No. 06-

IN THE

Supreme Court of the United States

DANIEL TAYLOR JENKINS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Commissioner of Internal Revenue entitled to a blanket exemption from the application of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, despite the absence of any such exemption in the statute and this Court's determination that blanket exceptions to RFRA should be neither inferred nor accepted on the basis of the government's generalized invocation of a need for uniformity in the administration of a federal program?

2. Can Ninth Amendment rights "retained by the people" be identified by examining liberties clearly existent at the time of the adoption of the Constitution and the Bill of Rights, as reflected in, for example, colonial and early state constitutions and legislation, so as to guarantee the right of conscientious objection to compelled participation in warfare that was well-established at the founding of this nation?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Jenkins v. Commissioner of Internal Revenue Service*, 483 F.3d 90 (2nd Cir. 2007). The Second Circuit affirmed the March 3, 2005 decision of the United States Tax Court, which is not officially reported. *See* Appendix.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

The Second Circuit's opinion was issued on March 6, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION FIRST AMENDMENT

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

UNITED STATES CONSTITUTION NINTH AMENDMENT

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Title 42 United States Code, Section 2000bb-1

Religious Freedom Restoration Act of 1993

§ 2000bb-1. Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Title 42 United States Code, Section 2000cc-5 (7)(A)
Religious Land Use and Incarcerated Persons Act
Definition of "Religious Exercise"

(7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

STATEMENT OF THE CASE

1. This case involves a request that the Internal Revenue Service accommodate petitioner Daniel Taylor Jenkins's religious conscientious objection to coerced participation in warfare by allocating his federal income taxes to non-military purposes.

Daniel Jenkins filed an accurate and timely 2001 income tax return on April 14, 2002. He paid the self-employed social security portion of his federal tax obligation and explained in a letter addressed to the Commissioner that the remainder of the taxes owed were being held in escrow pending direction on how the funds could be directed to non-military government expenditures.

Daniel Jenkins does not ask to be excused from paying any part of his federal income taxes. **He requests an accommodation, not an exemption.** He gave up dominion over the disputed portion of his taxes by placing it in escrow at the time of filing his tax return, and he advised the Commissioner in writing that the funds were available for use for non-military expenditures. This accommodation is consistent with the manner

in which the Internal Revenue Service segregates social security tax payments and funds designated pursuant to the presidential campaign finance check-off program under 26 U.S.C. § 6096, as well as other special or specific purpose tax provisions. None have caused undue administrative burden to the IRS. Historically, accommodating Daniel Jenkins is comparable to the way in which conscientious objector commutation taxes were administered by the states when the militia system was in use and by the federal government when it conscripted persons to serve in the armed forces (during the Civil War).

Respondent Commissioner of Internal Revenue, the Tax Court and the Second Circuit did not question the sincerity of Daniel Jenkins's religious belief, nor did they dispute that the lack of governmental accommodation creates a substantial burden on the exercise of his faith.

The Commissioner offered no evidence to demonstrate that the refusal to accommodate Daniel Jenkins's religious belief is in furtherance of a compelling governmental interest, nor that there are no less restrictive means of furthering any such interest. Instead, the Commissioner, and the court below, resorted to a categorical approach. They simply assumed that the government is excused from showing that accommodation is not possible, feasible or even practical on the basis of an irrebutable presumption that there is no possible less restrictive means of administering tax collections. (The Commissioner and the courts below also mischaracterized the nature of Daniel Jenkins's request by asserting that he sought to "avoid" paying his taxes and, hence, that he was seeking an exemption or entitlement not to pay those taxes.)

2. The Tax Court had jurisdiction of the case pursuant to 26 U.S.C. § 6330(d), as petitioner had timely requested review

of an adverse determination of the Internal Revenue Service Office of Appeals regarding the escrowed portion of his taxes for the calendar year 2001.

REASONS FOR GRANTING THE PETITION

Whether the Commissioner of Internal Revenue is entitled to a blanket exemption from the application of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, presents an important question of federal law that has not been, but should be, settled by this Court. The court of appeals has decided this question in a way that is facially inconsistent with the plain language of the statute and that conflicts with this Court's decisions explaining the scope and effect of RFRA and the related Religious Land Use and Incarcerated Persons Act, 42 U.S.C. § 2000cc-5, *et seq.* The lower court's interpretation of RFRA also conflicts with the analysis and application of the statute by courts of other circuits.

