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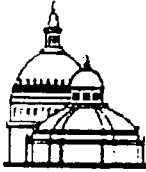
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SHORT REPORT
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97-795: The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status

Updated January 21, 1999

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Summary

In *City of Boerne, Texas v. Flores*⁽¹⁾ the Supreme Court on June 25, 1997, held the "Religious Freedom Restoration Act" (RFRA) to be unconstitutional as applied to the states. Congress enacted RFRA in 1993 in response to an earlier Supreme Court decision -- *Employment Division, Oregon Department of Human Resources v. Smith*⁽²⁾ -- which had construed the free exercise clause of the First Amendment to prohibit only government action which **intentionally** burdens the exercise of religion. In RFRA Congress sought to broaden the legal protection afforded religious exercise by prohibiting government action that has the **effect** of substantially burdening religious practice as well. But in *Boerne* the Court held that Congress lacks the power under § 5 of the Fourteenth Amendment to apply RFRA to the states.

The Clinton Administration maintains that RFRA continues to be valid for the federal government, and at least one federal appellate court has sustained that position. In addition, in the 105th Congress bills were introduced in both the House and the Senate to re-apply RFRA's standards to the states using Congress' interstate commerce and spending clause powers (S. 2148, H.R. 4019). A subcommittee of the House Judiciary Committee ordered a modified version of H.R. 4019 reported to the full committee; but further consideration fell victim to the Committee's impeachment inquiry.

This report briefly summarizes *Smith*, the legislative history of RFRA, the decision in *Boerne*, RFRA's current legal status, and Congressional efforts to respond to *Boerne*.

Legislative and Political History

The Smith Decision. As noted, the genesis of RFRA lay in the Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith, supra*. In that case, decided in 1990, the Court narrowed the scope of the free exercise clause of the First Amendment, which provides that "Congress shall make no law ... prohibiting the free exercise (of religion)."⁽³⁾ The specific issue before the Court in *Smith* was whether two Native Americans who had been fired from their jobs as drug counselors after they were discovered to have ingested peyote in a ritual of the Native American Church were eligible for state unemployment benefits. That issue the Court resolved in the negative, 6-3. But in the process of reaching that conclusion the Court also altered the standard of review generally used for free exercise cases, 5-4.

For the prior quarter of a century the Court had generally applied a **strict scrutiny test** to government action alleged to burden the exercise of religion. That test required the government to show that an

action burdening religion served a compelling public interest and that no less burdensome course of action was feasible. If the government could not so demonstrate, the test required that the religious practice be exempted from the government regulation or prohibition at issue.

In *Smith* the Court abandoned the strict scrutiny test (except in a few narrow categories). It held that religiously neutral laws may be uniformly applied to all persons without regard to **any** burden or prohibition placed on their exercise of religion. The free exercise clause, the Court said, **never** "relieves an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." In the case at hand, that new standard meant that the free exercise clause mandated no religious exemption from Oregon's drug laws for Native American use of peyote in a sacramental ceremony and, consequently, no eligibility for unemployment benefits of two Native Americans who lost their jobs because of their participation in such a ceremony. More generally, the Court asserted that the question of whether religious practices ought to be accommodated by government was a matter to be resolved by the political process and not by the courts, although it admitted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in"

The Congressional Response. The specific result in *Smith* was upsetting to some.⁽⁴⁾ But it was the Court's virtual abandonment of strict scrutiny and relegation of free exercise concerns to the political process that generated widespread alarm in the religious community and elsewhere. That alarm quickly coalesced into a broad-based organization known as the Coalition for the Free Exercise of Religion. Its efforts quickly resulted in the introduction by bipartisan sponsors in both the House and the Senate of a proposed "Religious Freedom Restoration Act of 1990" (H.R. 5377, S. 3254) and, 3 years later, of the enactment of a modified version of RFRA into law.⁽⁵⁾

None of the versions of RFRA considered by Congress addressed any specific free exercise concern. Rather, the intent was to restore the strict scrutiny test as the general standard governing the interaction of government and religious exercise. Because a constitutional amendment would have been required to do that for the judicial interpretation of the First Amendment, RFRA was crafted to impose the strict scrutiny test as a **statutory** standard. As enacted, RFRA provided that a statute or regulation of general applicability can lawfully burden a person's free exercise of religion only if it can be shown to be "essential to further a compelling governmental interest and (to be) the least restrictive means of furthering that compelling governmental interest." RFRA made the standard applicable to governmental action at every level -- federal, state, and local -- and allowed aggrieved parties to bring suit if they believed their exercise of religion had been restricted by government in violation of the statutory standard.

As noted, it took 3 years to enact RFRA. In 1990 hearings were held on the House bill (H.R. 5377) by a subcommittee of the House Judiciary Committee,⁽⁶⁾ but no further action was taken before the 101st Congress adjourned. In the 102d Congress RFRA was re-introduced in slightly modified form (H.R. 2797, S. 2969), hearings were held in both the House and the Senate,⁽⁷⁾ and the measure was reported late in the second session by the House Judiciary Committee.⁽⁸⁾ But disputes over the measure remained,⁽⁹⁾ and the 102d Congress adjourned soon thereafter without any further action.

In the 103d Congress RFRA was again introduced in slightly modified form (H.R. 1308, S. 578). But by this time the politics of the bill had changed substantially. President Clinton, unlike President Bush, came to office an avowed supporter of RFRA. The Supreme Court had had the opportunity to overturn *Roe v. Wade*⁽¹⁰⁾ but had chosen not to do so.⁽¹¹⁾ The Coalition for the Free Exercise of Religion had continued to expand.⁽¹²⁾ Most important, perhaps, earlier objections to the bill by the U.S. Catholic Conference and the right-to-life community had been resolved.⁽¹³⁾ As a result, H.R. 1308 was reported without dissent by the House Judiciary Committee⁽¹⁴⁾ and adopted by the House May 11, 1993, under rules suspension.⁽¹⁵⁾ No Member spoke against the measure on the House floor.

In the Senate, however, a new issue arose -- whether prisons ought to be exempted from the bill. Twenty-two state attorneys general as well as the prison administrators of all 50 states argued for such

an exemption in letters to the Senate Judiciary Committee, but the Committee chose not to add the exemption. Its report recommending adoption of RFRA stated simply that "the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison administrators" and that the strict scrutiny standard "will not place undue burdens on prison administrators."⁽¹⁶⁾ Nonetheless, Sen. Reid (D.-Nev.) offered a prison exemption amendment on the Senate floor. After vigorous debate the amendment was defeated, 41-58.⁽¹⁷⁾ The bill was then approved, 97-3.⁽¹⁸⁾ One week later, on November 3, 1993, the House, by voice vote, accepted the Senate version of RFRA rather than go to conference.⁽¹⁹⁾ President Clinton signed the measure into law on November 16, 1993.

City of Boerne, Texas v. Flores

In *City of Boerne, Texas v. Flores*, *supra* the Supreme Court on June 25, 1997, held RFRA to be unconstitutional as applied to the states, 6-3. The Court said that as applied to the states RFRA exceeded Congress' power under section 5 of the 14th Amendment.⁽²⁰⁾

The case arose because of a conflict between a local Catholic church and the city of Boerne's historic preservation ordinance. St. Peter the Apostle Catholic Church wanted to raze much of its existing structure and build a larger sanctuary in order to accommodate its rapidly growing congregation; but the city refused it permission to do so because, it said, the Mission Revival architecture of the church made it an historic structure that needed to be preserved. Archbishop Flores sued on behalf of the church, arguing in part that the city's denial of a building permit violated RFRA. The city responded by contending that RFRA was unconstitutional.

The Supreme Court agreed with the city, holding that as applied to the states RFRA "exceeds Congress' power." Justice Kennedy, writing for the majority, agreed that under § 5 of the 14th Amendment Congress has the power to enforce its provisions; but, he said, that power is limited. Congress can not in the guise of enforcement, he stated, adopt legislation that "alters the meaning" or the substance of the rights protected by the Fourteenth Amendment:

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.

Both the legislative history of the Amendment and most of the judicial decisions interpreting its provisions, Justice Kennedy asserted, made Congress' lack of power to define the rights protected by the Amendment clear. Moreover, he elaborated, in Congress' exercise of its remedial power under § 5, there must "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." But here, he said, Congress had failed to develop a legislative record showing extensive denials of religious liberty; yet RFRA intruded "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Particularly with respect to the states, he asserted, RFRA constituted "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." As a consequence, he concluded, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... and contradicts vital principles necessary to maintain separation of powers and the federal balance."

Present Status

Because of the *Boerne* decision, states and localities are no longer bound by RFRA. But RFRA may still be valid with respect to the federal government, because for that application Congress did not rely on § 5 of the 14th Amendment but on its substantive powers under Article I and the "necessary and proper" clause.⁽²¹⁾ The Clinton Administration has argued in support of RFRA's constitutionality as applied to the federal government, and to date at least one federal appellate court has agreed. On April 13, 1998,

the United States Court of Appeals for the Eighth Circuit held, in *Christians v. Crystal Evangelical Free Church*,⁽²²⁾ that RFRA is a valid exercise of Congress' power under the necessary and proper clause and, in the circumstances of the case, its plenary power over bankruptcy.⁽²³⁾ The case was believed to be a promising vehicle for Supreme Court review of the matter, but an amendment of the bankruptcy code by Congress in the summer of 1998 caused the Court not to review the decision.⁽²⁴⁾

Meanwhile, St. Peter the Apostle Catholic Church and the city of Boerne have worked out an accommodation in lieu of pursuing further litigation. The church will build a structure adding 850 seats to its sanctuary which will retain 80% of the original facade.

Finally, on June 9, 1998, Senators Hatch and Kennedy and Representatives Canady and Nadler introduced the "**Religious Liberty Protection Act**" (RLPA) (S. 2148, H.R. 4019). RLPA would re-impose strict scrutiny on state burdens on religious practice under Congress' powers over interstate commerce and federal spending and would as well limit state and local land use decisions that adversely impact religious institutions. Hearings were held on the proposal⁽²⁵⁾; and on August 6, 1998, a subcommittee of the House Judiciary Committee ordered a more limited version of H.R. 4019 reported to the full committee.⁽²⁶⁾ The Committee scheduled a mark-up on the bill for September 10, but further consideration of the measure in the 105th Congress fell victim to the Starr report and the Committee's impeachment inquiry. The measure has not as yet been re-introduced in the 106th Congress.

Footnotes

1. (back) 521 U.S. ___, 117 S.Ct. 2157 (1997).
2. (back) 494 U.S. 872 (1990).
3. (back) The free exercise clause has been held applicable not only to actions by the federal government but also to actions by state and local government. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
4. (back) Congress in 1994 made the religious use of peyote by members of the Native American Church legal under federal law. See P.L. 103-344 (Oct. 6, 1994); 42 U.S.C.A. 1996a. Oregon, similarly, decriminalized the religious use of peyote after *Smith*. See Ore. Rev. Stat. 475.992(5) (1996 Supp.).
5. (back) P.L. 103-141 (Nov. 16, 1993); 42 U.S.C.A. 2000bb et seq.
6. (back) See *Religious Freedom Restoration Act of 1990: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st Cong., 2d Sess. (September 27, 1990).
7. (back) See *Religious Freedom Restoration Act of 1991 and the Religious Freedom Act: Hearing on H.R. 2797 and H.R. 4040 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 102d Cong., 2d Sess. (May 13, 1992) and *Religious Freedom Restoration Act of 1992: Hearing Before the Senate Judiciary Committee*, 102d Cong., 2d Sess. (September 18, 1992) (unprinted).
8. (back) See 138 CONG. REC. D1261 (Oct. 1, 1992) (daily ed.).
9. (back) During the 102d Congress several concerns were raised about RFRA by the National Right to Life Committee and the U.S. Catholic Conference -- that it might make it possible for women to seek exemptions from restrictive anti-abortion statutes and to obtain abortions on religious grounds, that it might allow challenges to the tax-exempt status of church organizations, and that it might endanger public grants to church-related programs and institutions. Reflecting these concerns, a competing measure was introduced (H.R. 4040) which embodied the same strict scrutiny standard as H.R. 2797 but

excluded three areas from the possibility of suit under the bill (1) "the tax status of any person," (2) "the use or disposition of government funds or property derived from or obtained with tax revenues," and (3) "any limitation or restriction on abortion, on access to abortion services or on abortion funding."

10. [\(back\)](#)410 U.S. 113 (1973).
11. [\(back\)](#)*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
12. [\(back\)](#)The Coalition eventually comprised 67 organizations ranging across the political and religious spectrum. Its breadth is shown by its inclusion of such ordinarily disparate groups as the People for the American Way and the Traditional Values Coalition.
13. [\(back\)](#)The operative language of the bill had been slightly modified, a new section making clear that the bill had no application to issues of public funding for religious institutions or questions of tax exemption had been added, and the section on standing to sue had been clarified. As a result, the U.S. Catholic Conference withdrew its objections, although it never formally joined the Coalition for Free Exercise.
14. [\(back\)](#)See H.Rept. 103-88, 103d Cong., 1st Sess. (May 11, 1993).
15. [\(back\)](#)See 139 CONG. REC. H2356 - H2363 (daily ed. May 11, 1993).
16. [\(back\)](#)See S.Rept. 103-111, 103d Cong., 1st Sess. (1993).
17. [\(back\)](#)139 CONG. REC. S14468 (daily ed. Oct. 27, 1993).
18. [\(back\)](#)139 CONG. REC. S14471 (daily ed. Oct. 27, 1993).
19. [\(back\)](#)139 CONG. REC. H8715 (daily ed. Nov. 3, 1993).
20. [\(back\)](#)The Fourteenth Amendment, *inter alia*, bars the states from depriving "any person of life, liberty, or property, without due process of law." "Liberty" includes religious liberty. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
21. [\(back\)](#)Article I, § 8, provides: "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
22. [\(back\)](#)No. 93-2267 (8th Cir. April 13, 1998), *cert. denied*, 67 U.S.L.W 3229 (Oct. 5, 1998) (No. 97-1744). The appellate court had previously held RFRA to be constitutional and to bar a trustee from voiding debtors' tithes to their church as avoidable transfers under § 548(a)(2) of the Bankruptcy Code, but the Supreme Court had vacated and remanded that decision for reconsideration in light of *Boerne*. See *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *judgment vacated and case remanded for further consideration in light of City of Boerne, Texas v. Flores*, 117 S.Ct. 2157 (1997).
23. [\(back\)](#)The facts of the case involved an effort by a trustee in bankruptcy to recapture a couple's good faith tithes to a church made in the year prior to declaring bankruptcy. The court held that RFRA in effect amended the Bankruptcy Code and that a recapture of their tithes would place a substantial burden on their religious practice without compelling justification. As a consequence, it held RFRA to bar the recapture, to be a valid exercise of Congress' Article I powers, and not to violate the establishment clause of the First Amendment. A dissenting judge contended that *Boerne* implied that even as applied to the federal government, RFRA violates the separation of powers doctrine by imposing on the courts a

standard of review for a constitutional right beyond what the Supreme Court has held the Constitution to require.

24. [\(back\)](#) On June 19, 1998, President Clinton signed the "Religious Liberty and Charitable Protection Act" into law ([P.L. 105-183](#)). The Act amended the bankruptcy code (11 U.S.C.A. 548(a)) to exempt good faith charitable donations from recapture by trustees.

