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Background on Religious Liberty Protection Act March 2, 2000

Background

- The President was a strong supporter of the Religious Freedom Restoration Act (RFRA) when it became law in 1993. RFRA provided that the federal, state and local governments must have a compelling interest when they seek to enforce any law against an individual that substantially burdens his or her religious beliefs. RFRA became necessary in 1990 when the Supreme Court, in Employment Division v. Smith, abandoned the compelling interest test in applying the Free Exercise Clause. There was broad bipartisan support for RFRA, and it was applauded by all members of the religious community. However, the Supreme Court struck down most portions of RFRA in City of Boerne v. Flores on the grounds that Congress was improperly attempting to enact its own interpretation of the Fourteenth Amendment. The Religious Liberty Protection Act (RLPA) is an effort to re-enact RFRA in a constitutional form.

The Civil Rights Controversy

- There was little controversy surrounding the passage of RFRA. Since its passage, however, there have been a number of cases involving conflicts between religious freedom and the civil rights laws. These cases have arisen under state constitutions or RFRA itself before it was struck down. For example, a number of courts have held that a landlord can assert a religious claim as a defense to a fair housing law that prohibits discrimination against unmarried couples.
- While we cannot be certain how courts would rule if RLPA is enacted in its current form, a fair prediction is the following: 1) religious claims would not be a defense to state and local civil rights laws barring discrimination based on race or gender; the courts have recognized that these laws further a compelling interest; 2) courts would sometimes recognize religious claims as a defense to fair housing and fair employment laws that bar discrimination based on marital status, sexual orientation, and pregnancy; the courts are divided on whether these laws further a compelling interest; and 3) courts are less likely to recognize any defense if the employer or landlord is a large business; courts generally do not view restrictions on the actions of large businesses as a burden on religious freedom.
- Gay and lesbian groups are particularly concerned about the possibility that RLPA could negate their limited success to date in persuading states and cities to ban discrimination based on sexual orientation in employment and housing. Their fear is reinforced by the express statements of some groups on the religious right who are seeking this very result. In fact, we can assume that some of these groups would use a newly enacted RLPA in a public campaign to limit the effectiveness of gay rights laws and ordinances.

- The religious coalition has argued in the past that there should be no exception for any category of laws or individuals. At least some in the coalition felt deeply that small landlords and employers should be able to discriminate against gays, lesbians and unmarried persons. On the other hand, people in the civil rights community as well as some members of the religious community take the position that a person who has decided to engage in a business activity must be willing to accept some limitations on their freedom to choose with whom they will deal.

House Activity Last July

- Congressman Nadler tried to reach a compromise in the House last summer by proposing that the protections of the bill would be limited to small employers, in the case of employment claims, and small landlords, in the case of housing claims. As a practical matter, the Nadler amendment would have changed the result in only a few cases. It exempted large employers and landlords, but courts usually do not find there is a burden on religion in those situations. It allowed a small landlord or employer to discriminate, e.g., on the basis of sexual orientation, but state and local laws usually exempt very small businesses in any event.
- The Administration and the religious groups opposed exceptions to the RFRA in 1993. For example, one of the few controversial issues at that time was an effort by Senator Reid to exempt prisoners from the bill's coverage. The Administration and the religious coalition opposed Reid's amendment on the grounds that everyone should be entitled to protection of his or her religious liberty. White House staff in the past have also suggested that we would not support any exceptions.
- The Administration did not support the Nadler amendment, in part, because the President did not want to alienate the religious organizations who opposed the Nadler amendment. Accordingly, the Administration submitted a SAP which strongly supported the unamended RLPA. The SAP fell short of supporting Nadler, but stated that the "Administration looks forward to working with Congress to ensure that any remaining concerns about the bill, including clarification of civil rights protections, are addressed and that it can be enacted into law as quickly as possible."
- On July 15, 1999, the House rejected the Nadler amendment in a 234 to 190 vote. RLPA subsequently passed the House by 306 to 118.

Status Since House Passage

- Debate moved to the Senate. The bill has been sitting in the Judiciary Committee with the bill going nowhere because the Democrats want the civil rights concerns to be addressed.
- During negotiations over the hate crimes bill, Senator Hatch wanted to link hate crimes with RLPA. Senator Kennedy was opposed to this.