The rejection by the court of appeals of petitioner's argument and evidence under the Ninth Amendment presents a question of fundamental constitutional interpretation that has not been, but should be, considered by this Court. There has been little explication of the Ninth Amendment by this Court or lower federal courts. Petitioner proposes an analytical approach that is consistent with the language of the Amendment and the original intent of the Founders, and that is narrow, clear and capable of practical judicial application. Daniel Jenkins's protected liberty interest is demonstrated by the extensive history of state constitutional and statutory guarantees of a right of conscience against compelled military participation at the time of the adoption of the Constitution and Bill of Rights.

I. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS RELATING TO THE APPLICATION AND CONSTRUCTION OF THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the government argued that "it has a compelling interest in the *uniform* application of the Controlled Substances Act", *id.* at 423 (emphasis in original), which precludes any inquiry into whether accommodating the requested religious exception for ceremonial use of a Schedule I hallucinogen "would seriously compromise its ability to administer the program." *Id.* at 435. This Court emphatically rejected the government's "categorical approach" and directed that the government must establish on a case-by-case basis that it cannot accommodate a request based on religious conscience:

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened. . . . [W]e must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.

Id. at 430-431 (internal quotation marks omitted).

This Court rejected the suggestion that only Congress, and not the federal courts, should engage in crafting exceptions to federal laws of general application. *Id.* at 434 ("RFRA, however, plainly contemplates that *courts* would recognize exceptions – that is how the law works. *See 42 U.S.C. § 2000bb-1(c).*"). And the Court soundly rejected the contention that generalized fears about theoretical administrative burdens could justify refusing to consider a specific request for accommodation:

> Here the Government's argument for uniformity . . . rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(5).

Id. at 435-436.[1]

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1. The Court has analogously directed that this type of searching individualized adjudication is required under the similar language of the Religious Land Use and Incarcerated Persons Act. *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (Holding section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a)(1)-(2), to be constitutional and remanding for development of a (Cont'd)

In this case, the court below disdained undertaking any examination of "the application of the challenged law 'to the person'"; or of any "interests that the State seeks to promote"; or of any "impediment to those objectives that would flow from recognizing" Daniel Jenkins's request for accommodation. It rejected that RFRA or this Court's precedent require a fact-specific, individualized inquiry on the basis of the conclusion in prior decisions that "tax exemptions are a matter of legislative grace...." *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173, 180 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000).

Daniel Jenkins attempted to focus the courts below on specific evidence that accommodating his conscience would not be unduly burdensome to the Internal Revenue Service. The court of appeals summarily dismissed his arguments on the basis that *United States v. Lee*, 455 U.S. 252 (1982), establishes that no accommodation is required under the Free Exercise Clause of the First Amendment. Relying on a prior decision of the Second Circuit and one by the Third Circuit,[2] which each in

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factual record): "A finding that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates cannot be made at this juncture." (internal quotation marks omitted; emphasis in original).

2. The decisions cited by the court below are *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), and *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000). In *Adams*, the Third Circuit concluded that "the nature of the compelling interest involved – as characterized by the Supreme Court in *Lee* – converts the least restrictive means inquiry into a rhetorical question that has been answered by the analysis in *Lee*." 170 F.3d at 179. And in *Browne*, the Second Circuit rejected the plaintiff's RFRA claim simply on the basis of *Adams*. 176 F.3d at 26.

turn relied on *United States v. Lee*, the court below concluded it is "well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons." 483 F.2d at 92.[3]

United States v. Lee involved a request by an Amish employer for exemption from social security taxes for himself and his employees. This Court noted that "any exemption from payment of the employer's share of social security taxes must come from a *constitutionally required exemption*." *Id.* at 256 (emphasis added). Daniel Jenkins's petition, then, presents the question whether the constitutional standard established in *United States v. Lee* is conclusively determinative of statutory analysis under RFRA. The Court has not directly addressed that question.

The Second Circuit's conclusion flies in the face of the clear language of RFRA and its elucidation by this Court.

RFRA contains no exemption for tax laws. When Congress wishes to exempt the tax system from the scope of other general legislation, it knows how to do so. *See, e.g., Anti-Injunction Act*, 26 U.S.C. § 7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . ."). It chose not to exempt the federal tax system from accommodations required under RFRA. Congress's unambiguous legislative decision should be given full effect by the courts. *Bedroc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004).

