitioners has been filed with the Clerk of this Court.

[2] William H. Whitmore, *A Bibliographical Sketch of the Laws of the Massachusetts Colony From 1630 to 1686*, at 52 & 53 (1890).

[3] The organization's name was originally National Catholic Society for Animal Welfare. In 1972 it was changed to Society for Animal Rights and then to International Society for Animal Rights.

Farm Animal Reform Movement is a national, non-profit, public interest organization formed in 1981 by animal, consumer, and environmental protection advocates to expose and stop animal abuse and other destructive impacts of factory farming.

In Defense of Animals is a national, non-profit organization with over 50,000 members. It pursues change in the treatment of animals in industries that exploit them, in the lifestyles that support such industries, and in the attitudes that prevent recognition of the lives and rights of animals. It also attempts to stop current abuses in laboratory research and elsewhere. It pursues these goals through all available legal means.

Performing Animal Welfare Society, founded in 1985, is dedicated to the rescue of performing and exotic animals from cruel confinement and performances of pain. It investigates reports of abused performing animals and captive wildlife; rescues animals through intervention, legislation, and outright purchase; shelters rescued animals on a 20-acre sanctuary in Galt, California; works for legislation to protect all performing and exotic animals from neglect and cruelty; and educates the entertainment industry, legislators and the general public in the humane handling and care of animals.

Student Action Corps for Animals is a national, non-profit educational organization whose membership is composed of students in junior high school, high school, and college. The organization provides support, information, and a communications forum in the form a newsletter, to adolescents and adult advisors. Many young people who are members strongly believe that animals have the right not to be exploited for human purposes. Most members follow this principle by striving not to exploit animals in their own lives, and by not participating in the use of animal lives for educational purposes. The organization is composed of students from every state in the country.

SUMMARY OF ARGUMENT

The Court should abandon the compelling state interest test, to the extent that it exists, in cases involving a constitutional claim *to act* contrary to law in the name of religion. *Amici* argue that while the compelling state interest test entered Free Exercise jurisprudence properly via cases involving religious *speech*, it is a mistake to apply that test in cases involving religious *action*. Where religious claims *to act* are raised, *heightened*, rather than *strict*, scrutiny is appropriate and the state should have to present the existence of an important and legitimate interest in order to constrain religious practices. Because the interests of the City of Hialeah are unquestionably important and legitimate, petitioners' claim of a purported constitutional right to sacrifice animals in that municipality should be rejected and the Court should affirm the judgment of the court of appeals.

ARGUMENT

For good reasons this Court has almost always been unreceptive to Free Exercise challenges where the claimed right of a party *to act* in the name of religion has clashed with an important and legitimate governmental interest. *See, e.g.*, *Reynolds* v. *United States*, 98 U.S. 145 (1878); *Davis* v. *Beason*, 133 U.S. 333 (1890); *Mormon Church* v. *United States*, 136 U.S. 1 (1890); *Hamilton* v. *Regents*, 293 U.S. 245 (1934); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *United States* v. *Ballard*, 322 U.S. 78 (1944); *Cleveland* v. *United States*, 329 U.S. 14 (1946); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Jehovah's Witnesses* v. *King County Hosp.*, 390 U.S. 598 (1968); *Gillette* v. *United States*, 401 U.S. 437 (1971); *Johnson* v. *Robison*, 415 U.S. 361 (1974); *United States* v. *Lee*, 455 U.S. 252 (1982); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290 (1985); *Goldman* v. *Weinberger*, 475 U.S. 503 (1986); *Bowen* v. *Roy*, 476 U.S. 693 (1986); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Hernandez*

v. *Commissioner*, 490 U.S. 680 (1989); *Smith* v. *Employment Div., Dept. of Human Resources*, 494 U.S. 872 (1990) (*Smith II*); *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 60 U.S.L.W. 4749 (June 26, 1992).

Thus, from the very beginning of its Free Exercise jurisprudence, the Court has apparently realized that to permit citizens *to do* in the name of religion that which is proscribed by the legitimate laws of the state is to invite anarchy, permitting each man to be a floating island of private law governed only by the dictates of real or supposed religiously-motivated conscience. *See Reynolds*, 98 U.S. at 167. Conversely, however, the Court also apparently recognized early that the existence of the Free Exercise Clause and its history means, at the very least, that there must be no governmental intrusion whatsoever upon religious *belief*. *See id.* at 163. "Laws," the Court has written, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. This commonsensical — and *necessary* — belief/action dichotomy has been stressed repeatedly. Accordingly, compared to the twenty-two cases cited *supra* — where religious claims have lost out to a law prohibiting *doing* — are those cases involving government compulsion of *belief*, where the religious claimant has always handily won.[4]

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[4] Claims *to* polygamy, to *exemption* from ROTC training, *to* unfettered access to public by-ways, to *exemption* from child labor laws, *to* the fraudulent solicitation of funds, to *exemption* from blue laws, *to* withhold life-saving treatment from children, to *exemption* from being drafted into "unjust wars," *to* educational benefits despite conscientious objector status in alternate civilian service, to *exemption* from employer social security taxation, *to* favored tax status for racial discrimination, to *exemption* from minimum wage laws, to *exemption* from military dress code, to *exemption* from laws designed to curb welfare fraud, to *exemption* from prison regulations, *to* the preservation of the natural state of federal lands, *to* the tax-deductibility of the cost for participating in set-fee religious services, *to* take peyote, and *to* solicit contributions in an airport as part of a

(continued on next page...)

The latter type of cases, where the state has attempted to interfere with, or even *force*, belief are *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Wooley* v. *Maynard*, 430 U.S. 705 (1977); and *McDaniel* v. *Paty*, 435 U.S. 618 (1978).[5] In *Pierce* the inculcation of religious belief through parochial education was threatened by state-mandated secular education; in *Barnette* the religious belief of Jehovah's Witnesses that it is a sin to worship "graven images" such as a flag was threatened by a board of education resolution requiring a daily salute to the U.S. flag by school children; in *Torcaso* a notary public's freedom of belief and religion was threatened when he was denied a commission because of his refusal to declare his belief in God; in *Yoder* a state statute compelling children to attend school until age 16 threatened the Amish belief that remaining unworldly is essential to the maintenance of their religiously-mandated simple way of life; in *Wooley* the Jehovah's Witnesses' religious-based belief against fealty to the state was threatened by New Hampshire's requirement that all noncommercial vehicles have license plates bearing the state's motto, "Live Free or Die"; and in *McDaniel* the strong religious beliefs that impel some to the clergy was threatened by a state constitutional provision barring ministers

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[4](...continued from preceeding page)

religious ritual, all *failed* in light of the *important* and *legitimate* governmental interests they opposed.

[5] As noted by the Court in *Smith II*, 494 U.S. at 882, *Barnette* and *Wooley* were decided exclusively on free speech grounds, though they also involved freedom of religion. Moreover, a plurality of the Court in *McDaniel* (BURGER, C.J., and POWELL, REHNQUIST, and STEVENS, JJ.) decided the case on the basis of Free Exercise *action* while three Justices (BRENNAN, MARSHALL, and STEWART, J.J.) concurred on the basis of Free Exercise *belief*. Though these cases are not necessary to carry the argument, they are raised here because religious belief was, perforce, involved, and because they help reveal an undeniable thrust in the Court's jurisprudence. *Cf. Stromberg* v. *California*, 283 U.S. 359 (1931).

or priests from either house of the state legislature. *In all of these cases the threatened belief was vindicated*, the threatening law struck down, for, as JUSTICE JACKSON wrote for the Court in *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," 319 U.S. at 642, and, as the Court reiterated in a somewhat different context, under the Free Exercise Clause "freedom to believe . . . is absolute." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

Hence, analysis discloses that the action/belief dichotomy of this Court's Free Exercise jurisprudence has long been clear: religiously inspired action — sometimes, at least — can be regulated; religious belief cannot. *See also*, *e.g.*, *Smith II*, 494 U.S. at 877 (Court holds religiously-inspired use of peyote is subject to state's drug laws while reiterating that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such'") (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963)); *Bowen*, 476 U.S. at 699 ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute"); *Bob Jones Univ.*, 461 U.S. at 603 ("This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs . . . . However, '[n]ot all burdens on religion are unconstitutional'") (citations omitted) (quoting *Lee*, 455 U.S. at 257); *Gillette*, 401 U.S. at 461 (while Free Exercise Clause bars governmental regulation of religious beliefs, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government"); *Jehovah's Witnesses*, 390 U.S. at 598 ("The judgment is affirmed, *Prince* v. *Massachusetts*, 321 U.S. 158") (*per curiam* decision upholding three-judge district court dismissal of action wherein parents

claimed right to forbid blood transfusions for their children based on religious belief); *Braunfeld*, 366 U.S. at 603-04 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion") (WARREN, C.J., for plurality); *Ballard*, 322 U.S. at 87 ("'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with'") (quoting *Davis*, 133 U.S. at 342).

Before turning to the "tests" used by the Court to determine when religious action may be regulated, it is important first to linger upon the actual nature of religious belief, examining why its protection has been held so absolute.[6] The policy behind freedom of religious belief, it appears, is shared by the First Amendment as a whole and that policy involves the fostering and protection of

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[6] Some have suggested that as *belief* is the very predicate for the "*exercise*" of religion, it is expressly protected by the Constitution. But to say that freedom of religious belief is expressly protected by the Constitution is nothing more than to state a conclusion, shedding no light on *why* it is protected. *See*, *e.g.*, *Prince*, 321 U.S. at 174 (freedom of religious belief is "'of the very essence of a scheme of ordered liberty'") (MURPHY, J., dissenting) (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)). Indeed, virtually all other rights expressly (and impliedly) protected or recognized by the Constitution can hardly claim the *absolute* protection from governmental interference routinely enjoyed by freedom of religious belief. Another rationale posited for this absolute freedom is that the belief prong of the Free Exercise Clause is the result of the long catalogue of human folly wherein governments have attempted to homogenize religious belief by law. *See Davis*, 133 U.S. at 342. This problem, however, is undoubtedly covered by the Establishment Clause and the jurisprudence that has emerged from it.

something which is seen as not only desirable in itself but as something that is necessary to the very preservation of free government: *the marketplace of ideas*. This has found manifold expressions in the opinions of this Court. Thus, in *Prince* the Court said that freedom of conscience and freedom of the mind are equally protected by the First Amendment because they are inseparable. JUSTICE RUTLEDGE astutely wrote for the Court:

> "All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life."

321 U.S. at 164-65. And in *Cantwell* the Court stated:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

310 U.S. at 310; *see also id.* (essential characteristic of First Amendment liberties is that "many types of life, character, opinion and belief can develop unmolested and unobstructed"). And in *Wooley*, CHIEF JUSTICE BURGER noted that the First Amendment secures the right to proselytize religious, political, and ideological causes against the state's attempted invasion of the sphere of intellect and spirit. 430 U.S. at 714-15 (citing and quoting

Barnette, 319 U.S. at 642 (JACKSON, J., concurring) and *id.* at 642 (opinion of Court)); *see also Goldman*, 475 U.S. at 507 (rejecting Free Exercise claim of Air Force doctor to wear yarmulke noting deference due to military regulations as "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment"); *Wallace* v. *Jaffree*, 472 U.S. 38, 49-55 (1985) (noting freedom of conscience as unifying theme of First Amendment). This concept was most recently reiterated by JUSTICE KENNEDY in *Lee* v. *Weisman*, 60 U.S.L.W. 4723, 4726 (June 24, 1992) who, writing for the Court, noted that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . . ." For "[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Id.*

The reason, of course, for the importance of freedom of thought, denominated the "marketplace of ideas" (embracing the religious, political, philosophical, and other realms of the mind) — together with the rights to free speech, to free press, to freedom of association, to freedom of peaceable assembly, and, in our fifty-state federalist system, to the freedom of travel — is that the unimpeded exercise of these freedoms is the foundation upon which the existence of all our other rights depends. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see also Shapiro* v. *Thompson*, 394 U.S. 618, 630-31 (1969); *Wesberry* v. *Sanders*, 376 U.S. 1, 6-7, 17 (1964); *Ballard*, 322 U.S. at 86; *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326-27 (1937) *overruled on other grounds by Benton* v. *Maryland*, 395 U.S. 784 (1969); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931). Indeed, the freedom of thought and speech, considered together as one, perhaps occupies *the* preferred position in the Constitution, for "[o]f *that* freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko*, 302 U.S. at 327 (emphasis added). Thus considered, the underlying rationale is revealed behind noble

statements such as "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position," *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943), and "the interpreters of the Constitution find the purpose [of the First Amendment] was to allow the widest practical scope for the exercise of religion and the dissemination of information," *id.* at 121 (REED, J., dissenting).[7] So it is not surprising that it is in cases dealing with religious *speech* that one finds not only the initial applications of the First Amendment to the states, but an all-but absolute protection (like that accorded to religious belief) through employment of the compelling state interest test. As demonstrated *infra*, however, this laudable effort to protect religious *speech* led to the lamentable result that the compelling state interest test was indiscriminately, and erroneously, applied to the realm of religious *action*.