- Recently, Eddie Correia met with both civil rights groups and the religious groups. The civil rights groups oppose the House bill, but they are open to a targeted bill that would deal with issues such as land use, autopsies, prison, and school garb. Currently, the religious groups are split. The more liberal religious groups, such as Religious Action Center (David Sapperstein), the Joint Baptist Committee (progressive Baptists), and the National Council of Churches, oppose the existing broader bill. ADL, the National Council of Jewish Women, People for the American Way, and the ACLU all would support a targeted bill. The American Jewish Congress and the American Jewish Committee are also willing to do a targeted bill. Southern Baptists and the Family Research Council want the bill as is.
- The current issue seems to be whether there is enough support from the more conservative religious groups to support a targeted bill. Senator Hatch will support a targeted bill if all the religious groups will.

July 14, 1999
(House)

H.R. 1691 - Religious Liberty Protection Act of 1999
(Canady (R) Florida and 39 cosponsors)

The Administration strongly supports H.R. 1691, the Religious Liberty Protection Act (RLPA), which would protect the religious liberty of all Americans. RLPA would, in many cases, forbid state and local governments from imposing a substantial burden on the exercise of religion, unless they could demonstrate that imposition of such a burden is the least restrictive means of advancing a compelling governmental interest. This statutory prohibition would, in the cases in which it applies, embody the test that was applied by the Supreme Court as a matter of Constitutional law prior to 1990 and that is applied now to the Federal Government under the Religious Freedom Restoration Act (RFRA). RLPA will, in large measure, restore the principles of RFRA, which was enacted with broad Congressional support in 1993. It is necessary for Congress to enact RLPA since the Supreme Court invalidated the application of RFRA to state and local governments. RLPA is carefully crafted to address the Court's constitutional rulings. The Department of Justice has reviewed H.R. 1691 and has concluded that, while RLPA raises important and difficult Constitutional questions, nevertheless it is constitutional under governing Supreme Court precedents. The Administration looks forward to working with Congress to ensure that any remaining concerns about the bill, including clarification of civil rights protections, are addressed and that it can be enacted into law as quickly as possible.

* * * * *

(Do Not Distribute Outside Executive Office of the President)

This Statement of Administration Policy was developed by the Legislative Reference Division (Jones), in consultation with the: Departments of Justice (Silas, Lederman), Education (Kristy), Veterans Affairs (Raun), and Transportation (Holmstrup); the Office of Personnel Management (Gardner); and the White House Offices of Counsel (Correia) and Legislative Affairs (Fredrickson).

The Departments of Defense, Commerce, HUD, Labor, the Interior, HHS, Agriculture, and State; the Commission on Civil Rights; the White House Offices of Intergovernmental Affairs and Domestic Policy; and TCJSD, HTFD, HRD, NRD, NSD, HD, VAPD, IAD, BASD, BRCD, and OIRA did not respond to our request for comments on the draft SAP.

OMB/LA Clearance: Josh Gotbaum, Bob Damus, Michael Deich, Elizabeth Gore (OMB); Eddie Correia (WH Counsel).

H.R. 1691 was ordered reported by the House Judiciary Committee by a voice vote on June 23, 1999.

Administration Position to Date

The Administration has taken no position on the Religious Liberty Protection Act (RLPA). The Justice Department, in a July 14th letter, did state its conclusion that the "RLPA as currently drafted is constitutional under governing Supreme Court precedents."

Summary of H.R. 1691

H.R. 1691 would restore a major provision of the Religious Freedom Restoration Act (Pub. L. 103-141) that prohibited a government from interfering with a person's religious exercise unless the government could prove the action is the least restrictive means of furthering a "compelling state interest." That provision was overturned by the Supreme Court (*City of Boerne, Texas v. Flores*), which ruled in June 1997 that the Religious Freedom Restoration Act's restrictions on State and local governments exceeds Congress' power under section 5 of the Fourteenth Amendment. H.R. 1691 would restore this prohibition against governmental interference by basing it on the Commerce Clause of the Constitution.