This Court emphasized in *O Centro Espirita* that blanket exceptions to RFRA should be neither inferred nor accepted on

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3. Again, Daniel Jenkins does not seek to "avoid" payment of his taxes. He seeks an accommodation that will permit him to pay his taxes consistently with the dictates of his faith.

the basis of the government's generalized invocation of a need for uniformity in the administration of a federal program. *Certiorari* should be granted to resolve whether, in the face of the plain language of the statute and this Court's pronouncements, the tax system should be accorded a judicially-created *per se* exemption from RFRA, as the Second Circuit held.

Prior to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), requests for accommodation under the Free Exercise Clause were sometimes subjected to a form of individualized scrutiny elucidated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Some Circuit Court decisions have indicated that Congress intended in RFRA only to reinstate the so-called *Sherbert-Yoder* test. *E.g., Jefferson v. Lappin*, 2006 U.S. App. LEXIS 31931 (DC Cir. 2006) ("the strict scrutiny standard set forth in the RFRA in no way differs from the strict scrutiny test this and other courts have long applied under the *First Amendment*."); *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173, 180 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000) ("the result this court reaches in evaluating her particular [RFRA] challenge is dictated by prior [Free Exercise Clause] case law."). This case and the other perfunctory decisions of the Second and Third Circuits refusing to apply the individualized strict scrutiny mandated by RFRA's plain language to cases involving federal tax administration fall into this category. *Jenkins v. Commissioner of Internal Revenue Service*, 483 F.3d 90 (2nd Cir. 2007); *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000).

This Court, however, has determined that RFRA does not simply incorporate the individualized scrutiny standards of *Sherbert* and *Yoder*. Rather, "the Act imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify. . . ." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

Other Circuit Courts also have held that RFRA provides greater protection for religious conscience than required by this Court's pre-*Smith* constitutional free exercise decisions. Those courts have noted, among other differences, that the First Amendment forbids "prohibiting" the free exercise of religion, while RFRA forbids "burdening" religion; that the "least restrictive means" requirement uniformly imposed by RFRA was not part of the pre-*Smith* jurisprudence; that RFRA applies to all cases, while pre-*Smith* constitutional analysis had exempted some entire classes of governmental activity from the *Sherbert-Yoder* test's heightened scrutiny; and that RFRA employed a broader definition of "exercise of religion" after amendment in 2000 than had been utilized in this Court's interpretation of the Free Exercise Clause. *E.g., Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1032-1033 (9th Cir. 2007); *Spratt v. Rhode island Department of Corrections*, 482 F.3d 33, 41 n. 12 (1st Cir. 2007) (Interpreting RLUIPA).

Daniel Jenkins's petition should be granted so that the Court can resolve the conflict between this Court's determination and the Second Circuit's understanding of RFRA, as well as the conflict among the Circuits.

Moreover, in *Employment Division v. Smith*, the Court explained that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children. . . .

494 U.S. at 881. In other words, to the extent that RFRA incorporates standards of individualized scrutiny from *Sherbert* and *Yoder*, those standards were *not* even applicable in *United States v. Lee*.

The most that can be said of *United States v. Lee* and the other decisions cited by the court below is that accommodations of religious conscience that affect tax administration are not constitutionally required by the Free Exercise Clause of the First Amendment. RFRA does not apply a "constitutionally required" standard, though, and applications of RFRA to particular statutes and persons do not raise concerns that animate constitutional jurisprudence. *Cf. Employment Division v. Smith, supra,* 494 U.S. at 888-890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required. . . .").

In short, *United States v. Lee* reached a constitutional conclusion that the free exercise of religion protected by the First Amendment did not compel the government to accommodate taxpayers because (1) the First Amendment did

not require accommodations to federal statutes of general application, and (2) the Court believed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 260. Those considerations no longer hold. RFRA does not involve constitutional analysis, and its standards for refusing to accommodate religious exercise are more demanding than those applied in *United States v. Lee* and its progeny. Congress has shown by its subsequent acts, such as expanding the exemption of the Amish from social security taxes in response to *Lee*[4] and the presidential campaign finance check-off program,[5] that exceptions to the uniform application of the Internal Revenue Code based on sincere religious conscience do not necessarily undermine the tax system. RFRA entails consideration of accommodating the religious conscience of *individuals*, while *Lee* was concerned with exempting *denominations*. And this Court has made it clear that Congress's direction to the Federal Courts to adjudicate requests for accommodation on a case-by-case basis under the standards set forth in RFRA should be fully honored for *all* federal statutes.