25. [\(back\)](#) *Hearings on H.R. 4019 Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Cong., 2d Sess. (June 16 and July 14, 1998) (unprinted) and *Hearing on S. 2148 Before the Senate Judiciary Committee*, 105th Cong., 2d Sess. (June 23, 1998) (unprinted).

26. [\(back\)](#) For a fuller discussion of RLPA, see *The Religious Liberty Protection Act* (September 1, 1998) (CRS Report 98-734).

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The Religious Liberty Protection Act of 1998: Background and Recent Activity

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Summary

On August 6, 1998, the Subcommittee on the Constitution of the House Judiciary Committee ordered reported a revised version of the "Religious Liberty Protection Act of 1998" (RLPA) (H.R. 4019, S. 2148). The measure is part of an ongoing conversation between the Supreme Court and the Congress about the level of legal protection that should be afforded the exercise of religion and about the constitutional powers of Congress. More particularly, RLPA is a response to the Court's decision in *City of Boerne, Texas v. Flores*, which held unconstitutional the "Religious Freedom Restoration Act" (RFRA). That Act had attempted to restore the strict scrutiny test as the standard government has to meet for actions that impose substantial burdens on the exercise of religion. In applying RFRA to state and local governments, Congress had relied in part on its power under § 5 of the Fourteenth Amendment. But in *Boerne* the Court held that in doing so Congress exceeded its power under § 5 and that the application of RFRA to the states was unconstitutional. As introduced, RLPA seeks to re-apply the strict scrutiny standard to state and local governments using Congress' powers to attach conditions to federal spending programs and to regulate interstate commerce, while still using § 5 to limit state and local land use regulations that burden religious institutions. In ordering the bill reported, the Subcommittee deleted the provision based on the interstate commerce clause. This report will be updated if RLPA sees further legislative action.

Background

As noted, RLPA is part of an ongoing conversation between Congress and the Supreme Court about the level of legal protection that should be afforded the exercise of religion and about the scope of Congress' constitutional powers. RLPA is a response to



the 1997 Supreme Court decision in *City of Boerne, Texas v. Flores*,¹ which held the "Religious Freedom Restoration Act" (RFRA) to be unconstitutional in part. RFRA, in turn, had been adopted in 1993 by Congress in response to the Court's 1990 decision in *Employment Division, Oregon Department of Human Resources v. Smith*,² which had lowered the level of protection afforded religion by the free exercise clause of the First Amendment. The following subsections detail these precursors of RLPA.

The *Smith* Decision. The free exercise clause of the First Amendment provides in pertinent part that "Congress shall make no law ... prohibiting the free exercise (of religion)."³ It has long been clear that the clause protects religious beliefs absolutely from governmental interference, but over the past century the Court has used various standards of review in applying the clause to government actions impinging on religious practices. In 1963 in *Sherbert v. Verner*,⁴ however, the Court settled on the strict scrutiny standard. Religious interests, the Court said, are to be considered of paramount importance in the constitutional scheme and government actions infringing those interests are to be viewed as highly suspect. More specifically, the Court held that government actions alleged to interfere with religious practices are constitutional only if they can be shown to serve some compelling public interest and to be no more restrictive of religious practices than necessary.

Over the next quarter of a century the courts did not always apply the strict scrutiny standard with unflinching rigor, but the test still stood as a norm that purported to give special protection to religious exercise and to require exemptions for religious practices from some governmental regulations. However, in 1990 in *Employment Division, Oregon Department of Human Resources, supra*, the Court largely abandoned strict scrutiny as the constitutional test for free exercise cases, 5-4. Except in a few narrow categories, it held that so long as laws are religiously neutral, they may be uniformly applied to all persons without regard to any burden or prohibition placed on their exercise of religion. The free exercise clause, the Court said, never "relieves an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁵ In the case at hand, that new standard meant that the free exercise clause mandated no religious exemption from Oregon's drug laws for Native American use of peyote in sacramental ceremonies and, consequently, no eligibility for unemployment benefits for two Native Americans who lost their jobs because of their participation in such a ceremony. More generally, the Court asserted that the question of whether religious practices ought to be accommodated by government was a matter to be resolved by the political process and not the courts, although it admitted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in"

¹117 S.Ct. 2157 (1997).

²494 U.S. 872 (1990).

³The free exercise clause has been held applicable not only to actions by the federal government but also to actions by state and local government. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁴374 U.S. 398 (1963).

The Congressional Response. The specific result in *Smith* was upsetting to some.⁵ But it was the Court's virtual abandonment of strict scrutiny and relegation of free exercise concerns to the political process that generated widespread alarm in the religious community and elsewhere. That alarm quickly coalesced into a broad-based organization known as the Coalition for the Free Exercise of Religion.⁶ Its efforts quickly resulted in the introduction by bipartisan sponsors in both the House and the Senate of a proposed "Religious Freedom Restoration Act of 1990" (H.R. 5377, S. 3254). After three years of consideration, a modified version of RFRA was enacted into law in 1993.⁷

None of the versions of RFRA considered by Congress addressed any specific free exercise concern. Rather, the intent was to restore the strict scrutiny test as the general standard governing the interaction of government and religious exercise. Because a constitutional amendment would have been required to do that for the judicial interpretation of the First Amendment, RFRA was crafted to impose the strict scrutiny test as a **statutory** standard. As enacted, RFRA provided that a statute or regulation of general applicability can lawfully burden a person's free exercise of religion only if it can be shown to be "essential to further a compelling governmental interest and (to be) the least restrictive means of furthering that compelling governmental interest." RFRA made the standard applicable to governmental action at every level — federal, state, and local — and allowed aggrieved parties to bring suit if they believed their free exercise of religion had been restricted by government in violation of the statutory standard.

The Boerne Decision. One of the issues that received some attention while RFRA was being debated in Congress concerned whether Congress had the constitutional power to enact it. Some contended that RFRA violated constitutional principles both of federalism and of separation of powers, but Congress ultimately decided it had sufficient power under § 5 of the Fourteenth Amendment⁸ to apply the measure to the states and under the necessary and proper clause of Article I to apply it to the federal government.⁹

⁵Congress in 1994 made the religious use of peyote by members of the Native American Church legal under federal law. See P.L. 103-344 (Oct. 6, 1994); 42 U.S.C.A. 1996a. Oregon, similarly, decriminalized the religious use of peyote after *Smith*. See Ore. Rev. Stat. 475.992(5) (1996 Supp.).

⁶The Coalition eventually comprised 67 organizations ranging across the political and religious spectrum. Its breadth is shown by the inclusion of such ordinarily disparate groups as the People for the American Way and the Traditional Values Coalition.

⁷P.L. 103-141 (Nov. 16, 1993); 42 U.S.C.A. 2000bb *et seq.* For a fuller description of how RFRA was ultimately enacted, see CRS, *The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status* (Aug. 21, 1998) (Report No. 97-795A).

⁸The Fourteenth Amendment, *inter alia*, bars the states from depriving "any person of life, liberty, or property, without due process of law." "Liberty" has been held to include religious liberty, and Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

⁹Article I, § 8, provides: "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer

(continued...)

Nonetheless, arguments against the measure's constitutionality continued to be pressed in litigation under RFRA.

In *City of Boerne, Texas v. Flores*, *supra*, the Supreme Court on June 25, 1997, held RFRA to be unconstitutional as applied to the states, 6-3. The Court said that as applied to the states RFRA exceeded Congress' power under section 5 of the 14th Amendment.

The case involved a conflict between a local Catholic church that wanted to raze much of its existing structure and build a larger sanctuary and the city of Boerne's designation of the original sanctuary as an historic structure under its historic preservation ordinance. Archbishop Flores sued on behalf of the church, arguing in part that the city's denial of a building permit violated RFRA. The city responded by contending that RFRA was unconstitutional.

The Supreme Court agreed with the city's argument, holding that as applied to the states RFRA "exceeds Congress' power." Justice Kennedy, writing for the majority, agreed that under § 5 of the 14th Amendment Congress has the power to enforce its provisions; but it has no power, he said, to adopt legislation that "alters the meaning" or the substance of the rights protected by the Fourteenth Amendment. Moreover, he elaborated, in Congress' exercise of its remedial or preventive power under § 5, there must "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." But in enacting RFRA, he said, Congress had failed to develop a legislative record that showed extensive denials of religious liberty. Yet RFRA was so broad that it intruded "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Particularly with respect to the states, he asserted, RFRA constituted "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." As a consequence, he concluded, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... and contradicts vital principles necessary to maintain separation of powers and the federal balance."

Thus, after *Boerne* state and local governments are no longer bound by RFRA because, as to them, RFRA is unconstitutional. (RFRA remains applicable to the federal government.)

The Religious Liberty Protection Act

After lengthy consultations within the Coalition for the Free Exercise of Religion and among members of Congress, the "Religious Liberty Protection Act of 1998" (RLPA) was introduced on June 9, 1998, with bipartisan sponsorship in both the House and the Senate (H.R. 4019, sponsored by Representatives Canady and Nadler, and S. 2148, by Senators Hatch and Kennedy). As introduced, RLPA would re-impose a strict scrutiny test with respect to religious practices on state and local governments using different Congressional powers than that struck down in *Boerne*. As introduced, RLPA would bar state and local

⁹(...continued)
thereof."

governments from substantially burdening a person's religious exercise "in or affecting commerce" or "in a program or activity, operated by [a state or local] government, that receives Federal financial assistance," unless application of the burden furthers a compelling public interest and is the least restrictive means of furthering that interest. In addition, the bill would bar state and local governments from imposing a land use regulation that "(A) substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health and safety; (B) denies religious assemblies a reasonable location in the jurisdiction; or (C) excludes religious assemblies from areas in which nonreligious assemblies are permitted." Reflecting a continuing controversy over prisoner suits under RFRA, the bill would also require that prisoner suits under RLPA be subject to the "Prison Litigation Reform Act of 1995."

On June 16 and July 14 the Subcommittee on the Constitution of the House Judiciary Committee held hearings on RLPA,¹⁰ and on June 23 the Senate Judiciary Committee did so as well.¹¹ Most witnesses supported the enactment of RLPA, but some raised questions about its constitutionality, whether its use of federal power was too expansive, and whether it equated religion with commercial enterprises.

On August 6, 1998, the Subcommittee on the Constitution of the House Judiciary Committee marked up H.R. 4019 and, by voice vote, ordered a revised version reported to the full committee. The subcommittee's revision made several changes in the bill as introduced. The most significant alteration was the deletion of the section concerning interstate commerce. The subcommittee also modified the bill's restrictions on state and local land use regulations to provide (a) a strict scrutiny test for any land use regulation that imposes a substantial burden on religious exercise, if the regulation permits "individualized assessment of the proposed uses to which real property would be put"; (b) a requirement that state and local land use regulations treat religious assemblies "on equal terms with nonreligious assemblies"; (c) a bar against discrimination "on the basis of religion or religious denomination"; and (d) a prohibition on the unreasonable exclusion of religious institutions from a given jurisdiction. Finally, the subcommittee rejected amendments to bar RLPA from being used as a defense in civil and criminal actions based on federal, state, or local child welfare laws, civil rights laws, and environmental protection laws. Thus, as ordered reported, H.R. 4019 imposes a strict scrutiny standard on state and local governments only in federally assisted programs administered by such governmental entities. It also imposes limitations on state and local land use regulations that discriminate against or burden religious institutions.

¹⁰*Hearings on H.R. 4019 Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Cong., 2d Sess. (June 16 and July 14, 1998).

¹¹*Hearing on S. 2148 Before the Senate Judiciary Committee*, 105th Cong., 2d Sess. (June 23, 1998).

* * *

AJCongress

* * *

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Commission on Law & Social Action

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Memorandum

Marc D. Stern
(212) 360-1545
e-mail: mstern.ajc@aol.com

Lois C. Waldman
(212) 360-1548

BY FAX: 2 pages

April 29, 1999

TO: Elena Kagan

(202) 456-1647

FROM: Marc D. Stern/Doug Laycock

RE: *Religious Liberty Protection*

A draft of a version of the *Religious Liberty Protection Act* (RLPA) is being circulated by Congressman Canaday. It is based on the version the Coalition and the Justice Department agreed on last year. Representative Canaday has, we are told, persuaded the House Republican leadership to accord this bill high priority and to guarantee it a vote. In a departure from last year, the Republican leadership has agreed to include a section on the Commerce Clause. Last year it had accepted the argument of Michael Farris of the Home School Legal Defense Association that the Commerce Clause sections were beyond Congress' power. (Farris testified that Social Security, Interstate Highways and internal improvements of the 19th century were also beyond Congress' power.)

Representative Canaday has told some members of the Coalition that if this bill does not move on a fast track the Republican leadership will be under pressure to bring up for a vote either a new version of Representative Istook's prayer bill or Representative Aderholt's Ten Commandments bill. The latter will be particularly difficult to oppose since the decisions in the lower courts are now divided on the constitutionality of such displays. Many Democrats would certainly appreciate it if such a bill did not become the session's religion bill.

The outstanding political problem with moving RLPA is that the bill in its current form enjoys little support from the Democrats. Specifically, some Democrats are reluctant to support a RLPA which does not have an exemption for civil rights laws. It is more or less conceded all around that absence of an exemption would not matter much with regard to racial discrimination, since *Bob Jones v. U.S.* more or less forecloses any RLPA claim with regard to race. There are also core cases for religion that are not the target of any

Elana Kagan
re: Religious Liberty Protection Act
April 29, 1999

2

civil rights exemption, but which are included in the broad language now proposed. These include the male-only clergy of Catholics and Orthodox Jews.

The difficult issues are marital status cases (i.e. unmarried heterosexuals seeking to rent apartments from landlords who do not wish to facilitate sin), and claims by gays in both housing and employment. The Coalition has taken the position that these claims, too, ought to be subject to compelling interest and least restrictive means testing. Civil rights groups, particularly those representing gays, have insisted on carving out civil rights laws.

Some preliminary discussions have taken place between gay groups and the Coalition. The only proposal of which I am aware from that side has been a legislative declaration that the protection of civil rights is a compelling interest. Because that will amount in almost all cases to a judgment against the RLPA claimant, the proposal is not satisfactory to the Coalition.

We think a reasonable compromise would recognize that in evaluating claims of compelling interest, courts should take into account whether the statute or practice at issue protects the rights of third parties, whether it is uniformly enforced wherever relevant (i.e. a state should have a difficult time justifying as compelling a ban on marital status discrimination if it allows state institutions to practice such discrimination). We are also prepared to accept an explicit declaration that an interest may be compelling even if not enforced nationally, although, obviously, an interest protected universally is more likely to be compelling than one that is not. Perhaps other formulations are possible.

Until now, there has been little incentive for those seeking a civil rights exemption to negotiate seriously. Their goal of preventing enactment of a bill applicable to civil rights claims is achieved whether or not a result satisfactory to them and the Coalition is achieved because either way the bill does not move. Now that the Republican leadership has declared an interest in putting RLPA on a fast track, that situation may change. Help from the Administration in conducting talks between the Coalition and civil rights groups would be greatly appreciated. A mutually satisfactory solution now might avoid a situation where the President could be faced with calls to veto a RLPA of crucial importance to religious groups because it did not have a civil rights exemption.

drs

Copy TO ELENA KALININ
+ EMIRE CORREIA

PN - 6-16/11



WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

(202) 544-1881 Fax (202) 546-0738

122 Maryland Avenue, NE Washington, D.C. 20002

Fax

To: Richard Socrades From: Chris Anders
Fax Number: 456-6218 Pages: 2
Phone: _____ Date: _____
Re: _____ CC: _____

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• Comments:

Richard-

The Texas state House RERA amendment - passed the
House this week.