In *Schneider* v. *State*, 308 U.S. 147 (1939), citing "the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion," *id.* at 160, — rights that lie "at the foundation of free government by free men," *id.* at 161, and are "so vital to the maintenance of democratic institutions," *id.* — and adverting to the liberty to "impart information through speech or the distribution of literature," *id.* at 160, and to "the dissemination of information and opinion," *id.* at 163, this Court, *inter alia*, invalidated an ordinance that forbade unlicensed door-to-door solicitation and distribution of circulars as applied to a Jehovah's Witness's attempted profession and propagation of the faith. The test that

[7] And thus is explained JUSTICE STONE's citation to *Pierce* v. *Society of Sisters* for the suggestion that when reviewing statutes directed at particular religious minorities, prejudice against such minorities may be "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Carolene Products*, 304 U.S. at 153 n.4. For without the ability to maintain and augment the number of believers through religious education, a religion loses much of its ability to protect itself through the political process.

JUSTICE ROBERTS applied for the Court was that "[i]n every case . . . where legislative abridgement of the rights [to freedom of speech] is asserted, the courts should be astute to examine the effect of the challenged legislation . . . . [T]he courts [must] weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights," *id.* at 161.

There then followed *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), also written by JUSTICE ROBERTS. Citing *Schneider*, the Court for the first time held that the First Amendment's Free Exercise Clause applied to the States via the Due Process Clause of the Fourteenth Amendment, overturning the convictions of Jehovah's Witnesses under a statute which acted as a "prior restraint" upon "the dissemination of religious views or teaching." *Id.* at 304 (citing *Near* v. *Minnesota*, 283 U.S. 697, 713 (1931) (which was, of course, a pure speech/press case). Such censorship could not be countenanced, said the Court, because it implicated the religion's very right to survive, *id.* at 305, through "the solicitation of aid for the perpetuation of religious views or systems," *id.* at 307. Moreover, with regard to the conviction of one of the three Witnesses involved for breach of the peace, this Court equated "the free exercise of religion" with the "freedom to communicate information and opinion," *id.* at 307, and held that the conviction could not stand based on speech which, though offensive, did not amount to fighting words. *See id.* at 309. The test that the Court applied in this latter part of *Cantwell* was that a conviction for "only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion," *id.* at 310, had to fail "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State," *id.* at 311. Comparing the case before it to, *inter alia*, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) (HOLMES, J.) (which involved criminalization of *speech* that posed a clear and present danger to national security), *see Cantwell*, 310 U.S. at 311 n.10, the *Cantwell* Court held that "petitioner's communication,

considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question," *id.* at 311. Thus, yet another victory for the profession and propagation of *belief*, *i.e.*, religious speech. *See id.* at 310 (manifestly revealing the "marketplace-of-ideas" basis for the holding). And thus, perhaps even more significant, the entrance of what came to be called the "compelling state interest test" into the Court's Free Exercise *speech* jurisprudence.

Hard on the heels of *Schneider* and *Cantwell* were more "Witness" cases — again and again vindicating their thwarted attempts at profession and propagation — virtually all of which were steeped in the language of First Amendment speech jurisprudence, carried over into Free Exercise. *See especially*, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944); *Marsh* v. *Alabama*, 326 U.S. 501 (1946).[8]

During this time, of course, the Court's long-standing action/belief dichotomy was far from repudiated—indeed, it was reiterated repeatedly. *See Schneider*, 308 U.S. at 160; *Cantwell*, 310 U.S. at 304; *Cox*, 312 U.S. at 578; *Murdock*, 319 U.S. at 116; *Martin*, 319 U.S. at 143; *Prince*, 321 U.S. at 166-67; *Ballard*, 322 U.S. at 87; *Cleveland*, 329 U.S. at 20; *Braunfeld*, 366 U.S. at 603.

At this point, *amici* submit, the Court had articulated the proper state of Free Exercise jurisprudence: religious *belief* was absolutely protected (*Pierce*); religious *speech* was protected against all but compelling state interests (*Cantwell*, *Murdock*, *et al.*); and religious *action*, however, was capable of regulation if inimical to the health, safety, welfare, and morals of society (*Reynolds*, *Davis*, *Mormon Church*, *Cox*, *Prince*, *Ballard*, *Cleveland*, and *Braunfeld*). Thus, the Court's Free Exercise jurisprudence then matched a statute drafted by Thomas Jefferson that had been promulgated by the Virginia House of Delegates and

[8] *See also Jones* v. *Opelika*, 319 U.S. 103 (1943); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).

which read: "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain *the profession or propagation of principles* on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty"—"it is time enough for the rightful purposes of civil government, for its officers to interfere *when principles break out into overt acts* against peace and good order." An Act for Establishing Religious Freedom, 1785 Va. Stat., ch. xxxiv (*reprinted in* 12 Hening's Stat. 84, 85 (1823)) (emphasis added) (quoted by *Reynolds*, 98 U.S. at 163). "In these two sentences," this Court has acknowledged, "is found the true distinction between what properly belongs to the church and what to the State." *Reynolds*, 98 U.S. at 163.[9]

Amici respectfully suggest, therefore, that *the* fundamental error in this Court's Free Exercise jurisprudence occurred in *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

The prelude to *Sherbert* came in JUSTICE BRENNAN's opinion in *Braunfeld*, dissenting from the Court's rejection of the claim of Orthodox Jews that Sunday blue laws impermissibly burdened the free exercise of their religion. JUSTICE BRENNAN's dissenting opinion foreshadowed the unseen manner in which the "'grave and immediate danger'" test, *Braunfeld*, 366 U.S. at 612 (BRENNAN, J., dissenting) (quoting *Barnette*), or the "compelling state interest" test, *id.* at 613 (*ipse dixit*), was permitted to seep into the religious *action* side from the belief and speech side of the Free Exercise

[9] This concept found its most recent expression in the net result of two speech cases decided late last term, *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 60 U.S.L.W. 4749 (June 26, 1992), and *Lee* v. *International Soc'y for Krishna Consciousness, Inc.*, 60 U.S.L.W. 4761 (June 26, 1992) (per curiam). There, against the claimed right of a sect for its members to be able to "perform a ritual known as sankirtan . . . [w]hich consists of going into public places, disseminating religious literature and soliciting funds to support the religion," 60 U.S.L.W. at 4750 (internal quotations and citations omitted), a municipal airport's ban on solicitation was *upheld*, *id.* at 4753, but the airport's ban on distribution of literature was *struck down*, 60 U.S.L.W. at 4761.

Clause.[10] "This exacting standard," wrote JUSTICE BRENNAN, "has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom — the freedom to believe and to practice strange and, it may be, foreign creeds — has classically been one of the highest values of our society." *Id.* at 612. JUSTICE BRENNAN then proceeded to cite, by way of example, *Murdock*, *Jones*, *Martin*, *Follett*, and *Marsh*. *Id.* In JUSTICE BRENNAN's opinion, these cases, together with *Barnette — even though they dealt with the highly protected area of religious belief and religious speech* — justified the application of the compelling state interest test so as to permit the *Braunfeld* claimants *to act* contrary to the law because of their religion.

JUSTICE BRENNAN, of course, carried the day two years later in *Sherbert*, where he wrote the opinion for the Court, and where it for the first time applied the compelling state interest test to a religiously-inspired claim *to act*. Adverting first to *Cantwell*, *Torcaso*, *Fowler*, and *Murdock* (all of which involved religious *belief* or *speech*), *see Sherbert*, 374 U.S. at 402, and while noting that certain religious conduct which has "invariably posed some substantial threat to public safety, peace or order" (notably omitting "*morals*," but citing *Reynolds*, *Prince*, and *Cleveland*), *id.* at 403, JUSTICE BRENNAN observed that the state's "incidental burden" on Sherbert's free exercise could only be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .' *NAACP* v. *Button*, 371 U.S. 415, 438." *Id.* (*Button*, of course, was a freedom of

[10] *See also Braunfeld*, 366 U.S. at 607 (plurality opinion) ("If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect") (citing *Cantwell*). *But see id.* at 603-604 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion").

association case.) In *Sherbert*, the state and its arguably important and legitimate interest lost; Sherbert's claim *to act* in the name of religion prevailed. Thereafter, the results in *Thomas* v. *Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987), were foreordained. And ever since *Sherbert* the Court had to deal with the tar baby called the compelling state interest test — sometimes working with it, *see Gillette*; *Johnson*; *Thomas*; *Lee*; *Bob Jones Univ.*; *Hobbie*; *Hernandez*, sometimes getting around it, *see Tony & Susan Alamo Found.*; *Lyng*; *O'Lone*; *Goldman*; *Smith I*, and sometimes coming out against it, *see Bowen*; *Smith II*.

The Court's decision to insist upon *compelling state interests* in the *action* side of Free Exercise was a mistake not because the free exercise of religion is unworthy of protection. It was a mistake because the otherwise unrestrained freedom *to act* contrary to law in the name of religion can relegate to oblivion *other important and legitimate interests* of an ordered society, interests which, while not "grave" or "compelling," are nonetheless basic to a *civilized* voluntary association of free men. Even as early as *Braunfeld*, the Court began to express concerns about restricting "the operating latitude of the legislature" whenever a claimant waved the flag of Free Exercise, *see Braunfeld* 366 U.S. at 606, a concern that the Court echoed in *Lee*, *see* 455 U.S. at 262. And most recently in *Smith II*, the Court again reiterated this concern:

> "Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."

494 U.S. at 888 (internal quotation and citation omitted).

The Court's concern is especially justified given the allocation of burdens in a Free Exercise lawsuit. For in light of the deference accorded to legislative enactments when their constitutionality is

challenged in non-religious-based suits (where the plaintiff's injury is usually concrete, *see Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728 (1984); *see also Lucas* v. *South Carolina Coastal Council*, 60 U.S.L.W. 4842, 4853 (June 29, 1992) (BLACKMUN, J., dissenting)), there would be much to say in Free Exercise cases (where injury, perforce, is ephemeral) of requiring plaintiffs to prove by clear and convincing evidence that the government has prevented them from performing a religious *duty*.[11] Instead, as matters stand today, in a Free Exercise case the mere mention of religion causes some to believe that the usual presumption of constitutionality dissolves. *See Prince*, 321 U.S. at 167. Indeed, a religious claimant need not even show that the religious practice at issue is *central* to a faith. *See Smith II*, 494 U.S. at 886-87; *Hernandez*, 490 U.S. at 699. The belief impelling the claimant to act need only be *religious*, *cf. Yoder*, 406 U.S. at 235, and *sincerely held*, *see Hobbie*, 480 U.S. at 138 n.2 ("It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held"); *Bob Jones Univ.*, 461 U.S. at 602 n.28 ("The District Court found, on the basis of a full evidentiary record, that the challenges practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage"); *cf. Ballard*, 322 U.S. at 84; *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (drug-taking sect whose motto was "Victory Over Horseshit!" was not a sincere religion). And so long as plaintiff's religion "is *burdened*," *Thomas*, 450 U.S. at 718 (emphasis added), the defendant, the state, is then forced to justify the law. *See McDaniel*, 435 U.S. at 628-29 (state failed in proving that its once-arguably-important interest had not lost its validity with time). *But see id.* at 625

[11] *See, e.g*, *Reynolds*, 98 U.S. at 161; *Davis*, 133 U.S. at 341; *Mormon Church*, 136 U.S. at 18; *Schneider*, 308 U.S. at 159; 319 U.S. at 108; *Prince*, 321 U.S. at 163; *Braunfeld*, 366 U.S. at 601; *Sherbert*, 374 U.S. at 399 n.1; *Thomas*, 450 U.S. at 710; *Lee*, 455 U.S. at 255; *Bob Jones Univ.*, 461 U.S. at 580, 602 n.28; *Goldman*, 475 U.S. at 513 (BRENNAN, J., dissenting); *Hobbie*, 480 U.S. at 138; *O'Lone*, 482 U.S. at 345 — all noting that a religious *duty* was at issue.