Summaries of the principal provisions of H.R. 1691 as reported follow.

- **Protection of religious exercise.** The bill would prohibit a State or local government from placing a substantial burden upon a person's religious exercise in: (1) a government-operated program or activity that receives Federal financial assistance; or (2) in any activity affecting international or interstate commerce. The bill declares that a State may substantially burden a person's religious exercise only if the burden is in

furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. H.R. 1691 specifies that nothing in the RLPA shall be construed to authorize the United States to deny or withhold Federal financial assistance as a remedy for a violation of the RLPA or affect the authority of a government agency to intervene in any action or proceeding. The bill would subject both a State and the Federal Government to liability for a violation of the Free Exercise Clause, including a civil action for money damages.

- Procedure for enforcement of constitutional rights. The bill would provide generally that if a complaining party produces prima facie evidence of a violation of his or her right to the free exercise of religion, the government then bears the burden of proof on all issues except demonstrating the burden on religion. The bill would authorize the Attorney General to sue for injunctive or declaratory relief to enforce the RLPA.
- Land use regulation. The bill would prohibit the implementation of any land use-related regulation or exemption in which the government has the authority to make individualized assessments of the proposed uses of property, that would impose a substantial burden on a person's religious exercise, unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. H.R. 1691 would require governments to: treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions in land use decisions; not discriminate on the basis of religion or religious denomination; and exercise reasonably its jurisdiction over assemblies or institutions principally devoted to religious exercise.
- Rules of construction. H.R. 1691 explicitly states that the RLPA does not: (1) authorize a State to burden any religious belief; (2) create any basis for the regulation of religious exercise or for claims against a religious organization not acting under color of law; (3) create or preclude a right of any religious organization to receive State funding or assistance; (4) authorize State regulation of the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or (5) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act. The bill explicitly states that the RLPA should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution." It further declares that nothing in the RLPA shall be construed to affect, interpret, or in any way address the Establishment Clause of the Constitution (prohibiting laws respecting an establishment of religion).
- Amendments to conform to Supreme Court decision. The bill would amend the Religious Freedom Restoration Act to conform to the Supreme Court's decision in *City of Boerne v. Flores* by eliminating all references to the States and leaving RFRA applicable only to the Federal Government.

Conyers-Nadler Substitute Amendment

The Rules Committee made in order an amendment in the nature of a substitute by Rep. Conyers or his designee. The substitute is identical to the reported version of H.R. 1691 except for one subsection that would limit the use of the RLPA to avoid enforcement of certain civil rights laws.

The proposed substitute would:

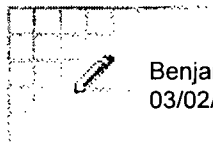
- prohibit the use of the RLPA to challenge the enforcement of a law prohibiting discrimination in public accommodations; and
- limit the circumstances under which a person could seek relief from anti-discrimination laws related to housing to owners who sell or rent no more than three single-family houses and from anti-discrimination laws related to employment to religious entities with respect to the employment of persons who perform instructional, devotional, or governing activities of the entity.

Pay-As-You-Go Scoring

According to TCJSD (Thompson), H.R. 1691 would not affect direct spending or receipts. Therefore, it is not subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990.

LEGISLATIVE REFERENCE DIVISION

July 14, 1999 - 4:24 PM



Benjamin M. Adams
03/02/2000 09:59:40 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: RLPA Paper

Per Eddie...

----- Forwarded by Benjamin M. Adams/WHO/EOP on 03/02/2000 09:57 AM -----

Edward W. Correia

03/02/2000 09:48:10 AM

Record Type: Record

To: Benjamin M. Adams/WHO/EOP@EOP

cc: Maura M. Pally/WHO/EOP@EOP

Subject: RLPA

Please circulate this to persons attending the RLPA meeting with Maria today.