Talk to you soon.

-Chris

Number of Pages including this cover sheet: _____

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Passed by Texas State House of Representatives - 5/17/99

FLOOR AMENDMENT NO. _____

BY Harold Chinn

1 Amend C.S.S.B. No. 138, in SECTION 1, by striking added
2 Section 110.011, Civil Practice and Remedies Code (house committee
3 printing, page 7, lines 3-9), and substituting the following:

4 Sec. 110.011. CIVIL RIGHTS. (a) Except as provided in
5 Subsection (b), this chapter does not establish or eliminate a
6 defense to a civil action or criminal prosecution under a federal
7 or state civil rights law.

8 (b) This chapter is fully applicable to claims regarding the
9 employment, education, or volunteering of those who perform duties
10 such as spreading or teaching faith, performing devotional
11 services, or internal governance, for a religious organization. For
12 the purposes of this subsection, an organization is a religious
13 organization if:

14 (1) the organization's primary purposes and functions are
15 religious, it is a religious school organized primarily for
16 religious and educational purposes, or it is a religious charity
17 organized primarily for religious and charitable purposes; and

18 (2) it does not engage in activities that would disqualify it
19 from tax exempt status under Section 501(c)(3), Internal Revenue
20 Code of 1986, as it existed on August 30, 1999.

MEMORANDUM

TO: Anthony Fox
David Lachmann
Veronique Pluvieose-Fenton
Robert Randhava

FROM: Christopher Anders
Terri Schroeder

DATE: May 24, 1999

RE: Proposed Amendment to RLPA

Attached please find a draft amendment to H.R. 1691, the Religious Liberty Protection Act. The amendment provides a limited exception to RLPA for certain civil rights claims brought under federal, state, or local civil rights laws.

The amendment closely tracks the language of an amendment passed last week by the Texas State House of Representatives as part of its state religious freedom restoration act. The amendment was jointly offered on the floor by the Democratic sponsor of the bill and a Republican supporter of the bill. The state RFRA is now in conference committee. The only material difference between the Texas amendment and the attached draft is a new subsection (c) to clarify that persons who own small owner-occupied dwellings may assert a RLPA defense against fair housing claims.

The Texas legislature added subsection (b) to its amendment to provide that persons who are already within the federal constitutional "ministerial exception" to Title VII and similar statutes may also assert a statutory RFRA claim against application of those anti-discrimination statutes. We believe that the proposed subsection is consistent with recent decisions under the Free Exercise Clause, which have held that religious organizations do not have to comply with civil rights laws in employment decisions regarding persons performing ministerial duties. E.g., E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455, 461 (D.C. Cir. 1996); Young v. Northern Illinois Conf. Of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Minker v. Baltimore Annual Conf. of the United Methodist Church, 894 F.2d 1354, 1357-58 (D.C. Cir. 1990); Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

With subsections (b) and (c) added to the general civil rights exception, we believe that the draft amendment will provide an exception in RLPA for most civil rights claims against those engaged in commerce, but also codify the federal constitutional exception for ministerial functions of religious organizations and the federal statutory exception for small, owner-occupied housing.

Thank you for your concern regarding this issue. Please do not hesitate to call Chris Anders at 675-2308 or Terri Schroeder at 675-2324 if you have any questions.

Attachment



GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

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Policy Fellow
Andy Schneider
Adjunct Professor of Law

Associate Policy Fellow
Leah Stevralia

Good afternoon. My name is Chai Feldblum and I am a law professor at the Georgetown

University Law Center in Washington, D.C.¹ I both teach courses in civil rights law, constitutional law, and the legislative process at the Law Center, and direct a Federal Legislation Clinic. I am testifying today in my personal capacity as a law school professor.²

I am pleased to offer to the Committee some observations on H.R. 1691, the Religious Liberty Protection Act of 1999 (RLPA). The current legal situation facing Congress is not an easy one. The Supreme Court, in *Employment Division v. Smith*, 494 U.S. 872 (1990), has made it clear that government is not constitutionally required to justify a neutral law of general applicability, even if such a law might burden an individual's free exercise of religion. As Justice Scalia pronounced for the Supreme Court: "To make an individual's obligation to obey such a law [a generally applicable prohibition of socially harmful conduct] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' --

¹ In accordance with House Rule XI, clause 2(g)(4), I state that I have not received any federal grant, contract, or subcontract during the current or preceding two fiscal years. I am not representing any entity or individual, other than myself, in this testimony.

² The Federal Legislation Clinic, which I direct, represents several organizational clients. In addition, outside of my academic work, I serve as a legal consultant to the National Gay and Lesbian Task Force (NGLTF). The views I present here today should not be attributed to any of the Clinic's clients. These views are consistent with those of NGLTF.

permitting him, by virtue of his beliefs, 'to become a law unto himself,' -- contradicts both constitutional tradition and common sense."³

The reason Justice Scalia believed such a rule would contradict common sense was apparent when he set forth what he perceived as the absurd result of requiring government to justify every neutral law that might burden religious belief or conduct. As Justice Scalia explained:

[I]f "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. . . . The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination, [and] drug laws, to social welfare legislation such as minimum wage laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races."⁴

Justice Scalia recognized, of course, that courts would not necessarily grant the religious exemption in each of these circumstances. Nevertheless, he found it "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."⁵

Despite Justice Scalia's concerns, Congress decided in 1993 that appropriate public policy, and appropriate concern for the tradition of religious liberty in this country, dictated that individuals be given the opportunity to challenge neutral laws of general applicability when those

³ *Employment Division v. Smith*, 494 U.S. 872, 884 (1990) (internal case citation deleted).

⁴ *Id.* at 888-89 (internal case citations omitted).

⁵ *Id.* at 889, n. 5.

laws burdened their free exercise of religion. That policy, embodied in the Religious Freedom Restoration Act (RFRA) of 1993, was -- as we all know -- invalidated in part by the Supreme Court in 1997 in *City of Boerne v. Flores*, 117 S.Ct. 2157. Justice Kennedy, writing on behalf of himself and Justices Rehnquist, Stevens, Thomas, Ginsburg, and Scalia, observed that Congress' power under Section 5 of the Fourteenth Amendment was limited to "enforc[ing]" the provisions of that Amendment, and that RFRA went beyond that authority. As Justice Kennedy observed: "Laws valid under *Smith* would fall under RFRA, without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA."⁶ Moreover, the Court failed to see how RFRA could be considered "remedial, preventive legislation," since -- as the Court observed -- the law's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."⁷

Hence the legal and prudential challenge before Congress today. There is still, I believe, widespread substantive agreement across broad spectrums of society that -- as a matter of public policy, and as a matter of respect for the tradition of religious liberty in this country -- greater protection should be available to individuals who may be subject to a law that requires them to engage in some action their religion prohibits, or that prohibits them from engaging in some action their religion requires or encourages. Moreover, as a matter of policy, I believe there is also widespread agreement that, while there should not be *absolute* protection of religious liberty

⁶ *City of Boerne v. Flores*, 117 S.Ct. 2157, 2171 (1997).

⁷ *Id.* at 2169.

in such circumstances, the government should generally be required to demonstrate that the law at issue is narrowly tailored to a compelling government interest.

The question, however, is how to implement such a policy in a judicious and thoughtful manner. RLPA, as currently drafted, fails this standard in several respects. First, as you have already heard, there is significant concern regarding the impact RLPA will have on the effective enforcement of state and local civil rights laws. It is not sufficient to say there must be a uniform standard to which government must adhere with regard to *any* neutral law it passes, and that civil rights laws must simply take their place alongside zoning laws and laws governing autopsies. Making that choice -- that is, *adding* civil rights laws to the coverage of RLPA -- reflects a *substantive* position on civil rights law generally. The substantive position is that civil rights laws may, indeed, *not* reflect a compelling government interest, and hence, it is legitimate to subject those laws to a case-by-case individual religious defense in the courts. Such a result would not only be harmful, as a practical matter, to a range of individuals across this country who are currently protected by state and local civil rights, but would also send an unfortunate and destructive message about the importance of state and local civil rights laws from the United States Congress.

Second, the concern about RLPA's effect on civil rights laws is simply a reflection of a larger, more basic, concern. While I do not personally ascribe to every aspect of the "parade of horrors" presented by Justice Scalia in his opinion in *Smith*, I do believe he had a valid point in admonishing us regarding the practical effects of requiring a "narrowly tailored to a compelling government interest" test to be met with regard to *each* and *every* neutral law that may be passed. As Congress decides how to approach this issue in a judicious manner, it may well be worth its

while to revisit that portion of Justice Scalia's opinion.

There are several areas in which Congress has been sufficiently informed that potential difficulties exist for religious individuals or organizations who may be burdened by neutral laws of general applicability. As someone who grew up in an Orthodox Jewish community (and who comes from a long line of Orthodox Jewish rabbis), I am personally aware of the unfairness and damage that can be inflicted by a range of local and state laws -- including laws that mandate autopsies, or that prohibit the placement of "eruv" (a symbolic "four walls" that allow Orthodox Jews to carry items on the Sabbath within a particular geographic area), or that require Orthodox synagogues to have parking lots, or that deny prisoners the ability to pray, or that prohibit students from wearing yamulkes. In each of these areas -- zoning laws, laws regulating bodily integrity post-death, religious practice within prisons, religious garb rules, and rules governing transportation (e.g., requiring Amish buggies to display certain signs) -- it appears there is a *basis* to believe that a potential burden on free exercise exists, *as well as* a basis to believe the government's rule may not, in fact, be narrowly tailored to a compelling government interest.

But RLPA, as currently drafted, does not apply solely to specific areas in which Congress has been presented with information that potential problems may exist, and in which it may be fair to say the government does not have a compelling interest in burdening the religious belief or conduct. Rather, as currently drafted, the bill allows an individual religious defense to be put forward in *any* situation in which some program or activity, operated by the government, receives federal financial assistance, or in *any* situation in which the substantial burden on the person's free exercise of religion affects interstate commerce. A bill drafted this broadly presents the specter of unintended, adverse consequences for public policy, and is not firmly grounded in

Congressional findings of fact.

As I noted at the outset, Congress is faced with a difficult legal and prudential challenge if it wishes to craft legislation that will provide religious individuals and entities with a defense against neutral laws of general applicability. I personally believe this challenge is worth rising to and that Congress is acting appropriately when it engages with this issue. With all due respect, however, I do not believe RLPA, as currently drafted, is a worthy example of rising to that challenge. The breadth of the law, with its potential adverse consequences, is unfortunate and unnecessary. It is possible to craft a more narrowly targeted piece of legislation that would appropriately provide religious individuals and entities with the protection they need and deserve in a selected number of areas, but would not run the risk of causing significant, adverse consequences in other important areas.

Thank you for inviting me to testify today. I would be happy to work with the Committee in drafting a narrower version of RLPA, if the interest in doing so exists.

1 **AN AMENDMENT TO H.R. 1691**

2 Page 11, after line 13, insert the following:

3 **SEC. 9. CIVIL RIGHTS.**

4 (a) Except as provided in subsections (b) and (c), this Act does not
5 establish or eliminate a defense to a civil action or criminal prosecution
6 under a federal or state civil rights law.

7 (b) This Act is applicable to claims regarding the employment,
8 education, or volunteering of those who perform ministerial duties, such as
9 spreading or teaching faith, performing devotional services, or internal
10 governance, for a religious organization. For the purposes of this
11 subsection, an organization is a religious organization if:

12 (1) the organization's primary purpose and function is
13 religious, it is a religious school organized primarily for religious and
14 educational purposes, or it is a religious charity organized primarily
15 for religious and charitable purposes; and

16 (2) it does not engage in activities that would disqualify it for a
17 tax exempt status under section 501(c)(3) of the Internal Revenue
18 Code, as amended, (26 U.S.C. 501(c)(3)).

1 (c) This Act is applicable to any claim regarding alleged
2 discrimination in the sale or rental of housing against an owner of housing
3 described in section 803(b) of the Fair Housing Act (42 U.S.C. 3603(b)).



National Gay and Lesbian Task Force

TO: NORA Members
FROM: Chai Feldblum, Rebecca Isaacs (NGLTF)
Chris Anders (ACLU)
- Winnie Stachelburg, Nancy Buermeyer,
Kevin Layton (HRC)
RE: Religious Liberty Protection Act
DATE: May 10, 1999

This memo sets forth a sensitive, but critical, issue for all communities concerned with the effective enforcement of state and local civil rights laws. Last week, Congressman Charles Canady (R-FL) reintroduced the Religious Liberty Protection Act (RLPA). We believe this legislation, as currently drafted, will be quite destructive to the effective enforcement of a number of state and local civil rights laws -- particularly those laws that prohibit discrimination based on disability (including AIDS/HIV), sexual orientation, marital status, and pregnancy status.

BACKGROUND

The basic goal of RLPA is laudable and one which we strongly support. Prior to a Supreme Court decision in 1990, a high constitutional standard existed for the protection of the free exercise of religion. Under that standard, if a government law caused a burden on the free exercise of religion, the government was required to prove that the law was narrowly tailored to a compelling government interest. This standard applied even if the law on its face was neutral with regard to religion -- that is, the law had not been passed in *order* to burden the free exercise of religion. This standard struck an appropriate and reasonable balance: it allowed government to pass laws it needed, but restrained government from applying those laws in a manner that would burden religious exercise unless such a burden was narrowly tailored to a compelling government interest.

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In 1990, however, in the case of *Employment Division v. Smith*, the Supreme Court changed the constitutional standard in a manner highly destructive of religious liberty. Under the new rule, as long as a government law was neutral (i.e., had not been passed to target religion), and the law was generally applicable to everyone, the government did not need to prove the law was narrowly tailored to a compelling government interest -- even if the law, as applied, burdened religious exercise.

<http://www.nglhf.org>
nglhf@nglhf.org
CFC # 2622

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), seeking to overrule *Smith* by establishing a federal statutory requirement that all state and local laws that burdened religious exercise be narrowly tailored to a compelling government interest. In 1997, however, in *City of Boerne v. Flores*, the Supreme Court invalidated that portion of RFRA which applied to state and local governments, ruling that Congress had exceeded its constitutional authority to legislate under the Fourteenth Amendment. **RLPA represents the current effort on the part of a broad-based religious coalition to once again require that all state and local laws that burden religious exercise be narrowly tailored to a compelling government interest, hopefully in a manner that will pass constitutional muster.**

THE PROBLEM

RLPA is intended to achieve the laudable goal of establishing a high standard for religious liberty. Unfortunately, over the past nine years, we have noted a disturbing trend in the exercise of religious liberty in one specific area -- that of civil rights. Starting in 1990, and increasing in frequency in recent years, landlords who have engaged in commerce have argued that complying with civil rights laws prohibiting discrimination based on marital status burdens their religious beliefs.