(against historical background Court would not "lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court").

The modern explosion of real and supposed religions under the putative protection of Free Exercise Clause jurisprudence also indicates the mistake of applying the compelling state interest test in cases involving religious action. For, while the Free Exercise Clause may once have been perceived to protect only Christianity or "established" religions, *cf. Wallace* v. *Jaffree*, 472 U.S. 38, 52-53 (1985), it is now rightly held to extend its protection to all religious beliefs.

> "We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents."

Zorach v. *Clauson*, 343 U.S. 306, 313 (1952). In the context of a Free Exercise case today, then, virtually anything goes. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. "Courts," we have been told, "should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.[12] The "religion" involved can be a religion even of one. *See Bowen*, 476

[12] Thus, in *Bowen*, which was predicated upon the plaintiff's "recently[-] developed . . . religious objection *to obtaining* a Social Security number for [his daughter] Little Bird of the Snow," 476 U.S. at 696 (emphasis added), the plaintiff Roy was permitted casually to change his religious views *mid-trial* when it was discovered that his daughter already had a Social Security number — apparently only then did it occur to Mr. Roy that Little Bird of the Snow's spirit would be "robbed" of its power only by the *use* of her Social Security number. *Id.* at 697.

U.S. at 696; *see also Wallace* v. *Jaffree*, 472 U.S. 38, 52-53 (1985). Thus, given the current unprecedented surge in immigration,[13] and given that the great bulk of immigrants are coming from areas that traditionally have not shared the "Judeo-Christian" ethic,[14] and given the virtually limitless capacity of the human spirit (or mind) for revelation (or improvisation and rationalization),[15] religious claims *to act* which are contrary to our

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[13] *See* Margaret L. Usdansky, *Immigrant Tide Surges in '80s*, USA Today, May 29, 1992, at 1 ("The USA's largest 10-year wave of immigration in 200 years — almost 9 million people — arrived during the 1980s") (citing Census Bureau figures).

[14] *See* Immigration & Naturalization Service, *1990 Statistical Yearbook* 50 (1991) (immigration from Asia, 1981-90: 2,738,157; Caribbean, 1981-90: 872,051; Europe, 1981-90: 761,550).

[15] *See, e.g.*, Larry Rohter, *Sect's Racketeering Trial Is Set To Open*, N.Y.Times, Jan. 6, 1992, at A14 (discussing allegations that Yahweh ben Yahweh, leader of Temple of Love, Nation of Yahweh, and The Brotherhood, required his inner circle to kill "white devils" and present to him their severed ears as proof of the deed); Larry Rohter, *Sect Leader Convicted On Conspiracy Charge*, N.Y. Times, May 28, 1992, at A16 (Yahweh ben Yahweh found guilty); Marjorie Miller & J. Michael Kennedy, *Mexico Massacre; Potent Mix of Ritual and Charisma*, L.A. Times, May 16, 1989, at 1 (discussing human sacrifice of University of Texas student, Mark Kilroy of Sante Fe, by marijuana-smuggling practitioners of Palo Mayombe in Matamoros, Mexico); John Huxley, *Sex-Cult Children Held*, Sunday Times (London), May 17, 1992 (sexual and psychological abuse of children sanctioned by Children of God religious sect); *Religion Based on Sex Gets a Judicial Review*, N.Y. Times, May 2, 1990, at A17 (federal district judge considers whether to halt state prosecution for prostitution by priestess of Church of the Most High Goddess; church, based on "absolution" through sex and "sacrifice" through payment of money, worships Egyptian goddess of fertility, Isis; priestesses must have sexual relations with 1,000 men before qualifying for priesthood); Anthony Flint, *Paganism Seeing a Resurgence*, Boston Globe, Apr. 27, 1992, at 1 (Metro/Region Section) (Paganism is "a confluence of people looking for alternatives," quoting codirector of The

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essentially Western law[16] will inevitably proliferate on a grand scale. This tide of "religiosity" will only augment the already-taxed relations between religious claimants and our enlarged 20th century governments. *See Bowen*, 476 U.S. at 707, 707 n.17; *Thomas*, 450 U.S. at 721 (REHNQUIST, J., concurring in part and dissenting in part). And while "[t]he rise of the welfare state" should not spell the decline of the Free Exercise Clause, *Bowen*, 476 U.S. at 732 (O'CONNOR, J., concurring in part and dissenting in part), still, the increase in the scope and number of religious claims *to do* contrary to law should not be allowed to *un*-do the legitimate ends of civilization.

For these reasons *amici* propose that the compelling state interest test be abandoned in cases involving Free Exercise *action*

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EarthSpirit Community); *Exempt Organizations—Charitable Contributions Made to Venusian Church Disallowed*, Daily Report for Executives, Mar. 13, 1987, at H-12 (discussing Venusian Church that runs adult pornographic film booths and live sex shows); *Women Break 107-Day Fast After Learning of Parole*, AP, Dec. 3, 1987, *available in* LEXIS, Nexis Library, AP File (religious sect called Sons of Freedom Doukhobors believes in public nudity and burning material possessions); *Renegade Mormons*, Newsweek, Jan. 20, 1975, at 72 (violent sect practicing polygamy in Mexican commune as Church of the First Born in the Fullness); Peg McEntee, *Polygamy Endures a Century After Mormon Church Rejects It*, AP, May 19, 1990, *available in* LEXIS, Nexis Library, AP File (5,000 polygamists living in western states under Church of Apostolic United Brethren).

[16] *But see Lyng*, 485 U.S. at 473, 474 (BRENNAN, J., dissenting) (suggesting that Western concepts of land, centered around notions of ownership and use of private property, be balanced against those of Native Americans "in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred"). Interestingly, this issue was raised at trial when petitioner Pichardo accused counsel for respondent of "applying western logic to a religion which is not western." (R729) "Mr. Pichardo," said the late District Judge Spellman, "so you understand, we're applying western law as well." (R730)

claims (if indeed it has ever truly been applied outside of the unemployment benefits context of *Sherbert*, *Thomas*, and *Hobbie*, *see Lee*, 455 U.S. at 263 n.3 (STEVENS, J., concurring)).[17] However, in urging the Court to abandon in Free Exercise *action* cases the most stringent test to have emerged from the Equal Protection Clause, *amici* do *not* suggest that the Equal Protection Clause's lowest test, "rational relation," be adopted. *Cf. Bowen*, 476 U.S. at 727 (O'CONNOR, J., concurring in part and dissenting in part). That test would not accord Free Exercise the obviously heightened protection that it deserves, and for this reason *amici* also respectfully suggest that the "general law" formulation of *Smith II* is flawed as well. On the one hand, the general law test is too susceptible to legislative legerdemain. Under it, too much depends on legislative craft and not enough on evaluating the government's interest and intent as juxtaposed against the religious claim. Thus, in this case, for instance, under the exact same circumstances as obtained when the challenged ordinance(s) was enacted, the City of Hialeah could have promulgated a law stating: "No one, except licensed commercial purveyors of food for human consumption, may possess live turtles, fowl, goats, sheep, and other livestock." Had *this* ordinance been passed, *certiorari* probably would never have been granted. Indeed, under the general law test, the validity of such an ordinance would have been definitively and quickly disposed of in the lower court(s); Hialeah's interests and intent in passing the ordinance would have remained unscrutinized — even though the law would still have been promulgated precisely *because of* petitioners' announced intention

[17] Yet another reason for abandoning the compelling state interest test in Free Exercise *action* cases is that by purporting to set the water mark so very high, while simultaneously realizing that such a standard is very hard to meet *and* intuitively sensing that it is an impossible burden in a religiously-pluralistic ordered society, courts are constrained to hold proffered state interests to be "compelling," even though, truly, they are important and legitimate at best. The compelling state interest test is thus dangerously devalued as a tool against repression in the contexts of race and speech.

to open up a Santerian church. (A22, A28) But because Hialeah's drafting was a bit more specific and forthrightly declared that the City was appalled by the ritual or ceremonial killing of animals not primarily for the purpose of food consumption, this Court's attention was engaged and Hialeah now bears the burden of arguing compelling interests (even though, in the opinions of *amici*, the ordinances, truly, are general[18]). Thus, in addition to being *under*-protective of religious claims to conduct, the general law formulation is *over*protective as well by leaving legislatures no operating latitude to target antisocial action when religious practitioners are the only ones currently interested in committing the act. *Cf. Dawson* v. *Delaware*, 112 S. Ct. 1093, 1102 (1992) (THOMAS, J., dissenting) ("Although we do not sit in judgment of the morality of particular creeds, we cannot bend traditional concepts of relevance to exempt the antisocial").

Amici support *heightened* scrutiny as the proper test for religious claims *to act* contrary to law, a test familiar from, and similar to, the intermediate level of Equal Protection analysis. *See, e.g., Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990); *Clark* v. *Jeter*, 486 U.S. 456 (1988); *City of Cleburne* v. *Cleburne*

[18] The ordinances were truly general, of course, because they applied to both religious and non-religious ritual or ceremonial killings of animals not for the primary purposes of food. They would, for instance, penalize the action of college students who, in a drunken spree, ceremonially hack to death a beached dolphin in homage to "The God of Spring Break," and arguably would prohibit tradition-laden English-style fox hunting. Moreover, unlike the law in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), the ordinances at issue here are applicable *everywhere* in Hialeah. *Cf. id.* at 2472 (WHITE, J., dissenting). *Amici* wish to make clear that they agree with respondent that the ordinances are general laws and, in the alternative, that they are supported by compelling interests. *Amici* approach the case from a different perspective, however, because we believe in the correctness of the arguments set forth herein, and because by presenting them we hope to perform a service by laying before the Court "relevant matter . . . that has not already been brought to its attention . . . ." *See* Sup. Ct. R. 37.1.

Living Center, 473 U.S. 432 (1985); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982); *Mills* v. *Habluetzel*, 456 U.S. 91 (1982); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971). Under this test, laws supported by important and legitimate governmental interests would survive religious claims to act contrary to them. *Cf. Bowen*, 476 U.S. at 709 ("The Social Security number requirement clearly promotes a legitimate and important public interest").[19] In this case, the interests of Hialeah are undoubtedly *important*. Prevention of cruelty to animals has long been recognized as well within the states' police power to safeguard the health, safety, welfare, and morals of its citizens. *See People* v. *Reed*, 176 Cal. Rptr. 98,103 (App. Dep't Super. Ct. L.A. County 1981); *Bland* v. *People*, 76 P. 359, 360-61 (Colo. 1904); *Johnson* v. *District of Columbia*, 30 App. D.C. 520, 522 (1908); *C.E. America, Inc.* v. *Antinori*, 210 So. 2d 443, 444 (Fla. 1968); *Hargrove* v. *State*, 321 S.E.2d 104, 108 (Ga. 1984); *State* v. *Abellano*, 441 P.2d 333, 340 (Haw. 1968); *Illinois Gamefowl Breeders Ass'n* v. *Block*, 389 N.E.2d 529, 532 (Ill. 1979); *State* v. *Karstendiek*, 22 So. 845, 846-47 (La. 1897); *State* v. *Starkey*, 90 A. 431, 432, 433 (Me. 1914); *Commonwealth* v. *Higgins*, 178 N.E. 536, 537 (Mass. 1931); *City of St. Louis* v. *Schoenbusch*, 8 S.W. 791, 792 (Mo. 1888); *State* v. *Prince*, 94 A. 966, 966 (N.H. 1915); *State* v. *Davis*, 61 A. 2, 4 (N.J. Super. Ct. 1905), *aff'd*, 64

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[19] And under this test, the real-life parade of general-law horrors that is set forth in the brief of *Amici Americans United For Separation of Church and State, et al.* at 19-24, arguably would be avoided. For instance, the generally important governmental interest in having autopsies performed in all cases involving an unnatural death arguably is not present, and thus is not legitimate, when the case involves an Conservative Jew who is killed in a car accident. And the view of the City of New York, that it is better for the homeless to sleep in the street rather than in a homeless shelter without an elevator, arguably fails to produce a governmental interest important enough to trump the religiously-inspired charitable activity of Mother Teresa's sisters. Heightened scrutiny would help eliminate the cases where appalling results are reached due to the general law formulation's failure to examine the importance and legitimacy of the governmental interests involved.