I'm attaching an ACLU-drafted bill, which targets certain types of state laws for federal protection of religious liberties. The areas are: 1) state and local land use policies, e.g., zoning restrictions which prevent churches from expanding and which are sometimes used to disfavor certain denominations; 2) autopsy requirements, which impose a particular burden on some groups; 3) state prison policies, which can prevent prisoners from worshipping, following certain dietary requirements, etc., and 4) school district rules regarding religious apparel, which can prevent students from wearing ceremonial garb or religious symbols. In all these cases, the bill would not flatly prohibit these restrictions; it would subject them to a heightened standard of review by requiring the governmental entity to show that they further a compelling interest and are narrowly tailored to accomplish the government's goal. Under this "targeted bill" approach, the issue of a conflict with the civil rights laws is avoided.

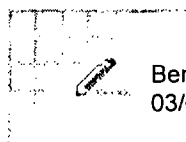
In order to make this acceptable to the conservative members of the religious community, at least one more provision would have to be added. We would need to create some kind of advisory commission or ongoing review, which monitors other areas to determine if further federal protection is needed. An example of such a provision (drafted by me) is also attached. There is broad interest in this kind of bill, but some of the most conservative groups are hesitant about it on the grounds that they can still get a broader bill. Others, e.g., the Family Research Council, probably would oppose anything but a comprehensive bill. I'm told by Hatch's staff that the FRC's view is not dispositive. One of the questions for us is how much to get involved in advocating this approach and, if we do want to get more active, how we do it.



rlpa.alternative3.d Advisory Commission.d

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In order to make this acceptable to the conservative members of the religious community, at least one more provision would have to be added. We would need to create some kind of advisory commission or ongoing review, which monitors other areas to determine if further federal protection is needed. An example of such a provision (drafted by me) is also attached. There is broad interest in this kind of bill, but some of the most conservative groups are hesitant about it on the grounds that they can still get a broader bill. Others, e.g., the Family Research Council, probably would oppose anything but a comprehensive bill. I'm told by Hatch's staff that the FRC's view is not dispositive. One of the questions for us is how much to get involved in advocating this approach and, if we do want to get more active, how we do it.

DRAFT

Advisory Commission on Religious Liberties

(a) Advisory Commission -- Within 180 days of the date of enactment of this Act, the President shall establish an Advisory Commission on Religious Liberties, which shall be composed of representatives of federal, state and local governmental agencies, as well as representatives of the general public.

(b) Responsibilities -- The Commission shall have the following responsibilities: 1) advising state and local governments and the general public regarding the requirements of this Act; 2) monitoring compliance with this Act; 3) monitoring the practices of governmental entities, including the federal government and state and local governments, which may restrict religious practices not covered by this Act; 4) conducting or arranging for studies of religious practices and the effect of federal, state and local laws on such practices; and 4) making recommendations to the President and the Attorney General regarding appropriate actions by the Department of Justice or other agencies of the Executive Branch and possible revisions to this Act, including extending the protection of religious liberties afforded under this Act.

(c) The Commission shall submit an annual report to the Congress regarding its activities and findings.

(d) Authorization of appropriations -- There is authorized to be appropriated to carry out this section \$5 million for each of fiscal years 2000 through 2005.

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1 subject real property would be put, the grantee does not impose
2 a substantial burden on the religious exercise of a person with
3 an interest in said real property, unless the grantee demonstrates
4 that application of the burden to the person is in furtherance of a
5 compelling governmental interest and is the least restrictive
6 means of furthering that compelling governmental interest;

7 (ii) Not imposing or implementing any land use
8 regulation in a manner that does not treat religious assemblies
9 or institutions on at least equal terms with nonreligious
10 assemblies or institutions;

11 (iii) Not imposing or implementing any land use
12 regulation that discriminates against any assembly or institution
13 on the basis of religion; and

14 (iv) Not using any land use regulation to exclude
15 unreasonably or limit unreasonably assemblies or institutions
16 principally devoted to religious exercise; and

17 (B) agrees that, for purposes of certification under this

18 subsection --

1 (i) the term ‘religious exercise’ means conduct that
2 constitutes the exercise of religion under the first amendment to
3 the Constitution; however, such conduct need not be compelled
4 by, or central to, a system of religious belief; the use, building,
5 or converting of real property for religious exercise shall itself
6 be considered religious exercise of the person that uses or
7 intends to use the property for religious exercise;

8 (ii) the term ‘land use regulation’ means a law or decision
9 by a government that limits or restricts a private person’s uses
10 or development of land, or of structures affixed to land, where
11 the law or decision applies to one or more particular parcels of
12 land or to land within one or more designated geographical
13 zones;

14 (iii) the term “an interest in real property” means an
15 ownership, leasehold, easement, servitude, or similar property
16 interest in the regulated land, or a contract or option to acquire
17 such an interest; and

18 (iv) the term ‘demonstrates’ means meets the burdens of
19 going forward with the evidence and of persuasion.”; and

(b) redesignating paragraph (6) as paragraph (7).