The reaction from the courts to this argument has, thusfar, been mixed. The two most recent court actions have been very sympathetic to the individual religious defense argument. In January 1999, the Ninth Circuit decided that an Alaska law that required landlords to rent to unmarried couples burdened the Christian landlords' religious beliefs, and that prohibiting discrimination based on marital status was not a sufficiently compelling government interest to justify such a burden. The court based its decision on the grounds that marital status does not receive heightened scrutiny under the Equal Protection Clause, and that federal law does not prohibit discrimination based on marital status. (*Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692).

In April 1999, the Michigan Supreme Court issued an order vacating an earlier opinion that had concluded the government's interest in providing equal access to housing, regardless of marital status, was compelling. In a brief statement, the Michigan Supreme Court simply stated that the portion of its earlier opinion which had held that the state's civil rights act did not violate the free exercise clause of the federal or state constitution was vacated. The Court provided no analysis for its change of heart. (*McCready v. Hoffius*, April 16, 1999).

The approach of these two opinions is consistent with a 1994 decision from the Massachusetts Supreme Court, which had directed a lower court to determine if the government had a compelling interest in eradicating marital status discrimination (*Attorney General v. Desilets*, 636 N.E.2d 233), and with a plurality of the Minnesota Supreme Court in 1990, which had concluded there was no compelling government interest in preventing marital status discrimination (*Cooper v. French*, 460 N.W.2d 2).

A few courts have been less sympathetic to the individual religious defense argument. One concluded that complying with a civil rights law was not a sufficient burden on religious beliefs (*Smith v. FEHC*, 913 P.2d 909 (Cal. 1996)), while two others concluded the government's interest in preventing marital status discrimination was compelling (*Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. 1997)(vacated on other grounds), and *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994)).

The individual religious defense argument that has been raised in the context of marital status discrimination could be raised, as easily, in the context of laws prohibiting discrimination based on disability (including AIDS/HIV), based on sexual orientation, or based on pregnancy status. In each of these cases, an individual religious person could argue that the government did not have a compelling interest in prohibiting such discrimination -- despite that fact that the state or local legislature clearly believed prohibiting such discrimination was sufficiently important to warrant passage of the law.

Under the *current* state of federal law, an individual religious belief defense *cannot* be raised against neutral, generally applicable state and local civil rights laws. If RLPA passes, as drafted, this defense will be available to any religious individual in every state and every locality that has a civil rights law.

As noted above, we strongly support the establishment of a strong standard to protect religious liberty. We also believe this standard should be that any neutral, generally applicable law must be narrowly tailored to a compelling government interest. **However, we believe *all* state and local civil rights laws *are* already designed to meet compelling government interests and *are* already narrowly tailored.** Thus, any federal law that would *now* subject civil rights laws to the individual religious defense argument would send the inappropriate message that some civil rights laws may not serve compelling interests. **We strongly oppose any federal law that will send the message that some civil rights laws may not serve compelling government interests.**

We should also be clear what we are *not* contesting. Almost every state and local civil rights law has some exemption for *religious organizations*. These exemptions are usually carefully crafted to ensure that *religious organizations* are not burdened by civil rights laws in a way that would interfere with their religious mission. Often, in light of the particular category that is provided civil rights protection, the exemption for these religious organizations might be quite broad. **Whether RLPA passes or not, exemptions for *religious organizations* in local, state, and federal civil rights laws will remain untouched.** City councils, state legislatures, and Congress will continue to have the authority to enact such exemptions for religious organizations.

It is very rare, however, for a civil rights law to include an exemption for the *personal* religious beliefs of *individuals*. The accepted rationale is that if an individual decides to enter the stream of commerce -- as a landlord, an employer, or a business -- that individual is

legitimately subject to the relevant civil rights laws. If RLPA passes, as currently drafted, a new defense will potentially be available to all religious individuals in every court in this country. There is no guarantee such a defense will always prevail (note the mixed caselaw described above); it can certainly be anticipated, however, that such a defense will often be invoked.

THE SOLUTION

The solution to this dilemma is actually quite easy as a logistical matter. **RLPA should be amended to exclude its application to any state or local civil rights law.** Such a provision would retain the important uniform standard for protecting religious liberty, but would reflect a Congressional understanding that civil rights laws hold a unique position in the realm of governmental action. **Alternatively, RLPA could be redrafted so as to apply only to select areas of neutral governmental action where the burden on the free exercise of religion has been clearly demonstrated and where a compelling government interest may not necessarily exist.**

FLOOR AMENDMENT NO. _____

BY Haroldberg Chinn

1 Amend C.S.S.B. No. 138, in SECTION 1, by striking added
2 Section 110.011, Civil Practice and Remedies Code (house committee
3 printing, page 7, lines 3-9), and substituting the following:

4 Sec. 110.011. CIVIL RIGHTS. (a) Except as provided in
5 subsection (b), this chapter does not establish or eliminate a
6 defense to a civil action or criminal prosecution under a federal
7 or state civil rights law.

8 (b) This chapter is fully applicable to claims regarding the
9 employment, education, or volunteering of those who perform duties
10 such as spreading or teaching faith, performing devotional
11 services, or internal governance, for a religious organization. For
12 the purposes of this subsection, an organization is a religious
13 organization if:

14 (1) the organization's primary purposes and functions are
15 religious, it is a religious school organized primarily for
16 religious and educational purposes, or it is a religious charity
17 organized primarily for religious and charitable purposes; and

18 (2) it does not engage in activities that would disqualify it
19 from tax exempt status under Section 501(c)(3), Internal Revenue
20 Code of 1986, as it existed on August 30, 1999.

Discussion Draft
Amendment to H.R. 1691
Offered by Mr. Nadler

Page 5, after line 24, insert the following:

1 (e) PERSONS WHO MAY RAISE A CLAIM OR DEFENSE. — A person who may
2 raise a claim or defense: under subsection (a) is —

3 (1) with respect to an assertion of a claim or defense under this Act against
4 the application of a prohibition relating to discrimination in housing, a natural
5 person with respect to a dwelling described in section 803(b) of the Fair Housing
6 Act (42 U.S.C. 3603(b));

7 (2) a religious corporation, association, education institution (as described
8 in 42 U.S.C. 2000e-2(e)), or society, with respect to an assertion of a claim or
9 defense under this Act against the application of a prohibition relating to
10 discrimination in the employment of individuals to perform work connected such
11 corporation, association, educational institution or society in the carrying on of its
12 activities; or

13 (3) with respect to an assertion of a claim or defense under this act with
14 respect to an assertion of any other claim or defense regards:

15 (A) an entity engaged in an activity affecting
16 interstate or foreign commerce who has fewer than
17 fifteen employees for each working day in each of
18 twenty or more calendar weeks in the current or
19 preceding calendar year and any agent of such an

1 entity; or

2 (B) a natural person, a religious corporation, association,

3 education institution (as described in 42 U.S.C. 2000e-2(e)), or

4 society

5 May 21, 1999 (1:00 p.m.)



Fax Transmission

DATE: 5/21/99

This is Page 1 of 11

Please Deliver FAX to: Elena Kagan

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National Gay and Lesbian Task Force

RLPA: THE NEED FOR AN EXEMPTION FOR CIVIL RIGHTS LAWS

This memo sets forth a sensitive, but critical, issue for all communities concerned with the effective enforcement of state and local civil rights laws. Last week, Congressman Charles Canady (R-FL) reintroduced the Religious Liberty Protection Act (RLPA). We believe this legislation, as currently drafted, will be quite destructive to the effective enforcement of a number of state and local civil rights laws -- particularly those laws that prohibit discrimination based on disability (including AIDS/HIV), sexual orientation, marital status, and pregnancy status.

BACKGROUND

The basic goal of RLPA is laudable and one which we strongly support. Prior to a Supreme Court decision in 1990, a high constitutional standard existed for the protection of the free exercise of religion. Under that standard, if a government law caused a burden on the free exercise of religion, the government was required to prove that the law was narrowly tailored to a compelling government interest. This standard applied even if the law on its face was neutral with regard to religion -- that is, the law had not been passed in *order* to burden the free exercise of religion. This standard struck an appropriate and reasonable balance: it allowed government to pass laws it needed, but restrained government from applying those laws in a manner that would burden religious exercise unless such a burden was narrowly tailored to a compelling government interest.

In 1990, however, in the case of *Employment Division v. Smith*, the Supreme Court changed the constitutional standard in a manner highly destructive of religious liberty. Under the new rule, as long as a government law was neutral (i.e., had not been passed to target religion), and the law was generally applicable to everyone, the government did not need to prove the law was narrowly tailored to a compelling government interest -- even if the law, as applied, burdened religious exercise.

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In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), seeking to overrule *Smith* by establishing a federal statutory requirement that all state and local laws that burdened religious exercise be narrowly tailored to a compelling government interest. In 1997, however, in *City of Boerne v. Flores*, the Supreme Court invalidated that portion of RFRA which applied to state and local governments, ruling that Congress had exceeded its constitutional authority to legislate under the Fourteenth Amendment. RLPA represents the current effort on the part of a broad-based religious coalition to once again require that all state and local laws that burden religious exercise be narrowly tailored to a compelling government interest, hopefully in a manner that will pass constitutional muster.

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THE PROBLEM

RLPA is intended to achieve the laudable goal of establishing a high standard for religious liberty. Unfortunately, over the past nine years, we have noted a disturbing trend in the exercise of religious liberty in one specific area -- that of civil rights. Starting in 1990, and increasing in frequency in recent years, landlords who have engaged in commerce have argued that complying with civil rights laws prohibiting discrimination based on marital status burdens their religious beliefs.

The reaction from the courts to this argument has, thusfar, been mixed. The two most recent court actions have been very sympathetic to the individual religious defense argument. In January 1999, the Ninth Circuit decided that an Alaska law that required landlords to rent to unmarried couples burdened the Christian landlords' religious beliefs, and that prohibiting discrimination based on marital status was not a sufficiently compelling government interest to justify such a burden. The court based its decision on the grounds that marital status does not receive heightened scrutiny under the Equal Protection Clause, and that federal law does not prohibit discrimination based on marital status. (*Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692).

In April 1999, the Michigan Supreme Court issued an order vacating an earlier opinion that had concluded the government's interest in providing equal access to housing, regardless of marital status, was compelling. In a brief statement, the Michigan Supreme Court simply stated that the portion of its earlier opinion which had held that the state's civil rights act did not violate the free exercise clause of the federal or state constitution was vacated. The Court provided no analysis for its change of heart. (*McCready v. Hoffius*, April 16, 1999).

The approach of these two opinions is consistent with a 1994 decision from the Massachusetts Supreme Court, which had directed a lower court to determine if the government had a compelling interest in eradicating marital status discrimination (*Attorney General v. Desilets*, 636 N.E.2d 233), and with a plurality of the Minnesota Supreme Court in 1990, which had concluded there was no compelling government interest in preventing marital status discrimination (*Cooper v. French*, 460 N.W.2d 2).

A few courts have been less sympathetic to the individual religious defense argument. One concluded that complying with a civil rights law was not a sufficient burden on religious beliefs (*Smith v. FEHC*, 913 P.2d 909 (Cal. 1996)), while two others concluded the government's interest in preventing marital status discrimination was compelling (*Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. 1997)(vacated on other grounds), and *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994)).

The individual religious defense argument that has been raised in the context of marital status discrimination could be raised, as easily, in the context of laws prohibiting discrimination based on disability (including AIDS/HIV), based on sexual orientation, or based on pregnancy status. In each of these cases, an individual religious person could argue that the government did not have a compelling interest in prohibiting such discrimination -- despite that fact that the state or local legislature clearly believed prohibiting such discrimination was sufficiently important to warrant passage of the law.

Under the current state of the law, an individual religious belief defense cannot be raised against neutral, generally applicable state and local civil rights laws. If RLPA passes, as drafted, this defense

will be available to any religious individual in every state and every locality that has a civil rights law.

As noted above, we strongly support the establishment of a strong standard to protect religious liberty. We also believe this standard should be that any neutral, generally applicable law must be narrowly tailored to a compelling government interest. **However, we believe *all* state and local civil rights laws are already designed to meet compelling government interests and *are* already narrowly tailored.** Thus, any federal law that would now subject civil rights laws to the individual religious defense argument would send the inappropriate message that some civil rights laws may not serve compelling interests. **We strongly oppose any federal law that will send the message that some civil rights laws may not serve compelling government interests.**

We should also be clear what we are *not* contesting. Almost every state and local civil rights law has some exemption for *religious organizations*. These exemptions are usually carefully crafted to ensure that *religious organizations* are not burdened by civil rights laws in a way that would interfere with their religious mission. Often, in light of the particular category that is provided civil rights protection, the exemption for these religious organizations might be quite broad. **Whether RLPA passes or not, exemptions for *religious organizations* in local, state, and federal civil rights laws will remain untouched.** City councils, state legislatures, and Congress will continue to have the authority to enact such exemptions for religious organizations.

It is very rare, however, for a civil rights law to include an exemption for the *personal religious beliefs of individuals*. The accepted rationale is that if an individual decides to enter the stream of commerce -- as a landlord, an employer, or a business -- that individual is legitimately subject to the relevant civil rights laws. If RLPA passes, as currently drafted, a new defense will potentially be available to all religious individuals in every court in this country. There is no guarantee such a defense will always prevail (note the mixed caselaw described above); it can certainly be anticipated, however, that such a defense will often be invoked.

THE SOLUTION

The solution to this dilemma is actually quite easy as a logistical matter. **RLPA should be amended to exclude its application to any state or local civil rights law.** Such a provision would retain the important uniform standard for protecting religious liberty, but would reflect a Congressional understanding that civil rights laws hold a unique position in the realm of governmental action. **Alternatively, RLPA could be redrafted so as to apply only to select areas of neutral governmental action where the burden on the free exercise of religion has been clearly demonstrated and where a compelling government interest may not necessarily exist.**

For further information, please contact Rebecca Isaacs or Brian Esser at (202) 332-6483 or Chai Feldblum at (202) 662-9595.



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Professor of Law

Testimony of

Professor Chai R. Feldblum
Georgetown University Law Center

on H.R. 1691, the Religious Liberty Protection Act

Before the House Subcommittee on the Constitution
of the House Committee on the Judiciary

May 12, 1999

Good afternoon. My name is Chai Feldblum and I am a law professor at the Georgetown University Law Center in Washington, D.C.¹ I both teach courses in civil rights law, constitutional law, and the legislative process at the Law Center, and direct a Federal Legislation Clinic. I am testifying today in my personal capacity as a law school professor.²

I am pleased to offer to the Committee some observations on H.R. 1691, the Religious Liberty Protection Act of 1999 (RLPA). The current legal situation facing Congress is not an easy one. The Supreme Court, in *Employment Division v. Smith*, 494 U.S. 872 (1990), has made it clear that government is not constitutionally required to justify a neutral law of general applicability, even if such a law might burden an individual's free exercise of religion. As Justice Scalia pronounced for the Supreme Court: "To make an individual's obligation to obey such a law [a generally applicable prohibition of socially harmful conduct] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' -- permitting him, by virtue of his beliefs, 'to become a law unto himself,' -- contradicts both constitutional tradition and common sense."³

The reason Justice Scalia believed such a rule would contradict common sense was apparent when he set forth what he perceived as the absurd result of requiring government to justify every neutral law that might burden religious belief or conduct. As Justice Scalia

¹ In accordance with House Rule XI, clause 2(g)(4), I state that I have not received any federal grant, contract, or subcontract during the current or preceding two fiscal years. I am not representing any entity or individual, other than myself, in this testimony.

