The CHAIRMAN. Thank you, Mr. Hayes—particularly for your timing. Thank you very much. Very good statement.

Mr. Zwiebel.

STATEMENT OF DAVID ZWIEBEL

Mr. ZWIEBEL. Thank you very much.

Mr. Chairman and distinguished members of the panel, I am David Zwiebel, and I am the general counsel and director of government affairs for Agudath Israel of America. Agudath Israel is the national's largest grassroots Orthodox Jewish movement, and I am here to convey our organization's support for the nomination of Clarence Thomas to the U.S. Supreme Court.

We support Judge Thomas for a number of reasons. We believe that his record and his background demonstrate integrity, intelligence, and independence. But, in light of the lateness of the hour, I think I would like to focus in on one very specific issue—an issue that has not gathered all that much attention during these hearings.

It is an issue of extraordinary importance to our own constituency and, we believe, of extraordinary importance to freedom-loving Americans throughout this country.

The issue, specifically, is the accommodation of the religious rights of minority religionists in the work force—a specific issue that Judge Thomas compiled a very distinguished record on during his years as Chairman of the EEOC.

In 1985, the U.S. Supreme Court ruled in a case called *Estate of Thornton* v. *Caldor*, in which a Connecticut statute, which was defended by, at that time, the attorney general of the State of Connecticut, a man by the name of Joseph Lieberman, was held unconstitutional in the U.S. Supreme Court.

The statute required employers to accommodate the sabbath observance requirements of their employees. Said the U.S. Supreme Court, this violated the establishment clause of the first amendment—there shall be no law establishing religion.

Because this particular accommodation requirement was absolute—it allowed for no exceptions whatsoever—the U.S. Supreme Court said that constituted an endorsement of religion in violation of the first amendment.

Well, after the Supreme Court issued that ruling, our phones and phones of many Jewish organizations around this country started ringing off the hook. Employees were calling us, telling us that their employers were telling them that they could no longer leave early on Friday afternoons, when sundown was early, in order to observe their sabbath, or that they could no longer take off for certain religious holidays.

And we said that that was an incorrect interpretation of this ruling. The Connecticut statute was sui generis, it stood on its own, it was different than other statutes. But, nonetheless, there was this very serious problem, based on a misperception of the U.S. Supreme Court ruling.

Among other things, at that time, we contacted the EEOC. And, at that time, Chairman Thomas took a very, very specific and great interest in this issue, and shortly thereafter issued a policy memo-

randum clarifying that what the Supreme Court held in the *Caldor* case applied specifically and only to the statute in Connecticut, because the statute brooked for no exceptions whatsoever. It was absolute.

Title VII, on the other hand, which mandates reasonable accommodation, and allows an employer to make a case of undue hardship, said Judge Thomas—at that time, Chairman Thomas—was in full force and effect. And that requirement of reasonable accommodation was the law of the land.

Armed with that memorandum, we were able to stop the problem that many of the employees were facing at that time.

An almost identical scenario played out 1 year later, when the U.S. Supreme Court issued a ruling in a case called *Goldman* v. *Weinberger*. Goldman was Capt. Simcha Goldman in the U.S. Air Force, an Orthodox Jew, who would always wear a yarmulke, or head covering, as a matter of religious faith. There was an Air Force regulation which said no head coverings may be worn while indoors.

Captain Goldman said, well the first amendment free exercise clause protects my right to wear this head covering. Said the U.S. Supreme Court, by a vote of 5 to 4, no it does not. The military is a very special setting, and the requirements of discipline and uniformity in the military would override Captain Goldman's first amendment free exercise rights.

Well, again the phones started ringing off the hook, and employees who wore yarmulkes on the job were calling us and telling us that their rights were being threatened because the employers were telling them the Supreme Court had held that yarmulkes were no longer permitted, or at least they could insist that there be no longer any wearing of yarmulkes on the job.

Again, Chairman Thomas was contacted, and issued a policy memorandum stating clearly that *Goldman* v. *Weinberger*, the Supreme Court decision, related specifically to the context of the military, and had no application to the context of private employment, where title VII's protections applied with full force and effect.

What do these policy memos and actions of Chairman Thomas, now Judge Thomas—hopefully, soon to be Justice Thomas—what do they tell us about the man? I think two things, one very specific and one more general.

The specific point is that, with respect to the question of respecting religious freedom and the rights of religious minorities, I think that we can assume that Judge Thomas is sensitive to those concerns, and will, in fact, be a champion of religious freedom.

This is no small issue, particularly in light of the Supreme Court's holding a year ago, in a case called *Employment Division* v. *Smith*—Senator Biden, I know you have introduced a bill in the Senate that would overturn the effect of that decision. But, a 5-to-4 ruling of the Supreme Court which held that the first amendment's free protection rights simply do not cover statutes that have only an incidental impact on the practice of religion, which curtailed the free exercise of religion enormously.

And this is a very, very serious issue as we enter the 1990's and beyond, and having a voice like Judge Thomas' on the Supreme

Court, we are hopeful, will, in fact, restore to some extent, the rightful place of the first amendment's free exercise protections.

The CHAIRMAN. I asked him that question, and he refused to tell me whether he agreed with O'Connor or Scalia, when everybody else we have asked that question to had no trouble answering the question.

I just thought you might want to know that.

Mr. ZWIEBEL. I understand that, and I am aware of that, but, again, what I would suggest is that this particular aspect of his record suggests to us, despite his consistent performance at these hearings of not answering all of those questions quite as openly as we had hoped he might—it suggests to us at least that the man is sensitive to religious liberty issues and the rights of religious minorities.

And when you look for clues in a record of that sort, when he has not issued any judicial rulings on the subject, where he has not answered the specific question put to him during the hearings, and you look for clues in the record, I think this is very telling.

And the second, more general, point that I draw from this particular episode, or series of episodes, is that he is not an ivory tower jurist. He is not somebody who does not understand the impact—the broad impact—that Supreme Court rulings can have on Americans all across the country, in the everyday lives of Americans, even in contexts in which the Court has never issued the ruling, such as in the *Goldman* case, and indeed, also with respect to the *Caldor* case.

And I think that that is a quality that is of extraordinary importance in a jurist, and particularly a jurist who is sitting on the highest court of the land.

Let me just conclude by stating that our review of the record persuades us at Agudath Israel of America that Judge Thomas is highly qualified to sit on the highest court of this land, and we believe he deserves confirmation.

Thank you.

[The prepared statement of Mr. Zwiebel follows:]