**SEC. 3. ACCOMMODATION OF RELIGIOUS EXERCISE OF
INSTITUTIONALIZED PERSONS.**

Chapter 21 of title 42 of the United States Code is amended by adding
the following new section:

**“ACCOMMODATION OF RELIGIOUS EXERCISE OF
INSTITUTIONALIZED PERSONS -**

**“(a) RELIGIOUS EXERCISE OF INSTITUTIONALIZED
PERSONS -** A State receiving funds under section 3756 of this title
shall adopt standards that ensure that no person, acting under color of
law, substantially burdens the religious exercise of any person residing
in or confined to an institution, as defined in section 2 of the Civil
Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the
burden results from a rule of general applicability, unless the State
demonstrates that application of the burden to the person is in
furtherance of a compelling governmental interest, and is the least
restrictive means of furthering that compelling governmental interest.

“(b) INELIGIBILITY FOR FUNDS - A State that fails to
comply with the requirements described in subsection (a) shall not

1 receive 10 percent of the funds that would otherwise be allocated to
2 the State under section 3756 of this title (42 U.S.C. 3756).

3 “(c) REALLOCATION OF FUNDS - Any funds that are not
4 allocated for failure to comply with this section shall be reallocated to
5 States that comply with this section.”

6 **SEC. 4. PROTECTION AGAINST CERTAIN AUTOPSIES.**

7 42 U.S.C. 1396a is amended:

8 (a) in paragraph (65), by replacing the last period with a semicolon;

9 and

10 (b) at the end thereof, by adding:

11 “(66) provide that the State shall adopt standards that ensure
12 that the State does not require any person to refuse to comply with
13 directions on whether to perform an autopsy on the body of a deceased
14 person, if such directions were expressed in writing by the decedent
15 or, if no such writing is available, are expressed orally or in writing by
16 the executor of the decedent’s estate or by any person who had the
17 legal power to make medical decisions for the decedent, unless the
18 State obtains a court order finding that the State has a compelling
19 interest in enforcing its regulations as to the body of that particular

1 decedent and that the regulations are the least restrictive means of
2 furthering that compelling governmental interest.”.

3 **SEC. 5. ACCOMMODATION OF RELIGIOUS APPAREL.**

4 20 U.S.C. 1232h is amended:

5 (a) by inserting after subsection (b):

6 “(c) (1) Except as provided under paragraph (2), a student at an
7 elementary or secondary school may wear an item of religious apparel
8 while attending the elementary or secondary school.

9 “(2) A school official may prohibit the wearing of an item of
10 religious apparel by a student if the government demonstrates that
11 such prohibition is in furtherance of a compelling governmental
12 interest, and is the least restrictive means of furthering that
13 governmental interest.

14 “(3) For purposes of this section, ‘religious apparel’ has the
15 meaning given such term in 10 U.S.C. 774(d).”; and

16 (b) by redesignating subsections (c), (d), and (e) as subsections (d),
17 (e), and (f), respectively.

18 **SEC. 6. RULES OF CONSTRUCTION; DEFINITIONS.**

1 (a) RELIGIOUS BELIEF UNAFFECTED - Nothing in this Act shall
2 be construed to authorize the United States or any State to burden any
3 religious belief.

4 (b) RELIGIOUS EXERCISE NOT REGULATED - Nothing in this
5 Act shall create any basis for restricting or burdening religious exercise or
6 for claims against a religious organization, including any religiously
7 affiliated school or university, not acting under color of law.