RFRA provides a means for harmonizing an individual's relationship to government and to God. Congress concluded that the federal government should actively adopt accommodations that permit the individual to be both loyal to

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4. After the *Lee* decision, Congress expanded the social security tax exemption to include Amish employers, like Mr. Lee, and their employees without any apparent damage to the federal tax system. Technical and Miscellaneous Revenue Act of 1988, Public Law 100-647, Section 8007 (1988), adding Section 3127 of the Internal Revenue Code, 26 U.S.C. § 3127.

5. 26 U.S.C. § 6096.

his country and faithful to his God. The categorical judicial exemption of the tax system from this statutory duty undermines the legislature's intent. It denigrates RFRA's specific directive to minimize the extent to which a person will be forced to choose between obedience to his government and obedience to his faith.

For all these reasons, the petition should be granted so that the Court can determine the applicability of RFRA to tax issues, and resolve a conflict between the Circuit Courts.

II. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS RELATING TO THE APPLICATION OF THE NINTH AMENDMENT TO THE RIGHT OF CONSCIENTIOUS OBJECTION IN EXISTENCE AT THE TIME OF THE FOUNDING OF THE UNITED STATES.

Below, Daniel Jenkins sought to present an argument that conscientious objection to participation in warfare was a liberty right recognized in colonial constitutions and statutes and, accordingly, within the intended scope of the Ninth Amendment's reservation of "rights retained by the people."

Ninth Amendment jurisprudence is not well developed. This Court has acknowledged that the Amendment has meaning and vitality[6] and that persons possess liberty rights beyond those

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6. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 488, 491 (1965) (Goldberg, J., *concurring*):

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental

(Cont'd)

specifically mentioned in the United States Constitution and amendments,[7] while also seeking to locate unenumerated rights in the text of other Amendments.[8] Members of the Court have explored the Founders's intention in including the Ninth Amendment and its possible application in particular situations,[9]

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> rights specifically mentioned in the first eight constitutional amendments. . . . To hold that a right so basic and fundamental and so deeply rooted in our society . . . may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

7. *E.g., Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of states at the time of the adoption of the 14th Amendment marks the outer limits of the substantive sphere of liberty which the 14th Amendment protects. *See* U.S. Const., Amdt. 9."); *Poe v. Ullman*, 367 U.S. 497, 541, 543 (1961) (Harlan, J., *dissenting*)

8. *E.g., Roe v. Wade*, 410 U.S. 113, 153 (1973):

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

See also Whelan v. Roe, 429 U.S. 589, 600 (1977).

9. *E.g., Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., dissenting) ("The Ninth Amendment, it has been said, states but a truism. But that truism goes to the very core of the constitutional

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but this Court as a whole has never had reason to develop workable standards for determining the types of unenumerated liberties it protects.

Ninth Amendment scholars propose giving content to its promise to preserve unenumerated rights by looking to this country's history and tradition. For example, in *The Tempting of America: The Political Seduction of the Law* (The Free Press 1990), Robert Bork observes that

> [t]he Ninth Amendment appears to serve a parallel function [to the Tenth Amendment's guarantee of federalism] by guaranteeing that the rights of the people specified already *in the state constitutions* were not cast in doubt by the fact that only a limited set of rights was guaranteed by the federal charter.

Id. at 185 (emphasis added). Others also have argued that retained rights can be identified by examining liberties clearly existent at the time of the adoption of the Constitution and the Bill of Rights, as reflected in, for example, colonial and early state constitutions and legislation.[10]

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relationship between the individual and governmental authority, and, indeed, between sovereigns exercising authority over the individual."); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 & n. 15 (1980) (opinion of Burger, CJ); *Palmer v. Thompson*, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting) ("The 'rights' retained by the people within the meaning of the Ninth Amendment may be related to those 'rights' which are enumerated in the Constitution.").

10. *See, e.g.*, Randy E. Barnett, *Restoring the Lost Constitution* (Princeton Univ. Press 2004); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, Boston University School of Law Working (Cont'd)

In accordance with this approach, Daniel Jenkins seeks to offer evidence that the individual right of religious conscience not to be compelled to participate in or support military activity was well recognized at the founding of this nation. For example, the New York State Constitution of 1777, which predates and is independent of the United States Constitution and the Bill of Rights, expressly protects persons with "scruples of conscience" from forced military service and requisition for armament.[11] The constitutions of other colonial states also contain liberty of conscience guarantees and religious exemptions from the "bearing of arms".[12] This constitutional right of conscientious objection was preserved by the states at least until the formation

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Paper 05-14, August 24, 2005, www.bu.edu/law/faculty/papers/BarnettR082405abstract.html; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 259 (1983).