A. 1134 (1906); *Barrett* v. *State*, 116 N.E. 99, 101 (N.Y. 1917); *State* v. *Longhorn World Championship Rodeo, Inc.*, 483 N.E.2d 196, 200, 201 (Ohio Ct. App. 1985); *Kuchler* v. *Weaver*, 100 P. 915, 921-22 (Okla. 1909); *Commonwealth* v. *Bonadio*, 415 A.2d 47, 49 (Pa. 1980); *State* v. *Tabor*, 678 S.W.2d 45, 48 (Tenn. 1984); *Cinadr* v. *State*, 300 S.W. 64, 65 (Tex. Crim. App. 1927); *Peck* v. *Dunn*, 574 P.2d 367, 369 (Utah) *cert. denied*, 436 U.S. 927 (1978); *Anderson* v. *George*, 233 S.E.2d 407, 410 (W. Va. 1977).[20] And the primary reason for statutes banning cruelty to

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[20] Indeed, all fifty states have laws protecting animals. *See* Ala. Code § 13A-11-14 (1982); Alaska Stat. § 11.61.140 (1989); Ariz. Rev. Stat. Ann. § 13-2910 (1956); Ark. Code Ann. § 5-62-101 (Michie 1987); Cal. Penal Code § 597 (West Supp. 1992); Colo. Rev. Stat. § 18-9-202 (1986 & Supp. 1991); Conn. Gen. Stat. § 53-247 (Supp. 1992); Del. Code Ann. tit. 11, § 1325 (1974 & Supp. 1990); D.C. Code Ann. § 22-801 & 802 (1981); Fla. Stat. ch. 828.12 (1976); Ga. Code Ann. § 16-12-4 (Michie 1988); Haw. Rev. Stat. § 711-1109 (Supp. 1991); Idaho Code § 18-2102 (1987); Ill. Ann. Stat. ch. 8, para. 703.01 (Smith-Hurd Supp. 1992); Ind. Code Ann. § 35-46-3-12 (Supp. 1991); Iowa Code Ann. § 717.2 (Supp. 1992); Kan. Stat. Ann. § 21-4310 (Supp. 1992); Ky. Rev. Stat. Ann. § 525.130 (1990); La. Rev. Stat. Ann. § 14:102 (West 1986 & Supp. 1992); Me. Rev. Stat. Ann. tit 7, § 4011 (West 1964); Md. Code Ann. § 27:59 (1992); Mass. Gen. L. ch. 272, § 77 (1990); Mich. Comp. Laws § 752.21 (1991); Minn. Stat. § 343.21 (1990); Miss. Code Ann. § 97-41-1 (1972); Mo. Ann. Stat. § 578.012 (Vernon Supp. 1992); Mont. Code Ann. § 45-8-211 (1991); Neb. Rev. Stat. § 28-1002 (1989); Nev. Rev. Stat. Ann. § 574.100 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 644:8 (1986 & Supp. 1991); N.J. Stat. Ann. § 4:22-26 (West Supp. 1991); N.M. Stat. Ann. § 30-18-1 (Michie 1978); N.Y. Agric. & Mkts. Law § 353 (McKinney 1991); N.C. Gen. Stat. § 14-360 (Supp. 1991); N.D. Cent. Code § 36-21.1-02 (1987 & Supp. 1989); Ohio Rev. Code Ann. § 959.13 (Anderson 1988); Okla. Stat. Ann. tit. 21, § 1685 (West 1983); Or. Rev. Stat. § 167.315-.330 (1991); 18 Pa. Cons. Stat. Ann. § 5511 (Supp. 1992); R.I. Gen. Laws § 4-1-2 & 3 (1987); S.C. Code Ann. § 47-1-40 (Law. Co-op. Supp. 1991); S.D. Codified Laws Ann. § 40-1-2 (1985); Tenn. Code Ann. § 39-14-202 (1991); Tex. Penal Code Ann. § 42.11 (West 1989 & Supp. 1992); Utah Code Ann. § 76-9-301 (Supp.

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animals — the protection of public morals — highlights the importance of yet another of Hialeah's interests, *i.e.*, shielding children from scenes of cruelty. *See Higgins*, 178 N.E. at 538 ("[statute] directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe"); *Bland*, 76 P. at 361 ("seeing frequently the mutilated and disfigured animals sears the conscience and hardens the minds of the people"); *Johnson*, 30 App. D.C. at 522 ("Cruel treatment of helpless animals . . . arouses the . . . indignation of every person possessed of human instincts"); *C.E. America, Inc.*, 210 So.2d at 446 (observing bloody bulls "shocks the sensibilities of any person possessed of humane instincts"); *Stephens* v. *State*, 3 So. 458, 459 (Miss. 1888) ("cruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men"); *Schoenbusch*, 8 S.W. at 792 (stating that prevention of cruelty to animals is for protection of general welfare); *Prince*, 94 A. at 966 (noting that cruelty to animal statute "calculated to prevent a prevalent evil and to promote the welfare of society"); *Barrett*, 116 N.E. at 101 (protecting animals guards moral and spiritual needs of citizens); *State* v. *Porter*, 16 S.E. 915, 916 (N.C. 1893) ("[statute] enacted to protect the public morals, which the commission of cruel and barbarous acts tends to corrupt"); *Kuchler*, 100 P. at 922 (regulating slaughter relates to public morals); *Peck*, 574 P.2d at 369 (legislating against animal fighting

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1991); Vt. St. Ann., tit. 13, § 352 (Supp. 1991); Va. Code Ann. § 3.1-796.122 (Michie Supp. 1991); Wash. Rev. Code Ann. § 16.52.070 (West 1992); W. Va. Code § 61-8-19 (Supp. 1991); Wis. Stat. Ann. § 951.02 (West Supp. 1991); Wyo. Stat. § 6-3-203 (1977). The following states, like Florida and Hialeah, forbid the "unnecessary," "needless," "unjustifiable" or "undue" suffering of animals: California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

"is justified for the purpose of regulating morals"); *see also Prince*, 321 U.S. at 166 (The state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience"); *Jehovah's Witnesses*, 390 U.S. at 598. Finally, Hialeah's interest in protecting its citizens from disease-fostering animal carcasses need only be stated to establish its importance. *Cf. Prince*, 321 U.S. at 166-67 ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease").

The *legitimacy* of Hialeah's interests is established in several ways. First, the interests are legitimate in the sense that they are *actually present* in this case; on the basis of wholly credible expert testimony the district court found this *as a matter of fact, and the court of appeals affirmed this finding. Cf. Tony & Susan Alamo Found.*, 471 U.S. at 299 (factual questions resolved against petitioners by both courts below are barred from review in this Court absent the most exceptional circumstances).[21] The interests are also legitimate in that making an exception for the petitioners (who aver that they will dispose of carcasses in a hygienic fashion) would abuse the cruelty-to-animals and protection-of-children interests, and would undoubtedly raise charges of favoritism from the many other sects in the area that practice exposed animal sacrifice. (A47) *Cf. O'Lone*, 482 U.S. at 353; *Goldman*, 475 U.S. at 512-13 (STEVENS, J., concurring); *Lee*, 455 U.S. at 263 n.2 (STEVENS, J., concurring).[22] Finally, the ordinances are legitimate

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[21] While not relying on them, the court of appeals left undisturbed the district court's findings of fact regarding the adverse psychological effects upon children of witnessing animal carnage.

Interestingly, even petitioners admitted at trial that the health risks associated with the "putrefication decomposition" (R364) of exposed animal sacrifices were "a legitimate concern." (T41)

[22] The appearance of favoritism also presents yet another reason for abandoning the compelling state interest test in Free Exercise *action* cases. For given the nature of things, no one thinks that government is favoring

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because they were not passed with "an intent to discriminate against particular religious beliefs or against religion in general." *See Bowen*, 476 U.S. at 707. *The district court found as a matter of fact (which the court of appeals affirmed), that when Hialeah passed the ordinances it did not have an intent to suppress Santeria, though it did want to stop animal sacrifice by whomsoever it was practiced.* (A28) This finding was amply demonstrated by the record, most tellingly, however, by the fact that Hialeah *granted* petitioners a certificate of occupancy, permitting them to open their doors and operate as a church — all they could not do was sacrifice animals. *See also* Kimberly C. Moore, *Supreme Court to Hear Florida Animal Sacrifice Case*, States News Service, Mar. 23, 1992, *available in* LEXIS, Nexis Library, Omni File ("'We don't have a problem with anyone's religion,' said Julio Martinez, the mayor of Hialeah and also a proponent of outlawing the animal sacrifices. 'Animal Sacrifices don't belong in this country in this century'"); A.J. Dickerson, *Secretive Religion Makes Waves in South Florida*, AP, June 7, 1987, *available in* LEXIS, Nexis Library, Omni File ("'People oppose it absolutely,' said Councilman Salvatore D'Angelo. 'I respect all religions but I am opposed to the ritual of live animal sacrifice'").[23] *Cf. Barnes*

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particular religious sects when it countenances the mere profession and propagation of those beliefs. But when government stands idly by as persons *act in* and *upon* the real world in the name of religion, permitting behavior that the enlightened sensibilities of society have long and rightly viewed as antisocial, the impression inevitably arises that government is favoring one group at the expense of all others.

[23] Petitioners make much of the "mob" atmosphere at the city council meeting during the time that the ordinances were passed. It is interesting to note at what point, however, the crowd got truly mob-like: "About 300 people turned out at a council meeting June 9 *demanding that the city [of Hialeah] stop the opening of south Florida's first Santeria church*," *Butterworth to Decide on Santeria Animal Sacrifice*, UPI, June 15, 1987, *available in* LEXIS, Nexis Library, UPI File (emphasis added) — "[the]

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v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991) (state intended to suppress public nudity, not erotic expression); *United States* v. *O'Brien*, 391 U.S. 367 (1968) (government intended to suppress destruction of draft cards, not expressive burning of them).

Which raises yet another, final, interest of Hialeah, one that is obviously legitimate and important. Having had the surrounding area for some time dotted with the remains of animals in streets, parks, and cemeteries,[24] the announcement of the church's imminent opening placed the subject of animal sacrifice squarely before the city council and it *rightly* recoiled in disgust. *Not* because it disagreed with the *teachings* of Santeria, or with what its adherents *believed*. These it was quite prepared to have disseminated throughout Hialeah via the church, viewing them, apparently, as perhaps odious but nonetheless harmless ignorance. No, the City Council of Hialeah recoiled in disgust at, and acted affirmatively to prevent, *animal sacrifice* because it is, in a word,

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[23](...continued from preceeding page)

furious crowd booed, hissed and jeered city attorneys who told City Council *it could not legally stop a religion that sacrifices animals from opening its first public church in Florida*," A.J. Dickerson, *Lawyers Jeered for Their Advice on Closing Church*, AP, June 10, 1987, *available in* LEXIS, Nexis Library, AP File (emphasis added). Thus, despite strong political pressure to the contrary, the City Council of Hialeah bowed to its constitutional obligations, and permitted the church to open. This is the political process in action, the principal means by which minority religions may be protected. *See Smith II*, 494 U.S. at 890.