8 (c) CLAIMS TO FUNDING UNAFFECTED - Nothing in this Act
9 shall create or preclude a right of any religious organization to receive
10 funding or other assistance from the United State or any State, or of any
11 person to receive funding from the United States or any State for a religious
12 activity, but this Act may require the United States or a State to incur
13 expenses in its own operations to avoid imposing a burden or a substantial
14 burden on religious exercise.

15 (d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON
16 FUNDING UNAFFECTED - Nothing in this Act shall -

17 (1) authorize the United States or any State to regulate or affect,
18 directly or indirectly, the activities or policies of a person, or entity,

1 not acting under color of law, as a condition of receiving funding or
2 other assistance; or

3 (2) restrict any authority that may exist under other law to so
4 regulate or affect, except as provided in this Act.

5 (e) STATE DISCRETION IN ALLEVIATING BURDENS ON
6 RELIGIOUS EXERCISE - For any policy of a State that does not further a
7 compelling governmental interest or is not the least restrictive means of
8 furthering such interest, the State may avoid the preemptive force of any
9 provision of this Act by changing the policy that results in the substantial
10 burden on religious exercise, by retaining the policy and exempting the
11 burdened religious exercise, by providing exemptions from the policy for
12 applications that substantially burden religious exercise, or by any other
13 means that eliminates the substantial burden.

14 (f) ESTABLISHMENT CLAUSE UNAFFECTED - Nothing in this
15 Act shall be construed to affect, interpret, or in any way address that portion
16 of the first amendment to the Constitution prohibiting laws respecting an
17 establishment of religion (referred to in this section as the “Establishment
18 Clause”). Granting government funding, benefits, or exemptions, to the
19 extent permissible under the Establishment Clause, shall not constitute a

1 violation of this Act. As used in this section, the term “granting”, used with
2 respect to government funding, benefits, or exemptions, does not include the
3 denial of government funding, benefits, or exemptions.

4 (g) BROAD CONSTRUCTION - This Act should be construed in
5 favor of a broad protection of religious exercise, to the maximum extent
6 permitted by its terms and the Constitution.

7 (h) SEVERABILITY - If any provision of this Act or of an
8 amendment made by this Act, or any application of such provision to any
9 person or circumstance, is held to be unconstitutional, the remainder of this
10 Act, the amendments made by this Act, and the application of the provision
11 to any other person or circumstance shall not be affected.

12 (i) DEFINITIONS - As used in sections 1 through 8 of this Act -

13 (1) the term “religious exercise” means conduct that constitutes
14 the exercise of religion under the first amendment to the Constitution;
15 however, such conduct need not be compelled by, or central to, a
16 system of religious belief; the use, building, or converting of real
17 property for religious exercise shall itself be considered religious
18 exercise of the person that uses or intends to use the property for
19 religious exercise;

1 (2) the term “Free Exercise Clause” means that portion of the
2 first amendment to the Constitution that proscribes laws prohibiting
3 the free exercise of religion and includes the application of that
4 proscription under the 14th amendment to the Constitution;

5 (3) the term “demonstrates” means meets the burden of going
6 forward with the evidence and of persuasion;

7 (4) the term “United States” means a branch, department,
8 agency, instrumentality, or official of the United States, and any
9 person acting under color of Federal law; and

10 (5) the term “State” means -

11 (A) a State of the United States, the District of Columbia,
12 or any commonwealth, territory, or possession of the United
13 States;

14 (B) a State, county, municipality, or other governmental
15 entity created under the authority of a State;

16 (C) any branch, department, agency, instrumentality,
17 subdivision, or official of an entity listed in subparagraphs (A)
18 or (B); and

19 (D) any other person acting under color of State law.

1 **SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM**
2 **RESTORATION ACT.**

3 (a) DEFINITIONS - Section 5 of the Religious Freedom Restoration
4 Act of 1993 (42 U.S.C. 2000bb-2) is amended -

5 (1) in paragraph (1), by striking “a State, or subdivision of a
6 State” and inserting “a covered entity or a subdivision of such an
7 entity”; and

8 (2) in paragraph (2), by striking “term” and all that follows
9 through “includes” and inserting “term ‘covered entity’ means”.

10 (b) CONFORMING AMENDMENT - Section 6(a) of the Religious
11 Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by
12 striking “and State”.