11. New York State Constitution of 1777, Article XL; in Charles Z. Lincoln, *The Constitutional History of New York* (Lawyers Co-Op. Publ. Co. 1906), Vol. I, at 186; available at: *http://www.yale.edu/lawweb/avalon/states/ny01.htm*. Article XL states:

> That all such of the inhabitants of this state (being of the people called Quakers) as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth.

12. *See, for example,* Constitution of the Commonwealth of Pennsylvania of 1776, Art. 2 & 8, *http://www.yale.edu/lawweb/avalon/states/pa08.htm*; Constitution of the State of Vermont of 1777, Art. 3 & 9, *http://www.yale.edu/lawweb/avalon/states/vt01.htm*; Constitution of the State of New Hampshire of 1784, Art. 4, 5 & 13, *http://nh.gov/constitution/billofrights.html*.

of the first permanent national army. It was also preserved and protected by the actions of the early Congress[13] and by the Civil War Congress that instituted the first federal universal military service draft.[14]

Accordingly, there is a substantial basis to conclude that a right of conscience not to be compelled to participate in warfare was "retained by the people" from before the founding of the federal government. The Ninth Amendment was intended to respond to concerns that the enumeration of specific rights in the first eight amendments could be interpreted to negate the existence and continuing vitality of other, unstated liberties. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (opinion of Burger, C.J.). It would be ironic indeed

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13. On May 8, 1792, Congress passed "An Act more effectually to provide for the National Defense by establishing a Uniform Militia throughout the United States." Act of May 8, 1792, § 1, 2nd Cong., 1st Sess., Ch. 33; in Richard Peters, ed., *The Public Statutes at Large of the United States of America from the Organization of the Government in 1789 to March 3, 1845* (Little & Brown 1845), Vol. I, at 271-272. This is the first national legislation enacted concerning military service. It included an exemption for "all persons who now are or may hereafter be exempted by the laws of the respective states. . . ."

14. In March 1863 and February 1864, Congress adopted acts exempting from service "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations. . ." and providing that the commutation fee to be paid for exemption from military service was "to be applied to the benefit of the sick and wounded soldiers." Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9. *See United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 322 F. Supp. 2d 603, 605 (ED Pa. 2004).

if the lack of a standard for identifying and delimiting these retained rights becomes the justification to deny their existence.

Liberty of conscience was a preeminent, perhaps the paramount, factor motivating the earliest settlers to leave their homelands and to venture across a foreboding ocean to make new lives on this continent. That preeminence poured into the founding governing documents of the colonies, the states and the nation. Its enduring legacy has attracted people to our shores for over two hundred years and made this country the international model of liberty.

In no small part due to the example of this nation and its people's leadership, freedom of religious conscience has become an established fundamental universal human right. *The American Declaration of the Rights and Duties of Man* was adopted by the Organization of American States (OAS) at Bogota, Columbia by the Ninth International Conference of American States in April 1948. It declares in Article III that "[e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private" and in Article XVIII promises every person access to the courts to ensure respect for this right. *The Universal Declaration of Human Rights* was adopted by the United Nations General Assembly in December 1948. It declares that "[e]veryone has the right to freedom of thought, conscience and religion. . ." and directs that these rights be effectively protected by national tribunals. UDHR, Articles 18 & 8. *The International Covenant on Civil and Political Rights* was concluded in New York in 1966, and was signed by the United States in 1977 and ratified by the Senate in 1992. It too guarantees that "[e]veryone has the right to freedom of thought, conscience and religion. . ." and endorsing nations agreed to provide effective judicial remedies to protect these rights. ICCPR, Articles 18 & 2. And on January 23, 2007, the United

Nations Human Rights Committee sustained the claims of South Korean Jehovah's Witnesses under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights that the refusal of South Korea to accommodate their conscientious objection to participation in the military was a violation of the guarantees of conscience and religion in Article 18.[15] The international recognition of rights of conscience further confirms that conscientious objection to coerced participation in warfare is a right properly understood as reserved to the people by the Ninth Amendment.

For all these reasons, this Court should grant the petition to resolve important questions regarding the interpretation and application of the Ninth Amendment.

CONCLUSION

For the foregoing reasons, petitioner Daniel Taylor Jenkins respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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15. *Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi v. Republic of Korea*, CCPR/C/88/D1321-1322/2004 of 3 January 2007 (UN Human Rights Commission), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26a8e9722d0cdadac1257279004c1b4e?Opendocument.