[24] *See* Jeffrey Schamlz, *Hialeah Journal; Animal Sacrifices: Faith Or Cruelty?*, N.Y. Times, Aug. 17, 1989, at A16; A.J. Dickerson, *Secretive Religion Makes Waves In South Florida*, AP, June 7, 1987, *available in* LEXIS, Nexis Library, Omni File ("'They drop it over the fence or they leave it on a grave. Every day we send an employee to clean up. We throw away the dead animals,' said Fred Cruz, a sales manager at Graceland Memorial Park").

barbaric, and is, as a secular matter, deemed to be immoral.[25] On several occasions this Court has declared that government may legislate against a return to barbarism. In *Mormon Church*, noting that "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism," 136 U.S. at 49, the Court held that "[t]he State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised," *id.* at 50. And in *Cleveland*, after quoting *Mormon Church*, *see Cleveland*, 329 U.S. at 19, the Court wrote that "[w]hether an act is immoral within the meaning of the statute, is not to be determined by the accused's concepts of morality." *Id.* at 20. Thus, while the enlightened sensibilities of our society unanimously and rightly condemn the *unnecessary* killing of animals, *amici* recognize that, regrettably, in this culture it is generally accepted that *the* primary purpose for the animals which petitioners wish to sacrifice is to provide food for the sustenance of humankind. It was, therefore, well within the bounds of civilized judgment for Hialeah to make the *secular* determination that the killing of these animals *not* for the primary purpose of consumption is "unnecessary" and thus immoral. Because we are civilized we must permit the profession and propagation of any belief whatsoever; but we are not yet so "civilized" that barbarism must be countenanced, irrespective of the reason advanced for its practice.

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[25] And make no mistake: for though this case *does* involve a clash of cultures, it does *not* present a "white" *versus* "black" or "white" *versus* "brown" scenario. Hialeah has a population of approximately 174,000 — 86% of which is Hispanic. D&B Donnelly Demographics, July 29, 1992, *available in* DIALOG, File No. 575. Cuban emigres and their progeny, then, are hardly outnumbered in Hialeah. Indeed, at the time the instant ordinances were enacted, the City of Hialeah was governed by its mayor, Raul L. Martinez, and city counsel members Cardoso, D'Angelo, Ehevarria, J. Martinez, Mejides, and Robinson. What this case *does* present, however, is the struggle of Western Civilization *versus* . . . something else.

CONCLUSION

The day is passed when America could be parochially described as strictly a "Christian Nation." It may be, moreover, that we are no longer strictly even a "religious" people — at least not in the traditional sense of established faith. But the United States is — still, at least — a Western nation, one that proceeds from the very best that Western Civilization has to offer, including limited government, due process, trial by jury, and, most assuredly, religious tolerance. Regarding the latter, government must therefore be utterly tolerant of religious beliefs and the peaceable profession and propagation of such beliefs, no matter how barbaric or misguided those beliefs may seem to any number of people. This is the "marketplace of ideas," religious and otherwise. But in this free yet civilized society of ours, neither the federal government, nor the states, nor the City of Hialeah is required to tolerate rampant primitivism in the name of religion. For while governments may choose to accommodate, nevertheless they may also choose to forbid non-expressive religious *action* when it is contrary to important and legitimate interests within their spheres of power. The prevention of cruelty to animals, the preservation of children from the dulling of their humane sensibilities through witness to carnage, the protection of the citizenry from disease-fostering rotting carrion, and the securing of society against a return to barbarism — all are governmental interests of high and time-honored importance, and all are genuinely present in this case. Because of this, and because the City of Hialeah, Florida, acted to safeguard these interests without

discriminatory intent, the judgment of the court of appeals, upholding that of the district court, should be affirmed.

Dated: New York, New York
July 31, 1992

Respectfully submitted,

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No. 91-948

IN THE

Supreme Court of the United States

October Term, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC.,

—and—

ERNESTO PICHARDO,

Petitioners,

—against—

CITY OF HIALEAH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF INSTITUTE FOR ANIMAL RIGHTS LAW, AMERICAN FUND FOR ALTERNATIVES TO ANIMAL RESEARCH, FARM SANCTUARY, JEWS FOR ANIMAL RIGHTS, UNITED ANIMAL NATIONS, and UNITED POULTRY CONCERNS, IN SUPPORT OF RESPONDENT CITY OF HIALEAH, FLORIDA

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INTERESTS OF *AMICI CURIAE*[1]

Institute for Animal Rights Law, a New York charitable trust, was created for the purpose of advancing the rights of animals. Its programs include an active *pro bono amicus curiae* effort on its own behalf and on behalf of other animal rights and animal welfare organizations. By addressing important legal issues affecting the well being of animals, it is able to further its mission of seeking to eliminate cruelty to, and other abuses of, animals.

American Fund for Alternatives to Animal Research devotes the main focus of its energy to giving financial assistance to scientists to develop, validate, and teach non-animal means of research and testing. It also supports other means to reduce the suffering of animals.

Farm Sanctuary is a national, non-profit organization representing approximately 10,000 members throughout the United States. The organization was formed in 1986 to address the serious animal abuse problems associated with "food animal" production. Among its various educative, legislative, and investigative programs, Farm Sanctuary operates a 175-acre working farm shelter for victims of animal agriculture.

Jews for Animal Rights, founded in 1985, seeks to raise the consciousness of the Jewish community about animal abuse. Judaism has a very long tradition of ethical concern for animals. This tradition is commonly called "tsa'ar ba'alei chaim," or "remember the pain of living creatures." This is the organization's motto, and the organization's goal is to make this millennially-old Jewish value a contemporary moral issue through promoting vegetarianism and by seeking to influence the animal-related decisions of Jewish organizations, rabbis, and Jewish action groups.

United Animal Nations, U.S.A. Chapter ("UAN-USA") serves to promote unity within the animal protection movement; to

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[1] *Amici* file this brief with permission of respondent; we understand that the blanket consent of petitioners has been filed with the Clerk of this Court.

coordinate, but never to compete. It convenes a General Assembly for organizations and individuals dedicated to humane treatment for animals; fund projects and supports local or specialized organizations and individuals working on behalf of animals; participates in and orchestrates national protest events; and puts animal exploiters "on trial" to encourage pressure against them. UAN-USA has also created an Emergency Animal Rescue Service to provide assistance to animals, wild or domestic, in times of great need or disaster, whether manmade or natural. Since the creation of UAN-USA in 1985, 41 organizations have joined it in support of unified efforts for animals.

United Poultry Concerns is a non-profit organization which addresses the use of domestic fowl in food production, science, education, and entertainment. It seeks to make the public aware of the ways domestic fowl are used in this society and elsewhere in the world. It promotes the respectful and companionable, non-exploitive view and treatment of these birds, holding that the production and keeping of them for food and other utilitarian purposes is inherently inhumane, not only because of the physical pain and suffering involved, but because it humiliates their dignity, encourages human smugness towards the rest of life, and sustains a psychological atmosphere that is demeaning and deficient.

SUMMARY OF ARGUMENT

A host of justiciability problems, either singly or in combination, plague this suit. As the ordinances challenged here constitutionally have never been enforced, and as petitioners' applications to sacrifice animals remain pending even today, the case is not ripe. Moreover, other laws which petitioners have not challenged would nevertheless prevent them from sacrificing animals even if petitioners prevail before this Court. The ultimate problem they face (an alleged inability to sacrifice) will not be redressed by a favorable decision and therefore petitioners lack standing. In addition, as petitioners no longer wish to sacrifice animals at the current site of the church, the case has become moot. Because resolution of the constitutional issues depends upon

an initial construction of state law upon which the state courts have not yet passed, the district court ought to have abstained. And finally, because the essence of petitioners' as-applied constitutional challenge has always been that respondent passed the ordinances with the express intention of chilling the free exercise of their religion, since the district court found as a fact that respondent had no such intent, nothing remains of the case to review but that factual determination — which the court of appeals affirmed. Accordingly, the Court should dismiss the writ of *certiorari* as having been improvidently granted.

ARGUMENT

I.

STATUTORY/PROCEDURAL ANALYSIS

Before this Court can properly exercise its Article III powers of review, and because *amici* have noted in other of the briefs submitted here a less-than-perfect grasp of exactly what the City of Hialeah actually did, the Court must be presented with a clear statement of which statutes are (and are *not*) involved here; what these statutes do (and do *not*) provide; which statutes petitioners actually challenged (and which they did *not*); and what the district court and the court appeals decided (and what they did *not*).[2]

Beginning in June of 1987, in response to petitioners' announcement that the Church of the Lukumi Babalu Aye, Inc., at its *first* church site, intended "to function as an established Santeria

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[2] As the Court is acquainted with the facts from the presentations of others, those facts are recited herein only to the extent they are necessary to carry the argument. References to the Trial Record are denominated "(R___)"; references to the Transcript of Oral Argument after Trial are denominated "(T___)"; references to the Appendix to the Petition for Certiorari are denominated "(A____)"; and references to the Joint Appendix are denominated "(JA___)".

church[,] . . . perform[ing] all of the religious rituals of Santeria, including animal sacrifice," (A22) the Hialeah City Council passed several ordinances (A22, A28):[3]

City of Hialeah Ordinance No. 87-40 (June 9, 1987), promulgated due to "concern over the potential for animal sacrifices being conducted in the City of Hialeah," incorporated by reference Florida Statute, Chapter 828. (A52, A56) Of particular note to this case, Fla. Stat. § 828.12(1), entitled "Cruelty to Animals" makes it a misdemeanor to "unnecessarily . . . kill[ ] any animal . . . ." (A56)[4] Thus, by Florida state statute *and* by City of Hialeah ordinance, the "unnecessary killing of animals" was forbidden. It still is.

City of Hialeah Ordinance No. 87-52 (Sept. 8, 1987), though certainly not a model of clarity, recites that it was enacted because of "concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah." (A52-53) This ordinance established the following: i) it forbade the ownership, possession, slaughter, or sacrifice of animals by persons "intending to use such animal for food purposes" *and* by groups or individuals that "sacrifice[ ] animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed" (A53); ii) it defined "sacrifice" to mean "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption" (A52); and iii) it made clear that the slaughter of animals for food purposes by properly licensed and zoned establishments was not prohibited. (A53)

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[3] The City Council at that time consisted of members Cardoso, D'Angelo, Ehevarria, J. Martinez, Mejides, and Robinson; the Mayor was Raul L. Martinez.

[4] *Per* Fla. Stat. § 828.27(6), Hialeah did not adopt the penalty provisions of § 828.12, but instead provided for punishment by fine not to exceed $500 and/or a jail term of 60 days. The Florida state statute provides for a fine of not more than $5,000 and/or a jail term of not more than one year. *See* Fla. Stat. §§ 828.12(1), 775.082.

City of Hialeah Ordinance No. 87-71 (Sept. 22, 1987), which recites that "the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community" (A53), adopted the same definition of "sacrifice" as Ordinance No. 87-52 (A53), and provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." (A54)

Finally, *City of Hialeah Ordinance No. 87-72* (Sept. 22, 1987), which recites that "the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare" (A54), defined "slaughter" as "the killing of animals for food" (A54), and provided that only properly licensed and zoned slaughterhouses could slaughter animals within the city limits of Hialeah. (A54)

In addition to this statutory scheme, an opinion by the Attorney General of Florida was issued shortly after the promulgation of Ordinance No. 87-40. The Opinion, rendered in response to an inquiry by the City Attorney of Hialeah, advised the City that "the sacrificial killing of animals other than for food consumption" came within the state statutory language proscribing the "unnecessary killing" of an animal and was therefore "prohibited by s. 828.12." Atty. Gen. Op. 87-56 (July 13, 1987).

In sum, as a result of the laws, ordinances, and Opinion referred to above, in Hialeah itself *and* in Florida as a whole, *no one was allowed to kill an animal in a ritual or ceremony not for the primary purpose of food consumption; and in Hialeah, only properly licensed and zoned slaughterhouses could kill animals for food.* This case, to the extent that it is about anything at all, is about only that.