² The Federal Legislation Clinic, which I direct, represents several organizational clients. In addition, outside of my academic work, I serve as a legal consultant to the National Gay and Lesbian Task Force (NGLTF). The views I present here today should not be attributed to any of the Clinic's clients. These views are consistent with those of NGLTF.

³ *Employment Division v. Smith*, 494 U.S. 872, 884 (1990) (internal case citation deleted).

explained:

[I]f “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. . . . The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination, [and] drug laws, to social welfare legislation such as minimum wage laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.”⁴

Justice Scalia recognized, of course, that courts would not necessarily grant the religious exemption in each of these circumstances. Nevertheless, he found it “horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”⁵

Despite Justice Scalia’s concerns, Congress decided in 1993 that appropriate public policy, and appropriate concern for the tradition of religious liberty in this country, dictated that individuals be given the opportunity to challenge neutral laws of general applicability when those laws burdened their free exercise of religion. That policy, embodied in the Religious Freedom Restoration Act (RFRA) of 1993, was -- as we all know -- invalidated in part by the Supreme Court in 1997 in *City of Boerne v. Flores*, 117 S.Ct. 2157. Justice Kennedy, writing on behalf of himself and Justices Rehnquist, Stevens, Thomas, Ginsburg, and Scalia, observed that Congress’ power under Section 5 of the Fourteenth Amendment was limited to “enforc[ing]” the provisions of that Amendment, and that RFRA went beyond that authority. As Justice Kennedy observed:

⁴ *Id.* at 888-89 (internal case citations omitted).

⁵ *Id.* at 889, n. 5.

"Laws valid under *Smith* would fall under RFRA, without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA."⁶ Moreover, the Court failed to see how RFRA could be considered "remedial, preventive legislation," since -- as the Court observed -- the law's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."⁷

Hence the legal and prudential challenge before Congress today. There is still, I believe, widespread substantive agreement across broad spectrums of society that -- as a matter of public policy, and as a matter of respect for the tradition of religious liberty in this country -- greater protection should be available to individuals who may be subject to a law that requires them to engage in some action their religion prohibits, or that prohibits them from engaging in some action their religion requires or encourages. Moreover, as a matter of policy, I believe there is also widespread agreement that, while there should not be *absolute* protection of religious liberty in such circumstances, the government should generally be required to demonstrate that the law at issue is narrowly tailored to a compelling government interest.

The question, however, is how to implement such a policy in a judicious and thoughtful manner. RLPA, as currently drafted, fails this standard in several respects. First, as you have already heard, there is significant concern regarding the impact RLPA will have on the effective enforcement of state and local civil rights laws. It is not sufficient to say there must be a uniform

⁶ *City of Boerne v. Flores*, 117 S.Ct. 2157, 2171 (1997).

⁷ *Id.* at 2169.

standard to which government must adhere with regard to *any* neutral law it passes, and that civil rights laws must simply take their place alongside zoning laws and laws governing autopsies. Making that choice -- that is, *adding* civil rights laws to the coverage of RLPA -- reflects a *substantive* position on civil rights law generally. The substantive position is that civil rights laws may, indeed, *not* reflect a compelling government interest, and hence, it is legitimate to subject those laws to a case-by-case individual religious defense in the courts. Such a result would not only be harmful, as a practical matter, to a range of individuals across this country who are currently protected by state and local civil rights, but would also send an unfortunate and destructive message about the importance of state and local civil rights laws from the United States Congress.

Second, the concern about RLPA's effect on civil rights laws is simply a reflection of a larger, more basic, concern. While I do not personally ascribe to every aspect of the "parade of horrors" presented by Justice Scalia in his opinion in *Smith*, I do believe he had a valid point in admonishing us regarding the practical effects of requiring a "narrowly tailored to a compelling government interest" test to be met with regard to *each* and *every* neutral law that may be passed. As Congress decides how to approach this issue in a judicious manner, it may well be worth its while to revisit that portion of Justice Scalia's opinion.

There are several areas in which Congress has been sufficiently informed that potential difficulties exist for religious individuals or organizations who may be burdened by neutral laws of general applicability. As someone who grew up in an Orthodox Jewish community (and who comes from a long line of Orthodox Jewish rabbis), I am personally aware of the unfairness and damage that can be inflicted by a range of local and state laws -- including laws that mandate

autopsies, or that prohibit the placement of "eruv" (a symbolic "four walls" that allow Orthodox Jews to carry items on the Sabbath within a particular geographic area), or that require Orthodox synagogues to have parking lots, or that deny prisoners the ability to pray, or that prohibit students from wearing yamulkes. In each of these areas -- zoning laws, laws regulating bodily integrity post-death, religious practice within prisons, religious garb rules, and rules governing transportation (e.g., requiring Amish buggies to display certain signs) -- it appears there is a *basis* to believe that a potential burden on free exercise exists, *as well as* a basis to believe the government's rule may not, in fact, be narrowly tailored to a compelling government interest.

But RLPA, as currently drafted, does not apply solely to specific areas in which Congress has been presented with information that potential problems may exist, and in which it may be fair to say the government does not have a compelling interest in burdening the religious belief or conduct. Rather, as currently drafted, the bill allows an individual religious defense to be put forward in *any* situation in which some program or activity, operated by the government, receives federal financial assistance, or in *any* situation in which the substantial burden on the person's free exercise of religion affects interstate commerce. A bill drafted this broadly presents the specter of unintended, adverse consequences for public policy, and is not firmly grounded in Congressional findings of fact.

As I noted at the outset, Congress is faced with a difficult legal and prudential challenge if it wishes to craft legislation that will provide religious individuals and entities with a defense against neutral laws of general applicability. I personally believe this challenge is worth rising to and that Congress is acting appropriately when it engages with this issue. With all due respect, however, I do not believe RLPA, as currently drafted, is a worthy example of rising to that

challenge. The breadth of the law, with its potential adverse consequences, is unfortunate and unnecessary. It is possible to craft a more narrowly targeted piece of legislation that would appropriately provide religious individuals and entities with the protection they need and deserve in a selected number of areas, but would not run the risk of causing significant, adverse consequences in other important areas.

Thank you for inviting me to testify today. I would be happy to work with the Committee in drafting a narrower version of RLPA, if the interest in doing so exists.



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OF PAGES: 8
(including cover)

FROM: Kevin Layton

MESSAGE:

Here's the California bill from the 1998 session.

*Copy to ELENA KAGAN
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CALIFORNIA: AB 1617 Religious Freedom Protection Act.

BILL NUMBER: AB 1617 ENROLLED 08/20/98

PASSED THE ASSEMBLY AUGUST 20, 1998
 PASSED THE SENATE AUGUST 12, 1998
 AMENDED IN SENATE AUGUST 3, 1998
 AMENDED IN SENATE JULY 8, 1998
 AMENDED IN SENATE JUNE 22, 1998
 AMENDED IN SENATE MAY 26, 1998
 AMENDED IN SENATE MARCH 19, 1998
 AMENDED IN ASSEMBLY JANUARY 15, 1998
 AMENDED IN ASSEMBLY JANUARY 5, 1998

INTRODUCED BY Assembly Member Baca (Principal coauthor: Assembly Member Scott) (Coauthors: Assembly Members Aguiar, Alquist, Baldwin, Bowler, Cunneen, Havice, Hertzberg, House, Kuykendall, Leach, McClintock, Shelley, Villaraigosa, and Washington) (Coauthors: Senators Brulte, Haynes, Leslie, Lewis, and Watson)

AUGUST 26, 1997

An act to add Section 43.2 to the Civil Code, and to add Chapter 4.5 (commencing with Section 6400) to Division 7 of Title 1 of the Government Code, relating to religious freedom.

LEGISLATIVE COUNSEL'S DIGEST: Religious Freedom Protection Act (AB 1617)

- (I) The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion and the California Constitution provides that the free exercise and enjoyment of religion without discrimination or preference is guaranteed.

This bill would declare that its purpose is to codify the principle that government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205, and provide a claim or defense to persons whose religious exercise is substantially burdened by government. This bill would prohibit government, as defined, from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except if government demonstrates that application of the burden to the person is both in furtherance of a compelling governmental interest and the least restrictive means of

*all State Leg's
pull all Bills,
passed or not.*

*look at language
- Language used
to clarify.*

*Options memo
- Reviewing state laws -
We allowing all
examples are
clarified:*

*- Use language soon
if children's groups,
"eradicating discrimination
City of Banning - zoning
exception.*

*Cite State
& Fed cases.*

*City of
Banning
1175.Ct.211*

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furthering that compelling governmental interest. This bill would permit a person whose religious exercise has been burdened in violation of these provisions to assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. This bill would also make various legislative findings and declarations with respect to these provisions.

- (II) Under existing law, each person is afforded various personal rights.

This bill would specify that the free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral. This bill would also provide that laws, regulations, and other governmental actions shall be subject to the Religious Freedom Protection Act.

SECTION 1. The Legislature hereby finds and declares all of the following:

- (a) The compelling governmental interest test in the Religious Freedom Protection Act, as added by this act, has been used repeatedly in case law relating to religious liberty and other fundamental rights. It is expected that in applying this standard in cases brought under the Religious Freedom Protection Act, courts will look to that case law, including decisions construing the federal Religious Freedom Restoration Act (42 U.S.C. Sec. 2000bb et seq.). The Religious Freedom Protection Act is not intended to codify or reject the holding or reasoning of any particular case, including cases construing the federal Religious Freedom Restoration Act or any other federal or state statute. However, the Legislature respects the role that persuasive authority and precedent play in the legal system and realizes that courts are influenced in deciding cases by decisions that apply the same standard to similar facts.
- (b) **Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights.** No inference should be drawn that by substituting a new subdivision (d) of Section 6404 of the Government Code, as added by this act, for the subdivision (d) that was adopted in the Assembly on January 15, 1998, that the Legislature intends to further discrimination. Indeed, subdivision (d) of Section 6404 of the Government Code, in its present form, should be read in the context of language in paragraph (1) of subdivision (b) of Section 6400 of the Government Code, as added by this act, which states that the bill's codification of principles is intended to be consistent with the compelling governmental interest justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205. Cases such as *Wisconsin v. Yoder* have employed a discussion of the rights of third parties in evaluating free exercise claims.
- (c) The definition of "exercise of religion" contained in the Religious Freedom

Protection Act is intended to reject discussions of centrality in determining whether a practice constitutes an "exercise of religion." Some courts have engaged in such discussion, while others have not. Discussion of "centrality" improperly involves state intrusion into questions of individual faith. The relevant inquiry is whether a practice is substantially motivated by a sincerely held religious belief. While both traditional and nontraditional believers have been improperly scrutinized under the centrality test, often it has been adherents of nontraditional or unfamiliar minority faiths whose claims have been barred by discussions of centrality.

SEC. 2. Section 43.2 is added to the Civil Code, to read:

- 43.2.** (a) Free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral.
- (b) Laws, regulations, and other governmental actions shall be subject to Chapter 4.5 (commencing with Section 6400) of Division 7 of Title 1 of the Government Code.

SEC. 3. Chapter 4.5 (commencing with Section 6400) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 4.5. RELIGIOUS FREEDOM PROTECTION ACT

6400. (a) The Legislature hereby finds the following:

- (1) The framers of the United States Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the United States Constitution.
- (2) The framers of the California Constitution, recognizing free exercise and enjoyment of religion without discrimination or preference as an inalienable right, guaranteed this right under Section 4 of Article I of the California Constitution.
- (3) The State of California has independent authority to protect the free exercise of religion by principles that are separate from, complementary to, and more expansive than the First Amendment to the United States Constitution.
- (4) The Legislature, under its police powers, may create statutory protections that codify and supplement rights guaranteed by the California Constitution.

- (5) Laws facially neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.
- (6) Government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification.
- (7) **In certain circumstances, courts have found health, safety, antidiscrimination, and other concerns to constitute compelling governmental interests.**
- (8) **Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights.** No inference should be drawn that by substituting a new subdivision (d) of Section 6404 of the Government Code, as added by this act, for the subdivision (d) that was adopted in the Assembly on January 15, 1998, that the Legislature intends to further discrimination. Indeed, subdivision (d) of Section 6404 of the Government Code, in its present form, should be read in the context of language in paragraph (1) of subdivision (b) of Section 6400 of the Government Code, as added by this act, which states that the bill's codification of principles is intended to be consistent with the compelling governmental interest justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205. Cases such as *Wisconsin v. Yoder* have employed a discussion of the rights of third parties in evaluating free exercise claims.
- (9) **In enacting this act, the Legislature recognizes the importance of protecting the health, welfare, and safety of children. In evaluating free exercise rights, cases such as *Wisconsin v. Yoder* (1972) 406 U.S. 205 have evaluated whether a sincerely held religious practice results in harm to the physical or mental health of a child. This approach is consistent with Section 300 of the Welfare and Institutions Code and following, other laws relating to child abuse and neglect, laws relating to the reporting of child abuse and neglect, and the interpretation of those statutes.**
- (10) It is anticipated by the Legislature that in interpreting this act, courts will continue to give appropriate respect to the experience and expertise of correctional professionals in maintaining security and safety. See, for example, *May v. Baldwin* (9th Cir. 1997) 109 F.3d 557. The standard in this act does not require a choice between correctional security and safety and free exercise rights. However, the act does require that diligent efforts be made to accommodate both interests. Properly applied, the standard

does not require correctional officials to place any person's life or safety at risk or to jeopardize correctional security. As cases such as *May v. Baldwin* note, the standard does not require prison officials to speculate about alternatives not readily apparent. However, correctional regulations and policies grounded on mere speculation do not meet the act's requirements (see *May v. Baldwin* (9th Cir. 1997) 109 F.3d 557, at pages 564-565). As examples of how the standard has been applied to respect this balance, see *Campos v. Coughlin* (S.D. N.Y. 1994) 854 F.Supp. 194, and *Sasnett v. Sullivan* (7th Cir. 1996) 91 F.3d 1018, in which the court held that prison security is a compelling interest, but rejected a regulation because it was not a serious and measured response to a concern with violence, and *Abdur-Rahman v. Michigan Dept. of Corrections* (6th Cir. 1995) 65 F.3d 489, in which the court noted that while inmates retain their First Amendment right to exercise their religion, the right may be subjected to reasonable restrictions and limitations.

- (11) The Legislature finds that while the government's compelling interest in protecting its citizens will often be sufficient to overcome religious justifications in criminal actions, in other circumstances courts have recognized the principle of accommodation of sincerely held religious practices in a criminal action where to do so does not materially interfere with the rights of third parties or the public safety, peace, order, or welfare. See, for example, *People v. Woody* (1964) 61 Cal.2d 716 and *Wisconsin v. Yoder* (1972) 406 U.S. 205. The Legislature believes that the criminal justice system will have the ability to distinguish legitimate requests for the accommodation of sincerely held religious practices from justifications advanced for the mere purpose of avoiding the enforcement of criminal laws. See, for example, *People v. Woody* (1964) 61 Cal.2d 716, *Leary v. United States* (5th Cir. 1967) 383 F.2d 851, *U.S. v. Bauer* (9th Cir. 1996) 84 F.3d 1549, and *U.S. v. Meyers* (D. Wyo. 1995) 906 F.Supp. 1494, affirmed (10th Cir. 1996) 95 F.3d 1475.