Further facts are necessary to illuminate what *is* (and is *not*) at issue in this case:

On August 7, 198<u>7</u>, Hialeah granted the Church of the Lukumi Babalu, Inc. a certificate of occupancy to operate a church on its premises. (A26) Two years later, on July 10, 198<u>9</u> (just prior

to the trial of this action), petitioners applied for a slaughterhouse occupational license; petitioners also applied for zoning authorization to operate their premises as a slaughterhouse. As petitioners subsequently explained to the district court at trial, "we were told by an assistant city attorney that we could do what we're in this lawsuit about if we file the proper licensing application which we have done." (R87) Petitioners' applications, however, have been held in abeyance pending the outcome of this litigation. (A25) *Thus, at no time were any of the Hialeah ordinances set forth above actually applied to petitioners* — no one has ever been fined, and no one has ever been jailed for disobeying the ordinances by improperly sacrificing or slaughtering animals in Hialeah. (A29; R149) Petitioners do not contend otherwise.

On September 25, 1987, petitioners filed a complaint in the District Court for the Southern District of Florida alleging, pursuant to 42 U.S.C. § 1983, that respondent had violated their First Amendment rights as secured by the Fourteenth Amendment. Their § 1983 suit was predicated upon a claim that agents of Hialeah had purposely harassed them because of their religion. Petitioners alleged that they had been discriminatorily harassed by respondent during the licensing and inspection process which the Church had to go through before it opened, but this claim was rejected by the district court's findings of fact. This determination was affirmed by the court of appeals, and was not raised by the petition for *certiorari*. Petitioners also sought a declaratory judgment that the ordinances prohibiting sacrifice were unconstitutional, alleging that they had been passed with the intent to chill petitioners' Free Exercise rights. Petitioners did *not* in any way challenge the state law, § 828.12(1), which forbade the "unnecessary killing of animals" (A3, A29, A49); and they did *not* mount a constitutional challenge against the ordinances insofar as they restricted the slaughter of animals to properly licensed and zoned slaughterhouses. (A23, A29)

In July and August of 1989, a nine-day bench trial was held. In a Memorandum Opinion, dated October 5, 1989, the district court awarded judgment in favor of respondent, finding that it had not violated petitioners' constitutional rights. Preliminarily,

however, the court made several crucial findings of fact and law. It held, *as a matter of law*:

- that even if the challenged ordinances were invalid, petitioners "would still be prohibited from performing ritual sacrifices under § 828.12 of the Florida Statutes. *See* Opinion Attorney General 87-56 (1987)" (A29);
- that there were, moreover, "several provisions of the Hialeah City Code that would apply" to prohibit ritual animal sacrifice "including zoning provisions . . . and licensing provisions" (A29);
- that "at no time have [petitioners] raised any free exercise challenge addressed toward the validity of [the] slaughterhouse regulations . . ." (A29; *see also* A23);
- that petitioners "cannot maintain a facial challenge to the ordinances" (A41); and
- that petitioners' only remaining constitutional claim going to the ordinances was an as-applied claim that they "were passed *because of the council members' intent* to discriminate against the Church and to keep the Church from establishing a physical presence within the City," (A28) (emphasis added), *i.e.*, "that the passage of the ordinances *was intended* to force the Church out of Hialeah, and to chill the religious freedom of Santeria practitioners by imposing criminal sanctions on practices that are an integral part of that religion." (A29)

None of these determinations of law were disturbed by the court of appeals — which, of course, affirmed the judgment of the district court — and *none* of these legal determinations were challenged in the petition for *certiorari*.

Thus, since Ordinance No. 87-40 ("unnecessary killing") was redundant in light of Fla. Stat. § 828.12(1), which was not challenged; and since Ordinance No. 87-72 (slaughterhouses) also was not constitutionally challenged; and since Ordinance No. 87-52 (no possession of animals intended to be sacrificed) was subsumed under Ordinance No. 87-71, petitioners' remaining entire case came down only to this:

1) an "as applied" constitutional challenge,

2) to the City's alleged discriminatory intent,

3) to "chill" the alleged free exercise right of petitioners,

4) to "sacrifice," *i.e.*, to unnecessarily kill an animal in a ritual or ceremony not for the primary purpose of food consumption,

5) by promulgating anti-sacrifice Ordinance No. 87-71.

This limited challenge is extremely significant in light of the district court having found, *as a matter of fact*, that there was "no evidence" to establish petitioners' contention that the ordinances had been passed with discriminatory intent (A28) — that petitioners' "allegations of discrimination by the City are not supported by the facts" (A49) — that "there was no proof of any discriminatory action by the City against the . . . Church or any of its practitioners." (A49) To the contrary, the court found that the trial evidence established that

> "the council members' intent was to stop the practice of animal sacrifice in the City. Although this concern was prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals, including animal sacrifice, the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." (A28)

In affirming the judgment of the district court, the court of appeals expressly left the trial court's determinations undisturbed, noting that "[t]he district court made extensive findings of fact . . ., and no party argues that the record does not support these findings." (A2) Indeed, as *none* of the district court's findings of fact were even challenged by petitioners in the court of appeals, they therefore have not been raised in the questions presented upon which *certiorari* was granted.

II.

NONJUSTICIABILITY

It is the position of *amici* that this could not be a worse case to serve as the vehicle for what could become an extremely important Free Exercise precedent. Respectfully, *amici* believe that this case's foundation is built on sand. It is, in *amici's* opinion, rife with justiciability problems which strongly counsel the Court to dismiss the writ of *certiorari* as improvidently granted.

A. Ripeness

First, the case is not ripe. *See Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2306 n.13 (1991) (ripeness relates to court's jurisdiction under Article III, and court must consider it on its own initiative).[5] As already indicated *supra* at 6, the ordinances at issue have never been applied to *anyone*, let alone to the petitioners. This means that, especially after the district court's fact-finding and the court of appeals' affirmance, all that is left in this Court of petitioners' complaint is *a claim for an as-applied, allegedly intentional "chill."* However, not every plaintiff who merely alleges a First Amendment "chill" has thereby established the existence of a case or controversy, *National Student Ass'n* v. *Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969) — something this Court expressly recognized in both *Laird* v. *Tatum*, 408 U.S. 1 (1972), and *Poe* v. *Ullman*, 367 U.S. 497 (1961). Indeed, in contrast to *every* Free Exercise (or even *arguably* Free Exercise) case that has preceded it in this Court, this case — where the ordinances at issue have never even been applied — is exceedingly unripe. By the time earlier cases were brought: George Reynolds had *already* been charged with and found guilty of bigamy, *Reynolds* v. *United States*, 98 U.S. 145 (1878); Samuel D. Davis

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[5] As the ordinances have severability clauses, petitioners must present a ripe claim as to each provision of each ordinance to permit them to mount an attack against the ordinances as a body. *See Communist Party of United States* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

had *already* been indicted for and convicted of obstruction of justice for falsely taking an oath, *Davis* v. *Beason*, 133 U.S. 333 (1890); the United States had *already* brought suit against the Mormon Church seeking the dissolution of the church's charter and the escheat of much of its property, *Mormon Church* v. *United States*, 136 U.S. 1 (1890); the Compulsory Education Act of 1922 had *already* caused withdrawal from the Society of Sisters' schools of children who would have attended them with the result that the Sisters had experienced a steady decline of their income, *and* the state had proclaimed its intention to strictly enforce the statute, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); Hamilton and his schoolmates had *already* been suspended from the university for refusing to take the prescribed military training courses, *Hamilton* v. *Regents*, 293 U.S. 245 (1934); Schneider had *already* been charged, tried, and convicted of soliciting without a permit, *Schneider* v. *State*, 308 U.S. 147 (1939); and Newton Cantwell and his two sons also had *already* been charged, tried, and convicted, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *see also Jones* v. *Opelika*, 319 U.S. 103 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); Sarah Prince had *already* been convicted for violating Massachusetts' child labor law, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); the Ballards had *already* been convicted for using and conspiring to use the mails to defraud, *United States* v. *Ballard*, 322 U.S. 78 (1944); Braunfeld was *already* about to go out of business because of application to him of the Sunday blue laws, *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); Torcaso had *already* been refused a commission as notary public, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); Sherbert had *already* been fired and then denied unemployment compensation benefits, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *see also Thomas* v. *Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); the children of Jehovah's Witnesses had *already* been administered blood transfusions against their parents' wishes, *Jehovah's*

Witnesses v. *King County Hosp.*, 598 U.S. 390 (1968) (per curiam), *aff'g*, 278 F. Supp. 488 (D.D.C. 1967) (three-judge court); Gillette had *already* been convicted of wilfully failing to report for induction into the army, *Gillette* v. *United States*, 401 U.S. 437 (1971); Jonas Yoder, Wallace Miller, and Adin Yutsy had *already* been convicted of violating the compulsory school attendance law, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); Robison, who as a conscientious objector, had *already* performed alternate civilian service, and had therefore been denied the educational benefits accorded veterans of active service, *Johnson* v. *Robison*, 415 U.S. 361 (1974); George Maynard had *already* been convicted of knowingly obscuring the state motto on his license plate, *Wooley* v. *Maynard*, 430 U.S. 705 (1977); McDaniel, the minister, had *already* been ousted from his position as a state constitutional convention delegate by the Tennessee Supreme Court, *McDaniel* v. *Paty*, 435 U.S. 618 (1978); Lee had *already* partially paid to the IRS assessed employment taxes which he claimed a religious right to withhold, *United States* v. *Lee*, 455 U.S. 252 (1982); the IRS had *already* revoked Bob Jones University's tax-exempt status, *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); the Secretary of Labor had *already* filed an action against the Tony and Susan Alamo Foundation alleging a violation of minimum wage laws, *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290 (1985); S. Simcha Goldman had *already* received a letter of reprimand, a negative recommendation, and was threatened with court-martial, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986); Little Bird of the Snow's AFDC payments, medical benefits, and food stamps had *already* been cut off, *Bowen* v. *Roy*, 476 U.S. 693 (1986); access to Jumu'ah had *already* been eliminated for Shabazz, *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987); the Forest Service had *already* determined that it was going to build a road through sacred Indian grounds, *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); the IRS had *already* disallowed deductions for Scientology "auditing" sessions, *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989); and Alfred Smith and Galen Black had *already* been fired from their jobs as drug counselors for taking peyote and had been denied

unemployment benefits, *Smith* v. *Employment Div., Dept. of Human Resources*, 494 U.S. 872 (1990) (*Smith II*).

Even if the undisputed fact that the Hialeah ordinances were never applied to petitioners is not enough to show that this case is technically *un*ripe, the foregoing cases demonstrate that this case must be the *least* ripe Free Exercise case *ever*, which by itself should give this Court pause. As the district court stated after trial: "There is no question that the evidence reveals that no effort was made by the church to in fact violate the ordinances so as to put that issue directly before this court on the basis of an unlawful arrest and challenging the constitutionality of the ordinance on that basis." (T24)

But there is more than that to petitioners' ripeness problem. Hanging in the air, still unresolved, are petitioners' applications for a license to slaughter and for a zoning variance to operate as a slaughterhouse. If these should be granted, petitioners will have the right to sacrifice animals in Hialeah *despite* the challenged ordinances, and petitioners' alleged Free Exercise rights will not at all be impeded. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng*, 485 U.S. at 445. Because this case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all, rendering constitutional adjudication premature, this dispute is unripe. *See Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990); *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *see also Bowen* 476 U.S. at 715 (BLACKMUN, J., concurring); *id.* at 717 (STEVENS, J., concurring). Moreover, not only are there serious ripeness problems in this case, but petitioners also lack standing.

B. Standing

The standing doctrine imposes limitations of constitutional dimension upon the federal courts. Constitutionally, a threshold in every federal case is whether the plaintiff has made out a "case or controversy" within the meaning of Article III. *Lujan* v. *Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). Specifically, the plaintiff

must show an injury to him or herself "that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see also Lujan*, 112 S. Ct. at 2136 (party invoking federal jurisdiction bears burden of *proving, inter alia*, redressability). Indeed, that likelihood must be "substantial." *See Duke Power Co.* v. *Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978). Without it, a federal court would not be the "last resort," and hearing the case would not be "a necessity." *See Allen* v. *Wright*, 468 U.S. 737, 752 (1984) (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)). Hearing this case is not "a necessity," and in fact would be "gratuitous," because petitioners cannot show a "substantial likelihood" that the relief they seek would flow from a favorable decision by this Court. *See Simon*, 426 U.S. at 38. While it is true that they "need not show that a favorable decision will relieve [their] *every* injury," *Larson* v. *Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original), petitioners fail to show potential relief from *any* alleged injury at all.[6]

Suppose that respondent's ordinances were found to be invalid. First, petitioners would still be prohibited from performing ritual sacrifices under unchallenged § 828.12 of the Florida Statutes, which Ordinance No. 87-40 incorporates (except as to punishment). (A29)[7] Section 828.12, Fla. Stat., prohibits persons from "unnecessarily" killing any animal "in a cruel or inhumane manner." Such "killing," at least in the opinion of the Attorney General of the State of Florida, includes ritual sacrifice. *See* Atty. Gen. Op. 87-56 (July 13, 1987). And though no reported Florida state *court* decision has passed on whether the *state* statute,

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[6] The lack of redressability was specifically raised by respondent at trial. (T75-76)

[7] The language of Ordinance No. 87-71 is similar to that of § 828.12, but that similarity alone does not render § 828.12 subject to constitutional challenge by petitioners. In order to remove the barrier to ritual sacrifice that § 828.12 erects, petitioners are required to mount a constitutional challenge to that section directly. This they have failed to do.

§ 828.12, prohibits animal sacrifice, *see* abstention discussion *infra* at 18-25, *amici* note that several arrests have indeed been made under this statute for animal sacrifice. On one occasion, three persons were arrested including a Ms. Ofelia Cueli-Garcia who "was arrested after a policeman saw her cut off a chicken's head and drink the blood."[8] On another, some 13 Santeria practitioners were arrested when police were called to a sacrifice scene after neighbors mistook the screams of the dying animals for those of a child.[9]

Second, various other local prohibitions would also continue to apply to petitioners, such as those governing zoning, health and sanitation, and licensing. (A29) Neither § 828.12 nor these local prohibitions were challenged by petitioners. (A23, A29)

Absent a showing of what would constitute "redressability," of course, "there can be no confidence of 'a real need to exercise the power of judicial review'" on petitioners' behalf. *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975) (quoting *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 221-22 (1974)). In this case, judicial review by this Court would result in what would amount to the rendering of a purely advisory opinion on a local ordinance's constitutionality — a "ruling" which would be contrary to the overwhelming weight of precedent. *See Larson*, 456 U.S. at 271. For, again, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [this Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). Ruling on the constitutional question supposedly presented in this case is clearly avoidable — and to be avoided by this Court. *Cf. Lyng*, 485 U.S. at 446 (before passing on constitutional issue, courts below required to determine whether decision on that issue

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[8] *See Three Santeria Worshippers Charged With Animal Cruelty*, UPI, Apr. 26, 1991, *available in* LEXIS, Nexis Library, UPI File.

[9] *See Animal Sacrifice Debate Rekindled*, UPI, Apr. 15, 1991, *available in* LEXIS, Nexis Library, UPI File.

would have entitled plaintiffs to more relief than from their statutory claims — if no additional relief warranted, constitutional decision would have been unnecessary and thus inappropriate).

C. Mootness

The justiciability problems inherent in this case are compounded by the additional problem of mootness. Because of Article III's "case or controversy" requirement, the trial court was without power to decide a case which had become moot; the issues presented were required to be "live," and the parties needed a "personal stake" in the outcome of the litigation. *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980). The "controversy," moreover, was required to exist throughout the course of the entire litigation. *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988); *Burke* v. *Barnes*, 479 U.S. 361, 363 (1987); *Doe v. Sullivan*, 938 F.2d 1370, 1384 (D.C. Cir. 1991) (THOMAS, J., dissenting).

Petitioners' claim has been rendered moot on this appeal by their own actions. *See Deakins*, 484 U.S. at 200 (holding case mooted by plaintiff's withdrawal of claim for equitable relief); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 512-13 (1989) (same); *see also* 13A Charles A. Wright, *et al.*, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.2 at 231 (1982). The evidence at trial established that from the time petitioners sought to establish a church, their mission was changing — and these changed circumstances have transformed what may have been a formerly "live" controversy into one whose resolution can have no impact on petitioners.

Petitioner Church of the Lukumi Babalu Aye, Inc. ("church") originally sought to establish itself at 173 West 5th Street in the City of Hialeah. Even at that early stage, the promoters decided that the function of the church would be *primarily* education, *not* sacrifice, by "establishing and promoting research among scholars to research this faith. . . ." (R648) Petitioner Pichardo indicated that the education function would occur on a broad basis: "[w]e can in fact educate right across the board *our* religious community *and* those who are *not* our religious community." (R660) (emphasis

added) Subsequently, the sacrifice function of the church apparently dropped out altogether when it moved to its present location at 700 Palm Avenue, for the mission of the church at its *new* location is *strictly* educational (R666), and involves education *not* of Santeros but of the non-Santerian public. (R860) *Indeed, that animal sacrifice would not ever take place at the new location has been clear to petitioners from the onset.* Said petitioner Pichardo at trial:

> "[w]e know that 700 Palm Avenue is not zoned for any animal sacrifices *and we never intended to have it at that location.*"

(R848) (emphasis added). In fact, petitioners acknowledged at trial that animal sacrifice would be inappropriate at its present church site since it is located in a shopping center. (R849) Since the church site has been the only location where petitioners in this non-class-action have sought to sacrifice,[10] the disavowal of their intention to sacrifice at the church site renders this case moot. *Cf. Bowen* v. *Roy*, 473 U.S. 693, 720-23 (STEVENS, J., concurring); *id.* at 713-15 (BLACKMUN, J., concurring) (noting probable mootness problem). Moreover, petitioner Pichardo has indicated

[10] At trial, Pichardo repeatedly testified that part of his mission was to have sacrifice take place only at the church, thus bringing Santeria above-ground and providing a place where sanitation could be ensured. Moreover, as the case was not a class action, the only claims before the district court were those of the church and Pichardo. Petitioners' assertion at trial, then, that they were seeking to vindicate the rights of all Hialeahan Santeros to sacrifice animals wherever and whenever they wished (R215-16), was not only *not* their claim to make, but was *inconsistent* with their theory of the case. Indeed, it appears that Pichardo's dream of bringing Santeria out into the open is not shared by many Santeros in Hialeah. *See* Paige Elizabeth-Pruitt, *A Comparative Study of Yoruba Influence in Santeria* 15 (1988) (unpublished M.A. thesis, Florida State University) ("Recently, during the month of June, 1988, . . . L. Ernesto Pichardo established a *Santeria* church . . . which became the first formal place of worship for the sect. Many *santeros* were irate, claiming they felt Pichardo was trying to establish himself as leader, even though there is supposedly no hierarchy within *Santeria*").

that he no longer is a practicing priest involved with the ritual sacrifice of animals. He has shifted his attentions instead to research and education. (R859-60) It is for this reason that he has almost absolutely no knowledge of Santeria as it is practiced in Hialeah. (R859-60) In fact, at trial Pichardo admitted that the last time he had performed an animal sacrifice was *ten years ago* — and *that* sacrifice occurred in Mexico City, Mexico. (R685)

Since petitioners *no longer* present an interest in performing sacrifices at the current church location (if they ever *did*), and since the purpose of petitioners' church *has evolved* into one of education *exclusively* (if it ever *was* anything else), their case has been rendered moot because, *inter alia*, petitioners no longer have a "personal stake in the outcome" of this controversy. *See Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 478 (1990). For, precisely because the "church" can now most accurately be characterized as an academic Santerian think tank, with the "priest" Pichardo as its chief academician, the question of whether *petitioners* can constitutionally be forbidden from *sacrificing animals* in *Hialeah* is an *academic* one, which fails to present a "case or controversy."[11]

[11] Of course, to the extent that petitioners are able to argue that the case only *looks* moot — *i.e.*, that it is only due to the "chilling effect" of the ordinances that the "church" is no more than a Santerian studies center ("[i]n the meantime, we're handcuffed" (R666)) — such an argument is *only* possible because the case was so *un*ripe when commenced. Had Pichardo first been fined $5 or sentenced to a half-day jail term for *actually* sacrificing animals, one could be certain that in fact he *wanted* to sacrifice in Hialeah and that he was sacrificing *no longer* because of the fear of further prosecutions. As things stand, however, we cannot be certain whether Pichardo has not broken his decade-long sabbatical from animal sacrifice because of the mere existence of the ordinances, or whether it is due to the failed pipe dreams of a self-proclaimed Santerian "priest"/academic who nonetheless is delighted that his theoretical and sanitized version of "Santeria" is being aired in the United States Supreme Court. The possibility of the latter was crystallized by the following colloquy at trial:

(continued on next page...)

D. Abstention

Moreover, not only are there *ripeness*, *standing*, and *mootness* problems with this case which render it unsuitable for decision, but because it also involves difficult threshold issues of unsettled state law, very real *abstention* concerns are also present. In general, federal courts have a duty to adjudicate federal questions which are properly before them. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'CONNOR, J., concurring). An exception to that duty is found, however, in the doctrine of abstention. *Id.* In fact, "the proper course for federal courts [is to consider] *first* whether abstention is required." *Ohio Bureau of Employment Servs.* v. *Hodory*, 431 U.S. 471, 477 (1977) (emphasis added); *see also* Laurence H. Tribe, *American Constitutional Law* § 3-28, at 195-98 (2d ed. 1988).

Although this Court has developed several forms of abstention, those principles first enunciated in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), are applicable here. *Pullman* abstention holds that federal courts should abstain from deciding a case such as this where the federal constitutional question can be addressed *only* by *first* resolving one or more difficult questions of unsettled state law. Because those questions

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[11](...continued from preceeding page)

> "THE COURT: Would I be less than candid in saying that this is more right now in your own mind a dream than it is a reality?
>
> [PICHARDO]: No, I would not say that would be fair."

(R873) *Amici* submit that the trial record as a whole, however, fairly establishes that *Pichardo* was less than candid in his answer, for it is quite evident that the Pichardian brand of "Santeria" — replete with a "fining system" for "deviants" and a "testing" procedure to determine "true" adherents — exists nowhere except perhaps in Pichardo's mind. *See* Migene Gonzalez-Wippler, *Santeria: African Magic in Latin America*, *passim* (6th ed., Original Publications 1990) (1973).

are unsettled, the district court should have "exercise[d] its wise discretion by staying its hands." *Pullman*, 312 U.S. at 501.[12]

Pullman abstention is based upon two principles: first, that federal courts should avoid the unnecessary resolution of federal constitutional issues; and second, that state courts should provide the authoritative adjudication of state law questions. *Brockett*, 472 U.S. at 508 (O'CONNOR, J., concurring).[13] Abstention is particularly appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication,'" or which might modify the constitutional question in a material way. *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (quoting *Harrison* v. *NAACP*, 360 U.S. 167, 177 (1959)). That a statute is merely "unconstrued" will not dictate abstention. *City of Houston* v. *Hill*, 482 U.S. 451, 469 (1987). Neither will "a bare, though unlikely" possibility that a statute will be subject to a limiting construction by state courts. *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 237 (1984). Instead, in order to warrant abstention, this Court has required that a statute be "*obviously* susceptible of a limiting construction." *Id.* (emphasis added) (internal quotation omitted).

Certain types of cases are more likely to warrant abstention. Among them

> "are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitu-

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[12] The prospect of abstention was specifically drawn to the court's attention at trial. (R22-23)

[13] Such abstention is not without its costs, for there are "delays inherent in the abstention process." *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 83 (1975). For this reason, this Court has counselled that the doctrine be invoked only in "'special circumstances,' and only upon careful consideration of the facts of each case." *Id.* (quoting *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967)).