(b) The purposes of this chapter are the following:

- (1) To codify the principle that government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205.
- (2) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

6401. This chapter shall be known and may be cited as the "Religious Freedom Protection

Act."

- 6402.** (a) Free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral.
- (b) 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 subdivision (c).
- (c) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both of the following:
- (1) In furtherance of a compelling governmental interest.
 - (2) The least restrictive means of furthering that compelling governmental interest.
- (d) 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.
- 6403.** As used in this chapter:
- (a) "Demonstrates" means meets the burdens of going forward with the evidence and of persuasion.
 - (b) "Exercise of religion" means an act or refusal to act that is substantially motivated by sincerely held religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.
 - (c) "Government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the state or a political subdivision of the state.
 - (d) "Person" for the purposes of this section includes an individual, partnership, association, corporation, organization, or any other combination thereof.
 - (e) "Political subdivision of the state" for the purposes of this section includes a county, city, whether general law or chartered, city and county, school district, municipal corporation, or district, or any board, commission, or agency thereof, or any other local public agency.
- 6404.** (a) This chapter applies to all state law, and the implementation of that law, whether

statutory or otherwise, and to all laws, ordinances, regulations, and governmental actions in this state, whether adopted before or after the effective date of this chapter.

- (b) This chapter applies to all cities, including charter cities. The Legislature finds and declares that free exercise of religion is a matter of statewide concern and is not merely a municipal affair or a matter of local interest.
- (c) Nothing in this chapter shall be construed to authorize any government to burden any religious belief.
- (d) **Nothing in this chapter shall be construed to require that religious liberty claims always prevail over, or always be subordinate to, other civil or constitutional rights.**
- (e) To the extent this chapter creates new rights to monetary damages, nothing in this chapter shall be construed to allow the imposition of monetary damages on any state or local governmental entity for acts occurring prior to January 1, 1999.
- (f) When a claim or defense is asserted by a person under this chapter, the question of whether the person's religious belief is sincerely held is a question of fact. All other questions involve questions of law, including whether the law, regulation, or other governmental action substantially burdens the person's exercise of that religion, and whether application of that burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

6405. Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the United States Constitution and Section 4 of Article I, Section 8 of Article IX, and Section 5 of Article XVI of the California Constitution, prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions to the extent permissible under the United States and California Constitutions shall not constitute a violation of this chapter. As used in this section, "granting" used with respect to government funding, benefits, or exemptions does not include the denial of government funding, benefits, or exemptions.

6406. The provisions of this chapter are severable. If any portion of this chapter should be declared invalid by a court of competent jurisdiction, it is the intent of the Legislature that the other provisions of this chapter remain in effect.

CENTER FOR LAW AND RELIGIOUS FREEDOM

4208 Evergreen Lane, Suite 222
Annandale, VA 22003
Phone (703) 642-1070
Fax (703) 642-1075

TRANSMITTAL MEMORANDUM

DATE: May 20, 1999
TO: Elena Kagan, DPC
FAX NUMBER: 202-456-2878
FROM: Steven T. McFarland, Esq.
RE: Religious Liberty Protection Act, H.R. 1696
=====

Total Number of Pages (including this cover sheet): 9

If you do not receive all the pages, please call Bette at (703) 642-1070 x 3501.

COMMENTS:

_____ As requested.
_____ X As discussed.
_____ For your review and comment.
_____ For your information.
_____ Please sign and return to this office.
_____ Other:

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Center for Law and Religious Freedom

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CONFIDENTIAL MEMORANDUM

Steven T. McFarland
Director

Gregory S. Baylor
Chief Litigation Counsel

Kimberlee W. Colby
Special Counsel

Virginia E. Hartman
Executive Assistant

To: Elena Kagan, DPC
Eddie Correia, Counsel to Pres.
Maureen Shea, Pub. Liaison
David Lachmann, Rep. Nadler
Doug Laycock, UT Law
Marc Stern, AJ Congress
Buzz Thomas, NCC
Brent Walker, BJC
David Saperstein, RAC of Reform Judaism
Abba Cohen, Agudath Israel

cc: Forest Montgomery, National Association Of Evangelicals

Fr: Steve McFarland *SM*

Dt: May 20, 1999

Re: Religious Liberty Protection Act, H.R. 1691

As requested in yesterday's meeting, here are CLS' thoughts about the transferability to H.R. 1691 of the compromise language in the bill passed last year by the California legislature. This language was drafted by Marc Stern, Professor Alan Brownstein, me and Ben Firschein (Assemblyman Joe Baca's staffer) and was embraced by the ACLU, Prof. Erwin Chemerinsky and the rest of the coalition in California.

1. Findings (Sections 1 and 3 of CA RLPA).

Christian Legal Society could support, and could recommend to its fellow Coalition members, the inclusion **as legislative intent language in a committee report on HR 1691** virtually all of the text in Section 1 [subsections (a), (b), and (c)] of last year's California RLPA.

The one exception - - the one statement that CLS would not want in committee language (and especially not in the statutory text) - - would be the first sentence in Section 1(b) ["Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights."]. CLS and its allies in California reluctantly agreed to its inclusion in the **uncodified findings** (Section 1), yet it was duplicated without our consent in the **codified findings** as well [Section 3 of the CA RLPA, section

6400(a)(8)].

The reason for CLS' opposition to this sentence is obvious. The "existing balance" is imbalanced, tilted against religious liberty claims. "Other civil and constitutional rights" routinely trump claims for religious accommodation because Employment Div. v. Smith left the latter impotent. The plain purpose of RLPA would be to **restore** the use of the CGI/LRM balancing test so that religious liberty might be given its proper respect (even if it continues to yield to discrimination laws in many cases). In this sense, we cannot honestly state that RLPA should "not be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights." If RLPA **wouldn't** alter the status quo in these cases, then we are all wasting our time and CLS doesn't want any part of this legislation.

Besides, in freezing the status quo, this language would mean that precedent abhorred by the ACLU (like the 9th Circuit's recent landlord decision in Thomas v. Anchorage Equal Rights Comm'n) would remain unaltered.

So including this sentence in report language or in the statute would be anathema to parties on both sides of this issue.

2. Description Of Compelling Interests [section 6400 (a)(7)]

In California, the following was an accurate statement of legal history:

"(7) In certain circumstances, courts have found health, safety, antidiscrimination, and other concerns to constitute compelling governmental interests."

Because this would be true of federal jurisprudence as well, Christian Legal Society could agree to its inclusion in findings or a committee report on H.R. 1691, if such an amendment would garner significant Democratic support for that bill.

3. Disclaimer Against Guaranteed Outcomes [Section 3 (6404 (d)) of CA RLPA]

Christian Legal Society would agree to, and urge the Coalition to accept, the insertion of this same language in the text and/or a committee report on H.R. 1691, if it would clinch significant Democratic support for the bill:

"Nothing in this [Act] shall be construed to require that religious liberty claims always prevail over, or always be subordinate to, other civil and constitutional rights."

We believe that the POTUS is personally committed to restoring protection to our First Freedom and that he would sign

RLPA as introduced, just as he did its predecessor in 1993. Therefore, as I stated yesterday, neither the Christian Legal Society nor the National Association of Evangelicals is at all inclined to discuss, much less accept, these concessions unless and until it becomes evident that the White House is wielding its influence to win support for H.R. 1691 among Democrats, particularly those on the House and Senate Judiciary Committees.

Thank you for considering the views of NAE and CLS on this important legislation.¹ We look forward to hearing from Elena and Eddie in this regard.

G:\1\1\1053kagn.mem

¹ The offers made above are only on behalf of CLS.

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BILL NUMBER: AB 1617 AMENDED

AMENDED IN SENATE AUGUST 3, 1998

AMENDED IN SENATE JULY 8, 1998

AMENDED IN SENATE JUNE 22, 1998

AMENDED IN SENATE MAY 26, 1998

AMENDED IN SENATE MARCH 19, 1998

AMENDED IN ASSEMBLY JANUARY 15, 1998

AMENDED IN ASSEMBLY JANUARY 5, 1998

INTRODUCED BY Assembly Member Baca

(Principal coauthor: Assembly Member Scott)

(Coauthors: Assembly Members Aguiar, Alquist, Baldwin, Bowler, Cunneen, Havice, Hertzberg, House, Kuykendall, Leach, McClintock, Shelley, Villaraigosa, and Washington)

(Coauthors: Senators Brulte, Haynes, Leslie, Lewis, and Watson)

AUGUST 26, 1997

An act to add Section 43.2 to the Civil Code, and to add Chapter 4.5 (commencing with Section 6400) to Division 7 of Title 1 of the Government Code, relating to religious freedom.

LEGISLATIVE COUNSEL'S DIGEST

AB 1617, as amended, Baca. Religious Freedom Protection Act.

(1) The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion and the California Constitution provides that the free exercise and enjoyment of religion without discrimination or preference is guaranteed.

This bill would declare that its purpose is to codify the principle that government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification, as set forth in *People v. Woody*, (1964) 61 Cal.2d 716, *Sherbert v. Verner*, (1963) 374 U.S. 398, and *Wisconsin v. Yoder*, (1972) 406 U.S. 205, and provide a claim or defense to persons whose religious exercise is substantially burdened by government. This bill would prohibit government, as defined, from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except if government demonstrates that application of the burden to the person is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.

This bill would permit a person whose religious exercise has been burdened in violation of these provisions to assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. This bill would also make various legislative findings and declarations with respect to these provisions.

(2) Under existing law, each person is afforded various personal rights.

This bill would specify that the free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral. This bill would also provide that laws, regulations, and other governmental actions shall be subject to the Religious Freedom Protection Act.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature hereby finds and declares all of the following:

(a) The compelling governmental interest test in the Religious Freedom Protection Act, as added by this act, has been used repeatedly in case law relating to religious liberty and other fundamental rights. It is expected that in applying this standard in cases brought under the Religious Freedom Protection Act, courts will look to that case law, including decisions construing the federal Religious Freedom Restoration Act (42 U.S.C. Sec. 2000bb et seq.). The Religious Freedom Protection Act is not intended to codify or reject the holding or reasoning of any particular case, including cases construing the federal Religious Freedom Restoration Act or any other federal or state statute. However, the Legislature respects the role that persuasive authority and precedent play in the legal system and realizes that courts are influenced in deciding cases by decisions that apply the same standard to similar facts.

(b) Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights. No inference should be drawn that by substituting a new subdivision (d) of Section 6404 of the Government Code, as added by this act, for the subdivision (d) that was adopted in the Assembly on January 15, 1998, that the Legislature intends to further discrimination. Indeed, subdivision (d) of Section 6404 of the Government Code, in its present form, should be read in the context of language in paragraph (1) of subdivision (b) of Section 6400 of the Government Code, as added by this act, which states that the bill's codification of principles is intended to be consistent with the compelling governmental interest justification, as set forth in *People v. Woody*, 61 Cal. 2d 716 (1964); *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Cases such as (1964) 61 Cal. 2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205. Cases such as *Wisconsin v. Yoder* have employed a discussion of the rights of third parties in evaluating free exercise claims.

(c) The definition of "exercise of religion" contained in the Religious Freedom Protection Act is intended to reject discussions of centrality in determining whether a practice constitutes an "exercise of religion." Some courts have engaged in such discussion, while others have not. Discussion of "centrality" improperly involves state intrusion into questions of individual faith. The relevant inquiry is whether a practice is substantially motivated by a sincerely held religious belief. While both traditional and nontraditional believers have been improperly scrutinized under the centrality test, often it has been adherents of nontraditional or unfamiliar minority faiths whose claims have been barred by discussions of centrality.

SEC. 2. Section 43.2 is added to the Civil Code, to read:

43.2. (a) Free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral.

(b) Laws, regulations, and other governmental actions shall be subject to Chapter 4.5 (commencing with Section 6400) of Division 7 of Title 1 of the Government Code.

SEC. 3. Chapter 4.5 (commencing with Section 6400) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 4.5. RELIGIOUS FREEDOM PROTECTION ACT

6400. (a) The Legislature hereby finds the following:

- (1) The framers of the United States Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the United States Constitution.
- (2) The framers of the California Constitution, recognizing free exercise and enjoyment of religion without discrimination or preference as an inalienable right, guaranteed this right under Section 4 of Article I of the California Constitution.
- (3) The State of California has independent authority to protect the free exercise of religion by principles that are separate from, complementary to, and more expansive than the First Amendment to the United States Constitution.
- (4) The Legislature, under its police powers, may create statutory protections that codify and supplement rights guaranteed by the California Constitution.
- (5) Laws facially neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.
- (6) Government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification.
- (7) In certain circumstances, courts have found health, safety, antidiscrimination, and other concerns to constitute compelling governmental interests.
- (8) Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights. No inference should be drawn that by substituting a new subdivision (d) of Section 6404 of the Government Code, as added by this act, for the subdivision (d) that was adopted in the Assembly on January 15, 1998, that the Legislature intends to further discrimination. Indeed, subdivision (d) of Section 6404 of the Government Code, in its present form, should be read in the context of language in paragraph (1) of subdivision (b) of Section 6400 of the Government Code, as added by this act, which states that the bill's codification of principles is intended to be consistent with the compelling governmental interest justification, as set forth in *People v. Woody*, 61 Cal. 2d 716 (1964), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Cases such as (1964) 61 Cal. 2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205. Cases such as *Wisconsin v. Yoder* have employed a discussion of the rights of third parties in evaluating free exercise claims.
- (9) In enacting this act, the Legislature recognizes the importance of protecting the health, welfare, and safety of children.

In evaluating free exercise rights, cases such as Wisconsin v. Yoder (1972) 406 U.S. 205 have evaluated whether a sincerely held religious practice results in harm to the physical or mental health of a child. This approach is consistent with Section 300 of the Welfare and Institutions Code and following, other laws relating to child abuse and neglect, laws relating to the reporting of child abuse and neglect, and the interpretation of those statutes.

(10) It is anticipated by the Legislature that in interpreting this act, courts will continue to give appropriate respect to the experience and expertise of correctional professionals in maintaining security and safety. See, for example, May v. Baldwin (9th Cir. 1997) 109 F.3d 557. The standard in this act does not require a choice between correctional security and safety and free exercise rights. However, the act does require that diligent

efforts be made to accommodate both interests. Properly applied, the standard does not require correctional officials to place any person's life or safety at risk or to jeopardize correctional security. As cases such as *May v. Baldwin* note, the standard does not require prison officials to speculate about alternatives not readily apparent. However, correctional regulations and policies grounded on mere speculation do not meet the act's requirements (see *May v. Baldwin* (9th Cir. 1997) 109 F.3d 557, at pages 564-565). As examples of how the standard has been applied to respect this balance, see *Campos v. Coughlin* (S.D. N.Y. 1994) 854 F.Supp. 194, and *Sasnett v. Sullivan* (7th Cir. 1996) 91 F.3d 1018, in which the court held that prison security is a compelling interest, but rejected a regulation because it was not a serious and measured response to a concern with violence, and *Abdur-Rahman v. Michigan Dept. of Corrections* (6th Cir. 1995) 65 F.3d 489, in which the court noted that while inmates retain their First Amendment right to exercise their religion, the right may be subjected to reasonable restrictions and limitations.

(11) The Legislature finds that while the government's compelling interest in protecting its citizens will often be sufficient to overcome religious justifications in criminal actions, in other circumstances courts have recognized the principle of accommodation of sincerely held religious practices in a criminal action where to do so does not materially interfere with the rights of third parties or the public safety, peace, order, or welfare. See, for example, *People v. Woody* (1964) 61 Cal.2d 716 and *Wisconsin v. Yoder* (1972) 406 U.S. 205. The Legislature believes that the criminal justice system will have the ability to distinguish legitimate requests for the accommodation of sincerely held religious practices from justifications advanced for the mere purpose of avoiding the enforcement of criminal laws. See, for example, *People v. Woody* (1964) 61 Cal.2d 716, *Leary v. United States* (5th Cir. 1967) 383 F.2d 851, *U.S. v. Bauer* (9th Cir. 1996) 84 F.3d 1549, and *U.S. v. Meyers* (D. Wyo. 1995) 906 F.Supp. 1494, affirmed (10th Cir. 1996) 95 F.3d 1475.

(b) The purposes of this chapter are the following:

(1) To codify the principle that government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification, as set forth in *People v. Woody*, 61 Cal.2d 716 (1964), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972); (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205.

(2) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

6401. This chapter shall be known and may be cited as the "Religious Freedom Protection Act."

6402. (a) Free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral.

(b) 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 subdivision (c).

(c) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both of the following:

(1) In furtherance of a compelling governmental interest.

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

(d) 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.

6403. As used in this chapter:

- (a) "Demonstrates" means meets the burdens of going forward with the evidence and of persuasion.
- (b) "Exercise of religion" means an act or refusal to act that is substantially motivated by sincerely held religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.
- (c) "Government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the state or a political subdivision of the state.
- (d) "Person" for the purposes of this section includes an individual, partnership, association, corporation, organization, or any other combination thereof.
- (e) "Political subdivision of the state" for the purposes of this section includes a county, city, whether general law or chartered, city and county, school district, municipal corporation, or district, or any board, commission, or agency thereof, or any other local public agency.

6404. (a) This chapter applies to all state law, and the implementation of that law, whether statutory or otherwise, and to all laws, ordinances, regulations, and governmental actions in this state, whether adopted before or after the effective date of this chapter.

(b) This chapter applies to all cities, including charter cities. The Legislature finds and declares that free exercise of religion is a matter of statewide concern and is not merely a municipal affair or a matter of local interest.

(c) Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(d) Nothing in this chapter shall be construed to require that religious liberty claims always prevail over, or always be subordinate to, other civil or constitutional rights.

(e) To the extent this chapter creates new rights to monetary damages, nothing in this chapter shall be construed to allow the imposition of monetary damages on any state or local government governmental entity for acts occurring prior to January 1, 1999.

(f) When a claim or defense is asserted by a person under this chapter, the question of whether the person's religious belief is sincerely held is a question of fact. All other questions involve questions of law, including whether the law, regulation, or other governmental action substantially burdens the person's exercise of that religion, and whether application of that burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

6405. Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the United States Constitution and Section 4 of Article I, Section 8 of Article IX, and Section 5 of Article XVI of the California Constitution, prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions to the extent permissible under the United States and California Constitutions shall not constitute a violation of this chapter. As used in this section, "granting" used with respect to government funding, benefits, or exemptions does not include the denial of government funding, benefits, or exemptions.

6406. The provisions of this chapter are severable. If any portion of this chapter should be declared invalid by a court of competent jurisdiction, it is the intent of the Legislature that the other provisions of this chapter remain in effect.



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DRAFT
11/16/97
3:00 P.M.

MEMORANDUM FOR THE PRESIDENT

FROM: Franklin D. Raines
Director

SUBJECT: Proposed Executive Order Entitled "Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government"

SUMMARY: This memorandum forwards for your consideration a proposed Executive order that was prepared by the White House Office of Domestic Policy. The proposed order would provide a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation, *EXCEPT AS OTHERWISE*

BACKGROUND: Current law prohibits discrimination in employment because of race, color, religion, sex, national origin, handicap, or age. The law is applied to Federal Government employment through Executive Order 11478, which is entitled "Equal Employment Opportunity in the Federal Government."

It is the policy of this Administration to also prohibit discrimination in employment because of sexual orientation. However, there is no statutory authority to support the prohibition countrywide. Nevertheless, certain Federal agencies have taken actions, where possible, to prohibit discrimination because of sexual orientation in the employment of their personnel. To ensure that all Federal agencies are aware of the Administration's policy regarding sexual orientation and Federal employment, the proposed order would add sexual orientation to Executive Order 11478's list of characteristics for which discrimination is prohibited.

We realize that without statutory authority the policy may not be enforced in the courts. Nevertheless, we may, as a matter of executive discretion in managing the executive branch, direct the executive agencies, wherever possible, to prohibit discrimination on the basis of sexual orientation in their employment practices. The White House Office of Domestic Policy believes strongly in the policy and recommends that you issue the proposed order.

None of the affected agencies objects to the proposed Executive order.

RECOMMENDATION: I recommend that you sign the proposed Executive order.

Attachments

12-02-97
Richard
FYI
Do you have
any charges?
Mary

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Mary
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accurate.

Please advise.
Thank you. Mary

11/16/97

Resumes
January 26, 1996

**Nonprofit Organizations
Eligible to Participate
in the
Intergovernmental Personnel Act Mobility Program**

- 1 70001 Training and Employment Institute
- 2 Academy for Contemporary Problems
- 3 Academy for Educational Development
- 4 Academy for State and Local Government
- 5 Academy of Marine Sciences, Inc.
- 6 Academy Research and Development Institute
- 7 ACEC Research and Management Foundation
- 8 Aerospace Corporation
- 9 Africare
- 10 Agricultural Research Institute
- 11 Air and Waste Management Association
- 12 Alabama Rural Council
- 13 Alameda County Transportation Authority
- 14 Alaska Native Health Board
- 15 Albany Research Institute
- 16 Alcoholism Services of Erie County, Inc.
- 17 Alliance for Perinatal Research and Services, Inc.
- 18 Alliance for the Chesapeake Bay
- 19 American Academy for Medical Administrators
- 20 American Alliance for Health Physical Education, Recreation and Dance
- 21 American Arbitration Association
- 22 American Association for Higher Education
- 23 American Association for State and Local History
- 24 American Association for the Advancement of Science
- 25 American Association of Community Colleges
- 26 American Association of Physics Teachers
- 27 American Association of Retired Persons
- 28 American Association of School Administrators
- 29 American Association of Small Cities
- 30 American Association of State Colleges and Universities
- 31 American Center for the Quality of Work Life
- 32 American Chemical Society
- 33 American Consortium for International Public Administration
- 34 American Correctional Association
- 35 American Council of Learned Societies
- 36 American Council on Education
- 37 American Council on the Teaching of Foreign Languages, Inc.
- 38 American Defense Preparedness Association
- 39 American Enterprise Institute for Public Policy Research
- 40 American Farmland Trust
- 41 American Fisheries Society
- 42 American Foundation for the Blind, Inc.
- 43 American Geophysical Union
- 44 American GI Forum of Colorado
- 45 American Health Foundation
- 46 American Historical Association
- 47 American Hospital Association
- 48 American Indian Law Center

49 American Institute for Research in the Behavioral Sciences
50 American Institute of Ecology
51 American Institute of Rehabilitation Education and Employment
52 American Iron and Steel Institute
53 American Productivity Center, Inc.
54 American Public Gas Association
55 American Public Health Association
56 American Public Welfare Association
57 American Society of Civil Engineers
58 American Society of Mechanical Engineers
59 American Society of Military Comptrollers
60 American Sportfishing Association
61 American Technology Initiative
62 American Vocational Association
63 American Water Works Association
64 American Water Works Association Research Foundation
65 Americans for Indian Opportunity
66 Anser
67 Appalachia Educational Laboratory, Inc.
68 Archaeological Research, Inc.
69 Arkansas Enterprises for the Blind, Inc.
70 Arthritis Foundation
71 Arts Council of San Antonio
72 Asian/Pacific Research Foundation
73 Asociacion Nacional Pro Personas Mayores
74 Aspen Institute for Humanistic Studies
75 Aspira Association, Inc.
76 Associated Universities, Inc.
77 Associates of the United States Commission for the Preservation of
78 Americas Heritage Abroad
79 Association of Bay Area Governments
80 Association of Big Eight Universities
81 Association of Government Accountants
82 Association of Metropolitan Sewerage Agencies
83 Association of Minnesota Counties
84 Association of New Jersey Environmental Commissions
85 Association of Reproductive Health Professionals
86 Association of Schools of Public Health
87 Association of State and Interstate Water Pollution Control
88 Administrators
89 Association of State and Territorial Public Health Laboratory
90 Directors
91 Association of State and Territorial Solid Waste Management Officials
92 Association of Universities for Research in Astronomy
93 Association of University Programs for Health Administrators
94 Atlanta Committee for the Olympic Games
95 Atlanta Paralympic Organizing Committee
96 Augusta Biomedical Research Corporation
97 Battelle Memorial Institute
98 Bear River Association of Governments
99 Bigelow Laboratory for Ocean Sciences
100 Biological Sciences Curriculum Study, Co.
101 Black College Educational Network
102 Booker T. Washington Foundation
103 Boston VA Research Institute, Inc.
104 Business-Education Compact of Washington Country
105 Brookings Institution

106 California Institute, The Care, Inc.
107 Caribbean Environment and Development Institute
108 Carnegie Endowment for International Peace
109 Carnegie Foundation for the Advancement of Teaching
110 Carnegie Institution of Washington
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129 Center for Protect Workers Rights
130 Central Midwestern Regional Educational Laboratory
131 Challenger Center for Space Science Education
132 Chamber for Commerce of the United States of America
133 Charles Center-Inner Harbor Management, Inc.
134 Charles F. Kettering Research Laboratory
135 Chautauqua Northwest
136 Chicago Historical Society
137 Chicagoland Enterprise Center
138 Child Welfare League of America, Inc.
139 Childrens Hospital Medical Center of Akron
140 City at 42nd Street, Inc.
141 Civil Engineering Research Foundation
142 Civilian Research and Development Foundation
143 Classification and Compensation Society
144 { Claude D. Pepper Fellowship Foundation, Inc. (previously Futures Fund and
145 Fellowship Foundation, Inc)
146 Clean Sites, Inc.
147 Collaborative Medical Research Corporation
148 College Board
149 College-University Resource Institute, Inc.
150 Colorado State University Research Institute
151 Columbia River Fisheries Council
152 Commission on Independent Colleges and Universities
153 Committee for Economic Development
154 Committee for the National Institutes for the Environment
155 Community Action for the Urbanized American Indian, Inc.
156 Community Systems Foundations
157 Concilio for the Spanish Speaking
158 Conference Board
159 Conference of Southern County Associations
160 Congressional Black Caucus Institute
161 Congressional Economic Leadership Institute
162 Congressional Hispanic Caucus Institute

220 Family Health International
221 Far West Laboratory for Educational Research and Development
222 Federal City Council
223 Federal Employee Education and Assistance Fund
224 Federation of American Societies for Experimental Biology
225 Federation of Behavioral, Psychological and Cognitive Sciences
226 Feed My People International, Ltd.
227 Finance Project, The
228 Florida Endowment Fund for Higher Education
229 Foundation for American Economic Competitiveness
230 Foundation for Border Progress
231 Foundation for Urban and Neighborhood Development
232 Foundation on Medical Decision Making
233 Fox Chase Cancer Center
234 Franklin Institute of the State of Pennsylvania
235 Fred Hutchinson Cancer Research Center
236 Friends of the Earth
237 Friends Medical Science Research Center, Inc.
238 Global Environment and Technology Foundation
239 Global Interdependence Center
240 Global Perspectives in Education
241 Global 2000
242 Golden Gate Energy Center
243 Golden Gate National Park Association
244 Government Accountability Project
245 Graduate School, USDA
246 Grand Canyon Trust
247 Grand Rapids Inter-Tribal Council
248 Great Lakes Commission
249 Greater Atlanta Chapter of Image, Inc.
250 Greater St. Louis Image, Inc.
251 Groundwater Foundation
252 Gulf Coast Conservation Association
253 Harbor Branch Oceanographic Institution
254 Harvard Pilgrim Health Care
255 Health Care for All
256 Health Education Systems Research, Inc.
257 Health Systems Agency of Southeastern Pennsylvania, Inc.
258 Henry J. Kaiser Family Foundation
259 High Frontier
260 Hispanic Association of Colleges and Universities
261 Hispanic American Police Command Officers Association
262 Housing Assistance Council, Inc.
263 Hudson Institute
264 Hudson River Foundation
265 Human Resources Development Institute
266 Human Systems Research, Inc.
267 Hungarian American Enterprise Fund
268 Image de Vallejo, Inc.
269 Immigration and Refugee Services of America
270 Indiana Association of Cities and Towns
271 Institute for Agricultural and Trade Policy
272 Institute for Contemporary Studies
273 Institute for Continuing Regulatory Education
274 Institute for Cooperation in Environmental Management
275 Institute for Defense Analyses
276 Institute for Educational Leadership

163 Congressional Hunger Center
164 Congressional Management Foundation
165 Connecticut Association of Boards of Education
166 Conservation Foundation
167 Consortium for International Development
168 Consortium for International Earth Sciences Information Network
169 Cook Inlet Regional Citizens Advisory Council
170 Cooper Institute for Aerobics Research
171 Cooperative Housing Foundation
172 Corporation for Public Broadcasting
173 Corporation for National Research Initiatives
174 Council for American Private Education
175 Council for Basic Education
176 Council for Economic Opportunities in Greater Cleveland
177 Council for Tribal Employment Rights
178 Council for Chief State School Officers
179 Council for Energy Resource Tribes
180 Council for Foreign Relations, Inc.
181 Council for Infrastructure Financing Authorities
182 Council for State Governments
183 Council for State Planning Agencies
184 Council of Graduate Schools
185 Council on Social Work Education
186 Crosscurrents International Institute
187 CSI Foundation
188 CSU Long Beach Foundation
189 D.C. Coalition for Youth
190 Desert Storm Homecoming Foundation
191 Disabled American Veterans
192 Downtown Denver, Inc.
193 Draper Laboratory, Inc., Charles Stark
194 Ducks Unlimited, Inc.
195 Earth Corps
196 East-West Center-Honolulu
197 Ecological Society of America
198 Economic Strategy Institute
199 Ecotrust
200 Edison Electric Institute
201 Editorial Projects in Education
202 Education Development Center, Inc.
203 Education in Partnership with Technology Corporation
204 Educational Testing Service
205 Eisenhower Foundation for the Prevention of Violence
206 Electric Power Research Institute
207 Electronic Industries Foundation
208 Employee Benefit Research Institute
209 Employers National Job Service Council
210 Employment Service Center
211 Enterprise Foundation
212 Environmental Council of the States
213 Environmental Defense Fund
214 Environmental Law Institute
215 Environmental Research Institute of Michigan
216 EOP Foundation
217 Eurasia Foundation
218 Export Managers Association of California
219 Fair Housing Congress of Southern California