> tional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong. The same considerations apply where . . . the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute."

Harris County Comm'rs, 420 U.S. at 84 (citations omitted). Cases raising questions under the First Amendment are not immune to abstention concerns; for "even in cases involving First Amendment challenges . . . abstention may be required." *Brockett*, 472 U.S. at 510 (O'CONNOR, J., concurring). The First Amendment cases in which this Court *has* expressed doubt concerning abstention all have involved *facial* challenges. *See, e.g., Hill*, 482 U.S. at 467 ("[W]e have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment"). Because this case does *not* involve a facial challenge (A41), *see supra* at 7,[14] abstention is appropriate here. Indeed, this is a case whose facts "call most insistently for abstention," in two respects. *See Harris County Comm'rs*, 420 U.S. at 84.

Petitioners challenge Ordinance 87-40, which incorporates by reference Chapter 828 of the Florida Statutes. The meaning of one section of those statutes, § 828.12, is unclear as a matter of Florida law. That section provides, in relevant part, that "[a] person who unnecessarily . . . mutilates, or kills any animal, or causes the same to be done, . . . is guilty of a misdemeanor of the first degree." Fla. Stat. § 828.12(1). The meaning of this section is

[14] The district court was clearly correct in holding that petitioners could not mount a facial challenge to the ordinances since petitioners have not disputed the proposition that the ordinances would be constitutional as applied to the killing of animals in *non*-religious rituals or ceremonies, *cf. United States* v. *Salerno*, 481 U.S. 739, 745 (1987), nor have they argued that the ordinances are "so broad that they may inhibit . . . third parties" from exercising their First Amendment rights. *See New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11 (1988) (citations omitted). Petitioners have not even attempted to demonstrate "from actual fact that a substantial number of instances exist" in which the ordinances cannot be constitutionally applied. *See id.* at 14.

pivotal because whatever it *may* mean, *that* meaning preempts conflicting local ordinances because of § 828.27(6) of the Florida Statutes, which provides that

> "[n]othing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty which is identical to the provisions of this chapter or any other state law, except as to penalty. *However, no county or municipal ordinance relating to animal control or cruelty shall conflict with the provisions of this chapter or any other state law.*"

Fla. Stat. § 828.27(6) (emphasis added). Clearly, the ordinances at issue in this case *relate* to animal control or cruelty. Whether they *conflict* with any provision of the Florida Statutes, however, is much less clear.

Ruling on petitioners' wholly separate prayer for relief seeking a declaration that, as a matter of state law, the ordinances were preempted by state statutes (*see* JA16), the district court found that "[t]he ordinances do not conflict with [state law] . . . but [merely] clarify [it]. . . ." (A22-23)[15] While the ordinances may indeed "clarify" rather than "conflict," one can easily imagine a Florida state court ruling to the contrary.[16] A comparison

[15] The only support relied upon by the district court was the opinion of the Florida Attorney General that the "ritual slaughter" exemption, Fla. Stat. § 828.22(3), applies only to religious slaughtering of animals for the primary purpose of food consumption. (A31) *See* Atty. Gen. Op. 87-56 (July 13, 1987). Although the opinions of the Florida Attorney General are "persuasive and entitled to great weight in construing the Florida Statutes," *State* v. *Office of Comptroller*, 416 So.2d 820, 822 (Fla. Dist. Ct. App. 1982), they can be no substitute for the *authoritative* opinions of, for example, the Florida Supreme Court.

[16] Of course, *amici* would urge that the ordinances *do* "clarify" state law rather than "*conflict*" with it. The following discussion serves merely to demonstrate for this Court the obvious susceptibility to limiting constructions of the state and local laws at issue, thus calling for *Pullman* abstention.

between the language of the statute and the ordinance is instructive. Section 828.12 of the Florida Statutes provides for the punishment of a person "who unnecessarily . . . kills any animal, or causes the same to be done." Section 1 of Ordinance No. 87-71 tracks the language of § 828.12, defining "sacrifice" as "unnecessarily . . . kill[ing] any animal, or caus[ing] the same to be done." *See* Hialeah Ordinance 87-71 § 3 (making it "unlawful for any person . . . to sacrifice any animal").

The district court appears to have been considerably influenced by the apparent symmetry between § 828.12 and Ordinance 87-71. (*See* A31-32) Yet such symmetry establishes nothing *per se*. For example, suppose the Hialeah City Council had been concerned with widespread killing, by lethal injection, of unwanted household pets. If the council included "euthanasia of animals" within a proscription against "unnecessarily . . . killing any animal, or causing the same to be done," the language of the ordinance would mirror that of the state statute, but would nonetheless conflict with Chapter 828 of the Florida Statutes, which clearly permits euthanasia of animals by lethal injection. *See* Fla. Stat. §§ 828.055-.065. As a consequence, that ordinance would be preempted under § 828.27(6) as a matter of Florida law.

The same is arguably true on the facts of this case: Ordinance 87-71 is a "clarification" only if Florida lawmakers would characterize ritual sacrifice as an *unnecessary* killing. If they would not, then Ordinance 87-71 adds too much to § 828.12. It would add a characterization which the state legislature would not have. As a consequence, Ordinance 87-71 would then create a "conflict" within the meaning of § 828.27(6), a "conflict" which is preempted under § 828.27(6) as a matter of Florida law — which would mean that Ordinance 87-71 is a nullity irrespective of any federal constitutional problems there may or may not be with it. Thus, a Florida court might very well "construe [§ 828.12] in a fashion that would avoid the need for a federal constitutional ruling." *Harris County Comm'rs*, 420 U.S. at 84. As this Court has noted, in such a case "the argument for abstention is strong." *Id.*

Related to the abstention problem is a particularly delicate issue of federalism, because petitioners' challenge also implicates a section of the Florida Constitution, article 1, § 3, whose impact upon the challenged ordinances is unclear as a matter of Florida constitutional law. That section provides, in relevant part, that "[t]here shall be no law . . . prohibiting *or penalizing* the free exercise [of religion. Yet, on the other hand,] [*r*]*eligious freedom shall not justify practices inconsistent with public morals, peace or safety.*" Fla. Const. art. 1, § 3 (1968 Revision) (emphasis added). Whether this section of the Florida Constitution *may* mean, *that* meaning, as a matter of state constitutional law, is pivotal because it perforce works to void as unconstitutional any conflicting local ordinances. Whether the ordinances at issue here are unconstitutional as "law[s] . . . prohibiting or penalizing the free exercise [of religion]" under article 1, § 3 is unclear.[17] One can search the district court opinion in vain for any reference to the Florida Constitution, *see Church of the Lukumi Babalu Aye, Inc.*, v. *City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), but the resolution of this case under the Florida Constitution may very well be "the nub of the whole controversy," *Harris County Comm'rs*, 420 U.S. at 85 (internal quotation omitted), thus making adjudication of the *federal* constitutional issues unnecessary on grounds of federalism.

As this Court has noted, "[t]his use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority." *Pullman*, 312 U.S. at 501. This "harmonious relation" can only be furthered if the federal courts adhere to the proposition that "[s]tate courts are the principal expositors of state law." *Moore* v. *Sims*, 442 U.S. 415, 429 (1979). This is particularly true in this case involving important issues of state law. *See Elkins* v. *Moreno*, 435 U.S. 647, 678

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[17] Of course, *amici* would urge that the ordinances do *not* conflict with the state constitution. As with the earlier discussion as to the possibility of preemption as a matter of state law, the discussion here serves merely to demonstrate to this Court the obvious susceptibility of the ordinances to a state court finding of unconstitutionality. This susceptibility counsels for *Pullman* abstention.

(1978) (REHNQUIST, J., dissenting). And for the State of Florida, the importance of the proper, largely state-ascertained balance between religiously-inspired action and public health, safety, welfare, and morals is obvious from the history of her Constitution. In 1868, the Florida Constitution was amended to include the principle that "the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the state." Fla. Const. of 1868, Dec. of Rts. § 4, 25 Fla. Stat. Ann. 441 (West 1970). In 1885, a further reference to the requirement that religion had to comport with "moral safety" was added, and that reference survived for eighty-three years. *Id.* § 5, 25 Fla. Stat. Ann. 479, 482 (West 1970). In 1968, the current version of Florida's "Free Exercise Clause" was adopted, tightening the reins on religious practices, providing that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. 1, § 3 (1968 Revision).

In sum, since it is entirely possible that a Florida court may "be likely to construe [the ordinances] in a fashion that would avoid the need for a federal constitutional ruling," *Harris County Comm'rs*, 420 U.S. at 84, that likelihood makes abstention appropriate here — particularly because state law provides for certification to the Florida Supreme Court of "questions or propositions of the laws of [Florida] which are determinative of [a] cause." *See* Fla. Stat. Ann. § 25.031 (West Supp. 1992). Although the mere availability of certification is not in itself sufficient to warrant abstention, this Court has "recognized the importance of certification in deciding whether to abstain." *Hill*, 482 U.S. at 470, for "[s]peculation by a federal court about the meaning of a state [law] in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court." *Brockett*, 472 U.S. at 510 (O'CONNOR, J., dissenting). In fact, in *Employment Div., Dept. of Human Resources* v. *Smith*, 485 U.S. 660 (1988) (*Smith I*) this Court refused to speculate in order to reach the federal constitutional question. *Id.* at 673 ("in the absence of a definitive ruling by the Oregon Supreme Court we are

unwilling to disregard the possibility that the State's legislation regulating the use of controlled substances may be construed to permit peyotism or that the State's Constitution may be interpreted to protect the practice").

The sovereign State of Florida has declared its dedication to the free exercise of religion *and*, at the same time, to public morals, peace, and safety *and* to the humane treatment of animals. The State of Florida, therefore, at least as an initial matter, should be allowed to place Hialeah Ordinances 87-52, 87-71, and 87-72 on the scales without having to suffer the "unnecessary friction" caused by premature federal court adjudication. *See Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965). The district court should have abstained until the uncertain — and possibly dispositive — issues of state law had been decided by a Florida state court.

E. *The* Factual Finding

Finally, petitioners face an insurmountable problem with *a* critical fact in this case. An allegation of discriminatory "intent" or "purpose" or "motive" has always been part and parcel of petitioners' *constitutional* challenge to the ordinances. In their verified complaint (JA6, JA10-14), and at trial (R11, R32, R69-70, R80, R136-37, R144, R148, R158, R178, R182-85, R188, R192-93, RR196, R250-51, R255, R258-59, R478-80, R514-20), and in oral argument after trial (T16-17, T28-35, T63, T86), and indeed in this Court, *see Petitioners' Pet. for Writ of Cert.* at 8, 12, *Petitioners' Br.* at 3, 14-15, 27, petitioners have clearly stated their position that the ordinances are unconstitutional because they were enacted by respondent *with the intent to chill the free exercise of petitioners' religion*. After a 9-day bench trial, this contention was flatly rejected by the district court who, as already noted, found *as a matter of fact* that there was no evidence to establish petitioners' contention that the ordinances had been passed with discriminatory intent (A28, A49) — "the council members' intent," said the court, was only "to stop the practice of animal sacrifice in the City." (A28) There is before this Court, therefore, nothing left to petitioners' constitutional claim *as they framed it* but an adverse finding of fact by the district court, affirmed by the court of

appeals, and corroborated by the singularly striking detail that respondent actually granted petitioners a certificate of occupancy to open their doors as a church in the City of Hialeah. The writ of *certiorari*, then, has brought nothing before this Court but a finding of fact, agreed upon by both lower courts, which this Court will not disturb because that finding of fact is not clearly erroneous. *See United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978).

CONCLUSION

The justiciability problems of this case — of ripeness, standing, mootness, and abstention — make it an unworthy vehicle for an important elucidation of this Court's Free Exercise jurisprudence, especially as nothing remains for this Court's review but a finding of fact upon which the district and circuit courts agreed. Accordingly, the Court should, metaphorically speaking, "abstain from meats offered to idols and from blood, and from things strangled," *Acts* 15:29 (King James), and dismiss the writ of *certiorari* as improvidently granted.

Dated: New York, New York

July 31, 1992

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