277 Institute for Environmental Mediation
278 Institute for Responsible Fatherhood and Family Revitalization
279 Institute for Scientific Computing
280 Institute for Womens Policy Research
281 Institute for the Social Science Study of Space
282 Institute of Internal Auditors
283 Institute of International Education
284 Institute of International Law and Economic Development
285 Institute of Paper Science and Technology
286 Institute of Public Administration
287 Institute of World Politics
288 International Association of Chiefs of Police
289 International Association of Counties Research Foundation
290 International Association of Machinists Center for Administering
291 Rehabilitation and Employment Services, Inc.
292 { International Association of Official Human Rights Agencies - United
293 States
294 International City Management Association
295 International Downtown Executives Association
296 International Employment Administrator
297 International Management Development Institute
298 International Media Fund
299 International Medical Services for Health
300 International Personnel Management Association
301 International Science Foundation
302 { International Union for Conservation of Nature and Natural Resources-
303 US
304 Interstate Conference of Employment Security Agencies
305 Interstate Oil Compact Commission
306 Intertribal Timber Council
307 Interuniversity Communications Council (EDUCOM)
308 Iowa Association of School Boards
309 Iowa Natural Heritage Foundation
310 Jefferson National Expansion Historical Association, Inc.
311 Jobs for the Future
312 Joint Center for Political Studies, Inc.
313 Joint Oceanographic Institutions, Inc.
314 Kentucky Health Systems Agency-West, Inc.
315 Keystone Center for Continuing Education
316 La Jolla Institute
317 Labor Agency of Metropolitan Washington, D.C., Inc.
318 Lake Superior Center
319 League of Federal Recreation Associations, Inc.
320 League of United Latin American Citizens
321 League of Women Voters of the United States
322 Legal Services Corporation
323 Logistics Management Institute
324 Los Alamos National Scientific Laboratory
325 Lumbee Regional Development Association, Inc.
326 Maine Humanities Council
327 Management Sciences for Health
328 Manpower Demonstration Research Corporation
329 Mansfield Center for Public Affairs
330 Marine Biological Laboratory; Woods Hole, MA
331 Marine Environmental Sciences Consortium
332 Marine Spill Response Corporation
333 Martin Luther King Ecumenical Center and Housing Development

334 Association
335 Massachusetts General Hospital
336 Massachusetts Higher Education Assistance Corporation
337 {Maumee Valley Resources Conservation Development and Planning
338 Organization
339 MCNC
340 Medical Care Development, Inc.
341 Medical and Health Research Association of NYC
342 Medical Technology and Practice Patterns Institute
343 Medlantic Research Institute
344 Mercy Medical Airlift
345 Metropolitan Washington Council of Governments
346 Mid-Continent Regional Educational Laboratory
347 Mid-Land Neighborhood Housing Services
348 Mid-Willimette Valley Community Action Agency, Inc.
349 Middle East Institute
350 Midwest Region Library Network
351 Midwest Research Institute
352 Military Order of the Purple Heart
353 Minnesota Rural Water Association
354 Minnesota Technology, Inc.
355 Minority Health Professions Foundation
356 Mississippi Valley International Trade Center
357 Missouri Association of Counties
358 MITRE Corporation
359 Monterey Bay Aquarium Research Institute
360 Mote Marine Laboratory
361 Mount Sinai School of Medicine
362 Museum of Science and Industry
363 National Academy Foundation
364 National Academy of Public Administration
365 National Academy of Sciences
366 National Academy of Social Insurance
367 National Alliance of Business
368 National Alliance for the Mentally Ill
369 National Aquarium Society
370 National Assembly of Local Arts Agencies
371 National Assembly of State Arts Agencies
372 National Association for City Drug and Alcohol Coordination
373 National Association for Equal Opportunity in Higher Education
374 National Association for the Advancement of Colored People
375 National Association of Attorneys General
376 National Association of Conservation Districts
377 National Association of Development Organizations
378 National Association of Housing and Redevelopment Officials
379 National Association of Negro Business and Professional Womens Club
380 National Association of Regional Councils
381 National Association of Schools of Public Affairs and Administration
382 National Association of Social Workers, Inc.
383 National Association of State Boards of Education
384 {National Association of State Directors of Vocational Technical
385 Education
386 National Association of State Universities Land Grant Colleges
387 National Association of the Partners of the Americans
388 National Association of Towns and Townships
389 National Association of Water Companies
390 National Black Caucus of State Legislators

391 National Building Museum
 392 National Bureau of Economic Research, Inc.
 393 National Business Education Association
 394 National Business League
 395 National California Institute for Research and Education
 396 National Center for Higher Education Management Systems
 397 National Center for Housing Management
 398 National Center for State Courts
 399 National Center for Tax Education and Research
 400 National Center for the Study of Professions
 401 National Coalition for Quality in Tax Administration
 402 National Coalition of Hispanic Health and Human Services Organizations
 403 National Commission for the Public Service
 404 National Committee on United States-China Relations, Inc.
 405 National Community AIDS Partnership
 406 National Conference of State Historic Preservation Officers
 407 National Conference of State Legislatures
 408 National Conference on Social Welfare
 409 National Congress for Community Economic Development
 410 National Council of Homemaker Home Health Aide Service
 411 National Council of La Raza
 412 National Council of Negro Women
 413 National Council of Savings Institutions
 414 National Council on the Aging
 415 National Criminal Justice Association
 416 National Education Association
 417 National Environmental Education and Training Foundation
 418 National Environmental Technology Applications Corporation
 419 National Fish and Wildlife Foundation
 420 National Foundation for the Centers for Disease Control
 421 Prevention, Inc.
 422 National 4-H Council
 423 National Governors Association
 424 National Health Council, Inc.
 425 Nation Hispanic University
 426 National Image, Inc.
 427 National Indian Health Board, Inc.
 428 National Institute for Dispute Resolution
 429 National Institute for Public Policy
 430 National Italian American Foundation
 431 Nation Minority AIDS Council
 432 National Organization of Black Law Enforcement Executives
 433 National Organization on Disability
 434 National Park Foundation
 435 National Real Estate Brokers
 436 National Rural Water Association
 437 National Safety Council
 438 National School Boards Association
 439 National Public Relations Association
 440 National School Volunteer Program
 441 National Security Industrial Association
 442 National Society of Professional Engineers
 443 National Trust for Historic Preservation
 444 National Urban Coalition
 445 National Urban Fellows, inc.
 446 National Urban League, Inc.
 447 National Water Well Association

448 National Wildlife Foundation
449 Nature Conservancy
450 Nature Institute
451 Naval Aerospace Medical Research Laboratory
452 New England Governors Conference, Inc.
453 New England Innovation Group, Inc.
454 New England Waste Management Officials Association
455 New Mexico MESA, Inc.
456 New York State Urban Development Corporation
457 North Alabama Science center, Inc.
458 North Americana Association for Environmental Education
459 North Carolina Supercomputing Center
460 North Mississippi Environmental Education Consortium, Inc.
461 Northeast Economic Action Research Corporation
462 Northeast States for coordinated Air Use Management
463 Northern California Institute for Research and Education
464 Northern Colorado Council of Governments
465 Northern Oklahoma Development Corporation
466 Northern Virginia Planning District Commission
467 Northwest Family Network
468 Northwest Michigan Council of Governments
469 Northwest Power Planning Council
470 Northwest Regional Educational Laboratory
471 Oak Ridge Associated Universities
472 Ohio Aerospace Institute
473 Ohio College of Podiatric Medicine
474 Ohio Historical Society
475 Oklahoma Medical Research Foundation
476 One to One Partnership, Inc.
477 Opportunity Funding Corporation
478 Opportunity Housing, Inc.
479 Oregon Trout, Inc.
480 Outreach, Inc.
481 Overseas Development Council
482 Pacific Academy for Advanced Studies
483 Pacific Fishery Management Council
484 Pacific Northwest Innovation Group
485 Pacific States Marine Fisheries Commission
486 Packard Childrens Hospital
487 Palo Alto Medical Foundation
488 Partners for Livable Places, Inc.
489 Partnership for Productivity
490 PEN American Center
491 Philadelphia Housing Authority
492 Physician Payment Review Commission
493 Piedmont Triad council of Governments
494 Planet Walk
495 Platte River Whooping Crane Maintenance Trust, Inc.
496 Points of Light Initiative Foundation
497 Police Foundation
498 Population Institute
499 Population Reference Bureau, Inc.
500 Positive Futures, Inc.
501 Potomac Institute for Economic Research
502 Private Sector Council
503 Professional Mangers Association
504 Public Administration Service

505 Public Employees for Environmental Responsibility
506 Public Health Foundation
507 Public Technologies, Inc.
508 Puget Sound Blood Center and Program
509 Quality Education for Minorities Network
510 Radio Free Europe/Radio Liberty, Inc.
511 RAND Corporation
512 Raptor Rehabilitation and Propagation Project
513 Region VII American Indian Council
514 Regional Citizens Advisory Council
515 Regional Fishery Management Councils (Northeast, Mid-Atlantic, South
516 Atlantic, Caribbean, Gulf of Mexico, Pacific, North Pacific, Western
517 Pacific)
518 Regional Plan Association
519 Research and Educational Institute, Inc.
520 Harbor-UCLA Medical Center
521 Research Corporation of the University of Hawaii
522 Research for Better Schools, Inc.
523 Research Triangle Institute
524 Resources for the Future
525 Riverside Research Institute
526 Robert R. Moton Memorial
527 Rural America
528 Rural New York Farmworker Opportunities, Inc.
529 Sabre Foundation, Inc.
530 San Diego Association of Governments
531 San Diego State University Foundation
532 San Francisco Bay-Delta Aquatic Habitat Institute
533 Save the Bay
534 Seattle Institute for Biomedical and Clinical Research
535 Semiconductor Research Corporation
536 Senior Executives Association
537 Senior Executives Association Professional Development League
538 SER-Jobs for Progress National, Inc.
539 SETAC Foundatin for Environmental Educationa, Inc.
540 SETI Institute
541 Small Business High Technology Institute
542 Smart Valley, Inc.
543 Social Science Research Council
544 Society for American Archaeology
545 Society for Hispanic Professional Engineers
546 Society for Research in Child Development
547 Solidarity Endowment
548 Soros Foundation
549 South Alabama Regional Planning Commission
550 South Carolina Sea Grant Consortium
551 South Central Connecticut Agency on Aging
552 South Central Los Angeles Regional Center
553 Southeast Consortium for International Development
554 Southeast Housing and Revitalization Program
555 Southeastern Center for Electrical Engineering Education
556 Southeastern Colorado Health Systems Agency
557 Southeastern Universities Research Association, Inc.
558 Southern Appalachian Mountains Initiative
559 Southwest Educational Development
560 Southwest Innovation Group
561 Southwest Research Institute

562 SRI International
563 SRI Institute
564 State Humanities Councils
565 State Justice Institute
566 Sunshine Foundation
567 Syracuse Research Corporation
568 Tahoe Regional Planning Agency
569 Tallahassee Housing Foundation
570 Tanana Chiefs Conference, Inc.
571 Task Force for Child Survival
572 Tata Energy and Resources Institute
573 TechnoService, Inc.
574 Terrene Institute
575 Trout Unlimited Corporation
576 Underground Injection Practices Council
577 Underwriters Laboratories, Inc.
578 United Nations Development Corporation
579 United Negro College Fund
580 United Sioux Tribes of South Dakota
581 United States-China Business Council
582 United States/Republic of China Economic Council
583 United States Conference of Mayors
584 United States Council for the international Year of Disabled Persons
585 United States Environment Training Institute
586 United States Institute of Peace
587 United States Marshals Foundation
588 Universities Space Research Association
589 University City Science Center
590 University Corporation for Atmospheric Research
591 University Research Foundation
592 United Way of America
593 Upper Albany Community Organization
594 Urban Institute
595 Urban Observatory of Metropolitan-Nashville -University Centers
596 Urban Resource Institute
597 USA-ROC Economic Council
598 UTE Distribution Corporation
599 Veterans Medical Research Foundation of San Diego
600 Visiting Nurses Association of America
601 W.E. Upjohn Insitute for Employment Research
602 Washington Business Group of Health
603 Washington Dulles Task Force
604 Washington Heights-West Harlem-Inwood Mental Health Council, Inc.
605 Washington Institute for Near East Policy
606 Water Environmental Federation
607 Water Pollution Control Federation Research Foundation
608 Weather Research Center
609 West Central Services, Inc.
610 West Virginia High Technology Cosortium Foundation
611 West Virginia University Research Corporation
612 West Virginia University Research High Technology Consortium
613 Foundation
614 Western Consortium for Public Health
615 Western Governors Association
616 Willapa Alliance
617 Winrock International Institute for Agricultural Development
618 Womens Institute

619 Woods Hole Oceanographic Institution
620 Workplace Health Fund
621 World Bird Sanctuary
622 World Council of Credit Unions, Inc.
623 World Energy Efficiency Association
624 World Environment Center
625 World Wildlife Fund-U.S.
626 Young Astronaut Council

ADDENDUM TO NONPROFIT LIST

May 1997

AIDS Research Consortium of Atlanta
Altamont Program
American Psychological Society
American Sociological Association
Applied Research Lab of Penn State
Associated Western Universities
Association for Enterprise Opportunity
Association for Public Policy Analysis and Management
Boston Private Industry Council
Brazos Higher Education Service Corporation
Center for Ethical Leadership
Center for Foreign Journalists
Center of Concern
Chesapeake Research Consortium
Concurrent Technologies Corporation
Consortium for Oceanographic Research and Education
Cornerstone Housing Corporation
Corporate Council on Africa
Craig Hospital
Federation of Families for Children's Mental Health
Forging New Tomorrows
Friends of the Estuary
Group Health Co-Op of Puget Sound
Great Lakes Fisheries Commission
Habitat for Humanity
Hemophiliac Foundation of Michigan
Henry Ford Health System
Henry M. Jackson Foundation
Henry Stimson Center
Industrial Union Department of the AFL-CIO
Institute for Responsible Management
International Life Sciences Institute
International Schools Services
Kerr White Institute
Land and Water Fund
Lower Colorado River Authority
Mayo Foundation
Mid-West Electric Consumers Assoc.
Miriam Hospital
Mitretek Systems
Monell Chemical Senses Center

Montana Job Training Partnership
NSF International
National Action Council for Minorities in Engineering
National Association of Area Agencies on Aging
National Association of Hispanic Federal Executives
National Center for Missing and Exploited Children
National Council of Senior Citizens
National Fallen Firefighters Foundation
National Osteoporosis Foundation
National Recreation and Park Association
Natural History Museum of Los Angeles
Natural Resources Council of America
North Central Regional Educational Lab
Northeast Consortium for Engineering Education
OIC International
Oral Health America
Partnership for Child Health Care, Inc.
PAT Projects, Inc.
Pinellas County Industry Council
Potomac Institute for Policy Studies
PROTEUS
Public Citizens, Inc.
Quality New Mexico
Rural Coalition
Rocky Mountain Elk Foundation
San Diego Zoo
Science Pioneers
Shepherd Center
Society for Automotive Engineers
Society for Range Management
Southwest Research Institute
Susquehanna Region Private Industry Council
Toxicology Excellence for Risk Assessment
TransCen
Trust for Public Land
U.S. Committee of the International Institute for Strategic Studies
U.S. Space Foundation
Waste Policy Institute
Western States Air Resources Council
Wheaton Franciscan Services
Women in International Security
Work and Technology Institute
World Resources Institute
World Trade Center San Diego